



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

# Judicial and statutory definitions of words and phrases

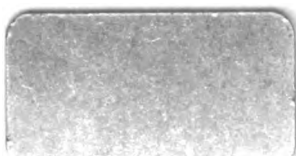
West Publishing  
Company



Dorms



HARVARD LAW SCHOOL  
LIBRARY

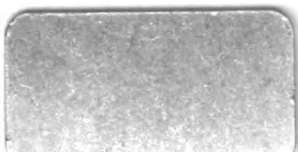




Dorms



HARVARD LAW SCHOOL  
LIBRARY













JUDICIAL AND STATUTORY DEFINITIONS <sup>cf</sup>  
=

OF

WORDS AND PHRASES

SECOND SERIES

COLLECTED, EDITED, AND COMPILED  
BY THE  
EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM

VOLUME 2  
DEPOSITION — LAMP

ST. PAUL  
WEST PUBLISHING CO.  
1914

COPYRIGHT, 1914  
BY  
WEST PUBLISHING COMPANY  
(2 Wds. & P. 2d Ser.)†

1/13/25

REPLACEMENT

4/60

# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES

## SECOND SERIES

## VOLUME 2

---

### DEPOSITION

"A 'deposition' is testimony taken out of court under authority which will enable it to be read as evidence in court and has no relation to oral testimony taken in court or before a master." In *re Harrison Bros.*, 197 Fed. 320, 322 (quoting 13 Cyc. p. 832).

"Depositions are a species of evidence of a secondary character, admissible where the *viva voce* testimony of the deponent is not attainable." Under Rev. St. 1898, § 4096, as amended, providing that, where a corporation is a party, the president, managing agent, or agent, or employé of the corporation may be examined before trial, depositions of mere employés of a defendant corporation, taken before trial, are not admissible, where deponents are present at the trial, subject to be called and examined as witnesses. *Hughes v. Chicago, St. P., M. & O. R. Co.*, 99 N. W. 897, 902, 122 Wis. 258 (quoting *Weeks, Depositions*, §§ 4-6).

By B. & C. Comp. § 816, a "deposition" is defined to be a written declaration under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine. *State v. Woolridge*, 78 Pac. 333, 336, 45 Or. 389.

The word "deposition," as used in Pen. Code, § 872, prior to its amendment in 1905, providing that if it appeared from the examination of accused that a public offense had been committed, and there was sufficient cause to believe him guilty thereof, the magistrate should indorse on the deposition an order for his commitment, was synonymous with the word "complaint," to which it was changed by the amendment. *People v. Lapique*, 103 Pac. 164, 165, 10 Cal. App. 669.

Testimony given before an examiner may be treated as a "deposition" within the meaning of Rev. St. U. S. § 824, providing for

solicitor's fees for each deposition taken and admitted in evidence. *State of Missouri v. State of Illinois*, 26 Sup. Ct. 713, 714, 202 U. S. 598, 50 L. Ed. 1160.

Depositions taken before a trial judge to be used as evidence on defendant's motion to dismiss were not depositions taken "to be used on the trial of the merits" within Kirby's Dig. § 3157, permitting depositions to be used on the trial of all the issues in certain cases named, as where the witness is absent from the state, etc. *Ferguson & Wheeler Land, Lumber & Handle Co. v. Good*, 133 S. W. 183, 184, 97 Ark. 106.

The transcript of the testimony of a party, relating to transactions with the adverse party, given at a trial occurring during the lifetime of the adverse party, is not a "deposition," within Code, § 4605, providing that a party may have his own deposition read in evidence, where his evidence would be incompetent by section 4604, providing that no party shall be examined as a witness in regard to personal transactions with a decedent, etc., though Acts 27th Gen. Assem. p. 16, c. 9, provides that a transcript of the testimony of a witness at a trial shall, when material and competent, be admissible in evidence at any subsequent trial. *Greenlee v. Mosnat*, 111 N. W. 996-999, 136 Iowa, 639, 14 L. R. A. (N. S.) 488.

### Affidavit

"Deposition," as used in Comp. Laws 1909, § 2182, relating to perjury, providing that the making of a deposition is deemed to be complete from its delivery by the accused with the intent that it be uttered or published as true, includes "affidavit," since section 2965 provides that every mode of written instrument under oath or affirmation is embraced by the term "depose." *Town of Checotah v. Town of Eufaula*, 119 Pac. 1014, 1017, 31 Okl. 85.

Under Practice Act, § 228, authorizing a Supreme Court examiner to take any "affidavit" that may be taken before a Supreme Court commissioner, a Supreme Court examiner may take the deposition of a judgment defendant under an order directing him to make discovery in proceedings supplemental to execution, though technically an "affidavit" is taken *ex parte*, and though a "deposition" is technically taken on notice, so that the testimony taken under an order for discovery is technically a "deposition," but the words "deposition" and "affidavit" may be synonymous. *Herschenstein v. Hahn*, 71 Atl. 105, 106, 77 N. J. Law, 39.

Code Cr. Proc. § 148, provided that, when an information was laid before a magistrate, he should examine on oath the informant and prosecutor and any witnesses he might produce, take their depositions, and cause them to be subscribed by the parties. Section 149 provided that the depositions must set forth the facts stated by the prosecutor and his witnesses tending to establish accused's guilt. Plaintiff was charged with false registration, which could be established only by proof of the residence, which he had stated to the board of election officers,

and of the falsity of such statement, and upon application of a deputy state superintendent of elections to a magistrate for a warrant for plaintiff's arrest, and an information verified by such deputy, on a day in November, 1905, which was left blank and based entirely upon information and belief, the sources of which were not given, amounting to no more than a statement of his conclusion that a crime had been committed, and the affidavit of a person, whose residence was by mistake of election officials substituted for that given by plaintiff when he registered, that plaintiff did not live at such address, were presented. The affidavit of the deputy did not even recite that in making his charge he relied upon a copy of the original registration book. Held, that there was before the magistrate no "deposition," within the meaning of the Code, and, the magistrate having also failed to examine the deputy and his witnesses as required by the Code, the warrant issued for plaintiff's arrest was a nullity; the magistrate having no jurisdiction. *Tanzer v. Morgan*, 123 N. Y. Supp. 497, 500, 139 App. Div. 10.

**As proceeding**

See Proceeding.

## DEPOSITOR

### In a bank

See Savings Depositor.

"A 'depositor' is not the owner of any specific money in the bank. He is simply the owner of a right and credit against the bank." *Wright v. Holmes*, 62 Atl. 507, 508, 100 Me. 508, 3 L. R. A. (N. S.) 769, 4 Ann. Cas. 583.

A "depositor" is one who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check. *State v. Corning State Sav. Bank*, 113 N. W. 500, 502, 136 Iowa, 79.

The holders of certificates of deposit are "depositors" in the bank within the Constitution providing that stockholders of banks shall be liable to depositors in a sum equal to the amount of their stock over and above its face value. *J. H. Wilkes & Co. v. Arthur*, 74 S. E. 361, 362, 91 S. C. 163.

A holder of a bank's certificate of deposit, payable on a fixed date with interest, is not a "depositor," within the Constitution, giving depositors, who have not stipulated for interest, a preference in case of the bank's insolvency. *Taylor v. Hutchinson*, 40 South. 108, 110, 145 Ala. 202.

The word "depositor" is used in its ordinary meaning in the business of banking in Comp. Laws, §§ 6102, 6116, 6135, 6141, authorizing a bank to declare a dividend after providing for expenses and surplus, providing for a reserve, making stockholders liable to the "depositors" to the amount of the stock in addition to the stock, and limiting loans which may be made by the bank, and stockholders of a bank are not "depositors" to the amount of the surplus; for, until a division thereof, the surplus is owned by the shareholders collectively, and is by them collectively embarked as the capital of the bank in the banking business, and stockholders sued on their statutory liability may not defend on the ground that they are creditors of the bank to the amount of a proportional share of the surplus. *Wedemeyer v. Hindelang*, 126 N. W. 708, 709, 161 Mich. 600.

On the insolvency of a bank, the court defined the terms "depositors" and "general creditors" as follows: "The following claims which have been filed and allowed herein shall be classed as depositors, to wit: 'All the claims of persons whose claims are based upon the balance due them, as depositors, in their respective general checking deposit accounts with said bank. All persons whose claims are based upon sums due them as depositors, upon certificates of deposit issued by said bank, as such, for deposits, of money in the usual course of business. All persons whose claims have been established and allowed by this court, and expressly designated as depositors' in the judgments and orders heretofore entered in this cause. And the

court further finds that the claims of all other creditors which have been allowed and established against said bank, which are not included in the above, are general creditors." *State ex rel. Carroll v. Corning State Sav. Bank*, 103 N. W. 97, 98, 127 Iowa, 198.

## DEPOSITORY

See County Depositories; Depositary; Special Depository.

One who received an article of merchandise for the sole purpose of doing work upon it is not a "depository," such as a warehouseman or wharfinger, within Pen. Code, §§ 629, 633, penalizing any warehouseman, wharfinger, or other depository, who, after giving a receipt or voucher for merchandise, shall deliver it without surrender of the receipt or voucher for cancellation. *Manny v. Wilson*, 122 N. Y. Supp. 16, 20, 137 App. Div. 140.

## DEPOT

See Oil Depot; Passenger Depot.  
See, also, Station.

### As freight or passenger station

In the United States the words "depot" and "station," as used in connection with railroads, are synonymous. In re *Atlantic & St. L. R. Co.*, 62 Atl. 141, 143, 100 Me. 430.

The word "depot" means a building for the accommodation and protection of passengers or freight. *Midland Valley R. Co. v. State*, 119 Pac. 413, 414, 29 Okl. 777.

"The term 'depot' \* \* \* may mean a house for the storage of freight and the accommodation of passengers, or it may mean a place where railroad trains regularly come to a stop for the convenience of passengers and for the purpose of receiving and discharging freight, or it may include all these things." The maintenance of a freight depot, passenger traffic being transferred to the depot of another company in the same town, was a sufficient compliance with a stipulation in a railway bonus note that a depot should be maintained in the town. *Fayetteville Wagon, Wood & Lumber Co. v. Kenefick Const. Co.*, 88 S. W. 1031, 1032, 76 Ark. 615 (quoting and adopting the definition in *Arkansas Cent. R. Co. v. Smith*, 71 S. W. 947, 71 Ark. 189).

A place is not a "depot" where it is shown that railroad ground on which a switch was laid was not open for use by the public; passengers were permitted to get on and off trains at that point but could not procure tickets there for any station on the road or by one for this point; packages of freight were sometimes thrown off there for the accommodation of the consignees but there was no agent to take charge of such freight when thrown off; it was not a regular stopping place for trains for any purpose, especially for taking on and discharging



either freight or passengers. *Duncan v. St. Louis, I. M. & S. Ry. Co.*, 85 S. W. 661, 663, 111 Mo. App. 193 (citing Webster's Dict.; Bouv. Law Dict. [Lawe's Ed.] 1031).

A freight car placed on a side track, and at which freight was received and cars stopped when flagged, is not a "depot," within the stipulation in a deed that, in consideration of the grant of a right of way, the company would put a "depot on the land," as the word "depot" in the stipulation was intended to mean a permanent structure to be used as a receptacle for freight and passengers, and to be of a kind in keeping with its other depots. *St. Louis, I. M. & S. Ry. Co. v. Berry*, 110 S. W. 1049, 1051, 86 Ark. 309.

#### Same—Surrounding grounds

The word "depot," in a statute requiring railroads, under penalty, to keep their "depots" or passenger houses lighted and open to ingress and egress of passengers, like "passenger house," as used in the statute, means some character of house or building that can be warm and open as well as lighted, and does not apply to depot platforms or other places where passengers are expected to get on or off trains. *Gulf, C. & S. F. Ry. Co. v. Barrett*, 47 S. W. 1039, 1040, 19 Tex. Civ. App. 626.

The word "depot," as used in an ordinance making it unlawful for any person to drum or solicit business for a hotel on the trains or "depots" of any railroads, includes, not only the depot building, but the platform and grounds connected therewith, and used by the company for its business with the public. *Moore v. Campbell*, 109 S. W. 544, 545, 85 Ark. 581.

#### Of a brewery

An ordinance, after providing for a license fee for each brewery, distillery, "depot," or agency established or maintained in the city, provided that any structure within the city used for the storage of liquors brewed by any brewery outside the city and shipped in for sale or distribution shall be considered a "depot of a brewery" under the provisions of the ordinance, whether the liquors be stored by the owner of the brewery, or an agent, or a purchaser. *Schmidt v. City of Indianapolis*, 80 N. E. 632, 636, 168 Ind. 631, 14 L. R. A. (N. S.) 787, 120 Am. St. Rep. 385.

#### DEPOT GROUNDS

"Depot grounds" of a railroad company prima facie include all that part of the right of way which is left unfenced between the switches and cattle guards, on either side of the platform, including the switches and side tracks, and, in the absence of evidence showing that they are unreasonable in extent, will be deemed the true limits. *Mills & Le Clair Lumber Co. v. Chicago, St. P., M. & O. R. Co.*, 68 N. W. 996, 997, 94 Wis. 336.

A place where a railroad received and discharged passengers on signal, and where

it maintained a switch track, but at which it had no building, was not a depot, within the rule permitting railroads to leave their tracks unfenced at "depot grounds." *Acord v. St. Louis Southwestern Ry. Co.*, 87 S. W. 537, 543, 113 Mo. App. 84.

Station grounds, or "depot grounds," at convenient points along the line of railroads, embrace not only the land of the right of way but additional land of such extent as existing and prospective conditions seem to require, but the land originally appropriated should not be arbitrarily held to limit railroads or the public, and in every case, in determining what are station and depot grounds, three conditions must concur: The grounds must be necessary, convenient, and be actually used by the railroad in transacting business. They therefore include sufficient land for safe and convenient approaches and exits for passenger and freight transportation, for the location of depot buildings, warehouses, etc., and an important criterion as to what land is necessary and convenient is the amount and character of business done at the station. In re *Atlantic & St. L. R. Co.*, 62 Atl. 141-143, 100 Me. 430 (citing *Davis v. Burlington & M. R. R. Co.*, 26 Iowa, 549; *Smith v. Chicago, M. & St. P. Ry. Co.*, 15 N. W. 303, 60 Iowa, 512).

"Depot grounds," such as are required to be fenced within the statute, may exist in the absence of either a depot building or station agent. *Welch v. St. Louis & S. F. R. Co.*, 109 S. W. 1074, 1076, 131 Mo. App. 464.

The "depot or station grounds" of a railroad company is the place where passengers get on or off the train, and where freight is loaded and unloaded, including all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches, and turnouts thereon, or adjacent thereto, necessary for handling and making up trains, storage of cars, etc., and so much of the main track outside the switches as is necessary for the proper handling of trains at the station. *Wilmot v. Oregon R. Co.*, 87 Pac. 528, 530, 48 Or. 494, 7 L. R. A. (N. S.) 202, 120 Am. St. Rep. 840, 11 Ann. Cas. 18; (citing 3 Words and Phrases, p. 1005 et seq.; *Grosse v. Chicago & N. W. Ry. Co.*, 65 N. W. 185, 91 Wis. 482; *Grondin v. Duluth, S. S. & A. Ry. Co.*, 59 N. W. 229, 100 Mich. 598).

#### DEPOT POLICE

Men employed by a railroad depot company to direct passengers what trains to take and to make reports of trains coming into and going out of the depot were known as "depot police." *Brown v. Southern Pac. Co.*, 88 Pac. 7, 8, 31 Utah, 318.

#### DEPRAVED

A person is "depraved" when he is generally bad, is wicked in mind and heart, loves evil rather than good, and, though a single act of adultery may be considered strong

evidence of depravity, it is not conclusive. *Knepper v. Knepper*, 122 S. W. 1117, 1119, 139 Mo. App. 493.

## DEPRECIATE

"Depreciation" is the loss in value of some destructible property over and above current repairs. *Cumberland Telephone & Telegraph Co. v. City of Louisville*, 187 Fed. 637, 653.

## DEPREDATOR

As robber, see Robber.

## DEPRIVE

Laws 1907, c. 197, regulating the width of certain entries in bituminous mines, and exempting block coal mines from its provisions, is a proper exercise of police power, and is not unconstitutional as a deprivation of property without due process of law. *Barrett v. State*, 93 N. E. 543, 545, 175 Ind. 112.

The owner of Philippine silver coin is not "deprived" of his property therein without due process of law, contrary to Act July 1, 1902, c. 1369, by the prohibition against the exportation of such coin from the Philippine Islands, under penalty of forfeiture and fine or imprisonment, which is made by Philippine law No. 1411, enacted by the Philippine Commission in the exercise of the power under Act Cong. March 2, 1903, c. 980, § 6, to adopt such measures as are deemed proper, not inconsistent with the organic act, to maintain the parity between gold and silver pesos, but such statute is within the limits of the police power. *Ling Su Fan v. United States*, 31 Sup. Ct. 21, 22, 218 U. S. 302, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176.

"The constitutional guaranty that no person shall be 'deprived of his property' without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." *MacMullen v. City of Middletown*, 98 N. Y. Supp. 145, 150, 112 App. Div. 81.

## DEPRIVE ANIMALS OF SUSTENANCE

A person renting a field to another on which to pasture cattle, but who has not agreed to care for the cattle, does not, by leaving them in the field in which their owner placed them, without providing food or shelter, deprive them of food and shelter within Code Supp. 1907, § 4969, providing that any person depriving any animals of

necessary sustenance shall be punished accordingly. *Pleper v. Krutzfeldt* (Iowa) 136 N. W. 904, 905.

## DEPRIVE OF EMPLOYMENT

A teacher employed in both day and night schools, whose night employment was terminated by discontinuance of the school in which he was employed, but whose employment in day school continued, was not "deprived of employment," so as to be entitled to preference in appointment, under Greater New York Charter, § 1090, providing that, in case of the discontinuance of any school, teachers who may be thereby deprived of employment shall be preferred in appointments to be made. *Cusack v. Board of Education of City of New York*, 85 N. Y. Supp. 991, 993, 89 App. Div. 355.

## DEPRIVE THE OWNER

See Permanently Deprive the Owner.

## DEPRIVED OF LIBERTY

See Restrained and Deprived of Liberty.

## DEPUTY

See Chief Deputy.

The "deputy" is but the officer's shadow and doth all things in the name of the officer himself, and nothing in his own name. *Wilkerson v. Dennison*, 80 S. W. 765, 767, 113 Tenn. 237, 106 Am. St. Rep. 821, 3 Ann. Cas. 297 (citing *Talbott v. Hooser*, 12 Bush. [75 Ky.] 414).

"Deputies," being appointed in the language of the Constitution "to perform the duties of the office," are not mere servants or agents of the clerk of the court; they are agents and officers of the court. *State, to Use of Smith, v. Turner*, 61 Atl. 334, 337, 101 Md. 584.

A "deputy" is one who by appointment exercises an office in another's right, having no interest therein, and doing all things in his principal's name, for whose misconduct the principal is answerable. *Halter v. Leonard*, 122 S. W. 706, 708, 223 Mo. 286.

A "deputy" is a subordinate officer authorized to act in place of the principal officer in his absence. Civil Service Law (Consol. Laws, c. 7) § 22, providing that a veteran shall not be removed except for incompetency or misconduct, but that the section shall not apply to the position of "deputy" of any official or department, does not prevent the removal of a veteran from the position of superintendent of streets, where, by the city charter, it is provided that the commissioner of public works shall be the head of the department of public works, and that he shall appoint, to hold during his pleasure, a superintendent of streets, and that in case of the absence or disability of the commissioner, or a vacancy in office, the superintendent of streets shall discharge the duties of the office until the commissioner returns or his disability ceases, or the vacancy is

filled; the duty of the superintendent being to supervise the making and repairing of streets under the direction of the commissioner of public works. *Williams v. Darling*, 122 N. Y. Supp. 534, 539, 67 Misc. Rep. 205.

**As assistant**

See Assistant.

**As officer**

See Officer.

## DERAIL SWITCH

A "derail switch" is a device which when set will cause a car running loose on the side track to run off its rails to the ground before reaching the main track. *Jones v. Kansas City, Ft. S. & M. R. Co.*, 77 S. W. 890, 892, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434.

## DERECHO

"Derecho," in Spanish law, is the impost laid upon goods or provisions, persons or lands, by way of tax or contribution. *Noe v. Card*, 14 Cal. 576, 608.

## DERELICT

A vessel is "derelict," in the maritime sense, when she is abandoned without hope of recovery or without intention of returning. It is sufficient if there has been an abandonment at sea by the master and crew without hope of recovery; but the mere quitting of the ship to procure assistance from shore, or with the intention of returning is insufficient. *Merrill v. Fisher*, 91 N. E. 132, 133, 204 Mass. 600, 134 Am. St. Rep. 706, 17 Ann. Cas. 937.

An essential element of a "derelict" vessel is that the boat must be abandoned. The word is derived from "de linquere," and the definition given in the dictionaries indicates the same meaning: To leave, to abandon; a ship abandoned at sea. A vessel which, although disabled, has not been abandoned by her officers and crew is not a "derelict", and salvage for her rescue cannot be awarded on that basis. *The Launberga*, 154 Fed. 959, 966.

The abandonment must be complete, and so a vessel anchored a mile or two from shore in comparatively calm weather, and left by her crew with the intention to return, is not a "derelict." *The Minnie E. Kelton*, 181 Fed. 237, 242.

A "derelict" is "a boat or vessel found deserted on the seas, whether it arose from accident or necessity or voluntary dereliction." A large schooner became stranded on Frying Pan Shoals off the North Carolina coast in March. A contract was made with the owner of tugs to float the schooner and deliver her at a port, but the effort was unsuccessful. Ten days after the stranding, and after she had been abandoned by the master and crew, she was moved off the

shoal by a high wind, and one of the tugs attempted to tow her to port, but was unable and abandoned her. Her hull was under water and her masts and rudder gone. Subsequently a tug from Savannah went in search of and found her, about 100 miles from Charleston, which was the nearest port she could enter, owing to her draft. After going to Charleston and obtaining the assistance of two other tugs, she was again found, and the three tugs towed her to that port nearly 10 days after she had gone adrift. Meantime the insurer had sent out a tug, which made a search for her, but not in the locality where she could have been found. She was sold with her cargo for \$24,000. The salvage service was performed with skill, and at considerable trouble and risk, owing to her condition. Held, that she was a "derelict," and that the salvors were entitled for their services to one-half the proceeds of vessel and cargo after payment of the expenses and costs. *The Myrtle Tunnel*, 146 Fed. 324, 329 (quoting and adopting definition of Mr. Justice Story).

Prima facie a vessel found at sea in a situation of peril, with no one on board, is a "derelict," but where the master and crew have left temporarily for the purpose of obtaining assistance, and with intent to return and resume possession, she is not technically a "derelict," although another vessel finding her in such condition and rescuing her is entitled to salvage compensation as in case of a derelict. *The Shawmut*, 155 Fed. 476, 478.

The term "derelict" imports a certain condition of things introducing elements which tend, on the general principles of salvage, to raise the amount of salvage reward. There are three conditions which a derelict generally fulfills: The first by the risk to which the salvaged ship is exposed; the second is that she has no men on board her and has to be approached without such aid as they could afford; and the third is that the position of the men put on board the vessel was not without risk, and the labor cast on the remainder of the crew of the salvaging vessel left on board their own vessel is very considerably increased. *The Theta*, 135 Fed. 129, 133.

## DERIVE

The word "derivative" is defined as coming from another or as acquired from another; hence a fraudulent conveyance, while valid as between the parties, is void as against creditors, and a judgment creditor may maintain a creditors' suit to set aside the conveyance as against the objection that his action is derived from the grantor, since his action is a remedy given to a judgment creditor. *Hubbard v. United Wireless Tel. Co.*, 115 N. Y. Supp. 1016, 1017, 62 Misc. Rep. 538.

The word "derive" is not limited to descent or transmission; hence, under Code 1873, §§ 2241, 2243, declaring parents the natural guardians of their children, and providing that where a minor has property not "derived" from either parent, a guardian must be appointed to manage the same, a parent may manage the property of an infant son where the property is derived from the parent, who directs that deeds thereto shall be executed in the son's name. *Ringstad v. Hanson*, 130 N. W. 145, 146, 150 Iowa, 324.

The word "derives," as used in Code, § 4604, providing that no person from whom any party derives any title by assignment or otherwise shall be a witness, etc., is defined as meaning "to receive, as from a source or origin, to obtain by descent or transmission"; and the statute does not disqualify an agent as a witness, since an agent is not interested in the result of the action or bound by the judgment. *Stiles v. Breed*, 130 N. W. 376, 380, 151 Iowa, 86.

Act April 15, 1905 (Sess. Acts 1905, p. 292), created a state sanatorium, and section 24 made laws governing other eleemosynary institutions applicable to it. Rev. St. 1899, § 7808, requires moneys received by such institutions to be paid to the state treasurer, and by him placed in respective funds created by such sections. Section 7809 provides that moneys in the state treasury to the credit of any such fund shall be appropriated for the support of the institution to which the fund belongs. Act April 15, 1907 (Laws 1907, p. 37) § 27a, appropriated out of the state treasury chargeable to the "Missouri state sanatorium fund" a specified sum; "the same being 'derived' from the payment into the state treasury by the treasurer or other financial officer of said institution." Act March 19, 1907 (Laws 1907, p. 309) § 15, requires the superintendent of the sanatorium to furnish the state treasurer sufficient data to enable him to collect from the various counties, etc., of patients. Section 16 (page 310) gives indigent patients the preference over private patients. Moneys received by the state treasurer under such section 15 (Laws 1907, p. 309) from the different counties are moneys "derived from the payment into the state treasury by the treasurer or other financial officer of said institution," within such section 27a (Laws 1907, p. 37), since by section 15 the state treasurer has been made a financial officer of the institution, and as such falls within the term "other financial officer." *State ex rel. Eaton v. Gmelich*, 106 S. W. 618, 620, 208 Mo. 152.

## DERNIERE VOLONTE

"Volonte" and "derniere volonte" are used as equivalents of "will" and "last will." In *re Billis' Will*, 47 South. 884, 885, 122 La. 539, 129 Am. St. Rep. 355.

## DESCEND

The use of the term "descend" in Act Cong. May 27, 1902, c. 888, 32 Stat. 245, and the Original and Supplemental Agreements between the United States and the Creek Nation, where descent, technically speaking, could not take place, creates an uncertainty and ambiguity calling for construction. *Shulthis v. MacDougal*, 162 Fed. 331, 339.

### As go to

In a will devising land to testator's widow for life and providing that at her death it should descend to their children, the word "descend" is used in the sense of "go to." *Case v. Haggarty*, 137 N. W. 979, 980, 91 Neb. 746 (citing 3 Words and Phrases, pp. 2012-2014).

### As pass by operation of law

The legal and technical meaning of "descend" is to pass by inheritance by operation of law. *Harvey v. Ballard*, 96 N. E. 558, 561, 252 Ill. 57.

### As a word of inheritance

"Descend," where used in a will giving one a life estate with the remainder to descend to those who otherwise would take the property as his heirs, signifies an intention of the testator that the property shall follow the same channel into which the law would direct it, and so pass the devisee a fee simple. *Hayes v. Martz (Ind.)* 84 N. E. 546, 547.

Under a devise of land by a testator to his daughter, to "descend" at her death to her children and at their death to "revert to my son, whom I appoint my lawful attorney, and I cause him to be interested for the valuable consideration of \$1 to cause to be made and kept in possession of my daughter, and at her death to descend to her children," the children of the daughter upon her death took the fee in remainder, which upon their death passed to their heirs and to the heirs of the testator's son. *Calmes v. Eubank (Ky.)* 40 S. W. 669, 670.

A bequest of property to the testator's daughter for life to "descend" to her bodily heirs vests only a life estate in the first taker, with a remainder over; the Code having abolished the rule in *Shelley's Case*. *Mason v. Pate's Ex'r*, 34 Ala. 379, 389.

The word "descend" has always had a well-known, certain, technical, legal meaning. Descent or hereditary succession is the title whereby a man, on the death of his ancestor, acquires the ancestor's estate by right of representation as his heir at law. The homestead statute being chiefly to provide an abiding place for the family so long as it continues as such, and not for the purpose of defining the character of estates or the general qualities of ownership, it should be construed to mean that, on the death of one spouse, the land descends to the other, and in that respect it is a statute of descent. The statute (Civ. Code. 1872, § 1265) origi-

nally provided that on the death of either spouse the homestead descended to and the title at once vested in the survivor. *Hannon v. Southern Pac. R. Co.*, 107 Pac. 335, 338, 12 Cal. App. 308.

Testator gave to his widow all his property for life, and directed that after her death the same should be equally divided between his children, provided that the portion that should go to his unmarried daughter should "descend to her bodily heirs." Held to create an estate tail in the daughter, converted into an estate in fee by Ky. St. 1903, § 2343; the words quoted being words of inheritance, and not of purchase. *Edwards v. Walesby* (Ky.) 98 S. W. 306, 307.

In the original Creek Agreement, ratified by Act March 1, 1901, c. 676, § 28, 31 Stat. 869, which provided that, in case of the death of the person entitled to enrollment as a member of the tribe, his distributive share of its lands and money, to which he would have been entitled if living, should descend to his heirs according to the laws of descent and distribution of the Creek Nation, and to be allotted and distributed to them accordingly, the word "descend" is not used in its strict legal sense, but as meaning that the lands and property of the deceased member shall be allotted to the same persons who would have inherited if such member had survived to receive the allotment, and such person took no vested interest before allotment. Hence, where such deceased member had not been enrolled and no allotment had been made at the time of taking effect of the Supplemental Agreement, ratified by Act June 30, 1902, c. 1323, 32 Stat. 500, which by section 6 repeals such provisions "in so far as they provide for descent and distribution according to the laws of the Creek Nation," and provides that such descent and distribution shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, the later provision governs, and title to the allotment, when made, passes to those who would inherit under the Arkansas statute. *Brann v. Bell*, 192 Fed. 427, 428; *Armstrong v. Wood*, 195 Fed. 137, 139.

Section 7 of the supplemental agreement with the Five Civilized Tribes of Indians (Act June 30, 1902, c. 1323, 32 Stat. 501), promulgated August 8, 1902, provides that "all children born to those citizens who are entitled to enrollment under previous acts, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission." Also, "if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands, and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided to be allotted and distributed to them." Held, that the

word "descend," which was technically inapplicable to the situation described, since the decedent would never be seised of the property, was used to indicate the character of the title or estate which passed to the heirs, it not being intended that they should take the property as an additional bounty from the tribe but by virtue of their heirship, their title being one of inheritance rather than of purchase, the situation being made the same by such provision as though the title had become vested in the decedent before his death. *Shulthis v. McDougal*, 170 Fed. 529, 531, 95 C. C. A. 615.

#### As a word of purchase

The word "descend" was used in the sense of to "go to," under a will giving a vested remainder to the testator's children expectant on the death of testator's widow, and providing that, in case of the decease of any of said children, his or her shares to "descend" to the heirs of their bodies. *Taylor v. Stephens*, 74 N. E. 980, 982, 165 Ind. 200.

The term "descend to them" in the will should be construed to mean "go to them," and not to evidence an intention that upon the grandson's death the estate given him should vest in his children or descend in them by operation of law. *Hays v. Martz*, 89 N. E. 303, 307, 173 Ind. 279.

A deed of gift conveying property to a trustee in trust for the grantor's wife during her life and at her death to "descend" to her children creates a life estate in the wife, with remainder to her children. *Greenwood v. Coleman*, 34 Ala. 150.

Where a deed of gift gave property to the grantor's daughter to enjoy during her life and to descend to the natural heirs of her body, the word "descend" means that the property should go to her bodily heirs as succeeding the parent. *McVay's Adm'r v. Ijams*, 27 Ala. 238, 244.

Where a deed conveyed land to the grantor's son, the land to "descend" to the son's children, if he shall have any, but, if not, to revert to the grantor and his heirs, the word "descend" was not used in its technical legal sense, for the fee could not descend from the son, because it was not vested in him, and could not descend from the grantor because it was to pass by the deed, and not by his death, and as the law favors the vesting of estates unless a contrary intention appears, there is nothing in the deed inconsistent with the vesting of the remainder in the first child born to the grantor's son, subject to open and let in after-born children. *Lewis v. Butts*, 128 N. Y. Supp. 842, 844.

Testator, by the third clause of his will, without an introductory clause, devised to his daughter one-half of a farm, to her heirs if she should have any children, and if she should have none to descend to the oldest son of J., if he should have any lawfully begotten, at her death; if he should have no

male heirs to descend to all her heirs alike, except to J. himself, but not to prohibit his heirs from receiving his part. Held, that the word "descend" indicated that testator intended that a fee should not pass, and that the oldest son of J. took a life estate only in his interest in the land so devised, and not a fee, under the rule that obtained prior to Rev. Code 1852, amended to 1893, p. 640, c. 84, § 24, declaring that a devise of real estate without words of limitation shall pass a fee, that such devise gives to the devisee a life estate only unless an intention to give a greater estate is sufficiently expressed in the will. In re Reed's Estate (Del.) 76 Atl. 617, 619, 7 Pennewill, 30.

### DESCENDANT

See Direct Descendants; Lineal Descendants.

The Century Dictionary defines the word "descendant" as "an individual proceeding from an ancestor in any degree; issue; offspring, near or remote"; and Worcester defines "descendant" as "the offspring of an ancestor; progeny." In re Cook's Estate, 100 N. Y. Supp. 628, 629, 50 Misc. Rep. 487.

The word "descendants," used in the creation of a separate estate of a married woman, will not, at her death, exclude the marital rights of the husband, except as to the children. Wood v. Reamer, 82 S. W. 572, 574, 118 Ky. 841.

S. bequeathed to her grandsons J. and W. an amount of money; her will providing that, if either of them died leaving no child or descendant surviving him, the share he received under this will is to go to his surviving brother, and if both should die, leaving no child or descendants, then to be equally divided between testatrix's children. Held, that the word "descendants," in the connection in which it occurs is not a word of purchase creating an estate in a class designated, but is a word of limitation which limits or describes the estate given. Daniel v. Lipscomb, 66 S. E. 850, 852, 110 Va. 563.

### As children

Child as including, see Child—Children.

While the words "children" and "descendants" are not synonymous, "descendants" includes "children"—comprises issue in every degree. French v. Logan's Adm'r, 60 S. E. 622, 623, 108 Va. 67 (citing Neilson v. Brett, 40 S. E. 32, 99 Va. 673).

The word "descendants," in a will which provides for the payment to a son of testator of a part of the son's share of the estate and directs that the remaining part shall be held in trust by the executors for the benefit of the son and his direct descendants, means children, and the will does not create an estate tail which entitles the son to receive the remaining portion at once, but a trust is created for the benefit of any children the son may leave at his death. Ballantine v. Ballantine, 152 Fed. 775, 785.

### As grandchildren

Code, art. 46, § 19, provides that the reality of an intestate who leaves no child or descendant shall descend to his brothers and sisters and their "descendants" in equal degree, equally. Section 21 provides that, if no brother or sister or any "descendant" from such brother or sister be living, then it shall descend to the father, and if no father living, then to the mother, and, if no mother living, then to the grandfather on the part of the father, and, if no such grandfather living, then to the descendants of such grandfather in equal degree, equally. Section 27 provides that, if in the descending or collateral line any parent shall be dead, the child or children of such parent shall by representation be considered in the same degree as the parent would have been in if living, and shall have the same share of the estate as the parent would have been entitled to if living; "provided that there be no representation admitted among collaterals after brothers' and sisters' children." Held, in a contest between first cousins and grandnieces of an intestate who left no nearer relatives, the former claiming as descendants of his grandfather and the latter as descendants of his sister, that the word "descendants," as used in section 19, was not limited to "children" by the proviso in section 27 limiting the right to take "by representation," which only applies to one seeking to be considered in the same degree as a deceased parent would have been in if living; and the grandnieces took as "descendants," under section 19, to the exclusion of the cousins, because the latter, who could only inherit by virtue of section 21, could only take in default of the persons mentioned in section 19. Hoffman v. Watson, 72 Atl. 479, 481, 109 Md. 532.

### As heirs or next of kin

Heirs as including, see Heirs.

Where a will, after providing for the testator's wife and daughter and their issue, if any, provided that, if at the decease of the survivor of the wife and daughter there should be no living descendants of the testator, then the principal should be distributed among the testator's own right heirs, unless his adopted son or his issue be then living, in which event he, if living, or his issue, if he be not living, should receive one-half of the principal, it was held that the word "descendant" was used, in its ordinary sense, as meaning those who can trace their origin to testator as ancestor, and that the interests of testator's "own right heirs" were contingent and vested in those who answered that description at the happening of the contingency. Boston Safe Deposit & Trust Co. v. Blanchard, 81 N. E. 654, 655, 196 Mass. 35.

"Descendants" includes the issue of the body of every degree, no matter how remote, and it does not mean the next of kin or heirs



generally. *Twaites v. Waller*, 110 N. W. 279, 280, 133 Iowa, 84.

#### As issue

Lawful issue as including, see Lawful Issue.

A will, providing for the payment to the testator's son of a stated portion of the estate, provided that "the remaining one-fifth part of his share shall be held in trust by my executors for the benefit of my said son \* \* \* and his direct descendants." Held, that such provision did not create an estate tail which entitled the son to receive such portion at once. The word "descendants" is not used in the sense of "issue." *Ballantine v. Ballantine*, 152 Fed. 775, 785.

It is well settled in this state that the words "legal issue," when used in a will and unexplained by the context, have the meaning of "descendants." *Schmidt v. Jewett*, 88 N. E. 1110, 1111, 195 N. Y. 486, 133 Am. St. Rep. 815.

"Descendants," as used in a will to limit a devise after termination of a particular estate, may be synonymous with "issue." In *re Tenney*, 93 N. Y. Supp. 811, 818, 104 App. Div. 290.

The term "descendants," as used in a will, includes all who proceed from the body of one named, as children, grandchildren, and great grandchildren. *Lich v. Lich*, 138 S. W. 558, 564, 158 Mo. App. 400.

The words "descendants" and "issue," in their primary and usual sense, comprehend more than immediate issue. A testamentary gift over to the lawful issue and descendants of a beneficiary and to her descendants forever violates the statute of perpetuities in force in 1883, since the descendants can only be ascertained on the death of the beneficiary, and may include children of persons not in being at testator's death. *Pease v. Cornell*, 80 Atl. 86, 88, 84 Conn. 391.

"Ordinarily the word 'descendants' includes the issue of the body of every degree, no matter how remote, and it does not mean the next of kin or heirs generally." Where a will provided that the income from property should be distributed quarterly to testator's children and, upon each of their deaths, to their children or descendants, a granddaughter, whose parent was dead, took only a contingent interest, which, being divested by her death, could not be willed to her husband. *Twaites v. Waller*, 110 N. W. 279, 280, 133 Iowa, 84.

While the word "issue" in a strictly technical meaning is equivalent to the word "descendants," and when used in a will, in the absence of other words or extrinsic circumstances requiring a different meaning, entitles remaindermen to take per capita and not per stirpes, it will not be given that meaning where the language of the will

shows a different intention, and hence where a will provided for a per capita taking in equal portions by all living grandchildren, "including the issue of any grandchild or grandchildren then deceased leaving issue then alive who shall take the same share together, if more than one, which such deceased parent or parents would have taken if living," thus clearly showing the testator's intention to apply the term only to descendants of a particular class at a particular time and to treat the child or children of each grandchild as one class, the remainder will be equally divided among the different classes. *Kernochan v. Whitney*, 109 N. Y. Supp. 721, 722, 125 App. Div. 371.

A testator having at the time of the execution of his will a wife, two sons, W. and G., the latter of whom had three children, and two daughters without children, made a bequest in trust to pay the income to a daughter for life, and on her death to divide the corpus and pay the same to her lawful issue and their descendants or to her descendants forever. He had made an advancement to the daughter, so that, with the bequest, her share in the estate would equal the sum given the other children. Held, that the bequest violated the statute of perpetuities in force at the time of testator's death in 1883, since issue and descendants comprehended more than immediate issue, and since the descendants could only be ascertained on the death of the daughter, and might include children of persons not in being at testator's death. *Pease v. Cornell*, 80 Atl. 86, 88, 84 Conn. 391.

Where a testator in one paragraph devised certain real estate to his son, to have and to hold the same to him for life, and, in case he should die leaving lawful male issue, then to such male issue his or their heirs and assigns forever, and in another paragraph directed his executors to pay the legacies to his children within three years and to release all claims and demands which he had against any of his children, the word "issue" was used in its legal sense as synonymous with "descendant" and not as synonymous with "children," and therefore included children of a deceased child of the devisee. *Wilson v. Wilson*, 78 N. Y. Supp. 408, 409, 76 App. Div. 232.

In a will in which the residue of testator's estate was left "to all my children and the descendants of such as may be dead (they to receive the parts respectively which their parents would have received if alive) to be distributed equally among them," the testator intended to regard each deceased child as a stock of descent, and the meaning of the word "descendants" is restrained, so "that grandchildren whose parents were living could not take with their parents. This construction lets in children to equal shares, and grandchildren to the share their parents would have taken if living." "The broad

import of the word 'descendants' is sometimes narrowed, where there is a ground for judging that it was intended in a restricted sense. Thus the word 'issue,' which is coextensive with 'descendants' and includes every degree, has been restrained to the sense of 'children.' *Snyder v. Greendale Land Co.*, 91 N. E. 819, 822, 48 Ind. App. 178.

#### As issue of living person

The word "descendant," according to its accurate lexicographical and legal meaning, designates the issue of a deceased person and does not describe the child of a parent who is still living. The word is the correlative of ancestor. The word "issue" is a word of broader import and may include the children of a living parent as well as the children or descendants of one who is dead. But in an accurate sense one cannot have a living ancestor, nor can a living person, although he may have children, have descendants. A trust deed conveying property to trustees during their lives and the life of the survivor of them recited that the grantor wished to provide for the maintenance of the beneficiaries named, directed the trustees to distribute the proceeds among the beneficiaries, provided for the distribution thereof on the death of one or more of the beneficiaries with or without "lineal descendants," and that, on the termination of the trust estate by the death of the last surviving trustee, the "lineal descendants" of the beneficiaries named should take the body of the fund, and further provided that the beneficiaries should not take any other interest in the grantor's property in the state than that therein granted. Held, that the phrase "lineal descendants" must be taken in its technical sense, and the contingencies on which the corpus of the fund devolved on the issue of the beneficiaries were that all the beneficiaries, as well as all the trustees, should be dead. *Parrish v. Mills*, 106 S. W. 882, 886, 101 Tex. 276.

#### Legal representative

See Legal Representative.

#### As lineal descendant

"Descendants" includes both lineal and collateral relations, all who would take under the statute of descents. *Dungan v. Kilne*, 90 N. E. 938, 940, 81 Ohio St. 371 (citing *Turley v. Turley*, 11 Ohio St. 173).

The word "descendants," as used in a clause in a will providing that, on the death of any of the beneficiaries, his or her share should go to their descendants, means children or grandchildren in the direct line. *Dozier v. Dozier* (Mo.) 81 S. W. 891, 894.

In the absence of anything in the will indicating the contrary, "descendants," in a gift of the remainder to children reared by testator, to be divided equally between them and their descendants, does not have other than its ordinary meaning, so as to include brothers and sisters of one of them dying

without issue. *Romjue v. Randolph*, 148 S. W. 185, 188, 166 Mo. App. 87.

Where a testator left to one daughter \$2,000 for life, and gave the balance of his estate to his two daughters equally, then to his legal descendants, if any, but, if none, the balance was bequeathed to strangers to the blood, the "descendants" are those who survive testator's daughters, and where, at the execution of the will and death of testator, he had two grandchildren, the interest of one, since deceased, does not pass to his father, who is a stranger to the blood of the testator. *Hadcox v. Cody*, 135 N. Y. Supp. 861, 863, 75 Misc. Rep. 569.

#### DESCENDIBLE

An executory devise to one dependent upon the death of the preceding owner in fee, without children or issue surviving, becomes a "descendible" estate; "descendible" and "devisable," in relation to such interests, being convertible terms. *King v. Guild*, 2 Tenn. Ch. App. 190, 195.

A will provided: "Lastly, I give, bequeath and devise to my son all the residue of my property, both real and personal, to be held in trust, nevertheless, by my said executors, and managed and cared for by them for my son's benefit until he shall arrive at the age of fifty years, when said trust shall continue in the discretion of said executors, and if my son shall die while it is in force he may dispose of said property by will, and if he dies intestate then this property I bequeath to my heirs at law." Held, that the son took a "descendible, devisable, and alienable" estate in expectancy within Real Estate Law (Laws 1896, p. 567, c. 547) § 49, to which the lien of the son's judgment creditor would attach under Code Civ. Proc. § 1251. *Higgins v. Downs*, 91 N. Y. Supp. 937, 939, 101 App. Div. 119.

#### DESCENT

See African Descent; Gift, Devise, or Descent; Indians by Descent; Line of Descent.

The purpose of the act of approved August 13, 1910 (Acts 1910, p. 90), regulating the use of automobiles, is to protect pedestrians and others lawfully on the highways of this state against the consequences of the negligent and improper operation of automobiles. Construing the word "descent," as used in section 5 of this act, in the light of its context and the declared purpose of the act, it will be held to mean a declivity in the highway over which, from ordinary human experience and observation, it would be deemed more dangerous to operate an automobile at an excessive rate of speed than upon level ground. Such a construction of the word "descent" does not make it so indefinite and uncertain in meaning as to render this provision of the act incapable of enforcement as a penal law. *Elsbery v. State* (Ga.) 76 S. E. 779, 781.

"Descent" or "hereditary succession" is the title whereby a man, on the death of his ancestor, acquires his ancestor's estate by right of representation as his heir at law. *Hannon v. Southern Pac. R. Co.*, 107 Pac. 335, 338, 12 Cal. App. 350; *Parrish v. Mills*, 106 S. W. 882, 886, 101 Tex. 276 (quoting and adopting *Barclay v. Cameron*, 25 Tex. 233).

"There are two modes only, regarded as classes, of acquiring a title to land, viz., 'descent' and 'purchase,' 'purchase' including every mode of acquisition known to law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by act of the law;" and where a Creek Indian died before enrollment, to which he was entitled, and before selection and patent of his allotment, under the act of Congress, his heirs took by purchase, as donees of the nation, and not by descent. *Shulthis v. MacDougal*, 162 Fed. 331, 338 (citing 3 Washb. Real Prop. p. 4).

Code, c. 28, § 1281, rule 10, provides that illegitimate children shall be considered legitimate as between themselves and their representatives, and in case of the death of such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all the children had been born in wedlock. Held, that the "descent" so referred to was between brothers and sisters, and had no application to collaterals. *Bettis v. Avery*, 52 S. E. 584, 586, 140 N. C. 184.

The word "descent," as used in a statute providing that an alien can take by descent lands in the same manner as a citizen of the state, applies to the tenancy by the curtesy, which is a tenancy by descent, and not by purchase. *Cooke v. Doron*, 64 Atl. 595, 596, 215 Pa. 393, 7 L. R. A. (N. S.) 659, 7 Ann. Cas. 502.

Act of Congress approved March 3, 1885 (23 Stat. 340, c. 139), providing for the allotment of lands to the Indians residing on the Umatilla reservation, declares that the law of alienation and descent in force in the state of Oregon shall apply after patents have been executed. Held, that the word "descent" was intended to render the transmission of an estate by inheritance applicable to the land allotted to an Indian from the time a certificate was issued. *Kalyton v. Kalyton*, 78 Pac. 332, 333, 45 Or. 116.

The phrase "right and interest by descent," in a statute providing that a conveyance by the wife without the joinder or assent of her husband shall not bar his right and interest by descent in the estate conveyed, is to be limited to conveyances of real estate, and designates a right which a surviving husband has in the real estate of a deceased wife in place of curtesy and has no reference to the interest in the personal estate which comes through distribution. *Wright v. Holmes*, 62 Atl. 507, 509, 100 Me. 508, 3 L. R. A. (N. S.) 769, 4 Ann. Cas. 583.

## DESCRIBE—DESCRIPTION

See *As Above Described*; *Correct Description*; *Defect in Description*; *Last Described*; *Substantially as Described*; *Sufficient Description*.

Any and every description, see *Any*.

Any description, see *Any*.

Similar description, see *Similar*.

The word "description," in its ordinary and legal signification, means a description which has a legal susceptibility of being aided by testimony so as to identify the subject-matter. *Casey v. Luken*, 88 N. E. 347, 348, 43 Ind. App. 682 (citing *Lowe v. Harris*, 17 S. E. 539, 112 N. C. 472, 22 L. R. A. 379).

Usually general "description" in a grant, such as "all the estate, both real and personal of the grantor," and "all my lands" in the town, county, or state, "all my lands wherever situated," "all my right, title, and interest in and to my father's estate at law," and the like, are held sufficient. *Holley's Ex'r v. Curry*, 51 S. E. 135, 136, 58 W. Va. 70, 112 Am. St. Rep. 944 (citing *Brewster*, Conv. § 81; *Pettigrew v. Bobbelaar*, 63 Cal. 396; *Frey v. Clifford*, 44 Cal. 335; *Austin v. Dolbee*, 59 N. W. 608, 101 Mich. 292; *Huron Land Co. v. Robarge*, 87 N. W. 1032, 123 Mich. 686; *Warren v. Syme*, 7 W. Va. 474).

Under a statute concerning street improvements, providing that the council shall pass a resolution of intention "describing the work," a resolution declaring it to be the intention of the council that a described street be graded, graveled, and guttered in accordance with the plans and profiles on file in the office of the city engineer and specifications in the office of the city clerk, that a cement curb be constructed along each line of the roadway of a street in accordance with the specifications, and that a cement sidewalk, five feet in width, be constructed along each side of the street in accordance with the specifications, contains a sufficient "description" of the work where the plans and specifications supply all the information required to make the character of the work and materials absolutely certain. *Chase v. Trout*, 80 Pac. 81, 87, 146 Cal. 350.

A "description" in a mortgage is sufficient which enables a third party, aided by the inquiry which the instrument itself suggests, to identify the property covered by it. If it directs the mind of the inquirer to facts or evidence from which he may ascertain the mortgaged property with certainty, it is sufficient. When a mortgage contains a description, part of which is true and part false and erroneous, that which is false or erroneous may be stricken out as redundant or superfluous, and the description will be sufficient if enough remains to lead a third party, by the inquiries it suggests, to the identification of the property covered by it. *Livingston & Schaller v. Stevens*, 94 N. W. 925, 928, 122 Iowa, 62.

**DESCRIPTIVE**

The allegations which are not necessary to the complete statement of the cause of action, but which the pleader must prove because of their being of the kind designated as "descriptive," are ordinarily those which limit more general statements, and which so advise the opposing party of the precise claim relied upon that to treat them as mere surplusage would be to require him to meet evidence of a state of facts substantially different from what he had occasion to anticipate. *Stevens v. Sheriff*, 80 Pac. 936, 937, 71 Kan. 434.

**DESERT****DESERTER**

The crew of a sailing vessel are not "deserters" where they objected to going to sea short-handed, and were given the option by the master to so make the voyage or be discharged without pay; but, as they persisted, he obtained another crew and made no objection when the old crew left the vessel, neither discharging them nor logging them as "deserters." *The Amazon*, 144 Fed. 153, 154.

**DESERTION (As a Felony)**

"By some early English statutes, which appear to have been in force down to the Revolution of 1688, desertion was made felony, punishable in the civil courts. \* \* \* But those statutes fell into disuse after Parliament by the Mutiny Acts, beginning with the statute of 1 W. & M. c. 5, and re-enacted almost every year since, for the first time authorized mutiny and desertion to be punished at the sentence of a court martial in time of peace." *Kurtz v. Moffitt*, 6 Sup. Ct. 148, 152, 115 U. S. 499, 29 L. Ed. 458.

"Desertion," as used in Pub. Acts Mich. 1907, p. 182, No. 144, making one who deserts and abandons his wife guilty of a felony, "abandonment or desertion" means a separation from, wrongfully, without intention of again resuming marital relations. *People v. Stickle*, 121 N. W. 497, 498, 156 Mich. 557.

Where, after his wife obtained a divorce and they were living apart, accused failed to comply with the provisions of the decree requiring him to pay her a weekly allowance for the children's support, he was not guilty of the crime of desertion and abandonment of his minor children, denounced by Pub. Laws 1907, No. 144, where the decree of divorce absolutely deprived him of all custody or right over his children, and imposed upon the wife the duty of furnishing them support, subject to his contribution; so there could be no "desertion," which is the act of a consort leaving his wife and children with intent to cause a perpetual separation, or "abandonment," which is the act by which a man deserts and abandons his minor children. *People v. Dunston*, 138 N. W. 1047, 1048, 173 Mich. 368, 42 L. R. A. (N. S.) 1065.

In order to warrant a conviction of desertion under Cr. Code, § 212a (Laws 1903, p. 642, c. 137), both the "abandonment" and "failure to support" must have occurred since the taking effect of the statute. *State v. Hoon*, 111 N. W. 462, 463, 78 Neb. 618.

Code Supp. 1907, §§ 4775a-4775f, defining desertion, describes three criminal acts—refusal of a husband to provide for his wife; abandonment of a legitimate child under the age of 16 years; and neglect to provide for such child—and any one of such acts is desertion, and as to the child there may be an abandonment, constituting a crime, without a neglect to provide for it. *State v. Stout*, 117 N. W. 958, 960, 139 Iowa, 557.

**DESERTION (In Divorce Law)**

See Constructive Desertion; Continued Desertion; Obstinate Desertion; Willful Desertion.

"Desertion," when applied to the relation of husband and wife, has a well-defined legal meaning, and signifies the act by which a man quits the society of his wife and children, or either of them, and renounces his duties towards them. *State ex rel. Mioton v. Baker*, 36 South. 703, 704, 112 La. 801 (citing *Black*, Law Dict.).

"Desertion" in divorce law is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or the wrongful conduct of the other. *Bacon v. Bacon*, 70 S. E. 762, 763, 68 W. Va. 747 (citing *Alkire v. Alkire*, 11 S. E. 11, 33 W. Va. 517; *Martin v. Martin*, 11 S. E. 12, 33 W. Va. 695; 14 Cyc. p. 611); *Ault v. Ault*, 68 Pac. 231, 29 Colo. 149 (quoting and adopting definition in *Johnson v. Johnson*, 43 Pac. 130, 131, 22 Colo. 20, 55 Am. St. Rep. 112); *Crounse v. Crounse*, 60 S. E. 627, 629, 108 Va. 108; *Kupka v. Kupka*, 109 N. W. 610, 611, 132 Iowa, 191; *Luper v. Luper*, 96 Pac. 1099, 1101, 61 Or. 418; *Todd v. Todd*, 80 Atl. 717, 84 Conn. 591 (citing *Bennett v. Bennett*, 43 Conn. 313, 318; *Tirrell v. Tirrell*, 45 Atl. 153, 72 Conn. 567, 570, 47 L. R. A. 750); *Rector v. Rector*, 79 Atl. 295, 78 N. J. Eq. 386; *Patterson v. Patterson*, 88 Pac. 196, 197, 45 Wash. 296.

Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert willfully, and maliciously persisted in without cause for two years. *Olson v. Olson*, 27 Pa. Super. Ct. 128, 131.

A physical departure from a spouse is not essential to "desertion." *Rector v. Rector*, 79 Atl. 295, 302, 78 N. J. Eq. 386.

That a wife is maintaining an action against her husband for separate maintenance or divorce will not prevent her absence from him amounting to "desertion." The action must have been begun in good faith; and there is no presumption that she acted in good faith where there was no foundation

for her action. *Kusel v. Kusel*, 81 Pac. 297, 298, 147 Cal. 52.

Under Code Civ. Proc. § 370, providing that a wife, when living separate from her husband by means of his "desertion" of her, may sue alone, the "desertion" need not have continued for the statutory period entitling a wife to a divorce, but the desertion must be such as is given as a cause for divorce by Code Civ. Proc. § 95, to wit, a voluntary separation with intent to desert. *Humphrey v. Pope*, 54 Pac. 847, 848, 122 Cal. 253.

Desertion, however willful and without reasonable cause, is no ground for divorce, unless continued for the statutory period. *Luper v. Luper*, 96 Pac. 1099, 1101, 61 Or. 418.

A husband's wrongful abandonment of his wife does not constitute desertion, if within one year thereafter she showed by her words or conduct that she acquiesced in the separation. *Creasey v. Creasey*, 151 S. W. 219, 226, 168 Mo. App. 68.

"Desertion" is a marital offense, consisting in the voluntary separation of one of the married parties from the other, or the refusal to renew suspended cohabitation without justification either in the consent or the wrongful conduct of the other party. *Buckner v. Buckner*, 84 Atl. 156, 160, 118 Md. 101.

"Desertion," warranting a divorce, is a breach of matrimonial duty accompanied by an intent to desert, concurrently existing in uninterrupted combination during at least the entire statutory period of one year and until the entry of a decree; it not being proper to join two periods of desertion to make the statutory period, however brief the period of cohabitation separating the two periods of desertion. *Luper v. Luper*, 96 Pac. 1099, 1101, 61 Or. 418.

"Desertion" is a continuing offense, but it continues only so long as there is a want of consent to the separation on the part of the deserted party. The original offense is not destroyed by the fact that, after the desertion has continued for the period necessary to make it ground for divorce, the status of the separation changes and it becomes, in every way, agreeable to the deserted party. *McMullen v. McMullen*, 73 Pac. 808, 809, 140 Cal. 112.

Where a husband deserted his wife, and without intending to resume the marital relation, induced her to cohabit with him, under the belief that the marital union had been restored, and again deserted her, the period of desertion was not interrupted, and the wife was entitled to a divorce for desertion continuing for three years from the beginning of the first abandonment. *Womble v. Womble* (Tex.) 152 S. W. 473, 474.

Where the meaning of the word "desertion" is not controlled by the wording of the statute, matrimonial desertion occurs when-

ever either spouse, without good reason or just cause, consecutively and persistently refuses to have intercourse with the other; but under Rev. St. 1899, § 2921, allowing a divorce where either party has absented himself or herself for a year, without a reasonable cause, there must not only be a cessation of copulation, but the husband and wife must not live together under the same roof. Hence where they do so live the wife's refusal of sexual intercourse, continued for more than a year, is not "desertion" justifying a divorce. *Williams v. Williams*, 99 S. W. 42, 44, 121 Mo. App. 349 (citing and adopting *Hall v. Hall*, 77 Mo. App. 600).

For the wife of one who emigrates to America to better his condition to refuse to accompany or follow him, without other excuse than disinclination to leave her native land, is "desertion," entitling the husband to divorce. *Franklin v. Franklin*, 77 N. E. 48, 49, 190 Mass. 349, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851.

Where the husband establishes a new home, and requests his wife to follow him to the new domicile, and furnishes her the means with which to travel, and she declines to take up her residence with him, the husband is not thereby guilty of deserting the wife. *Roby v. Roby*, 77 Pac. 213, 214, 10 Idaho, 139.

"Desertion" is not made out by a showing that when the husband returned from work at noon on a day named, he found that most of the furniture of his house had been taken away; that he had seen his wife but twice since that time; that she gave no reason for leaving him, and that he knew of none; that he said nothing of previous disagreements and it did not appear that he made any effort to find out why she left him, or to invite her back; on the contrary, it appeared that he voluntarily paid her a certain sum per week during a portion of the period of alleged desertion. He gave no explanation of why he made this payment. *Olson v. Olson*, 27 Pa. Super. Ct. 128, 131.

Desertion justifying a divorce is the voluntary separation of one spouse from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other, and though there must be a simultaneous separation and an intent to desert and though desertion does not exist without the presence of both, the two need not begin together, and desertion begins whenever to either one the other is added. A separation of husband and wife caused by the wife leaving her home and living separately and apart from her husband without justification establishes the termination of cohabitation, essential to desertion. *Taylor v. Taylor*, 77 Atl. 133, 136, 112 Md. 666.

In an action by a wife for divorce on the ground of desertion, complainant must prove that defendant willfully deserted or

absented himself from her, without any reasonable cause, for the space of two years. *Trimmer v. Trimmer*, 74 N. E. 96, 97, 215 Ill. 121.

Where a husband fits up a home for his wife, is able to provide for her in a manner suitable to their station of life, and writes her to come to him, and she refuses to do so, for reasons not sufficient to entitle her to a decree of divorce, and for such reasons lives separate and apart from her husband for more than the statutory period preceding the filing of the bill by him, the husband is entitled to a decree of divorce. *Walton v. Walton*, 114 Ill. App. 116, 118.

As affecting "desertion" it is the husband's right to fix the family domicile. *Patterson v. Patterson*, 88 Pac. 196, 197, 45 Wash. 296 (citing 14 Cyc. pp. 611, 612).

To constitute "desertion willful, continued, and obstinate" as a ground for divorce, three elements must concur: First, cessation of cohabitation; second, intent in the mind of defendant to desert; and, third, separation against the will of complainant. *Taylor v. Taylor*, 70 Atl. 323, 326, 73 N. J. Eq. 745 (citing *Taylor v. Taylor*, 28 N. J. Eq. 207).

#### Absence

Mere absence of one spouse from the other, though voluntary, does not constitute "desertion"; but cohabitation must cease, and there must be intent in the mind of the offending party to desert or abandon the other. *Hall v. Hall*, 71 S. E. 103, 69 W. Va. 175, 34 L. R. A. (N. S.) 758.

Under P. L. 1902, p. 502, authorizing a divorce for "two years willful, continued, and obstinate desertion," the two-year term contemplated by the statute is that immediately preceding the filing of the petition for divorce and not the first two years of the period of separation. *Myles v. Myles*, 76 Atl. 1037, 77 N. J. Eq. 265.

The term of "two years' willful, continued, and obstinate desertion" described in divorce act (P. L. 1902, p. 502) as entitling the injured party to a divorce of vinculo, is that next preceding the filing of the petition for divorce. *Myles v. Myles*, 76 Atl. 1037, 77 N. J. Eq. 265.

#### Refusal of sexual intercourse

"Desertion" by a husband or wife need not be a total abnegation of all marital rights. A spouse's willful refusal to engage in sexual intercourse is desertion under the statute, making desertion ground for divorce, and hence, where a husband refused to consummate the marriage by sexual intercourse, he deserted his wife, even though he supported her and they lived under the same roof. *Raymond v. Raymond* (N. J.) 79 Atl. 430, 431.

Unjustified refusal of one spouse for the statutory desertion period to have sexual intercourse with the other, and withdrawal from other marital duties against the other's

will, constitutes "desertion," though they continue to reside in the same house. *Rector v. Rector*, 79 Atl. 295, 304, 78 N. J. Eq. 386.

A husband without the wife's consent has the right to establish the family domicile, and it is her duty to live with him at his domicile if it is reasonably possible for her to do so. But if a husband by his own acts, intentionally brings the cohabitation to an end, and by his own acts keeps it at an end for the statutory period, showing no evidence of a reasonable purpose to renew his marital relations, he is guilty of desertion, and she is entitled to a divorce on that ground. *Walker v. Walker*, 59 South. 898, 899, 64 Fla. 536.

#### Separation

"Desertion," to justify a divorce, is a voluntary separation of one spouse from the other for a statutory time without the latter's consent, without justification, and with the intention of not returning; but mere separation is not desertion, and a spouse, suing for desertion, must show that he has not acquiesced in the separation and accepted it as satisfactory. *Andrade v. Andrade* (Ariz.) 128 Pac. 813, 817.

"Desertion" of a husband or wife means more than merely going away, and more than separation. It negatives the idea of a friendly separation or a separation for a just cause. As defined by 1 Bouv. L. Dict., p. 561, "desertion" is the "act by which a man abandons his wife and children or either of them." *People v. Stickie*, 121 N. W. 497, 498, 156 Mich. 557.

Although a husband, after separating himself from his wife and children without lawful excuse still provides for their support, his conduct may constitute the matrimonial offense of desertion. *Power v. Power*, 58 Atl. 192, 194, 66 N. J. Eq. 320, 105 Am. St. Rep. 653.

#### Same—Compulsory

A husband who so treats his wife as to render it impossible for her to live with him in safety is guilty of desertion as if he himself had left the home with intent never to return. *Davenport v. Davenport*, 56 S. E. 562, 565, 106 Va. 736.

A wife who left her husband, who was drinking heavily, could not procure a divorce from her husband on the theory of constructive desertion, where the separation was not forced upon the wife by the husband's drunkenness, but was brought about by consent, and in order to relieve the husband, who was in financial straits, until he should be able to procure employment and provide a suitable home. *Foote v. Foote* (N. J.) 61 Atl. 90, 92.

A wife cannot establish "desertion" by showing that the husband refused to comply with her demands relative to his habits and manner of supporting her, since she is bound to accept the position which her husband is able to maintain for her. *Provost v. Provost* (N. J.) 63 Atl. 619.



It is only such conduct upon the part of the husband as will entitle the wife to a decree of divorce as will justify a desertion by her. *Walton v. Walton*, 114, Ill. App. 116, 118.

In a suit for divorce for willful and continued desertion, it is immaterial which of the married parties leaves the marital home, and the one intending to bring the marriage relation to an end commits the desertion, and a wife who drove her husband away is the deserter. *Hudson v. Hudson*, 51 South. 857, 858, 59 Fla. 529, 29 L. R. A. (N. S.) 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278.

#### **Same—By mutual consent**

Desertion by the spouse implies want of consent and unwillingness by the other spouse, and there can be no desertion where the separation is upon mutual consent. *Summers v. Summers* (Ind.) 100 N. E. 71, 72.

"Desertion" is the willful separation of one of the married parties from the other, without legal cause. A separation by mutual consent is not desertion on the part of either, unless one of the parties offers to resume cohabitation and the offer is refused. *Burnett v. State*, 81 S. W. 382, 383, 72 Ark. 398.

What may have been desertion in its inception, but has become a separation with mutual consent within two years, is not ground for divorce. The mutual consent that will prevent a divorce upon the ground of desertion may be inferred from the conduct of the parties, and need not be put in the form of a solemn written agreement. *Olson v. Olson*, 27 Pa. Super. Ct. 128, 131.

#### **DESERTION (In Maritime Law)**

"From the year of the Declaration of Independence, Congress has dealt with desertion as exclusively a military crime, triable and punishable in time of peace, as well as in time of war, by court-martial only, and not by the civil tribunals; the only qualification being that since 1830 the punishment of death cannot be awarded in time of peace." *Kurtz v. Moffitt*, 6 Sup. Ct. 148, 153, 115 U. S. 501, 29 L. Ed. 458.

"Desertion" is the unlawful and willful abandonment of a vessel during a voyage with an intention not to return to duty, a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not to return. Where a seaman left a vessel by permission, got drunk, and was imprisoned, which prevented his return to his home port with the vessel, but there was nothing to indicate that he had an intention, when he went ashore, not to return, he was not guilty of desertion. *The Charles K. Schull*, 166 Fed. 374, 375.

## **DESIGN**

See Premeditated Design.

#### **As intend**

"Design" is the conceived plan or system by which an intent is to be carried out or

attained. *Crosby v. Wells*, 67 Atl. 295, 302, 73 N. J. Law, 790 (citing Wigm. Ev. §§ 237, 300).

With reference to evidence of other offenses to show design or system, a "design" implies a preconceived plan or preparation, while "system" may be established by any facts showing a general intent coupled with similarity of method or arrangement. *People v. Harben*, 91 Pac. 398, 400, 5 Cal. App. 29.

A "design" to commit murder may be indicated by the deliberate selection and use of a deadly weapon, by previous quarrels or grudges, or by prior menaces or threats, and it is not necessary that such design should have existed in accused's mind for any considerable time before the killing if it existed when the mortal wound was inflicted. *State v. Adams* (Del.) 65 Atl. 510, 511, 6 Pennewill, 178.

The word "design," in *Wilson's Rev. & Ann. St. 1903*, § 2167, defining murder as "homicide when perpetrated without authority of law and with a premeditated 'design' to effect the death of the person killed," means intention, purpose, aim, scheme, or plan in the mind. *Walcher v. Territory*, 90 P. 887, 888, 18 Okl. 528.

"Intent to kill" means just what the ordinary signification of the words suggest. Whether it be described by the words "actual intent," "design," or "premeditated design" makes no difference. When we leave entirely out of view those subtleties, often indulged in in discoursing on the meaning of "premeditated design," and giving words the meaning ordinarily attributed to them, the person who effects the death of another by design does so intentionally, and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated or thought of, because without mental action the purpose could not be formed. So when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design or premeditated design. That the word "premeditated," as used in the statutes on the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term "premeditated design," where used inclusively in murder in the first degree, as to "design," where that word alone is used exclusively in murder in the third, and manslaughter in the first, second, and third, degrees. *Cupps v. State*, 98 N. W. 546, 549, 120 Wis. 504, 102 Am. St. Rep. 996, 1 Ann. Caa. 85.

That a payment was made in contemplation of insolvency and with a "design" to prefer a creditor within Ky. St. § 1910, is not shown where a creditor attacking a payment by a debtor to another creditor as made in

contemplation of insolvency and with a design to prefer the creditor, showed that the debtor was worth about \$5,000 less than his liabilities, but he had a large credit by reason of the confidence of the people in his integrity, and the payment attacked was a payment of \$1,500 on a debt of \$3,250 made to preserve his credit and save his business, and shortly thereafter the debtor lost his mind, while if he had been able to manage his business he would have succeeded in continuing in business. *Cecil v. Citizens' Nat. Bank of Danville*, 141 S. W. 416, 419, 145 Ky. 842.

#### **Chance distinguished**

See Chance.

#### **DESIGN (In Copyright)**

See Useful Design.

"We are in the habit of regarding a 'design' as a thing of distinct and fixed individuality of appearance—a representation, a picture, a delineation, a device." *N. Y. Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 11 Sup. Ct. 193, 195, 137 U. S. 450, 34 L. Ed. 741.

"A 'design' or pattern in ornamentation or shape appeals only to the taste through the eye, and is often a matter of evanescent caprice." *Dobson v. Hartford Carpet Co.*, 5 Sup. Ct. 945, 948, 114 U. S. 445, 29 L. Ed. 177.

The word "design" covers the invention of any new machine or improvement thereof, where an employé tendered his services to a sawmill manufacturer, and stated that he had designed machines which were in successful operation, and the employer accepted the proposal of the employé with the understanding that drawings, patterns, or "designs" of machinery made by the employé should be the property of the employer. *Portland Iron Works v. Willett*, 89 Pac. 421, 423, 49 Or. 245.

#### **DESIGNED**

"Designed" indicates a bad purpose with evil intent. *State v. Fairbanks*, 39 South. 443, 444, 115 La. 457 (citing 12 Cyc. p. 151).

The term "designed" is equivalent to adapted, where, in a proceeding for a mechanic's lien, the boundaries of the land upon which the building is built have not been designated previous to the commencement of the building, Code Pub. Gen. Laws, art. 63, § 7, provides that the court may order a surveyor to designate the limits and extent of grounds necessary for the convenient use of the building for the purpose for which it was designed. *Filston Farm Co. of Baltimore County v. Henderson & Co.*, 67 Atl. 228, 234, 106 Md. 335.

The term "designed," under P. L. 1906, p. 157, authorizing a city having a plant "designed" for furnishing a water supply, means a plant for water supply already in use, and does not refer to a plant which is merely planned and not installed. *Lighthipe v. City of Orange*, 68 Atl. 120, 122, 75 N. J. Law, 365.

The words "devised" and "designed" are not synonymous. Where both words are employed in a criminal statute in the description of an offense, both must be used in the indictment. *State v. Sherman*, 119 S. W. 479, 480, 137 Mo. App. 70 (citing *State v. Etchmann*, 83 S. W. 978, 184 Mo. 193).

An allegation in an indictment that defendant set up a device adapted and devised for gaming was not sufficient under Rev. St. 1899, § 2194, making it a felony to set up a device adapted, devised, or designed for gaming. *State v. Etchman*, 83 S. W. 978, 980, 184 Mo. 193.

#### **DESIGNATE**

The word "designate," as used in a constitutional provision directing the Legislature to enact a law whereby any county, justice precinct, town, city, or such subdivision of the county as may be designated by the commissioners' court of the county may determine from time to time whether the sale of intoxicants shall be prohibited within the prescribed limits, has not the same meaning as the word "create," and the Legislature is not authorized to empower the commissioners' court to combine two or more political subdivisions of a county into a local option district, thus creating a new subdivision. *Ex parte Heymen*, 78 S. W. 349, 352, 45 Tex. Cr. R. 532.

The word "designate," as used in Cr. Code, § 563 (Dispensary Act 1896, § 7; 22 Stat. 128), which provides that where the county board of control designates a locality for a dispensary (of intoxicants), on 20 days' public notice a majority of voters can prevent its location by petition, does not mean that the board shall name a place where they have determined to establish a dispensary, but that it must indicate that it has under consideration the establishment of a dispensary at a designated place, so as to give opportunity for petition against it; and a notice of application for a "dispensary at Scranton, in Lee township, and one at Lake City, in Lee township both in the county of Williamsburg, state of South Carolina," is sufficient. *Severance v. Murphy*, 46 S. E. 35, 37, 67 S. C. 409.

#### **As mark or point out**

The word "designate" means to point out or specify. *State v. Noah*, 124 N. W. 1121, 1126, 20 N. D. 281.

The word "designate" means "to mark out and make known; to point out; to name; to indicate; to show; to distinguish by mark or description; specify; to call by a distinctive title; to indicate or set apart for a purpose or duty." *State ex rel. Rocky Mountain Bell Tel. Co. v. City of Red Lodge*, 83 Pac. 642, 643, 33 Mont. 345 (quoting and adopting definition in *Webst. Int. Dict.*).

"The word 'designate' is defined by the Standard Dictionary to mean: To mention

by distinctive name, identify by name. By Webster: To point out, to name. By 9 Am. & Eng. Ency. Law (2d Ed.) 405 as: To designate is to point out or mark by some particular token, to show or point out, to indicate by description or by something known or determinate. From this it appears that to designate a beneficiary, within the meaning of the Constitution, a positive and affirmative act expressly naming or pointing out of the person was required on the part of the assured." *St. Louis Police Relief Ass'n v. Tierney*, 91 S. W. 968, 974, 116 Mo. App. 447.

The word "designate" means to mark out and make known; to point out; to name; to show. Ky. St. § 1453 (Russell's St. § 4012), provides that the county clerk shall print on the respective ballots the names of any candidates for office when petitioned by electors qualified to vote for such candidates as follows: For an officer of any division less than a county 20 petitioners, but no petitioner shall be counted unless his residence and post-office address be designated, etc. Held, that of the sufficiency of the petition the clerk is the judge; hence where a petition failed to comply with the statute literally in not giving the post-office address of some of the signers, the omission would not invalidate the election in the absence of any charge of fraud or wrongdoing, where the clerk possessed this information to his entire satisfaction. *Blackburn v. Welch*, 127 S. W. 991, 992, 138 Ky. 267.

In Comp. St. 1905, c. 77, art. 9, § 7, providing that the county commissioner shall designate the newspaper in which certain notices shall be published, the word "designate" means to point out or select, and when the board awarded "the printing of a list" to a certain paper it clearly pointed out or selected such paper to do the work, and, so long as it did that, whether it used one word or another is immaterial in the eyes of the law. *State ex rel. Cronin v. Cronin*, 106 N. W. 986, 987, 75 Neb. 738.

### DESIGNATED

The effect and meaning of the word "designated," as used in Const. art. 3, § 25, providing that a special session shall not legislate on a subject not "designated" in the proclamation of the Governor convening it, does not require as clear and comprehensive an expression of the subject of the legislation as is required in the title of an act. In *re Likins*, 72 Atl. 858, 862, 223 Pa. 456.

The word "designated," as used in a declaration of trust giving to testatrix \$250 a year from the principal of the trust fund, together with interest thereon, and authorizing her to dispose of the balance by will, and by the seventh clause of her will giving the remainder of the money, securities, and deposits belonging to her estate in trust for G., etc., and by the eighth clause directing that all articles of personal property belonging to her not specifically bequeathed or "des-

ignated to be held in trust" and all interest, if any, she had in any real estate, she gave to C., meant "given in trust," and did not require that money, securities, and deposits should be excluded in all cases from the personal property covered by the eighth clause of the will, which therefore included all personal property not passing under previous provisions and constituted a valid exercise of the power, so that the remainder of the trust funds passed to testatrix's executrix, and did not revert to the creator of the trust. *Howland v. Parker*, 86 N. E. 287, 288, 200 Mass. 204, 16 Ann. Cas. 201.

"When the Code of Criminal Procedure undertook to define an information and to require that it should allege 'that a person had been guilty of some designated crime,' it used the word 'designated' in its well-settled legal sense, which is 'to call by a distinctive title; to point out by distinguishing from others; to express or declare; to indicate by description, or something known and determinate; to point out or mark by some particular token; to show; to point out; to specify.'" *People v. Dunning*, 98 N. Y. Supp. 1067, 1070 (citing 14 Cyc. p. 229).

The word "designated," as used in section 3 of the Act of 1866, granting lands to the Atlantic & Pacific Railroad Company "at the time of the line of said road is 'designated' by a plat thereof filed in the office of the Commissioner of the General Land Office," means no more nor less than the words "definitely located" mean. *Southern Pacific R. Co. v. United States*, 18 Sup. Ct. 18, 29, 168 U. S. 1, 42 L. Ed. 355.

### DESIGNATION

The term "designation" means "selection and appointment for a purpose; allotment; the act of designating or pointing out." *Kimball v. Salisbury*, 56 Pac. 973, 975, 19 Utah, 161 (citing *Kimball v. Salisbury*, 53 Pac. 1040, 17 Utah, 381; *Beecher v. Baldy*, 7 Mich. 488).

### DESIRE

#### As word of intention

See *If Desired by Creditors; Wish and Desire*.

Where all the parties interested in certain real estate, which had been converted into personality, joined in a petition for the discharge of the executor under the decedent's will, in whom legal title to the land was then vested, on the ground that they "desired" to hold the property as real estate, and the heirs subsequently joined in a conveyance of part of the land, such acts constituted a reconversion, regardless of the fact that they used the word "desire" instead of "intend." *Lincoln v. Wakefield*, 85 Atl. 133, 135, 237 Pa. 97.

While there may be some question as to whether the expression, "It is my desire," amounts to a positive restriction, there can be no question that the phrase, "It is my

will," does amount to a restriction and is equivalent to the expression, "I direct." Testator devised certain property absolutely to certain of his sons, with a provision that it was his will and "desire" that none of the real estate so devised should be sold until the oldest son was 35, etc., and that the word will in such connection amounted to a restriction equivalent to the expression, "I direct," and that the devisees were therefore incompetent to convey the property prior to the time specified, though their interest was subject to their debts as expressly provided by St. 1903, §§ 1681, 2355. *Girdler v. Girdler* (Ky.) 113 S. W. 835, 836.

A will provided, "I desire" that a certain sum invested in the Lord's work in care of a certain person shall not be withdrawn from such work at testatrix's decease, because of the importance of such work, and testatrix's belief that it should not be embarrassed. Held, that the word "desire" was equivalent to "direct." *In re Compton's Will*, 131 N. Y. Supp. 183, 185, 72 Misc. Rep. 289.

Where a testatrix devised all the rest of her real estate to her husband, and provided that, if the husband should not expend the whole of the estate, then it was her desire that at his death so much as remained to her sisters and brothers, the husband had only the power to consume the estate in good faith, and, if he did not expend or consume it, then what remained at his death should go to her sisters and brothers; the word "desire" being mandatory and not precatory. *In re Dickinson's Estate*, 58 Atl. 120, 122, 209 Pa. 59.

The word "desired," in a devise stating that the testatrix's son "is desired by his mother" to pay a certain sum to her grandniece, shows an intention to make such sum a gift and entitles the grandniece to such gift. *In re Copeland*, 77 N. Y. Supp. 931, 932, 38 Misc. Rep. 402.

The word "desire," in Bankruptcy General Order 21, cl. 6 (89 Fed. x, 32 C. C. A. xxiii), providing that, when the trustee or any creditor shall "desire" the re-examination of any claim, he may apply by petition to the referee for an order for re-examination, and thereon the referee shall make an order fixing a time for hearing the petition, is used in the sense of "intend." *In re Lewensohn*, 121 Fed. 538, 540, 57 C. C. A. 600.

The words "I desire" that my real estate shall be sold are the equivalent of the words "I will" that it be sold. *In re Pforr's Estate*, 77 Pac. 825, 827, 144 Cal. 121.

The expression of testator's "desire," as used in a will by which testator devised his residuary estate to his son one undivided half part, "and I desire that my real estate in N. \* \* \* shall be held by my son \* \* \* in the division of my estate, together with the farm stock, utensils and other personal property on said estate in N., to" each of my daughters "one undivided quar-

ter part," was an operative disposition of the designated property to his son, and vested the interests of the three children at the death of the testator, giving to the son the designated property and to him and the two daughters, as tenants in common, the rest of the property in such proportions that, taking into account the value of the designated property, the son's share should be one-half and the share of each of the daughters one-quarter of the whole. *Mosely v. Bolster*, 87 N. E. 606, 607, 201 Mass. 135.

#### As creating trust

"The mere use in a will of the precatory word 'desire' will not be sufficient to create an enforceable trust or a power in the nature of a trust, when the context clearly shows that the testator's intention was contrary." A testator made a devise to an educational institution, and provided that in case the devise should fail for any cause the same should go to the children of his two brothers. In a codicil he authorized, empowered, and requested his daughter, his only lineal descendant, to ratify and confirm the devise to the institution, declaring that in case she complied with the request the gifts over should be revoked. The daughter executed the power by a deed to the institution, and the gift over was thereby revoked. *Thomas v. Board of Trustees of Ohio State University*, 70 N. E. 896, 899, 70 Ohio St. 92.

The word "desire," used by testator in a will to express his desire that the executor will conduct a fund in a specified manner, testator having power to command, will not be construed as precatory only, but as commands clothed in the language of civility, and to impose on the executor an enforceable duty, sufficient to create a trust. *Trustees of Pembroke Academy v. Epsom School Dist.*, 75 Atl. 100, 101, 75 N. H. 408, 37 L. R. A. (N. S.) 646.

The word "desire" does not import a trust where testatrix devised certain real estate to her husband, and stated that it was her desire and request that he should convey the same to a lodge, so as to impose on it the duty to properly care for the cemetery lot in which she might be buried. They should be understood in their usual sense, in the absence of anything in the will to indicate that they were used in any other than their ordinary sense. *Kauffman v. Gries*, 74 Pac. 846, 848, 141 Cal. 295.

## DESTINATION

See Point of Destination; Property Immovable by Destination.

The words "place of destination" as used in a stipulation in a shipping contract, requiring the giving of notice of injuries to stock before its removal from the place of destination, refer to the town, village, or city to which the shipment is made. *Hatch v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 107 N. W. 1087, 15 N. D. 490.

Rev. St. c. 93, § 53, gives a lien for certain services upon spool timber and spool bars manufactured therefrom, which continues for 60 days after such timber or spool bars arrive at the "place of destination for sale or manufacture." Held, that in the case of spool bars the "place of destination for sale or manufacture" is the place where such spool bars are actually intended to be sold or manufactured into spools. *Chamberlain v. Wood*, 60 Atl. 706, 707, 100 Me. 73.

The "destination" of goods is the place of delivery, and a carrier has no right, without authority from the consignee, to deliver them to another for him; but if it is the custom for the carrier to forward goods by boat from their destination on its line, and the consignee knew this when he ordered goods shipped, and the owner of a boat has previously received goods for him from the carrier and delivered them, the carrier is authorized to deliver the goods to such owner for transportation by boat to the consignee. *Chesapeake & O. Ry. Co. v. Lavin*, 124 S. W. 274, 276, 136 Ky. 205.

To construe a provision in a contract of carriage that the carrier should not be liable for injuries to a shipment of sheep unless the shipper gives notice in writing of any damages claimed before the sheep should be removed from the place of destination, etc., so that the word "destination" would mean the premises of the carrier where the sheep were unloaded, would be too strict. Where the notice was given before the sheep were removed from the town to which they were shipped, the provision is complied with. *Welch v. Northern Pac. R. Co.*, 103 N. W. 396, 397, 14 N. D. 19.

The word "destination," as used in Pen. Code 1895, § 420 (2), providing that the prohibition of a statute as to running freight trains on Sunday shall not extend to a train running over a road on Sunday night if the time of its arrival at destination, according to schedule, be not later than 8 o'clock Sunday morning, means the state line and not the ultimate stopping place of the train. *Seale v. State*, 49 S. E. 740, 741, 121 Ga. 741.

#### DESTINATION DU PERE DE FAMILLE

The "destination du pere de famille" is the use which the owner has intentionally established on a particular part of his property in favor of another part, and which is equal to a title with respect to perpetual and apparent servitudes thereon; and by this "destination du pere de famille" is meant the disposition which the owner of two or more estates has made for their respective use. *Woodcock v. Baldwin*, 26 South. 46, 51 La. Ann. 989.

#### DESTITUTE

A deserted wife is "destitute" within Code Supp. 1907, § 4775a, punishing one who without good cause abandons his wife or

child under 16 years of age, leaving either in a destitute condition, when she is left in a condition of great need or has no money on which she can rely for support, though she is not left unhusbanded or in a condition of actual starvation. *State v. Weyant*, 128 N. W. 889, 840, 149 Iowa, 457.

Where the constitution and laws of a mutual benefit association provide that one-half the amount of the face of the certificate may be paid to a member who shall become permanently disabled from attending to his business or gaining a livelihood, and be "destitute of means of support," when he arrives at the age of expectancy, a member whose only income was a pension of \$29.65 a month from the relief department of a railroad, which was a mere gratuity and might at any time be discontinued, and of which he paid at least \$15 each month in assessments to the benefit association, and who had no property, and at the age of 71 years was disabled from labor at his trade, was destitute of means of support, though his wife owned some productive real estate, since by Burns' Ann. St. 1908, § 7852, no lands of a married woman are liable for the debts of her husband, and by section 7853 a married woman may hold property, real or personal, under her own control the same as if unmarried, and a wife is not bound either at common law or by statute to support her husband. *Supreme Council Catholic Benev. Legion v. Grove*, 96 N. E. 159, 163, 176 Ind. 356, 36 L. R. A. (N. S.) 913.

#### DESTROY—DESTRUCTION

See Break and Destroy; Thoroughly Destroyed; Wholly Destroyed; Self-destruction; Total Destruction.

Where there was evidence that plaintiff's nervous system was seriously injured, an instruction that if the jury found a permanent impairment and destruction of his nervous system and the functions thereof, etc., was not erroneous; the word "destruction" being used not in the sense of a total loss of nerve force, but as meaning an enfeeblement or impairment which would mark plaintiff's condition through life. *Fishburn v. Burlington & N. W. R. Co.*, 103 N. W. 481-487, 127 Iowa, 483.

Under Crimes Act, § 170, which makes it an offense to maliciously break, destroy, or injure the door of any shop or building, the property of another, the word "destroy" means to destroy the completeness of anything; and defendant, who forced open the back door fastened by a bolt upon the door and a socket which held the bolt in the casing of the door frame, the socket coming out and the door opening without injury to it, was guilty of no offense under the statute. *State v. McBeth*, 31 Pac. 145, 49 Kan. 584.

Removal from a dwelling house of doors and windows by a cotenant in the absence of

good faith and without the purpose to make repairs is such "destruction" of the common property as to make him a trespasser. *Davis v. Poland*, 66 Atl. 380, 382, 102 Me. 192, 10 L. R. A. (N. S.) 212, 120 Am. St. Rep. 490.

#### **Loss synonymous**

See Loss.

#### **Destruction by fire**

A building was not "destroyed" by fire under a lease providing that plaintiff lessor was to keep the premises in good habitable condition, and that if the building should be destroyed by fire or other casualty, so that it could not be occupied without rebuilding, either party might cancel the lease, where the building caught fire, which burned the roof and ceiling of the third story, except in one corner, the rear wall was slightly damaged, and a great quantity of water was thrown in the building, damaging defendant's stock, which was removed, and plaintiff at once set to making repairs, erected two brick piers in the first story at the rear, and putting plaster on the north, south, and west sides of the building and putting on a new roof, etc., all of which was completed in 63 days. *Tedstrom v. Puddephat*, 137 S. W. 816, 819, 99 Ark. 193, Ann. Cas. 1913A, 1092.

The provision in a lease of a store that if the premises be "destroyed by fire" the lease shall cease unless the lessor at once rebuilds or places the store in a tenantable condition within a reasonable time contemplates not only a case of total destruction of the building, but also one of such damage thereto as to render it unfit or incapable of being used for the purposes for which it was rented. *Tyson v. Well*, 53 South. 912, 914, 169 Ala. 558, Ann. Cas. 1912B, 350.

#### **DESTRUCTION BY ABATEMENT**

"Destruction by abatement" occurs when one permits a thing to become a nuisance which another abates without appeal to the court. If a man so uses his property that it becomes a nuisance, the nuisance is liable to be abated to the destruction, if necessary, of the property. *Daniels v. Homer*, 51 S. E. 992, 997, 139 N. C. 219, 3 L. R. A. (N. S.) 997 (quoting and adopting language of Bish. Crim. Law, vol. 1).

#### **DETAIL**

"The word 'detail' means a minute portion; one of the small parts; a particular; an item. The word is used chiefly in the plural, as the details of a scheme or a transaction." *State ex rel. Van Deusen v. Williams*, 39 South. 276, 277, 143 Ala. 501.

#### **As set apart to particular service**

The words "detail one or more of their judges," used in Const. art. 5, § 8, authorizing courts in the counties of Philadelphia and Allegheny to detail one or more of their judges to hold the courts of oyer and terminer and court of quarter sessions of the

peace, include judges called in from other districts to specially preside. *Commonwealth v. Johnson*, 84 Atl. 824, 825, 236 Pa. 412.

#### **DETAILED ACCOUNT**

See Full, True, and Detailed Account.

#### **DETAILED DRAWING**

The phrase "detailed drawings," as used in a contract under which a party furnished steelwork for a building, meant a plan showing the position of each column, beam, etc., and not "punching sheets" or "shop drawings." *New York Architectural Terra-Cotta Co. v. Williams*, 92 N. Y. Supp. 808, 809, 102 N. Y. App. Div. 1.

#### **DETAIN**

The word "detain," as defined by Webster's International Dictionary, means to hold or keep in custody. A petition in replevin which alleges a delivery of the property in controversy to a person named, who claims the same, alleges that the person named detained the property at the commencement of the suit and wrongfully held and kept the same in his custody. *Walls v. Farrington*, 116 Pac. 428, 429, 27 Okl. 754, 35 L. R. A. (N. S.) 1174.

To take the crutch of a cripple girl, or to hold her by the hand, while pleading with her for carnal knowledge, is a "detaining," within the meaning of Ky. St. § 1158, creating the offense of detaining a woman against her will with intent to have carnal knowledge with her. *Paynter v. Commonwealth*, 55 S. W. 687, 688.

In order to constitute the offense of detaining a female against her will with intent to have carnal knowledge of her, it is sufficient if defendant willfully and intentionally, and for the purpose of having sexual intercourse with the female against her will, apply such force as to prevent to any extent the exercise by her of the power of free locomotion so as to prevent her from going to or being wherever she wishes. *Robb v. Commonwealth (Ky.)* 101 S. W. 918, 919.

Whether prosecutrix was "detained" held a jury question, where she testified that, as she was returning home along a railroad, she noticed a negro, and from his actions became suspicious and alarmed; that she slackened her steps, but, when he noticed that she had done so, he did likewise, and frequently turned and looked at her; and that she then became thoroughly frightened. The negro finally sat down on the railroad track until she had advanced to within 20 feet from him. About this time she attempted to pass him. A freight train came along and he left the track, and climbed through a barbed wire fence, and said to her: "Come over here. You are going to come over here. You had better come over here." With that, she started and ran screaming down the track, and the negro also ran in the same direction on the inside

of the wire fence which separated the railroad right of way from the adjoining pasture, until they came in sight of some men at work on the railroad, when he desisted. *McKey v. Commonwealth*, 140 S. W. 658, 659, 145 Ky. 450.

An accused was guilty of "detaining" a woman, where, while drunk and riding along a highway near a railroad, he asked a woman walking on the railroad if she were married or single, and when she said she was single and started to run, offered her money, which she declined, and then followed her as she ran to her aunt's house, but was not admitted; and where he called to a woman on the other side of a railroad cut 12 or 15 feet deep and asked where she was going, and when told that it was none of his business, drew a pistol and said: "Don't be so damned smart, I'll blow your brains out; I've got some money for you." *Riley v. Commonwealth (Ky.)* 55 S. W. 547.

#### DETAINEE

See Forcible Detainer; Forcible Entry and Detainer; Unlawful Detainer.

#### DETECT

To "detect" is to uncover; to discover; to bring to light; as to "detect" a crime, or a criminal (*Web. Dict.*). It means to uncover; lay bare, show (*Cent. Dict.*). *Cullinan v. Furthman*, 79 N. E. 989, 990, 187 N. Y. 160.

#### DETECTIVE

See Private Detective; Public Detective.

The word "detective," as commonly understood, is defined as one of a body of police officers, usually dressed in plain clothes, to whom is intrusted the detection of crimes and the apprehension of the offenders, or a policeman whose business is to detect wrongs by adroitly investigating their haunts and habits. *Grand Rapids & I. Ry. Co. v. King*, 83 N. E. 778, 780, 41 Ind. App. 701 (citing *Am. Dict. and Webst. Dict.*).

Post-office inspectors are not what is known as "detectives," but are men occupying responsible positions, who make no concealment of their duties and purposes; and, in a criminal prosecution depending in part on their testimony, it is not error for the trial court to refuse to grant instructions, asked by the defense, cautioning the jury against the testimony of detectives or of persons engaged to procure evidence against the accused, especially where the jury, in the charge of the court, are instructed that they are to determine the weight of the evidence and to pass on the credibility of witnesses. *Lorenz v. United States*, 24 App. D. C. 337, 388.

Liquor Tax Law (Laws 1896, p. 50, c. 112) § 10, provides that "special agents" shall be deemed confidential agents of the state commissioner of excise, and shall, under his direction, investigate all matters in relation to the collection of liquor taxes and penalties,

and that the agents may investigate any other matters in connection with the liquor traffic, and shall, under the direction of the commissioner, make verified complaints of criminal violations of the act, which, if approved by the commissioner, are to be by him forwarded to the district attorney for prosecution. Special agents are appointed by the state commissioner of excise at a fixed salary, and are subject to removal by him. Held that, it being the duty of the "special agents" to investigate violations of the liquor tax law, he is required to "detect" or uncover such violations, and, according to the definition of the word "detect" contained in *Webster's Dictionary* and the *Century Dictionary*, such "special agents" are "detectives" within the meaning of the requirement that the testimony of a "detective" must be scrutinized with great care by the jury. *Cullinan v. Furthman*, 79 N. E. 989, 990, 187 N. Y. 160.

#### As officer

See Officer.

#### DETENTION

Code Civ. Proc. § 283, provides that in an action for recovery of specific property the jury may assess the value of the property and assess damages, if any claimed, which the prevailing party has sustained by reason of the withholding of the same. Section 299 provides that in an action to recover personalty judgment may be for possession, or recovery of possession or the value thereof if delivery cannot be had, and damages for "detention." Held not to authorize punitive damages in an action for claim and delivery. By a well-known rule of construction, for the sake of consistency the word "detention," used in section 283, is to be interpreted and applied as in section 299. To be consistent with 299 the provision of 283 as to damages to the prevailing party "sustained by reason of the 'detention or taking and withholding' such property" must be held to mean that, when the prevailing party is the plaintiff, the jury must assess the damages for the detention; but when the prevailing party is the defendant, and the property has been taken in the claim and delivery proceedings, the jury may assess for such taking and for the withholding. *Titile v. Kennedy*, 50 S. E. 544, 546, 71 S. C. 1, 4 Ann. Cas. 68.

A sale of a vessel on which a wireless apparatus was installed, by a receiver, without special reference to such apparatus, did not constitute a "detention" thereof, so as to entitle the lessor to an allowance out of the proceeds of the steamer of the \$1,000 and \$50 per month under a lease of a wireless telegraph outfit, which provided that when once installed it should not be removed to any other vessel or place without the lessor's consent, and gave the lessor the right to resume possession; also gave the lessor, in case of the lessee's abandonment, or any use

otherwise than as provided in the contract, special remedies by injunction, etc. The lease also provided for payment by the lessee of the reasonable value of any instrument, or parts, lost or destroyed, not exceeding \$1,000 for total loss or destruction, otherwise than by unavoidable accident or detention, and \$50 per month in case of the unauthorized removal or detention of any instrument, until their destruction or loss without the lessee's fault was satisfactorily proved. *Massie Wireless Tel. Co. v. Enterprise Transp. Co.*, 175 Fed. 8, 9, 99 C. C. A. 146.

#### Custody synonymous

See Custody.

### DETERIORATION

To furnish sewer connection would be to furnish a new improvement or an addition of an original character, and not repairing a building, and would not be included in the meaning of the word "deterioration" as used in the lease. *Torreson v. Walla*, 92 N. W. 834, 836, 11 N. D. 481.

### DETERMINABLE FEE

See, also, Base Fee; Qualified Fee.

A title in fee, which may be divested by the happening of some future event and by possibility revert to the grantor, is a "fee-simple determinable." *North v. Graham*, 85 N. E. 267, 269, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189 (citing 1 Preston, Estates, 441, 484).

An "estate in fee" may not be an estate in fee simple properly speaking, which is a pure inheritance, free from any and every qualification or condition. Estates in fee are not thus restricted in their nature. Every estate which may pass to heirs general by descent and continue forever is a fee; the owner having the entire property in himself. Such an estate may be a pure fee simple, or it may be a "determinable fee." The latter is an estate which may continue forever, and is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be transitory or perishable, yet such an estate is deemed a fee, because, as is said, it has a possibility of enduring forever. A limitation to a man and his heirs, so long as A. shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of B.; or so long as St. Paul's church shall stand, or a tree shall stand—are a few of the many instances given in the books of this species of fee. The material difference between a fee simple and other fees is "that the former estate will, the latter may, continue forever." *Waldron v. Gianini* (N. Y.) 6 Hill, 601, 604, 605 (citing 4 Kent's Comm. 5, 9 [5th Ed.]; 2 Black. Comm. 104, 106, 109; 1 Cruise's Dig. 68, §§ 42-86; 1 Preston, Estates, 429,

431); *Moss Point Lumber Co. v. Harrison County*, 42 South. 290, 314, 89 Miss. 448 (citing *Anderson's Law Dict.*; 2 Black. Comm. 109).

A "determinable fee" is an estate limited to a person and his heirs with the qualification annexed to it by which it is provided that it must determine whenever the qualification is at an end. *Lyford v. City of Laconia*, 72 Atl. 1085, 1089, 75 N. H. 220, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680 (citing *Weed v. Woods*, 53 Atl. 1024, 71 N. H. 581, 584, 585; 2 Bl. Comm. \*109; 4 Kent, Comm. \*9; 1 Cruise's Dig. \*73; Gray, Perp. § 32).

An estate which may revert on the happening of some contingency or which may endure forever is a determinable fee. *Mendenhall v. First New Church Soc. of Indianapolis*, 98 N. E. 57, 60, 177 Ind. 336.

An estate which may end on the happening of an event is usually called a "determinable fee." The estate taken by a church to continue in such organization as long as devoted to specified uses was such a fee. *North v. Graham*, 85 N. E. 267, 268, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189 (citing *First Universalist Soc. of North Adams v. Boland*, 29 N. E. 524, 155 Mass. 171, 15 L. R. A. 231).

"Whenever a fee is so qualified as to be made to determine, or liable to be determined, at the happening of some contingent event, or act, the fee is said to be base, determinable. There are four classes of such fees, viz.: Fee upon condition, fee upon limitation, a conditional limitation, and a fee conditional at common law." Testator first devised to his wife and her heirs one half of all his property to hold, use, and manage during her life, remainder to testator's son, if he survived her. Testator then devised to the son and his heirs the other half of the property, to have, hold, use, and manage in his discretion "during his natural life," and in case the wife survived the son at his death the property so devised to him should belong to her. Held, that under Rev. St. 1879, § 4008, requiring all courts concerned in the execution of wills to have due regard to the directions of the will and the true intent of the testator, the will should be construed as giving to the widow and son each a freehold estate for the life of the one who might first die, with cross-determinable fees in remainder; the one to be enlarged into a fee simple in the survivor. *Tebow v. Dougherty*, 103 S. W. 985, 988, 205 Mo. 315 (quoting and adopting the definition in *Tiedeman*, Real Prop. p. 28, §§ 44, 271).

An instrument called a "lease," whereby the owner in consideration of "rents" and covenants demised and leased to an individual for the benefit of a church society to have and to hold during the time the society might use and occupy the premises as a church and pay as rent all assess-



ments against the premises, etc., created an estate in fee determinable on the church society which was placed in the possession by the owner ceasing to occupy the premises as a church. *Mendenhall v. First New Church Soc. of Indianapolis*, 98 N. E. 57, 60, 177 Ind. 336.

The homestead has been called a "determinable fee"; but as no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him. *Joyner v. Sugg*, 44 S. E. 122, 126, 132 N. C. 580 (quoting *Citizens' Nat. Bank v. Green*, 78 N. C. 252).

A "determinable fee" is distinguished from a life estate, in that such fee may last forever in case the first taker dies leaving a child or children entitled to take under the will, but is liable to be terminated by the death of such first taker without leaving a child or children, while a life estate terminates absolutely on the death of the life tenant. *Ahlfield v. Curtis*, 82 N. E. 276, 277, 229 Ill. 139.

E. died in 1798, having by his last will and testament devised a farm to his son M., his heirs and assigns forever, and another farm to his son J., in like manner. The will contained this clause: "It is my will, and I do order and appoint, that if either of my sons should depart this life without lawful issue, his share or part shall go to the survivor." In 1801, the sheriff sold all the estate which M. then had in his share, by virtue of a *f. fa.* against him; and J. died in 1813, leaving M. surviving. Held, that the estate devised to M. was a "determinable fee," which became a fee simple on the death of J., and belonged to W. *Waldron v. Gianini* (N. Y.) 6 Hill, 601, 604, 605 (citing 4 Kent's Comm. [5th Ed.] 5, 9; 2 Black. Comm. 104, 106, 109; 1 Cruise's Dig. 68, §§ 42-86; 1 Preston, Estates, 429-431).

## DETERMINABLE FUTURE TIME

A "determinable future time" as used in clause 2 of section 3060—a4 of Code 1907, declaring an instrument to be payable at a "determinable future time" when expressed to be payable on or before a fixed or determinable future time specified therein, meant a time that could be certainly determined after the execution of the note. *State Bank of Halstad v. Bilstad* (Iowa) 136 N. W. 204, 207.

## DETERMINATION

See Complete Determination; Final Determination.

Any determination, see Any.

The certificate of a physician, under Laws 1899, p. 1071, c. 520, § 9, authorizing a transfer to be made whenever the physi-

cian of either of the state prison reformatories or penitentiaries shall certify to the warden or superintendent thereof that a male prisoner confined therein for a felony is in his opinion insane, is not a "determination of incompetency" within either the spirit or letter of Code Civ. Proc. tit. 6, c. 17, relating to proceedings for the appointment of a committee of an incompetent. *Trust Co. of America v. State Safe Deposit Co.*, 96 N. Y. Supp. 585, 588, 109 App. Div. 665.

There was no "determination of the supervisors" within St. 1898, § 1283, providing that the determination of the supervisors shall be final for a year, and the proceedings did not bar a new application within a year, where, in proceedings to establish a highway on a town line, the boards of supervisors of the towns adjourned the hearing until a designated date after receiving affidavits of service and posting of notices, but no further proceedings were taken. *State ex rel. Ronglien v. Clemenson*, 134 N. W. 403, 404, 148 Wis. 268.

## DETERMINATION OF CHANCE

See Chance Verdict.

## DETERMINE

See Hear and Determine.

"To determine" involves the possibility of framing an issue to determine. *Hoffman v. Newell*, 20 N. Y. Supp. 432, 433 (quoting and adopting definition in *Brown, Jur.* § 41).

"To determine" is defined as meaning to ascertain definitely or to settle, and it is used in that sense in Rev. St. 1892, § 591, as amended by Acts 1899, p. 106, c. 4711, providing that a resolution submitted to voters relating to the issue of bonds shall "determine" the rate of interest to be paid on the bonds. *Hillsborough County v. Henderson*, 33 South. 997, 998, 45 Fla. 356.

In an instruction in a prosecution for homicide that the jury are not only to find and determine the physical facts, but also the intention, the word "determine" means to find out or ascertain the truth about the occurrence. *Irvin v. State*, 72 S. E. 440, 441, 9 Ga. App. 865.

The word "determine," in an instruction in an action for injuries from a defective walk, that it was not negligence for plaintiff to pass over a crosswalk, known to him to be dangerous, but in doing so he must use care and caution reasonably commensurate with the known danger, and that the jury should consider carefully his knowledge of the condition of the walk, the nature of the defect, whether easily visible or apparent, or not, the nature and manner of the accident, and then "determine," in the light of all the circumstances, whether the plaintiff on his part exercised the care and caution that a person of reasonable prudence would have exercised in the light of such knowledge,

means to consider the elements stated and everything else in evidence. *Ottawa v. Green*, 83 Pac. 616, 618, 72 Kan. 214.

The word "determined," in Laws 1901, c. 106, § 3, providing that on proof of certain facts to the county court it shall be "determined" whether the territory should be disconnected from a city, and that the court shall decree accordingly, does not give the court discretionary powers, but the statute is mandatory and is not unconstitutional as a delegation of legislative power. *Town of Edgewater v. Liebhardt*, 76 Pac. 366, 377, 32 Colo. 307.

The word "determine," as used in Laws 1895, c. 1406, § 2, providing that the city engineer shall proceed to mark out and define the street line adjacent to a proposed structure if such line can be accurately determined, is equivalent to "ascertained" or "limited," and does not mean "establish." Laws 1895, c. 1406, § 1, requires every person intending to erect a building within 10 feet of any street to file with the city engineer a written notice of such intention; section 2 provides that the city engineer shall "proceed to mark out and define the street line adjacent to the proposed structure, if such line can be accurately determined," and mark the grade of the adjacent street, if such grade has been duly established, and make return of said marking of line and grade to the inspector of buildings; and section 3 prohibits the inspector from issuing a building permit until he is satisfied that applicant has complied with section 2. Held, that a street line, not correctly marked by the city engineer, was not binding on an adjacent property owner, and could be questioned in a proceeding to enjoin the maintenance of a building within such line, marked by the engineer. *Greenough v. Industrial Trust Co.*, 82 Atl. 266, 267, 33 R. I. 470.

The word "determined," as used in Acts 32d Gen. Assem. p. 10, c. 12, providing that if it has been or shall be found or "determined" by the district court in any county that a lawfully constituted grand jury has not or cannot be obtained by drawing from the names returned, the court may order the board of supervisors to prepare lists of names, etc., enacted after it has been brought to the attention of the Legislature that in some counties grand jurors for a certain year had been illegally selected, will not be given a technical meaning, but should be so construed as to carry out the plain intent of the act. *State v. Carter*, 121 N. W. 801, 802, 144 Iowa, 371.

#### As try

Gen. St. 1863, c. 38, § 2, providing that "the Supreme and county courts may grant new trials in all cases 'determined' in such courts," etc., applies to those cases where a trial has been had, but does not reach the

case of a default. *Farmers' Mut. Fire Ins. Co. v. Reynolds*, 52 Vt. 405, 407.

The word "determined," in the statute providing that "the Supreme and county courts may grant new trials in all cases determined in such courts," etc., does not mean more than tried, so that the statute does not apply to judgments by default. *Goddard v. Fullam*, 38 Vt. 75, 76.

#### DETERMINED RIGHTS

The phrase "determined rights," in *Sess. Laws 1909*, p. 319, relating to the duties of the board of control and providing that the division superintendent shall have control over the water masters of the several districts within his division, with power to make regulations for fair distribution of water in accordance with the "determined rights" as may be needed, and that on petition to the board of control by water users requesting determination of the relative rights the board may make a determination of the rights, etc., refer only to such rights as are determined and established by the action of the board pursuant to the statute and to decrees made under its provision, and the board of control does not have jurisdiction to supervise the distribution of irrigation water taken from a stream before the rights and priorities of the parties have been determined under the statute, and the water master is not entitled to compensation for acting in an unauthorized distribution. *Wattles v. Baker County*, 117 Pac. 417, 419, 59 Or. 255.

#### DETHRONEMENT OF REASON

"Obscurement of reason" is not synonymous with "dethronement of reason" as a definition of "heat of passion." *Dillon v. State*, 119 N. W. 352, 356, 187 Wis. 655, 16 Ann. Cas. 913.

#### DETINUE

See Non Detinet.

Detinue is a personal action, the gist of which is the wrongful detention of personal property. *Morrow v. Norvell-Shapleigh Hardware Co.*, 51 South. 766, 165 Ala. 331.

"Detinue" is an action to recover property, and the defendant can only show facts that would destroy title and defeat recovery, but cannot recover a judgment against the plaintiff." *McDaniel v. Sullivan & Bramlett*, 39 South. 355, 144 Ala. 583.

#### Trover distinguished

"Trover" and "detinue" are concurrent remedies, either of which the plaintiff may pursue at his election; trover being an action for damages for the conversion of the property, and detinue being an action for the recovery of the property in specie, or for damages for its unlawful detention. *Brocking v. O'Bryan*, 112 S. W. 631, 632, 129 Ky. 543.

Trover is an action to recover damages sufficient to cover the value of personal property wrongfully held by another, while replevin or detinue is primarily an action to recover the property, and a judgment is given only in the absence of ability to secure the specific articles claimed. *Leeper, Graves & Co. v. First Nat. Bank*, 110 Pac. 655, 660, 26 Okl. 707, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302.

## DETRIMENT

To bind the party who breached the contract, it was a sufficient consideration for a contract to leave two adjoining strips vacant for light that the other parties to the contract constructed a building in accordance with it in such manner as to render valueless the strip left by them; this being a detriment which they were not "lawfully bound to suffer," within the meaning of Civ. Code, § 1805, providing what shall be a good consideration. *Knoch v. Haizlip*, 124 Pac. 998, 1001, 163 Cal. 146.

The term "detriment," as used in the rule that a detriment to the promisee is a sufficient consideration for a contract, includes every act or forbearance which may be of legal value. *Frye v. Hubbell*, 68 Atl. 325, 332, 74 N. H. 358, 17 L. R. A. (N. S.) 1197.

Civ. Code, § 3336, provides that the "detriment caused by the wrongful conversion of property" is presumed to be the value of the property at the time of the conversion with interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest at the option of the injured party and a fair compensation for the time and money properly expended in pursuit of the property." The interest on the value of the property is the allowance provided by the statute in lieu of the value of the use of the property, and not in addition thereto. *Lynch v. McGhan*, 93 Pac. 1044, 7 Cal. App. 132.

## DEVELOP

See Fully Developed Mine.

To "develop" is defined by Webster to be: "To free from that which enfolds or envelops; to lay open by degrees or in detail, to disclose, to produce or give forth." And, by the Standard Dictionary: "To uncover or unfold; to bring to light by degree, work out in detail." Thus to develop a mining claim is to uncover or bring forth that which it produces or can produce. *Blewett v. Hoyt*, 103 N. Y. Supp. 451, 457, 118 App. Div. 227.

The word "develop" in a contract giving to a gas company the right to purchase a gas well should the other party, an oil prospector, in his operations for oil "develop" a

gas well, and to the prospector the right to purchase an oil well, should the company in its operations for gas "develop" an oil well, is used in its ordinary acceptation as applied to oil and gas well operations, and means on the development of oil or gas in paying quantities, and does not permit the prospector, on drilling a well which produces gas, to refuse to deliver to the gas company, in order that he may carry it deeper in a search for oil. *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 49 S. E. 548, 552, 56 W. Va. 402.

## DÉVELOPMENT

See Further Development; Improved and Under Development; Standard Development of Stream.

Civ. Code Alaska, § 262, gives a lien for labor or material furnished in the "development" of a mine, but that does not include the ordinary work of a miner in the operation of a placer claim, having no relation to the development or improvement of the mine. *Pioneer Min. Co. v. Delamotte*, 185 Fed. 752, 755, 108 C. C. A. 90.

An instruction that, to constitute a discovery of gold sufficient to support a location of a gold placer mining claim as against an adverse mineral locator, the gold found must be of such character and quantity and found under such circumstances as to justify a man of ordinary prudence in the expenditure of time and money in the development of the property, is not erroneous; the word "development," as so used, being the equivalent of "exploration." *Charlton v. Kelly*, 156 Fed. 433, 436, 84 C. C. A. 295, 13 Ann. Cas. 518.

Defendant granted to plaintiff the full, uninterrupted, and perpetual flow of 30 inches of water from the former's ranch, but did not warrant a flow of that quantity; but the contract provided that the defendants would not by any act diminish the flow, but stated that they intended to continue developing the flow, and reserved the privilege of doing so by boring, driving tunnels, and such other means as were necessary, and that if the water thereafter decreased because of any unforeseen agency, so as to be insufficient to supply the 30 inches, defendant would do any further work towards restoring the flow which any competent engineer selected by plaintiff should direct, the expense of such work by developing to be advanced by plaintiff. The flow of water subsequently decreased below 30 inches, but there was more than sufficient water under the surface to supply that quantity, and plaintiff selected an engineer, who reported that it was necessary to install a pumping plant in one of the wells to restore the flow. Held that, even if the means of restoring the water must be of the same general character as "boring wells or driving tunnels," which defendant reserved the privilege to do, the use of pumps as recommended by the engineer was "development work" within the contract and a proper

means of restoring the flow, and the fact that pumps had never been used on the ranch or in the county for that purpose was immaterial. *Garvey Water Co. v. Huntington Land & Improvement Co.*, 97 Pac. 428, 432, 154 Cal. 232.

## DEVIATION

### DEVIATION (In Law of Shipping)

"Deviation," in contracts of affreightment, as in marine insurance, means a departure from the usual course of the voyage, or from the usual manner of prosecuting it, thereby changing the risk. *Globe Nav. Co. v. Russ Lumber & Mill Co.*, 167 Fed. 228, 230.

"Deviation," in the law of shipping, has a varied meaning and wide significance, and the placing of a vessel in dry dock after receiving cargo on board for a voyage, for the purpose of painting her bottom, not a maritime necessity, constitutes a deviation. *The Indrapura*, 171 Fed. 929, 931.

Any "deviation" from the course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other will cast subsequent loss of or injury to either ship or cargo on the shipowner, and delay of a vessel even on the route prescribed by a policy or bill of lading, may amount to a "deviation." *The Citta Di Messina*, 169 Fed. 472, 474.

"Deviation," generally speaking, is a voluntary departure, without necessity or reasonable cause, from the regular course of the voyage. A provision of bills of lading giving the vessel the right to "deviate" does not authorize her, after arriving at the port of delivery, to return to the port of shipment with the goods on board, and thence make a second voyage to the port of delivery, which is not a "deviation," but an abandonment of the voyage so far as relates to such shipment. *Pacific Coast Co. v. Yukon Independent Transp. Co.*, 155 Fed. 29, 34, 83 C. C. A. 625 (citing 14 Cyc. p. 282; *Hostetter v. Park*, 11 Sup. Ct. 1, 137 U. S. 30, 34 L. Ed. 568; *Constable v. National S. S. Co.*, 14 Sup. Ct. 1062, 154 U. S. 51, 38 L. Ed. 903).

### DEVIATION (In Marine Insurance)

"In the law maritime a 'deviation' is defined as a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the ship insured." *Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 28 Sup. Ct. 607, 614, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70; *Thebauld v. Great Western Ins. Co.*, 50 N. E. 284, 286, 155 N. Y. 516.

## DEVICE

See By Any Device Whatever; Dangerous Device; Gambling Device; Safety Device; Same Device.

Any device, see Any.

Keeping gambling device, see Keep.

A "device" is a thing devised or formed by design; a contrivance; an invention. *Collins v. State*, 78 N. E. 851, 852, 38 Ind. App. 625; *Armour Packing Co. v. United States*, 28 Sup. Ct. 428, 431, 209 U. S. 56, 52 L. Ed. 681 (quoting and adopting definition in *Webst. Dict.*).

The term "device," within the meaning of the Elkins Act of Feb. 19, 1903 (32 Stat. 847, c. 708), making discrimination in transportation charges "by any device whatever" a criminal offense, includes anything which is a plan or contrivance and need not be necessarily fraudulent. *Armour Packing Co. v. United States*, 28 Sup. Ct. 428, 431, 209 U. S. 56, 52 L. Ed. 681 (quoting and adopting the definition in *Webst. Dict.*).

Within the meaning of Banking Law which provides that no person or corporation, other than those incorporated under article 10, by any device or pretense of charging for his services or otherwise, shall directly or indirectly charge or receive interest in excess of the legal rate upon a loan where household goods are taken as security, a transaction, wherein the borrower paid \$10 for the lender's regular attorney as a pretended fee, according to the lender's custom of making loans, and gave as security a mortgage upon her household furniture for \$65, covering the amount received by her and the fee paid, was a device of charging for services or otherwise. *London Realty Co. v. Riordan*, 133 N. Y. Supp. 595, 598, 148 App. Div. 854.

The sale of prohibited liquor either openly or secretly, under the guise of a deceptive name is a sale by a "device," within Kirby's Dig. § 5140, prohibiting the sale of liquor by any device. *Brownson v. State*, 123 S. W. 762, 763, 93 Ark. 20.

*Burns' Ann. St.* 1901, § 7283b, declaring that no "devices" for amusements or music of any kind shall be permitted in any saloon, does not prohibit the keeping of a musical device so long as it is not operated or used as a source of amusement, and hence an indictment charging merely the keeping of a musical box in defendant's saloon did not charge an offense. *Collins v. State*, 78 N. E. 851, 852, 38 Ind. App. 625 (citing *Cent. Dict.* and *Webst. Dict.*).

A "device" is a permanent material thing. The crossing of a belt to produce a reversal of motion in parts of a machine is not a "device," within a claim covering a combination of devices for that purpose, but merely a method of using the devices. *Heap v. Greene*, 91 Fed. 792, 794, 34 C. C. A. 86.

The words "device, print, or impression or anything whatsoever," as used in Act Cong. Feb. 10, 1891, c. 127, § 3, 26 Stat. 742, providing that every person who makes, or causes or procures to be made, or shall bring into the United States from any other country, or shall have in possession with intent to sell, give away, or in any other manner

use the same, any business or professional card, notice, placard, token, "device, print, or impression, or any other thing whatsoever," in likeness or similitude as to design, color, or the inscription of any of the coins of the United States or of any foreign country that have been or hereafter may be issued as money "either under the authority of the United States or of any foreign government," shall on conviction be punished by a fine not to exceed \$100, must be read in connection with and construed as being of the same general nature as their companion words, "business or professional card, notice, placard, token," and not to cover counterfeit coins, the making of which is punishable under section 1 as a felony. *Kaye v. United States*, 177 Fed. 147, 150, 100 C. C. A. 567.

**As distinguishing mark on ballot**

Under Priv. Laws 1909, c. 290, § 25, relating to an election in a city, and providing that ballots cast which contain any device shall be void, ballots used at an election which were one inch and a half by three inches in size, when the board of aldermen under the law had regulated their size to one inch by three inches, are not void as containing a "device," since it was a matter over which the electors had no control. *State v. Spires*, 67 S. E. 41, 152 N. C. 4.

**DEVISABLE**

An executory devisee to one dependent upon the death of the preceding owner in fee, without children or issue surviving, becomes a "devisable" estate; "devisable" and "descendible" in relation to such interest being convertible terms. *King v. Guild*, 2 Tenn. Ch. App. 190, 195.

**DEVISE**

See *By Right, Devise, or Bequest; Collateral Bequest or Devise; Executory Devise; Gift, Devise, or Descent; Give, Devise and Bequeath; Specific Devise; Will, Devise, or Trust.*

All other devises, see *All Other*.

Any devise, see *Any*.

As give and bequeath, see *Give and Bequeath*.

Devise to a class, see *Class*.

Residuary devise, see *Residuary*.

"A 'devise of the income of lands' is in effect a devise of the lands." *Merrill v. American Baptist Missionary Union*, 62 Atl. 647, 648, 73 N. H. 414, 3 L. R. A. (N. S.) 1143, 111 Am. St. Rep. 632, 6 Ann. Cas. 646 (quoting statement in *Reed v. Reed*, 9 Mass. 372); *Mettler v. Warner*, 90 N. E. 1099, 1103, 243 Ill. 600, 134 Am. St. Rep. 388.

**Bequeath or bequest synonymous**

"Bequeath" is synonymous with devise when used with reference to a gift of real estate. *Gannon v. Albright*, 81 S. W. 1162,

1163, 183 Mo. 238, 67 L. R. A. 97, 105 Am. St. Rep. 471.

The word "bequeath," when expressly applied to real estate, is equivalent to the word "devise"; words of inheritance being unnecessary by 3 Gen. St. p. 3763, § 35. *Centenary Fund and Preachers' Aid Soc. of New Jersey Annual Conference of Methodist Episcopal Church v. Lake*, 66 Atl. 601, 72 N. J. Eq. 808.

In a strictly modern legal sense, the words "bequest" and "bequeath" are the appropriate terms for making a gift by will of personalty, and the word "devise" for a gift of realty; but as it is evident that the testator used the former words in their popular sense, and as applicable alike to a gift by will of property of any kind, they cannot be limited to gifts of personalty. *Baldwin v. Zien*, 134 N. W. 498, 500, 117 Minn. 178.

Although the word "devise" properly and technically applies only to real estate and "bequeath" only to personal property, they have been made interchangeable by Ky. St. 1903, § 467. *Roberts v. Chenoweth* (Ky.) 112 S. W. 625, 627.

Where circumstances indicated that a sale of testator's property would be necessary, and the entire will showed that he probably contemplated that there should be a sale, a provision that he did "give," "devise," and "bequeath" to his two sons each \$500 and \$500 to three daughters who should share equally of his estate both real and personal with the two sons, the word "devise" was not used in its technical or legal sense but as synonymous with "give" and "bequeath." *Schwengel v. Anthes*, 101 N. W. 335, 336, 72 Neb. 650.

The words "give and bequeath" in a will disposing of personalty and realty are the equivalent of "devise." *Hoefliger v. Hoefliger*, 107 N. W. 312, 313, 132 Iowa, 575.

The word "bequest" was not meant to be used in a technical sense, and referred to a devise of the family residence and a legacy of \$400 to the grandchild under a will providing that after the payment of debts the testator's wife should have the family residence for life, remainder to his three daughters, and directing his executor to convert into money any property real or personal of which he might die possessed, and providing that one-fifth of a life policy should go to his granddaughter, the amount to be paid out of the estate, and the household and kitchen furniture to his wife, and further provided that "it is my desire that my wife and three daughters shall share equally in the distribution of the estate after the 'bequests' already made are complied with." *Thomas' Ex'x v. Thomas' Guardian* (Ky.) 110 S. W. 553.

While the word "devise" is usually employed to denote a gift of real estate or an interest therein, the word "bequest" may

mean any gift by will, whether it consists of personal or real property, and the use of the word "bequeath" in a will instead of "devise" will not necessarily lead to the conclusion that the property which a testatrix thereby intended to dispose of was personalty; but where the word "bequeath" is coupled with the word "give," which is of the largest possible signification, "bequeath" is applicable as well to real as personal estate. *Rickman v. Meier*, 72 N. E. 1121, 1126, 213 Ill. 507.

#### As legacy

"Legacy and devise" are often used as interchangeable phrases in wills and everyday conversation, and therefore courts would not feel fettered to any nice construction, where the subject-matter or context shows the words were used interchangeably and as of the same import. But such popular and loose construction is hardly permissible in view of the statutory rule of hermeneutics. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587.

In common acceptation, "bequest" and "legacy" are synonymous terms, but "bequeath" is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed. The words "devise," "bequest," and "legacy" are not infrequently used in wills in a sense different from their strict legal meaning. It is stated in a recent work on wills that: "Of the verbs used to denote the act of making a will, 'devise' is properly used of realty, and 'bequeath' of personalty. Of the nouns used to name the various forms of gift, 'devise' is used of a gift of realty. 'Legacy' is used of a gift of personalty in general. None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy. A devise is often miscalled a 'bequest,' or 'bequest' is often used to include both realty and personalty or is used of a gift of money alone. So the verb 'devise' is often used to refer to personalty alone." *In re Campbell*, 75 Pac. 851, 853, 27 Utah, 361 (citing *Page, Wills*, § 2).

#### As a testamentary disposition of land

A "devise" ordinarily passes real estate. *Farney v. Weirich*, 103 N. Y. Supp. 38, 44, 52 Misc. Rep. 245; *Mills v. Tompkins*, 97 N. Y. Supp. 9, 10, 110 App. Div. 212.

A "devise" is a gift of real property by a last will and testament. *In re Dailey's Estate*, 89 N. Y. Supp. 538, 541, 43 Misc. Rep. 552.

The words "convey" and "devise" are technical terms relating to the disposition of interests in real property. *Vann v. Edwards*, 47 S. E. 784, 787, 135 N. C. 661, 67 L. R. A. 461.

"Devise" means the gift of some land to some person denoted by the language used in the writing which purports to make the devise, and the Connecticut courts have never sanctioned any legal fiction by which a gift of land in a writing not attested can be made operative as a legal devise by reference to it in a duly attested will which does not contain in itself any gift of any land to any person. *Hatheway v. Smith*, 65 Atl. 1058, 1062, 79 Conn. 506, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99.

#### DEVISE BY IMPLICATION

"The word 'devise' is the proper word to use in a testamentary disposition of real estate. \* \* \* A devise exists, by implication, when the testator uses words manifesting an intention to give, by so strong a probability that the contrary intent cannot be supposed to have existed in his mind when he made the will." *Metz v. Wright*, 92 S. W. 1125, 1127, 116 Mo. App. 631.

#### DEVEISED

Designed distinguished, see *Designed*.

#### DEVISEE

The word "devisee" has a common-law meaning, and indicates a person obtaining real estate by will, and by the use of the term the Legislature will be presumed to have also adopted that meaning. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587.

The word "devisee" is used to denote one to whom real estate passes by will; and the word "heirs" in its ordinary or customary sense means the kindred of the decedent upon whom the law casts the estate in real property in the absence of a devisee, and has reference to the law of succession. *Hays v. Wyatt*, 115 Pac. 13, 15, 19 Idaho, 634, 34 L. R. A. (N. S.) 397 (citing 4 *Words and Phrases*, p. 3241).

#### As creditor

See *Creditor*.

#### As legal representative

See *Legal Representative*.

#### As heir

See *Heirs*.

#### Legatee synonymous

"Legatee and devisee" are often used as interchangeable phrases in wills and everyday conversation, and therefore courts would not feel fettered to any nice construction, where subject-matter or context shows the words were used interchangeably and as of the same import. But such popular and loose construction is hardly permissible in view of the statutory rule of hermeneutics. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587.

Although the words "legacy" and "legatee," apply only to personal property, they have been made interchangeable by Ky. St. 1903, § 467, which provides that "the words

'legatee' and 'devisee' shall each be held to convey the same idea. *Roberts v. Chenoweth* (Ky.) 112 S. W. 625, 627.

The term "devisee," as used in Rev. St. 1899, § 148, providing that on filing of a petition for the sale of real estate of a decedent the court shall order all persons interested in the estate to be notified thereof and that such notice be published, provided that where the heirs or devisees are residents of the county notice shall be served on each one, does not include legatees in view of section 4160, which provides that in construing statutes words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587.

Where such is the intent of the will, the word "devisees" will be deemed to mean "legatees" when applied to gifts of personality, and hence where gifts to certain persons were gifts of personality or interests therein, but the gifts were given in terms "I give and devise," and the words "devise" and "devisees" were clearly used in the granting clauses of the will as intending to cover interests in personality and the recipient of such interest, the recipients thereof will be deemed "devisees" within a provision of the will that, if any of the devisees should aid or attempt to prevent the proof of the will, all the expenses of probating it should be taken by the executor from the share of each one so attempting. *Kayhart v. Whitehead*, 76 Atl. 241, 77 N. J. Eq. 12.

#### As one taking as heir

The word "heir" is technically distinguishable from "devisee," but is sometimes used "in its mere general sense, as indicating the person upon whom property devolves on the death of another"; and hence, when the intention is clear, the word may sometimes be treated as equivalent to "legatee" or "devisee." *Taylor v. Perkins*, 56 Atl. 741, 742, 72 N. H. 349 (citing *Shapleigh v. Shapleigh*, 44 Atl. 107, 108, 69 N. H. 577, 579).

While the word "heir" in a will may be construed to mean "devisee" when it refers to a relationship to the testator, it could not be so construed when used in a codicil and having reference to a relationship with another than the testator. *Wells v. Fuchs*, 125 S. W. 1137, 1140, 226 Mo. 97.

#### As remainderman

Code Civ. Proc. § 1452, providing that "devisees" may maintain an action for the recovery of real estate against any one except the administrator, means only those heirs and devisees who have a present right of possession and a present cause of action as against every one except the administrator, and has no application to a remainderman,

although he may have acquired his estate through a devise. *Pryor v. Winter*, 82 Pac. 202, 203, 147 Cal. 554, 109 Am. St. Rep. 162.

## DEVOLUTIVE APPEAL

A "devolutive appeal" is one which does not suspend the execution of a judgment appealed from. *State ex rel. Schwan v. Allen*, 26 South. 434, 436, 51 La. Ann. 1842.

## DEVOLVE

An estate is said to "devolve" upon another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve from one person to another as the result of some positive act or agreement between them. The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. Instances of its appropriate use are found when speaking of the succession of estates upon death, or upon a change of official incumbents; also in proceedings in bankruptcy or insolvency, where by the act or operation of law the estate of the bankrupt devolves upon his assignee. A transfer by a debtor of property not accompanied by change of possession is not void as against the assignee for the benefit of the debtor's creditors, under Civ. Code, § 4491, declaring such transfer void as against any one on whom the debtor's estate devolves in trust for the benefit of others, as the estate does not devolve by such assignment, but is granted by it. *Babcock v. Maxwell*, 74 Pac. 64, 66, 29 Mont. 31.

## DEVOTE

A claim that property is exempt from taxation under P. S. 496, on the ground that the property is "devoted" to charitable uses, merely means that the property has been so set apart. *Grand Lodge of Masons v. City of Burlington*, 78 Atl. 973, 975, 84 Vt. 202.

Where an incorporated village was authorized by law to maintain an electric light plant for lighting its streets and public places, such property was devoted to public use within P. S. 496, subd. 6, declaring that property so devoted should be exempt from taxation. *Village of Swanton v. Town of Highgate*, 69 Atl. 667, 668, 81 Vt. 152, 16 L. R. A. (N. S.) 867.

## DEXTRINE

White dextrine, produced by the chemical treatment of starch, while not a dextrine, technically speaking, is classifiable as "dextrine," because it is commercially so known, under Tariff Act July 24, 1897, c. 11, § 1,

Schedule G, par. 286, 30 Stat. 173. *Charles Morningstar & Co. v. United States*, 159 Fed. 287, 288.

## DIA

The Greek word "dia" means through. *State v. Williams*, 61 S. E. 61, 68, 146 N. C. 618, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562.

## DIAGRAM

A "diagram" is simply an illustrative outline of a tract of land, or something else capable of linear projection, which is not necessarily intended to be perfectly correct and accurate. *Shook v. Pate*, 50 Ala. 91, 92; *Burton v. State*, 22 South. 585, 588, 115 Ala. 1.

It is proper to admit and exhibit to the jury a diagram, prepared by the attorney for the state, of the place of a crime, indicating the locality of objects to which there is much reference in the testimony, upon which can be traced the route that it is claimed defendant followed in going to and returning from the place of the homicide, in connection with the evidence of the draftsman as to its accuracy. It is proper to permit other witnesses to refer to it in explanation of their testimony, and the jury should be permitted to take it to the jury room. *Burton v. State*, 22 South. 585, 588, 115 Ala. 1.

A "diagram" is not a public or private writing, nor is it made by law primary or secondary, or prima facie evidence of any fact or object represented by it. When used on the trial of a case, it is not used as evidence, and does not prove, nor tend to prove, in the sense of evidence, any fact. It is simply a figure drawn to suggest to the minds of the jurors the relation between objects about which a witness is testifying, and may be drawn on paper or on a stationary blackboard which cannot be removed. *Carman v. Montana Cent. Ry. Co.*, 79 Pac. 690, 692, 32 Mont. 137.

## DIAMETER

The word "diameter" means primarily the measure through; a right line passing through the center of a body, as a circle, conic section, sphere, cube, etc., and terminated by the opposite boundaries; and as applied to a cylindrical body it means the thickness of such body as measured on a diameter of a cross-section made perpendicular to the axis. *Strickland v. Richardson*, 69 S. E. 871, 872, 135 Ga. 513.

## DICE

As banking game, see *Banking Game*.

As gambling device, see *Gambling Device*.

"Dice," which are defined as "small cubes used in gaming, or in determining by

chance," constitute a gambling device within *Burns' Ann. St.* 1901, § 2181, providing punishment for keeping or exhibiting for gain "any gambling apparatus, device, table or machine of any kind or description under any denomination or name whatever." *White v. State*, 76 N. E. 554, 555, 37 Ind. App. 95 (citing *Webst. Dict.*; *State v. Shaw*, 39 N. W. 305, 39 Minn. 153).

## DICTA

See *Dictum*.

## DICTATE—DICTATION

Civ. Code, art. 1578, requiring that a non-cupative testament must be dictated by the testator and written by the notary as it is dictated, means to pronounce orally what is designed to be written. Where the testator simply handed the notary a piece of paper indicating that his will was to be "like that," and the notary embodied it in the will, it was not "dictated." *Succession of Theriot*, 38 South. 471, 473, 114 La. 611 (citing *Prendergast v. Prendergast*, 16 La. Ann. 220, 79 Am. Dec. 575).

## DICTUM

A "dictum" is an opinion expressed by the court, which, not being necessarily involved in the action, lacks the force of an adjudication. *Callahan v. Salt Lake City (Utah)* 125 Pac. 863, 864 (quoting 3 Words and Phrases, p. 2051).

Where a judge expresses a view on any point or principle which he is not required to decide, his opinion as to such point or principle is "obiter dictum." *Huston v. Scott*, 94 Pac. 512, 517, 20 Okl. 142, 35 L. R. A. (N. S.) 721 (citing 3 Words and Phrases, p. 2051).

"A 'dictum' is an opinion expressed by the court, which, not being necessarily involved in a case, lacks the force of an adjudication." *Moser v. Talman*, 100 N. Y. Supp. 231, 233, 114 App. Div. 850 (citing *Bouv. Dict.*).

"Obiter dictum" is: "Made as argument or illustration, as pertinent to other cases as to the one on hand, and which may enlighten or convince, but which in no sense are a part of the judgment in the particular issue, not binding as a precedent, but entitled to receive the respect due to the opinion of the judge who utters them." *Commonwealth v. Paine*, 56 Atl. 317, 319, 207 Pa. 45.

"One of the best definitions of the term 'obiter dictum' is said to be that given by *Folger, J.*, in *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 58, 20 Am. Rep. 451. He said: 'Dicta are opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are



not the professed deliberate determinations of the judge himself. Obiter dicta are such opinions uttered by the way, not upon the point or question pending, as if turning aside from the main topic of the case to collateral subjects." *Newman v. Kay*, 49 S. E. 926, 931, 57 W. Va. 98, 68 L. R. A. 908, 4 Ann. Cas. 39 (citing *United States ex rel. Johnston v. Clark County Court*, 96 U. S. 211, 24 L. Ed. 628).

"Obiter dictum" is a mere observation by a judge on a legal question suggested by the case before him, but not arising in such a manner as to require decision by him. It is therefore not binding as a precedent on the other judges, or the court, although it may be entitled to more or less respect. *Lancaster County v. McDonald*, 103 N. W. 78, 81, 73 Neb. 453.

"Dictum" is of two kinds, "obiter" and "judicial." "Obiter dictum" is an expression of opinion by the court or judge on a collateral question not directly involved or mere argument or illustration originating with him, while "judicial dictum" is an expression of opinion on a question directly involved, argued by counsel, and deliberately passed on by the court, though not necessary to a decision. While neither is binding as a decision, judicial dictum is entitled to much greater weight than the other and should not be lightly disregarded. In *re Chadwick's Will*, 82 Atl. 918, 919, 80 N. J. Eq. 168.

Whenever a question fairly arises in the course of a trial, and there is a distinct decision thereon, the court's ruling in respect thereto can in no sense be regarded as mere "dictum." *New York Cent. & H. R. R. Co. v. Price*, 159 Fed. 330, 332, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

"According to the more rigid rule, an expression of opinion, however deliberate upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a 'dictum'; but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point." *People's Lumber Co. v. Gillard*, 90 Pac. 556, 557, 5 Cal. App. 435 (quoting *Bouvier*).

Where a question was not before the Supreme Court, any expression upon the subject would be "obiter dictum." *Scottish Union & National Ins. Co. v. Wade* (Tex.) 127 S. W. 1186, 1188.

Where several objections to the validity of a constitutional amendment are raised by the issues, and are held as valid grounds for denying its validity by the trial court,

and its rulings thereon are assigned as error and are specifically considered and affirmed on appeal, the decision is authoritative, and not "dictum," as to each objection. *State ex rel. Bailey v. Brookhart*, 84 N. W. 1064, 1066, 113 Iowa, 250.

General expressions not essential to disposition of a cause on points not presented, nor argued, are obiter; but, when a question is directly involved and was determined below and is assigned as error and argued and distinctly decided the decision is not obiter, though the cause is disposed of on other grounds. *Watson v. St. Louis, I. M. & S. R. Co.*, 169 Fed. 942, 944.

"Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is 'obiter'; but each is the judgment of the court, and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum." *Union Pac. R. Co. v. Mason City & Ft. D. R. Co.*, 26 Sup. Ct. 19, 20, 199 U. S. 160, 50 L. Ed. 134.

While it may be difficult to concisely define "obiter dictum," it is difficult to see why the court's opinion is not as persuasive on all the points involved in the case which it was the duty of counsel to argue, and which were deliberately passed upon by the court, as if a decision had hung upon one point. *Carstairs v. Cochran*, 52 Atl. 601, 95 Md. 488.

A mere declaration of the views of the writer of the opinion is known as "dicta" or "obiter dicta"; it is judicial dictum, for it is the expression of the views of at least a majority, if not of the entire court, upon a matter which, while possibly not essential to a decision, was presented, argued, and considered. Judicial dictum represents the views of the court upon questions deemed too clear to admit of discussion, and should accordingly not be disregarded without extraordinary reasons appearing therefor. Such declarations as to the law are, to say the least, very persuasive, and nisi prius courts and counsel, in absence of something to the contrary, usually act upon them. *Zeuske v. Zeuske*, 103 Pac. 648, 651, 55 Or. 65, Ann. Cas. 1912A, 556 (citing 3 Words and Phrases, p. 2051).

If an expression of opinion on a point argued by counsel and deliberately passed on by the court is a dictum, it is "a judicial dictum as distinguished from a mere obiter dictum; i. e., an expression originating alone with the judge who writes the opinion, as an argument or illustration." Where propositions of law stated by the court were necessarily involved in the determination of the case, they are of the doctrine of the

case for which the decision is authority. *Derosia v. Firland*, 76 Atl. 153, 155, 83 Vt. 372, 28 L. R. A. (N. S.) 577, 138 Am. St. Rep. 1092.

## DID AN ASSAULT

The words "did an assault" in an indictment are equivalent to the expression that the accused made an assault. *Hase v. State*, 105 N. W. 253, 254, 74 Neb. 493.

## DID COMMIT FORNICATION

The phrase "did commit fornication," in an indictment for incest, is, in substance, an allegation of illicit intercourse, and a sufficient averment that he had carnal knowledge of the person of the particeps, and it is not necessary to allege that he knows of the relationship existing between them. *State v. Dana*, 10 Atl. 727, 731, 59 Vt. 614.

## DID SHOOT

The term "did shoot," in an indictment alleging that accused "did \* \* \* intentionally \* \* \* and feloniously shoot" a person named with a shotgun, with intent to kill the person named, embraces the weapon, the load, the discharge, and the act of discharging, and, when it is said that one person "did shoot" another, every one of common understanding knows what is intended, without explanation. *Heatley v. Territory*, 78 Pac. 79, 80, 15 Okl. 72.

The phrase "did shoot," in an indictment alleging that accused with a revolver loaded with gunpowder and leaden bullets "did shoot" decedent, embraces the weapon, the load, the discharge, and the act of discharging, and an indictment alleging that accused feloniously murdered decedent, and did with a certain firearm, to wit, a pistol loaded with gunpowder and leaden bullets, shoot decedent, inflicting a fatal wound, is sufficient. *McHugh v. Territory*, 86 Pac. 433, 434, 17 Okl. 1.

## DIE

See Previously Died.

When a devise or bequest to children is made with a provision over "if either of my children should die," the courts will assume that the testator had in mind something less than merely to provide for the case of the legatee dying at some time, and in such cases the courts will construe the bequest over as intended to take effect in case the death referred to should occur in the testator's lifetime or before some fixed period for the enjoyment of the estate or gift which is in such event to go over. *McClellan v. MacKenzie*, 128 Fed. 701, 704, 61 C. C. A. 619 (citing 2 Williams, Ex'rs, 1126; *In re Hayward*, 19 Ch. Div. 470).

2 Wds. & P. 2D SER.—3

## DIE BEFORE

The phrase "die before," or a like expression, as used in a will making disposition of property if a beneficiary shall "die before" a certain time, is construed to provide against the inability of the legatee or beneficiary first named to take, either by reason of prior or simultaneous death. *Supreme Council of Royal Arcanum v. Kacer*, 69 S. W. 671, 675, 96 Mo. App. 93 (citing and adopting *Balder v. Middeke*, 92 Ill. App. 227; *Paden v. Buscoe*, 17 S. W. 42, 81 Tex. 563; *Fuller v. Linzee*, 135 Mass. 468).

## DIE BY HIS OWN HAND

### Self-destruction while insane

Though the clause of the Constitution and laws of a beneficial association providing that the death of a member "by his own hands, whether sane or insane at the time, whether the act be voluntary or involuntary," is a risk not assumed, may not exempt from liability in every case of death by accident, it does exempt from liability for involuntary suicide from causes other than those proceeding from the act of an insane mind. *Campbell v. Order of Washington*, 102 Pac. 410, 412, 53 Wash. 398.

Under a life insurance policy excepting self-destruction, sane or insane, assured "died by his own hand," though death resulted from an irresistible, insane impulse. *Clarke v. Equitable Life Assur. Soc. of United States*, 118 Fed. 374, 378, 55 C. C. A. 200.

### Suicide synonyms

The word "suicide" and the words "to die by his own hand" mean the same thing, and convey the idea of voluntary, intentional self-destruction. *Dickerson v. Northwestern Mut. Life Ins. Co.*, 65 N. E. 694, 696, 200 Ill. 274.

"Die by his own hand" is synonymous with 'voluntary suicide.' *Campbell v. Order of Washington*, 102 Pac. 410, 412, 53 Wash. 398 (quoting and adopting definition in *Grand Legion of Select Knights v. Korne-man*, 63 Pac. 293, 10 Kan. App. 577).

A provision in a life policy rendering it void in case insured should die by his own hand, "sane or insane," covered every case of suicide, irrespective of the state of insured's mind. *Moore v. Northwestern Mut. Life Ins. Co.*, 78 N. E. 488, 490, 192 Mass. 468, 7 Ann. Cas. 656.

A clause in a fraternal benefit certificate which reads "and shall not die by his own hand, whether sane or insane," will not relieve the association from payment, where death results from accidental drowning, although such drowning may be the direct result of the acts of the insured. Such clause will only relieve the association if the deceased purposely destroys his life. Where the insured was walking in water not to exceed three feet in depth and was seen to fall

and remain apparently motionless until life was extinct, and the jury find that death resulted from drowning, but that such death was not caused by the intentional acts of the deceased, the association is liable. *Grand Legion of Select Knights v. Korneman*, 63 Pac. 292, 293, 10 Kan. App. 577.

#### DIE DURING SIXTY DAYS

The phrase "die during said 60 days 'before the expiration of term herein granted contemplated that the 60 days' notice of intention to renew should be or run during the last 60 days of the term, where the lease for a year provided for a renewal for a year by a further lease containing like agreements and covenants as in the first, on condition that the lessees should give 60 days' notice in writing of her desire to avail herself of the option of renewal, and that the lessor would sell the premises to the lessee for a specified price, except that, in case the lessee should give the 60 days' notice of her intention to renew and the lessor or her husband should 'die during said 60 days before expiration of the term herein granted,' then the lessor or her executors might, upon obtaining a bona fide purchaser for the premises, sell them, after having first given the lessee the opportunity to purchase them at the price offered by the prospective purchaser. *Pfium v. Spencer*, 108 N. Y. Supp. 344, 346, 123 App. Div. 742.

#### DIE IN CONSEQUENCE OF VIOLATION OF LAW

Death received while retreating from a personal difficulty, not for the purpose of gaining vantage ground to renew it, where the encounter is begun by an assault by the deceased upon his slayer with a weapon capable of inflicting great bodily harm, or death, according to its use, is not within the meaning of an insurance clause exempting against liability for death "in violation or attempted violation of any criminal law." *Supreme Lodge, K. P., v. Bradley*, 83 S. W. 1055, 1056, 78 Ark. 274, 67 L. R. A. 770, 108 Am. St. Rep. 38, 3 Ann. Cas. 872 (citing *Harper v. Phoenix Ins. Co.*, 19 Mo. 506. Reiterated in *Overton v. St. Louis Mut. Life Ins. Co.*, 39 Mo. 122, 90 Am. Dec. 455; *Cluff v. Mut. Benefit Life Ins. Co.*, 13 Allen [95 Mass.] 308. Reaffirmed in the same case in 99 Mass. 318; *Bradley v. Mut. Benefit Life Ins. Co.*, 45 N. Y. 422, 6 Am. Rep. 115).

A policy of life insurance contained the stipulation that, "if death is caused or superinduced at the hands of justice, or in violation of or attempt to violate any criminal law," the insurer would not be liable for the full amount of the policy. The insured was slain by a husband, either while he was attempting to have sexual intercourse with the wife, or immediately after the act of sexual intercourse. Held, that the death of the insured was not caused or superinduced in

the violation of, or attempt to violate, any criminal law, within the meaning of the policy. *Supreme Lodge Knights of Pythias v. Crenshaw*, 58 S. E. 628, 629, 129 Ga. 195, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

The phrase "die in consequence of the violation or attempted violation of the laws," in a beneficiary certificate stipulating that the same shall be void if the member shall die in consequence of a duel or in consequence of the violation or attempted violation of the laws of a state or the United States or any province or nation, means that the member must lose his life in the act of actually violating the law; and to defeat an action on the certificate it must be shown that the member came to his death while in the act and as the result of his violation of the law. *Sovereign Camp of the Woodmen of the World v. Welch*, 83 Pac. 547-549, 16 Okl. 188.

#### DIE IN PERFORMANCE OF DUTY

A fireman driving a hose wagon received a broken back and other injuries by the overturning of the wagon, and, as a result of the pain he suffered, became insane and committed suicide. Held that, as he was neither legally nor morally responsible for killing himself, his death was caused without the intervention of any outside or independent cause, and he died in the performance of his duty, so as to entitle his widow to the pension, within San Francisco Charter, c. 7, art. 9, § 5, requiring, as a condition to the duty of the board of fire pension fund commissioners to provide a pension for a widow, that her husband shall have died "in the performance of his duty." *Baker v. Board of Fire Pension Fund Com'rs of City and County of San Francisco*, 123 Pac. 344, 345, 18 Cal. App. 433.

#### DIE LEAVING CHILDREN

Where testator devised certain lands to his son and daughter in remainder, and certain other lands without the intervention of any particular estate, and then provided that the "lands given as above" to his daughter should be her separate estate; but, in the event she should marry and die without any children and leave a husband surviving her, the husband should have the lands for life; and at his death to go to testator's son, if living, or, if he be dead, then to his children, if any, or, if none, then to a certain grandson of testator; but if the daughter should "die leaving children," then the land to go to said children—it was held that the words "die leaving children" refer to the happening of that event at any time, and not to their happening within the testator's lifetime, or within a period of five years during which the lands were to be rented out for the purpose of raising money to pay debts; there being various recitals of the will indicating the expectation of testator's death in the near

future, and a number of contingencies being provided for which might occur a long time after his death. *Cooksey v. Hill*, 50 S. W. 235, 237, 106 Ky. 297.

### DIE LEAVING NO CHILDREN

Under a devise to M. for life, and at her death to J. and R., with provision that if either J. or R. "die at any time, leaving no child" his interest shall go at his death to the survivor, and, if both die leaving no child, the interest devised to them shall go to another, the death of J. or R. without issue, which will defeat his fee, is not limited to the lifetime of M., but may be any time thereafter. *Walton v. Bohannon*, 150 S. W. 648, 649, 150 Ky. 486.

Under a devise to testator's wife for life, remainder to his son, with a provision that, should he "die leaving no children" or descendants, the said estate must revert to my legal heirs, the son, having survived the widow, takes the fee, as the words "die leaving no children" refer to a dying before the death of the life tenant. *Weakley v. Hanna* (Ky.) 51 S. W. 570, 571.

Where a bequest is made to A. of a certain sum to be put out at interest until her child or children became of age, and if A. died "leaving no child or children" the legacy with the interest to be paid by testator's executors to the trustees of an orphan asylum for the use and benefit of the institution, the word "leaving" is to be taken as equivalent in meaning to the words "having had," and at birth each child of A. took an indefeasible interest which at death before payment would pass to a personal representative. *Male v. Williams*, 21 Atl. 854, 855, 48 N. J. Eq. 33.

### DIE LEAVING NO ISSUE

The clause "die leaving no issue," when used in a will, has a fixed legal meaning, and, in the absence of language in the will disclosing a different intent, imports a general indefinite failure of issue, and not a failure at the death of the first taker. *Arnold v. Muhlenberg College*, 76 Atl. 30, 31, 227 Pa. 321; *Burrough v. Foster*, 6 R. I. 534, 540.

Where a testator bequeathes a certain sum of money to his daughter and over to sons and daughters on her death, "leaving no issue," such a gift is valid, and limitation over of real estate on the death of the first devisee, leaving no issue, would create an estate tail, but, as applied to personal estate, such limitation over imports not an indefinite, but a definite, failure of issue, and is good. *Woodward v. Woodward*, 16 N. J. Eq. 83, 86.

By one clause of a will property was devised in trust for testator's niece, for life, and her children, after her death, should she have any. In another clause the proper-

ty was spoken of as devised to the niece and her heirs, and it was provided that if the niece should die leaving no children or lawful issue surviving her, or if such child or children should die leaving no lawful issue surviving them, the property should go to a trust company to be held in trust for a Bible society. Held, that the words "die leaving no lawful issue surviving them" did not import an indefinite failure of issue, but referred to the child's or children's death before the termination of the life estate, and the Bible society's trust was to arise upon the niece dying without leaving a child or grandchild, and hence did not suspend the power of alienation for longer than a life or lives in being at the creation of the estate, forbidden by the common-law rule against perpetuities, and Ky. St. 1903, § 2360, declaratory thereof. *Kasey v. Fidelity Trust Co.*, 115 S. W. 739, 741, 131 Ky. 609.

### DIE LEAVING NO LAWFUL ISSUE SURVIVING

By one clause of a will property was devised in trust for testator's niece for life and then to her children, if any. In another clause the property was spoken of as devised to the niece and her heirs, and it was provided that if the niece should die leaving no children or lawful issue surviving her, or if such child or children should die leaving no lawful issue surviving them, the property should go to a trust company to be held in trust for a Bible society. Held, that the words "die leaving no lawful issue surviving them" did not import an indefinite failure of issue, but referred to the child's or children's death before the termination of the life estate, and the Bible society's trust was to arise upon the niece's dying without leaving a child or grandchild, and hence did not suspend the power of alienation for longer than a life or lives in being at the creation of the estate, forbidden by the common-law rule against perpetuities, and Ky. St. 1903, § 2360, declaratory thereof. *Kasey v. Fidelity Trust Co.*, 115 S. W. 739, 740, 131 Ky. 609.

### DIE LEAVING NO LIVING ISSUE

The phrase "die leaving no living issue," when used in a will, is equivalent to the phrase "die leaving no surviving issue," and carries a plain implication in favor of any issue of the first taker who may survive him. *Hull v. Holmes*, 62 Atl. 705, 706, 78 Conn. 362.

### DIE LEAVING NO SURVIVING ISSUE

The phrase "die leaving no living issue," when used in a will, is equivalent to the phrase "die leaving no surviving issue," and carries a plain implication in favor of any issue of the first taker who may survive him. *Hull v. Holmes*, 62 Atl. 705, 706, 78 Conn. 362; *Burrough v. Foster*, 6 R. I. 534, 540.

**DIE WITHOUT CHILDREN**

Die without children or issue, see Die Without Issue.

The phrase "die without children" means without having had children. *Bond v. Moore*, 86 N. E. 386, 393, 236 Ill. 576, 19 L. R. A. (N. S.) 540 (citing *Field v. Peeples*, 54 N. E. 304, 180 Ill. 376).

Where a devise limited to take effect after death "without issue" is construed as taking effect after death "without children," it does not depend on an indefinite failure of issue. *Stisser v. Stisser*, 85 N. E. 240, 235 Ill. 207.

Testator gave all his property to his wife for life, with full power of disposal, providing that on her death what remained should be equally divided among his children; he giving a fifth of it absolutely to each of his two sons, and a like amount to his unmarried daughter, with a provision that if she married her share should vest in his sons in trust for her use during life, with power to them, with her consent, to sell her share, the part of her share remaining at her death to go to her children, or, if she had none, then to her brothers and sisters, her husband, if any, being excluded from all right therein while for each of his two married daughters he gave a fifth to his sons as trustees, with like power of sale and like provisions as to the passing of any part of their shares remaining at their deaths. Held, that the provision in the codicil that if a son "dies without children" his share shall return back again to the family, as provided in case a daughter so dies, did not take away the power of the children to sell the property. *Pennsylvania Land Co. v. Just*, 90 S. W. 279, 280, 121 Ky. 765.

Revisal 1905, § 1581, provides as the rule of construction that a devise to one for life, with remainder over upon dying "without heirs," or "without issues," or "without children," shall be construed to mean dying without heirs, or children, or issues living at the time of his death (or born to him within ten lunar months thereafter), unless a contrary intent is expressly declared in the face of the deed or will. *Staton v. Godard*, 62 S. E. 519, 148 N. C. 434.

Where a will made certain devises to testator's two sons, and provided that if either should die without legal heirs then his portion should go to the other, or his children, if any, and that neither should have power to sell unless the proceeds should be invested in other real estate, it was held that, in view of the provision for sale, the phrase "if either should die without children" referred to the death of either son at any time before or after testator's death, and each son took a defeasible fee, which would be defeated by the death of the devisee at any time without issue then living. *Rice v. Rice*, 118 S. W. 270, 133 Ky. 406.

A will gave testatrix's husband her property for life, and provided that upon his death it should be divided equally among her daughters, and if any of them should die without children their part should be divided equally among the remaining children. Held, that the provision as to "death without children" referred to death before the life tenant died, when the property was to be divided, so that the share of a child dying without issue after the life tenant's death would not go to the other devisees. *Garrard v. Kendall* (Ky.) 121 S. W. 997, 998.

**DIE WITHOUT HEIRS**

Where testator devised property to his widow for life or widowhood, and then made specific devises to his children by his second wife, who were minors at the date the will was executed, providing that the land should be held intact until such children became of age or married, when the portion allotted to each should be turned over to him, but that should any of such children "die without heirs" the portion of those dying should be equally divided among the others, the testator by use of the quoted words had reference to their dying before he died, or before they reached their majority or married, if they should marry before reaching their majority or before he died, and left no child or children surviving them. He did not intend to limit the estate which he gave them; he was merely limiting the division of his landed estate to such of the four children as should be living when the period fixed for distribution should arrive. *Deskins v. Williamson* (Ky.) 106 S. W. 258, 259.

Revisal 1905, § 1581, provides as the rule of construction that a devise to one for life, with remainder over upon dying "without heirs," or "without issues," or "without children," shall be construed to mean dying without heirs, or children, or issues living at the time of his death (or born to him within ten lunar months thereafter), unless a contrary intent is expressly declared in the face of the deed or will. *Staton v. Godard*, 62 S. E. 519, 148 N. C. 434.

In a will giving to a son the remainder of the estate and providing that in the event of his death "during his minority, without heirs of his body," the property should go to persons designated. The words "without heirs of his body" refer to his dying during his minority, without leaving heirs of his body, and the son acquired the fee subject to a life estate in one-third given to the testator's wife, and subject to be defeated by dying before reaching majority. *Allen v. Allen* (Ky.) 108 S. W. 250, 251.

Under Code 1904, § 2422, which provides that limitations in a deed or will contingent upon a person "dying without heirs," etc., shall be construed a limitation to take effect when such person dies not having such heir living at the time of his death, or born within

10 months thereafter, unless the intention be otherwise plainly declared on the face of the deed or will creating it, the common-law construction of the phrase "dying without heirs," and similar expressions, has been changed, the purpose of the statute being to effectuate the intention of the testator by rendering valid a limitation otherwise invalid as a perpetuity, and words which under the common law were construed to mean an indefinite failure of issue are now construed to mean a definite failure of issue. *Daniel v. Lipscomb*, 68 S. E. 850, 852, 110 Va. 563.

### DIE WITHOUT ISSUE

Where there is no intervening estate and no other period to which the words "dying without issue" can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee which is defeated by the death of the devisee without issue then living. *Deakins v. Williamson* (Ky.) 106 S. W. 258, 260.

#### As indefinite failure of issue

The primary meaning of the word "issue" in a will is heirs of the body, and "dying without issue," standing alone, means an indefinite failure of issue; but this general rule does not apply where the devise over of land to take effect is expressly or impliedly for a period of a life or lives in being and 21 years thereafter. *Todd v. Armstrong*, 62 Atl. 1114, 1115, 213 Pa. 570 (citing *Beckley v. Riegert*, 61 Atl. 641, 212 Pa. 91).

"Dying without issue living at the time of his decease," as used in a will, means a definite failure of issue. *Beckley v. Riegert*, 61 Atl. 641, 642, 212 Pa. 91.

"It is said to be a rule of construction, that the words 'dying without issue' will be construed to mean 'an indefinite failure of issue' as to real estate; but, with regard to personalty, it shall be taken to mean 'a failure at the death.'" *Abbott v. Essex Co.*, 18 How. (59 U. S.) 202, 216, 15 L. Ed. 352.

The words "heirs" or "issue" may be so used as to mean children. Where devise over is on death of B. without issue before a certain person dies, etc., or where it is if B. dies unmarried and without issue, the limitation is defeated even if B. marries and has issue, or where the devise is that on the death of the first taker, B., without "issue," the executors of deviser shall sell, etc., the failure meant is indefinite, and the limitation fails. *Middlesex Banking Co. v. Field*, 37 South. 139, 144, 84 Miss. 646.

In a will devising land for life with a limitation over upon the death of the life tenant without children, or if the children die unmarried and before the age of 21 "without children," were words of purchase and not of descent, and clearly imported a definite failure of issue. *Ball v.*

*Phalen*, 49 South. 956, 968, 94 Miss. 293, 23 L. R. A. (N. S.) 895.

Where a devise limited to take effect after death "without issue" is construed as taking effect after death "without children," it does not depend on an indefinite failure of issue. *Stisser v. Stisser*, 85 N. E. 240, 242, 235 Ill. 207.

Where an estate was devised for life, with remainder over, with the further provision that, if the remainderman should die without children or issue, then to a third person, the words "dying without children or issue" had reference to the death of the remainderman before the termination of the particular estate, and where she survived the termination of that estate she thereupon took a fee-simple interest. *Bradshaw v. Butler* (Ky.) 110 S. W. 420, 422.

Where an estate is devised to one for life, with remainder to another, with gift over on the remainderman dying without issue, the words "dying without issue" are restricted to death before the termination of the particular estate; but where there is no intervening estate, or where there is a period fixed for distribution, the words, in the absence of a contrary intent, create a defeasible fee, defeated by death at any time without issue. *Simpson v. Adams*, 106 S. W. 819, 821, 127 Ky. 790.

Revisal 1905, § 1581, provides as the rule of construction that a devise to one for life, with remainder over upon dying "without heirs," or "without issues," or "without children," shall be construed to mean dying without heirs, or children, or issues living at the time of his death (or born to him within ten lunar months thereafter), unless a contrary intent is expressly declared in the face of the deed or will. *Staton v. Godard*, 62 S. E. 519, 148 N. C. 434.

The words "die without issue" import a general and indefinite failure of issue. The effect of Act July 9, 1897 (P. L. 213) was to change the previous ruling that the words "die without issue" in a will imported an indefinite failure of issue, so that thereafter, in the absence of a different intent shown in the will, such words would mean a failure of issue during the lifetime or at the death of the person named, and hence where testator devised land to his nieces, providing that should they die without lawful issue the real estate devised should descend to and vest in the heirs of a third person, the words "die without issue" must be construed to mean a failure of issue in the lifetime of the nieces. *Smith v. Piper*, 80 Atl. 877, 878, 231 Pa. 378.

The words "die without issue" are equivalent to die without leaving heirs of the body, contemplating what is known as an indefinite failure of issue. Where a testator gave to a niece and nephew in terms suffi-

cient to constitute a fee-simple estate the residuum of any realty left after payment of any legacies, and directed that should the nephew die without issue his part should be divided among testator's heirs, the will created in favor of the nephew an estate in fee tail. *Gilkie v. Marsh*, 71 N. E. 703, 704, 186 Mass. 336.

A testator devised land to his son, with a proviso that "should my son die without issue then the said realty shall revert to my lawful heirs." In the same will he devised real estate to others of his children in language clearly signifying a definite failure of issue. The devise to the son imported an indefinite failure of issue, and he took an estate tail, which, by Act April 27, 1855 (P. L. 368), was enlarged into an estate in fee simple. *Graham v. Abbott*, 57 Atl. 178, 179, 208 Pa. 68.

Where a will gave land to testator's two sons, their heirs and assigns, forever, and stated it to be testator's will that the land should not be sold until the younger of the sons should become of age, and that, if either of them should die without issue, the testator's surviving heirs should take the property, as fee tails were abolished by statute in 1816, and Rev. St. 1899, §§ 4592, 4593, declare that, where by common law any person might become seised in fee tail such person shall have only a life estate, and that the words "dying without issue" should be construed to mean "dying without issue living at the death of the person," the sons took a fee; the word "heirs" not being used as "heirs of the body," and the statute, despite the abolition of estates tail, requiring that the words "dying without issue" be not construed as creating an estate tail. *Gannon v. Albright*, 81 S. W. 1162, 1165, 1166, 1167, 183 Mo. 238, 67 L. R. A. 97, 105 Am. St. Rep. 471.

Testator bequeathed his property to plaintiff, and provided that if plaintiff should "die without issue," then the property should go to a specified charitable institution. Held, that the will should be construed to mean that, if plaintiff died without issue prior to the death of the testator, the devise over should take effect, but that if plaintiff survived the testator, he acquired title to the property in fee, though he subsequently died without issue. *St. Paul's Sanitarium v. Freeman (Tex.)* 111 S. W. 443, 445.

Under a will giving to six of testator's children an equal portion of the estate, and charging them with legacies in favor of other children, unless they elected to share equally with the six, and providing that the six children and the others, if they elected to share, should make a payment of "\$200 to be laid out in land for my grandchild \* \* \* and the brothers and sisters which he has or may hereafter have, all to share equally. \* \* \* I also direct that the shares of my

daughters, if they die without children, descend to their surviving sisters or their descendants, if they have any. If my grandson, \* \* \* and his brothers and sisters which he has or may have, shall die without issue, then the said land to revert to the said children before named and their heirs." Held, that the words "shall die without issue" were not intended to mean without issue or children surviving the first takers at the time of their death, but meant if they should die without having had issue or children born to them, and hence birth of issue at any time vested the estate, and defeated the limitation over. *Stafford v. Read*, 91 N. E. 91, 93, 244 Ill. 138.

A will created in testator's wife and eldest son an estate for the wife's life in a farm constituting the bulk of his estate. It then provides that on the wife's death the farm "vests absolutely in and is the property of" the son, and in case said son "dies without issue his property herein specified becomes the property of" a second son, and at his death goes to a daughter. When the will was made, the eldest son was a bachelor 42 years old, while the daughter had three young children. Held, that testator intended to preserve the estate for his daughter, and hence the words "dies without issue" will be construed as meaning death at any time, and not death in the lifetime of the wife in order to effectuate that intent. *In re Carothers' Estate*, 119 Pac. 926, 927, 161 Cal. 588.

The language of the deed considered as a whole, plainly shows that the grantor did not use the words "dying without issue" as meaning so dying before the termination of the life estate, but that they had reference to the time of the death of the daughter. *Sterling v. Huntley*, 76 S. E. 375, 377, 139 Ga. 21.

#### As within lifetime of testator

Testator gave the residue of his estate to his daughter for her benefit forever. By a subsequent clause he directed that, if the daughter shall die before or after attaining the age of 21 years without issue, then over. He also in his will desired and requested his daughter to select and have appointed as her guardian a particular person named. The will was made when the daughter was 16 years of age. Held, that such provisions disclosed a manifest intention of the testator not to limit the meaning of the words "die without issue" to death of the daughter in his own lifetime. *In re Daniel's Estate (Pa.)* 27 Pa. Super. Ct. 358, 360.

Where a testator devised lands to his two sons and to their heirs and assigns forever, and provided that the same should not be sold before the younger of the two should become of age, and that, should either of them die without issue, the survivor, his heirs and assigns, should take the part bequeathed to the son so dying, and that, in

the event both should die without issue, the land should pass to testator's surviving heirs, it was held that it does not create an estate tail by implication, because both by the language of the will, and especially by the positive command of the statute of 1845 (Rev. St. 1889, § 4593), the words "die without issue" mean dying without issue living at the death of the two sons, and therefore mean a definite failure of issue. *Gannon v. Pauk*, 98 S. W. 471, 473, 200 Mo. 75 (citing *Gannon v. Albright*, 81 S. W. 1162, 183 Mo. 238, 67 L. R. A. 97, 105 Am. St. Rep. 471).

Where an estate is devised to one for life, with remainder to another, and, if the remainderman die without children or issue, then to a third person, the general rule is that the words "dying without children or issue" are restricted to the death of the remainderman before the termination of the particular estate. *Harvey v. Bell*, 81 S. W. 671, 674, 118 Ky. 512.

Where an estate is devised to one for life with remainder to another, with the provision that, if the remainderman should die without child or issue, then to a third person, the words "dying without child or issue" are restricted to the death of the remainderman before the termination of the particular estate. *Reuling's Ex'r v. Reuling*, 126 S. W. 151, 152, 137 Ky. 637.

When the division of an estate is postponed by a will, a provision if one of the devisees "dies without issue" is construed to refer to his death before the time of division. *Shropshire v. Gault* (Ky.) 83 S. W. 590 (citing *Duncan v. Kennedy*, 72 Ky. [9 Bush.] 580; *Webster's Trustee v. Webster*, 21 S. W. 332, 93 Ky. 632; *Dunlap v. Shreve's Ex'rs*, 2 Duv. [63 Ky.] 334).

Where a testator devised and bequeathed the residue of his estate to his children and legal heirs absolutely and in fee simple and in equal shares, but in the concluding sentence of the will provided that, should any of his sons "die without issue, his or their share shall also revert" to the testator's children then living, the words "die without issue" mean death without issue during the life of the testator, though Acts 1851-52, p. 113, c. 91, § 3 (Shannon's Code, § 3875), provides that every contingent limitation made to depend upon the dying of any person without heir shall be a limitation to take effect when such person dies without heir, etc., as the case may be, living at the time of the death or born to him within 10 months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared in the face of the deed or the will creating it. *Frank v. Frank*, 111 S. W. 1119, 1120, 120 Tenn. 569.

Though in many cases it has been held that "death without issue" may mean death

without issue born, such construction has been excluded, except when clearly intended by Rev. St. 1898, § 2046 which provides that: "When a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." In re *Korn's Will*, 107 N. W. 659, 662, 128 Wis. 428.

Under Act July 9, 1897 (P. L. 213), providing that in any bequest or devise the words "die without issue," or "die without leaving issue," or "have no issue," or any words importing the failure of issue, shall be construed to mean a failure of issue in the lifetime or at the death of such person, unless a contrary intent appears, in a devise to a person for life, and then to his issue, "but in the event of the death of the devisee without issue" then over, the words "death without issue" mean a failure of issue in the lifetime of the devisee, and not an indefinite failure, and devisee takes a life estate, and not a fee, under the rule in *Shelley's Case*. *Lewis v. Link-Belt Co.*, 70 Atl. 967, 222 Pa. 139.

The effect of the act of July 9, 1897 (P. L. 213), was to change the previous rule that the words "die without issue," in a will, imported an indefinite failure of issue, so that thereafter, in the absence of a different intent shown in the will, such words would mean a failure of issue during the lifetime or at the death of the person named; and hence, where testator devised land to his nieces, providing that, should they "die without lawful issue," the real estate so devised should descend to and vest in the heirs of a third party, the words, "die without lawful issue" must be construed to mean a failure of issue in the lifetime of the nieces. *Smith v. Piper*, 80 Atl. 877, 878, 231 Pa. 378.

Testatrix, after giving shares of her estate to two sons, directed that such shares should be held by her executor "in trust for my said sons, the income and clear annual profit arising from the interest or share hereby given is to be paid to my said sons for five years after my death, and then only when in the judgment of my executor they shall have proven themselves to be entirely competent and qualified to take proper care of same, at which time the said trustee shall pay the same over to my said sons, and in the event of the death of either of my said sons without issue, then their share or shares shall revert back to my estate, and shall go to and be divided among my remaining heirs." Held, that the words "death without issue" meant death in the lifetime of the testatrix, and that there is nothing in Act July 9, 1897 (P. L. 213), to prevent such a construction of the will. *Slegwarth's Estate*, 33 Pa. Super. Ct. 622, 625.



The rule that where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of his dying without issue, the words "without issue" refer to a death without issue during testator's life, and the primary devisee surviving the testator takes an absolute estate in fee simple, does not apply where the language of the will indicates that the testator referred to a death either before or after his own, in which case the testator's intention will prevail. *Fifer v. Allen*, 81 N. E. 1105, 1106, 228 Ill. 507.

#### As without having had issue

The phrase "die without issue" means without having had issue. *Bond v. Moore*, 86 N. E. 386, 393, 236 Ill. 576, 19 L. R. A. (N. S.) 540 (citing *Field v. Peeples*, 54 N. E. 304, 180 Ill. 376).

In a will providing for testatrix's children and grandchildren, in which she directed that "if my grandson, \* \* \* and his brothers and sisters which he has or may have, 'shall die without issue,' then the said land to revert to the said children before named and their heirs," the words "shall die without issue" were not intended to mean without issue or children surviving the first takers at the time of their death, but meant if they should die without having had issue or children born to them, and hence birth of issue at any time vested the estate and defeated the limitation over. *Stafford v. Read*, 91 N. E. 91, 93, 94, 244 Ill. 138.

Testator devised his estate to his two sons, share and share alike, and, in case of the death of either of them "without issue," then the estate devised to him to go to the survivor of them, and, in case both died without issue, or in case of the death of both prior to testator's death, then in either such case to others. Held, that the words "without issue" should be construed to mean "death without having had issue," and not "without living issue" at the time of the sons' death, and hence both having survived the testator, and having issue born to them, the sons took title to the property devised in fee. *Kendall v. Taylor*, 92 N. E. 562, 563, 245 Ill. 617, 37 L. R. A. (N. S.) 164.

#### DIE WITHOUT LAWFUL ISSUE SURVIVING

Where testator gave a life estate to his wife and sister-in-law and provided that after their death "I bequeath to my daughter her heirs and assigns all my property," but, in case of the death of the daughter without lawful issue surviving her, the property was to descend to testator's son-in-law, it was not evident from the will that testator intended the words "without lawful issue surviving her" to have any other meaning than their well-established meaning, and the daughter surviving her father took an estate

tail which under Act April 27, 1855 (P. L. 368), was converted into estate in fee simple. *Hannon v. Fliedner*, 65 Atl. 944, 216 Pa. 470.

#### DIE WITHOUT LEAVING ISSUE

##### As indefinite failure of issue

Under Act July 9, 1897 (P. L. 213), providing (section 1) that in any bequest or devise the words "die without issue," or "die without leaving issue," or "have no issue," or any words importing the failure of issue, shall be construed to mean a failure of issue in the lifetime or at the death of such person unless a contrary intent appears, in a devise to a person for life, and then to his issue, "but in the event of the death of the devisee without issue" then over, the words "death without issue" mean a failure of issue in the lifetime of the devisee, and not an indefinite failure, and the devisee takes a life estate and not a fee under the rule in *Shelley's Case*. *Lewis v. Link-Belt Co.*, 70 Atl. 967, 222 Pa. 139.

#### DIE WITHOUT LEGAL HEIRS

A limitation over on the death of a devisee "without legal heirs or heir" was precisely the same in principle as where the expression used in making the limitation over was simply "should one of them die," without any provision as to the failure of issue. Testator, who left a widow, five children, and several grandchildren, first gave absolutely to his widow his dwelling and its contents, and then gave her four-tenths of his entire estate for her life, with remainder to his children in equal shares, then gave absolutely, without limitation or qualification, to each of his children, by name, one-tenth of his estate, less what might be due him from the child, then gave one-twentieth of the estate to a grandchild, and the remaining twentieth to other grandchildren, to be held in trust for them till they come of age, and then provided: "In case of either of my children's death without leaving lawful issue then I will and direct that their portion or inheritance in my estate shall be equally divided between my wife and my surviving children." Held, that the limitation over was only in case of a child dying before testator, and applied as well to the children's shares in the remainder in the four-tenths of the estate given to the widow for life as to the gifts to the children directly. *Lumpkin v. Lumpkin*, 70 Atl. 238, 244, 108 Md. 470, 25 L. R. A. (N. S.) 1063 (citing and adopting *Gerting v. Wells*, 59 Atl. 177, 100 Md. 97; *Hammett v. Hammett*, 43 Md. 311).

#### DIES NON

See Legal Holiday.

The words "legal holiday" and "dies non" are convertible terms. That they are so in the legislation of Louisiana "is dem-

onstrated by the fact that they are so used in Act No. 110 of 1896, p. 158, making Decoration Day a legal holiday." *State v. Duncan*, 43 South. 283, 287, 118 Ga. 702.

## DIES NON JURIDICUS

At the common law, a holiday was not, as in the case of Sunday, "dies non juridicus," and holidays have only the sanctity attached to them by statute. *State v. Lewis*, 72 Pac. 121, 123, 31 Wash. 516.

## DIFFERENCE

See Question in Difference; Settling of Differences.

A stipulation in a contract provided that, if any difference should arise between the parties, it should be submitted to arbitration. Held, that the word "difference" meant "disagreement," requiring arbitration before suit brought. *Fravert v. Fesler*, 53 Pac. 288, 290, 11 Colo. App. 387.

A suit by a foreign seaman on a Swedish vessel against such vessel, based on the alleged negligence of the master by which libellant was injured in an American port and compelled to leave the vessel, comes within the term "differences," as used in the provisions of the treaty of July 4, 1827, between Sweden and Norway and the United States (8 Stat. 352, art. 13), and that of June 1, 1910, between Sweden and the United States, both of which vest in the consular officers of each country exclusive jurisdiction to hear and determine "differences" which may arise between the officers and crews of merchant vessels of such country, either at sea or in port, without interference by the local authorities unless in case of breach of the peace, etc., and hence a court of admiralty of the United States is without jurisdiction. *The Ester*, 190 Fed. 216, 227.

## DIFFERENT

In act of Congress June 29, 1906, prohibiting a carrier from receiving a greater or less or "different" compensation than the rates specified in the tariff filed and in effect, the word "different" was not without a distinct purpose, the purpose of curing a defect in the law, and of suppressing evil practices, and one which would prevent the railroad company from receiving compensation different in kind from that mentioned in its published schedule, which it could not be doubted was payable in money. *Louisville & N. R. Co. v. Mottley*, 31 Sup. Ct. 265, 268, 219 U. S. 467, 475, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

It is not unfair to assume that Congress intended by the addition of the word "different," in such act, to the words "greater or less," to make the law more explicit and

more difficult to evade. *United States v. Chicago, I. & L. R. Co.*, 163 Fed. 114, 117.

Where a carrier receives a note from a shipper in payment of freight on shipments in interstate commerce, it thereby receives a "different compensation" from that which only the law authorizes, to wit, money, in violation of the Elkins Act (32 Stat. 847), as amended in 1906 (34 Stat. 587), providing that a shipper who is permitted to settle his charges by paying a less or different compensation to the carrier than is required by other shippers operating under the same or similar circumstances accepts or receives a discrimination. *United States v. Sunday Creek Co.*, 194 Fed. 252, 254.

## DIFFERENT OFFENSES

"Different offenses," as the term is used in relation to the same indictment charging different offenses, carries the idea of separate, distinct, and independent action in the perpetration of each. An indictment charging shooting with intent to kill as an offense under one statute was not bad as stating different offenses, because it incidentally charged that the shooting was from ambush in a manner that would constitute an offense under a different statute. *Collins v. Commonwealth (Ky.)* 70 S. W. 187, 188.

An indictment charging that defendants conspired to rob and did rob another of a silver dollar and a warrant of arrest in his hands against them does not allege two distinct offenses. *Lisle v. Commonwealth*, 82 Ky. 250, 252.

## DIFFERING IN PHASE

"Differing in phase," as used in the definition of multiphase system in the transmission of electric power, as consisting of the use of two or more alternating currents of equal period, but differing in phase, means that the two alternations or current waves do not come together, but one after or at a different time from the other. *Harrison v. Detroit, Y., A. A. & J. Ry.*, 100 N. W. 451, 452, 137 Mich. 78.

## DIFFICULT

The words "difficult" and "extraordinary," as used in Code Civ. Proc. § 3253, authorizing the court to grant an additional allowance where the action is difficult, must be given its usual and accepted meaning. A general rule specifying the precise limitation that they impose upon the power of courts to grant an additional allowance may be difficult to formulate, but every application to the facts of a particular case when presented is not troublesome. The section does not authorize an additional allowance in an action for personal injuries where the only question for the court is the amount of the damages, and no difficult questions of law

are involved. *Standard Trust Co. v. New York Cent. & H. R. R. Co.*, 70 N. E. 925, 926, 178 N. Y. 407.

The right to make an extra allowance of costs does not depend on whether difficult questions of law have been litigated, since the case may be "difficult and extraordinary" though it involve only questions of fact. *American Fruit Product Co. v. Ward*, 99 N. Y. Supp. 717, 721, 113 App. Div. 319 (citing *United Press Co. v. New York Press Co.*, 58 N. E. 527, 164 N. Y. 406, 53 L. R. A. 288).

The words "difficult and extraordinary" are words of limitation upon the power of the court, and the practice of making an additional allowance substantially in every case cannot be sanctioned. These words must be given their usual and accepted meaning. That defendant, in an action on contract for money only, was obliged to procure the record of a trial of the same action in the courts of a sister state, in the support of his plea of *res judicata*, did not justify the granting of an additional allowance to him on the ground that the case was "difficult and extraordinary." *Campbell v. Emslie*, 81 N. E. 458, 459, 188 N. Y. 509.

An action by a shipper against a carrier for breach of a contract, whereby the latter agreed to transport goods in time for shipment by a certain steamer, did not involve such a "difficult and extraordinary" question as to the true measure of damages, where the issues of fact were clearly defined, and the evidence procured in the ordinary way and without unusual expense, as to bring the case within Code Civ. Proc. § 3253, authorizing an extra allowance of costs in a difficult and extraordinary case. *Frey v. New York Cent. & H. R. R. Co.*, 100 N. Y. Supp. 229, 231, 114 App. Div. 623.

An action for breach of marriage promise was not a "difficult and extraordinary action," within the statute, and the court was not authorized to grant an allowance in addition to costs. *Horner v. Webendorfer*, 126 N. Y. Supp. 475, 477, 141 App. Div. 759.

An action by executors to obtain the judgment of the Supreme Court whether they had the equitable right to set off a sum due the testator against the distributive share of a legatee was not a "difficult and extraordinary case" within Code Civ. Proc. § 3253, authorizing an extra allowance of costs in such cases. *Leask v. McCarty*, 132 N. Y. Supp. 92, 95, 147 App. Div. 796.

The following case was held to be a "difficult and extraordinary" one: Plaintiff signed a syndicate agreement to underwrite the bonds of a railroad company, the syndicate being managed by defendants S. & Co., and the agreement having been assigned to defendant trust company as security for a loan of \$150,000 to S. & Co. for the benefit of

the subscribers. The scheme proving unsuccessful, plaintiff sued in equity for the cancellation of the agreement, alleging that he had been induced to become a subscriber by false representations, and also on the ground of failure of consideration and abandonment of the enterprise. The trust company answered, pleading separate defenses, and alleging that it had loaned S. & Co., as the agents of the subscribers, \$150,000, in good faith relying on plaintiff's subscription, etc. Pending the action, a receiver for S. & Co. had been appointed in bankruptcy, and also for the railroad company which had been organized, as contemplated, and in response to plaintiff's motion for leave to discontinue defendant trust company showed that it had expended \$5,350 for counsel fees and disbursements in the defense and preparation for the trial of the action, and had incurred additional like obligations, probably over \$4,000, and that it and the other defendants would be inconvenienced and put to extraordinary expense in the trial of the issues in another jurisdiction, and might be unable to obtain personal service. *Jermyn v. Searing*, 123 N. Y. Supp. 832, 834, 139 App. Div. 116.

#### DIFFICULTY

See *Brought on the Difficulty*; *Provoking a Difficulty*.

"Difficulty" means "controversy"; "a falling out." In a prosecution for shooting a person in sudden affray, an instruction that if accused sought the difficulty, and willingly engaged in it with intent to do the injured person great bodily harm or take his life, the jury could not acquit him on the ground of self-defense was erroneous, where the accused sought the injured person for the purpose of an explanation, since the jury might have misconstrued his seeking the injured person for an explanation as seeking the difficulty. *Ward v. Commonwealth (Ky.)* 103 S. W. 719, 720.

An instruction upon self-defense which used the word "difficulty" to refer to a "physical encounter," which resulted in one party being killed, was not erroneous. *State v. Ferguson*, 74 S. E. 502, 505, 91 S. C. 235.

#### DIG

Where a deed to land largely covered with limestone and granite, rising above the natural surface, reserved to the grantor all mines and minerals found on the land, with the right of entry to "dig" and carry the same away, it was held, in support of a construction of the deed as not giving the right to the grantor to open quarrying and blasting, that the word "dig" had a technical meaning, when the context was considered, and did not apply to open quarrying or blasting. *Brady v. Smith*, 73 N. E. 963, 964, 181 N. Y. 178, 106 Am. St. Rep. 531, 2 Ann. Cas. 636.

## DIKE

The words "embankment" and "dike," when used to represent the means employed to prevent the inundation of land, are synonymous and mean a structure of earth or other material usually placed upon the bank of a stream, or near the shore of a lake, bay, etc., the ends of which extend across lowland to higher ground forming a continuous bulwark or obstruction to water, designed to keep it within the inclosure, thus formed. *Morton v. Oregon Short Line Ry. Co.*, 87 Pac. 151, 153, 48 Or. 444, 7 L. R. A. (N. S.) 344, 120 Am. St. Rep. 827.

## DILAPIDATION

To furnish sewer connection would be to furnish a new improvement or an addition of an original character, and not repairing a building and would not be included in the meaning of the word "dilapidation," as used in a lease. *Torreson v. Walla*, 92 N. W. 834, 836, 11 N. D. 481.

## DILATORY

If a party plaintiff, instead of availing himself of a bar to an action on a counterclaim, prefers to risk a hearing on the merits, the bar is waived by not being interposed in time. Such a defense, not being on the merits, is called "dilatory," and its indulgence, except at the first favorable opportunity, is not favored. *Ennor v. Raine*, 74 Pac. 1, 3, 27 Nev. 178.

## DILATORY CREDITOR

He is a "dilatory creditor" who fails to comply with the surrogate's order as to the time of bringing in his claim against an estate or who, having complied therewith, does not begin suit within the time specified by statute when notified that the claim is disputed. *Simons v. Forster*, 63 Atl. 858, 859, 73 N. J. Law, 338.

## DILATORY PLEA

See, also, Plea in Abatement.

"Dilatory pleas" are those which do not answer the general right of the plaintiff, either by denial or in confession and avoidance, but assert matter tending to defeat the particular action by resisting the plaintiff's present right of recovery. They are thus steps which, if taken, are preliminary to the substantial defense of the action and in no way affect the legal right of the plaintiff to recover, save by suspending it, if they prevail, so far as the present action is concerned. *Walden v. Walden*, 57 S. E. 323, 325, 128 Ga. 126 (citing *Shipman's Com. Law Pl.* p. 189, § 273; *Andrews' Stephen's Pl.* [2d Ed.] p. 186, § 100).

The test as to whether a plea is dilatory or goes to the merits is that if defendant, upon establishing the facts, can defeat plain-

tiff's cause of action in whole or in part, or can obtain any substantial relief against plaintiff, the plea is not dilatory; but if the effect of sustaining the plea is not to deny or diminish defendant's liability on the cause of action asserted, or to obtain other substantial relief, against plaintiff, but merely to defeat his action as presently laid, and leave him an unimpaired right to sue again, the plea is dilatory. *Southern Ry. Co. v. Ansley*, 68 S. E. 1086, 1090, 8 Ga. App. 325.

## DILIGENCE

See Due Care and Diligence; Due Diligence; Extraordinary Diligence; High Degree of Care and Diligence; Highest Possible Degree of Care and Diligence; Necessary Diligence; Ordinary Diligence; Reasonable Care and Diligence; Reasonable Diligence.

### As a relative term

"Diligence" is a relative term. *Atlantic Coast Line R. Co. v. Moore*, 68 S. E. 875, 8 Ga. App. 185.

"Diligence" is comparative, depending largely upon the circumstances calling for its use. The courts do not require the same from parties who are apparently lured to their injury or destruction by the misleading conduct of the adversary party and for which they are not responsible. *Cleveland, C. & St. L. R. Co. v. Schneider*, 80 N. E. 985, 988, 40 Ind. App. 38.

It is difficult to define the term "diligence," as applied to the time for instituting mandamus proceedings, or as applied to the bringing of a bill for equitable relief, since the question must be dependent upon the circumstances of each particular case. But it may be said that the mere lapse of time since the right of action accrued is important, but not absolutely decisive, although, if the equitable claim is analogous to a legal right which is controlled by a statute of limitations, equity will apply the same limit within which an action must be begun. A party removed from a public office did not lose his right to mandamus, for reinstatement by laches, by instituting an ineffective action at law, because both proceedings were not concurrently instituted, where it appeared that there was no intentional waiver or abandonment of the claim to the office. *Hill v. Fitzgerald*, 79 N. E. 825, 826, 193 Mass. 569 (citing *Snow v. Boston Blank-Book Mfg. Co.*, 26 N. E. 1116, 153 Mass. 458, 458; *H. H. Wentworth Co. v. French*, 57 N. E. 789, 176 Mass. 442; *Hayward v. Elliot Nat. Bank*, 96 U. S. 611, 24 L. Ed. 855; *Broadway Nat. Bank v. Baker*, 57 N. E. 603, 176 Mass. 294; *Sunter v. Sunter*, 77 N. E. 497, 190 Mass. 449, 456; *Pope v. Salamanca Oil & Refining Co.*, 115 Mass. 286, 291; *Morse v. Hill*, 136 Mass. 60, 66; *Wood v. Westborough*, 5 N. E. 613, 140 Mass. 403; *Ransom v. City of Boston*, 79 N. E. 823, 193 Mass. 537).

The word "diligence," as applied to the duty of an electric company to avoid injury to third persons in the distribution of its electric energy, is a relative term, and the diligence demanded must be commensurate with the danger. *Perham v. Portland General Electric Co.*, 53 Pac. 14, 24, 33 Or. 451, 40 L. R. A. 799, 72 Am. St. Rep. 730.

#### DILIGENT CREDITOR

He is a "diligent creditor" of an estate who complies with the surrogate's order as to the time of bringing in his claim and who brings suit thereon within the time specified by statute when the claim is disputed. *Simons v. Forster*, 63 Atl. 858, 859, 73 N. J. Law, 338.

#### DIMENSIONS

"Dimensions" is "defined as including length, breadth, and thickness, implying the presence of three of these characteristics; a body having extent, size, and magnitude in at least two directions. In commercial transactions the word usually relates to capacity or bulk and implies cubic rather than superficial proportions. At least there must be measurement in more than one direction; mere length will not do; a straight line has no 'dimensions.'" The provision in *Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192*, for imitation precious stones not exceeding an inch in "dimensions," does not exclude stones exceeding an inch in a single dimension. To be excluded they must exceed an inch in more than one direction. *Albert Lorsch & Co. v. United States*, 146 Fed. 379, 380, 76 C. C. A. 651.

#### DIMENSION STONE

The terms "dimension stone" and "footing stone" are synonymous, but neither is the synonym of "rubblestone." *Nugent v. Armour Packing Co. (Mo.)* 81 S. W. 506, 507.

#### DIMINISH

A mere classification of the capital stock of a corporation into preferred and common shares without an increase or decrease in the number is not an increasing or diminishing of its capital stock, within Civ. Code, § 362, providing the method of increasing or diminishing. *California Telephone & Light Co. v. Jordan*, 126 Pac. 598, 602, 19 Cal. App. 536.

#### DIMINISHED CAPACITY

"Diminished capacity to labor," as used in an instruction in a personal injury action, held to mean lessening, without totally destroying, the power to labor. *Houston & T. C. R. Co. v. Maxwell (Tex.)* 128 S. W. 160, 164.

Where, in an action for injuries to plaintiff's wife, the jury were confined to an al-

lowance of the pecuniary loss to the husband from his wife's diminished capacity, the court's failure to further limit the words "diminished capacity" by confining them to labor or the earning of money was not error. *Southern Pac. Co. v. Blake (Tex.)* 128 S. W. 668, 669.

#### DINKEY CABOOSE

A "dinkey caboose" is one which is shorter and lighter than other cabooses and has a step which is a round bar of iron instead of being a plank step, the steps being hung down more like a ladder, while the steps of the old style caboose are boxed and set into the platform, like those on passenger cars. *Texas & P. R. Co. v. Hemphill*, 86 S. W. 350, 351, 38 Tex. Civ. App. 435.

#### DINKEY ENGINE

A "dinkey engine" is a locomotive of regular pattern, but small size. *Howard v. Waterman Lumber & Supply Co. (Tex.)* 134 S. W. 387, 388.

#### DIOCESE OF CENTRAL NEW YORK

The term "diocese of Central New York" is not used to designate a corporation but is used to designate a subdivision of territory in which the Protestant Episcopal Church operates in the state of New York. *Kingsbury v. Brandegee*, 100 N. Y. Supp. 353, 354, 113 App. Div. 606.

#### DIP

See Sheep Dip.

"Dip" is the turpentine which has dripped from the trees and been caught in boxes prepared for that purpose. Being severed from the realty, such turpentine is personal property. *Floralda Sawmill Co. v. J. T. Parrish*, 46 South. 461, 462, 155 Ala. 462; *Knight v. Empire Land Co.*, 45 South. 1025, 1027, 55 Fla. 301.

The art of enameling metal is old. Many different formulas and substances are used to form the enamel, but the usual process is substantially as follows: Certain ingredients, usually a mixture of silica or sand, and of other substances having a fluxing property to produce glass when mixed with sand, and subjected to heat, are mixed together mechanically. This mixture is called by enamelers the "mix." The mix is then subjected to a high degree of heat and fused, resulting in a vitrified or glassy mass. This is called the "frit." The frit is then put in a mill and ground fine, with a mixture of clay and water, resulting in a liquid paste. This is called the "dip." The metal article to be enameled is then dipped in the paste, dried, and subjected to a very high temperature in an oven or muffle. In some cases more than one dipping and burning takes place. The

result is, if the operation is successful, a metal article with its surface covered with an adherent coat of metal. *National Enameling & Stamping Co. v. New England Enameling Co.*, 151 Fed. 19, 29, 80 C. C. A. 485.

## DIPLOMA

Webster defines a "diploma" as "a document bearing record of a decree conferred by a literary society or educational institution." *State ex rel. Crandall v. McIntosh*, 103 S. W. 1078, 1084, 205 Mo. 589 (quoting and adopting the definition in *State ex rel. Granville v. Gregory*, 83 Mo., loc. cit. 130, 53 Am. Rep. 565).

## DIRECT

See As Directed; Indirect—Indirectly.

As used in act approved February 18, 1897 (Acts 1896-97, p. 1465, § 11), providing that the board of revenue for Cullman county shall have authority to "direct and control" the property of the county, all the power in this direction that is best in the management of the county's property is conferred. This power necessarily includes the authority to change officers from one room to another whenever deemed expedient and proper. *White v. Hewlett*, 42 South. 78, 79, 143 Ala. 374.

The charter of a city authorizing the council to "direct and control" the location of railroad tracks does not include the power to authorize the construction of railroads and the exercise of the right to eminent domain. It merely vests in the council as part of the police power, to be exercised in providing for the public safety and convenience in the use of streets and alleys, a supervision over the location of railroad tracks, where the authority to construct the railroad already exists. *Chicago, B. & N. R. Co. v. Porter*, 46 N. W. 75, 76, 43 Minn. 527, 529.

The words "control and direction," in Laws 1859, p. 359, c. 143, as amended by Laws 1889, p. 7, c. 7, providing that the free bridge over the Mohawk river between certain towns shall be under the control and direction of the commissioners of highways of the towns, were of no broader significance with reference to the duties and powers of the commissioners of highways of the two towns in question than the words "care and superintendence" in the highway law with reference to the duties and powers of commissioners of highways in the towns of the state. *Town of Palatine v. Canajoharie Water Supply Co.*, 86 N. Y. Supp. 412, 414, 90 App. Div. 548.

From the use of the word "direct," in Const. art. 6, § 15, providing that counties shall be laid off into civil districts, as the General Assembly may direct, it is not to be necessarily implied that the Legislature has no power to lay off the districts by its own

immediate action. *Grainger County v. State*, 80 S. W. 750, 763, 111 Tenn. 234.

### As command or order

The word "direct," as used in a statute, has been held in many cases to have imposed a mandatory duty. Acts 1898, c. 123, § 95, provides that the board of police commissioners of Baltimore City is "directed," at the request of the board of park commissioners, to detail from time to time such of the regular police force as the park commissioners may deem necessary to preserve order within the parks, which policemen shall be under the direction of the board of park commissioners and have the same power as conservators of the peace in Baltimore City. Other sections require the police commissioners to preserve the peace within the city limits, require policemen to report to the police board, authorize the police commissioners to employ a permanent police force, provide that the mayor and council shall have no control over the police commissioners, and that no officer of the city shall interfere with them. Held, that the word "directed," as used in section 95, was merely directory as respects detailing of policemen for the parks, so that the park commissioners, appointees of the mayor, could not compel the police commissioners to detail patrolmen for park service. *Upshur v. City of Baltimore*, 51 Atl. 953, 958, 94 Md. 743.

A provision in a will that "I hereby direct my executors to sell" and dispose of all my real estate gives no discretionary authority, but the direction is imperative, and the executors are absolutely obliged to make the conversion, and its proceeds are thereafter to be held and treated as personal property. *Thissell v. Schillinger*, 71 N. E. 300, 301, 186 Mass. 180.

In an action on an insurance policy, defendant requested an instruction that if, prior to October 10, 1906, insured had any serious illness or disease of an organic type, accompanied by circumstances which would naturally lead a reasonable man to suppose that he was afflicted with an illness or disease that might impair his health, and must thereby necessarily have been impressed on his memory, it was his duty to disclose the same to the insurer, and his failure to do so warrants the jury in finding, and "I direct you to find, a verdict for defendant." Held, that the quoted clause was an implied direction to the jury to make an affirmative finding as to the facts stated in the instruction, which was therefore properly refused. *Kelper v. Equitable Life Assur. Soc. of United States*, 159 Fed. 206, 216.

### As desire

See Desire.

### As proximate

See Proximate.

**As require**

The word "direct," as used in a request for bids for coal for a city asking for coal to be delivered as fast as "required," will be construed as synonymous with "require," when the bids offered to deliver at such times and in such quantities as the city might direct, and the body of the contract stated in one place that the coal should be delivered promptly "as ordered," and in another, that on failure to make delivery "as ordered," the city might either forfeit the contract or buy coal at the contractor's expense in the open market. *McLean County Coal Co. v. City of Bloomington*, 84 N. E. 624, 627, 234 Ill. 90.

Where executors were empowered to sell the land at their discretion, but, if the land should be sold, they were then "directed" to pay over one-half of the proceeds in cash, the word "directed" would mean "required." *Whitfield v. Thompson* (Miss.) 38 South. 113, 118.

Where, in an action for injuries to a servant while painting a roof, the court instructed the jury that if the master was guilty of negligence "in requiring plaintiff to go upon said ladders on the roof," etc., and there was evidence that plaintiff was told to go upon the roof, etc., but there was nothing to show that he was compelled to do so, the word "requiring" was used by the court in the sense of "directed" and could not have misled the jury. *Planters' Gin Co. v. Washington* (Tex.) 132 S. W. 880, 881.

**Natural and proximate synonyms**

"Proximate," defined as lying or being in immediate relation with something else, is synonymous with "direct" or "immediate." "Direct" is defined as meaning free from intervening agencies or conditions; hence characterized by immediateness of relation or of action. *Texas & P. R. Co. v. Coutourle*, 135 Fed. 465, 473, 68 C. C. A. 177 (quoting *Stand. Dict.*).

The words "direct and proximate cause," as used in defining the liability arising from one's negligence, mean that cause which in a natural and continuous sequence, unbroken by any new cause, produces the injury. *St. Louis Southwestern R. Co. of Texas v. Lowe* (Tex.) 86 S. W. 1059, 1060.

The word "direct," in a policy insuring against all "direct loss or damage by fire," read in the light of Civ. Code 1893, § 2094, providing that a loss or injury may be incurred from fire without the actual burning of the articles or property, means no more and no less than "proximate" or "immediate." The word "direct" means merely the "immediate" and "proximate," as distinguished from the "remote," cause. *Insurance Co. of North America v. Leader*, 48 S. E. 972, 974, 121 Ga. 260 (citing *Ermentrout v. Girard Fire & Marine Ins. Co.*, 65 N. W. 635, 63 Minn. 305,

30 L. R. A. 846, 56 Am. St. Rep. 481; and quoting and adopting *Elliott, Ins.* § 221).

**DIRECT ACTING ENGINE**

The term "direct acting engine" is one which good usage warrants to exclude, engines with crank and flywheel and other rotative parts. *Blake & Knowles Steam Pump Works v. Warran Steam Pump Co.*, 155 Fed. 285, 289.

**DIRECT AND PROXIMATE CAUSE**

See *As the Direct and Proximate Cause*.

**DIRECT AND SPECIAL INTEREST**

The "direct and special interest" of a private individual which entitles him to apply for mandamus to enforce his private right in the performance of a public duty must be independent of and distinguishable from that which obtains to him in common with the general public, though it may not be necessary that such particular interest should be different in kind from that of the general public or peculiar to the individual alone. *Louisville Home Telephone Co. v. City of Louisville*, 113 S. W. 855, 858, 130 Ky. 611.

**DIRECT ATTACK**

A "direct attack" on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. *Continental Gin Co. v. De Bord*, 123 Pac. 159, 161, 34 Okl. 66.

"A 'direct attack' on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. Or in other words, as is said by the Supreme Court in *Crawford v. McDonald*, 33 S. W. 327, 88 Tex. 630, 'a direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of same in a proceeding instituted for that purpose, such as a motion for a rehearing, an appeal, an injunction to restrain its execution, etc.'" *Newman v. Mackey*, 83 S. W. 31, 33, 37 Tex. Civ. App. 85 (citing *Vanf. Col. At.* § 2).

By "direct attack upon the judgment" is meant some proceeding in the action in which it was rendered, such as an attempt to impeach it on the ground of fraud. An appeal therefrom is a "direct attack." *Parsons v. Weis*, 77 Pac. 1007, 1009, 144 Cal. 410.

A "direct attack" on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of same in a proceeding instituted for that purpose, such as a motion for a rehearing and appeal, some form of writ of error, a bill of review, or an injunction to restrain its execution. *Scudder v. Cox* (Tex.) 80 S. W. 872, 873.

Where the main object of an appeal, writ of error, or motion, if taken or made in the original action, or in an independent action, is for the purpose of setting aside a judgment, such attack is "direct attack" on the

judgment. *O'Neill v. Potvin*, 93 Pac. 20, 21, 41 Colo. 316 (citing 1 Black, Judg. § 252).

A judgment against defendant in an action for divorce upon a defective affidavit of service is not absolutely void and subject to attack in any court, but is subject only to direct attack, and an appeal is such a "direct attack." *Belknap v. Belknap*, 134 N. W. 734, 735, 154 Iowa, 213.

#### Collateral distinguished

Where a judgment set up in bar is directly assailed as procured by fraud, it is a "direct," and not a collateral, attack. *Houser v. W. R. Bonsal & Co.*, 62 S. E. 776, 778, 149 N. C. 51.

In a proceeding to revive a judgment, an attack on the jurisdiction of the court by answer is a "direct attack" and not a "collateral attack." *Waterman v. Bash*, 89 Pac. 556, 558, 46 Wash. 212.

Where a petition, in a suit to quiet title to certain land, alleges that an order of court directing a guardian to sell land was procured by fraud, and prays to have the order of sale and subsequent orders approving the sale canceled, the suit is a "direct attack" on the orders and not a "collateral attack." *Brown v. Trent* (Okla.) 128 Pac. 895, 897.

Where certain claims were allowed against a decedent's estate, and the administrator was ordered to sell certain real estate for the payment thereof, a contest filed by plaintiff, objecting to the confirmation of a sale had under such order because the debts were barred by limitations and charging fraud on part of the husband of one of the heirs in procuring the administration to be opened for purpose of allowing such claims, constituted a "direct" and not a collateral attack on the proceedings allowing the claims. *Smart v. Panther*, 95 S. W. 679, 681, 42 Tex. Civ. App. 262.

A suit by a judgment debtor to vacate the judgment and to enjoin the execution of the same on the ground of its invalidity is a "direct" and not a collateral attack. *Lane v. Moon* (Tex.) 103 S. W. 211, 214.

A suit to redeem from a mortgage which has been foreclosed by a decree of the court on the ground that complainant, who was made a defendant in the foreclosure suit, was not legally served with process therein, and his right of redemption was therefore not cut off, is a "collateral" as distinguished from a "direct" attack in the foreclosure decree. *Cohen v. Portland Lodge No. 142*, B. P. O. E., 144 Fed. 266, 268.

#### DIRECT CAUSE

As proximate cause, see Proximate Cause.

#### DIRECT CONTEMPT

A direct contempt is a contempt committed in the face of the court, and may consist

of noisy or tumultuous conduct in the presence of the court, or so near thereto as to interrupt its proceedings, or an open defiance of its just powers or authority, or in disrespectful behavior or language to the presiding judge, or any improper conduct tending to defeat or impair the administration of justice. *Ex parte Clark*, 106 S. W. 990, 996, 208 Mo. 121, 15 L. R. A. (N. S.) 389.

A direct contempt of court is the doing of any improper act in the presence of the court while in session, tending directly to disturb the proceedings, or to defeat, disturb, or impair the administration of justice, or the refusal to do any improper act required to be done in open court in the presence of the court, where such refusal directly tends to disturb the proceedings, or to defeat, disturb, or impair the administration of justice. *Ferriman v. People*, 128 Ill. App. 230, 234.

Criminal contempts are direct when committed in the face of the court, or when committed out of the view of the court, if they tend to impede, embarrass, or obstruct the court in administering justice. *In re Clark*, 103 S. W. 1105, 1107, 126 Mo. App. 391.

A "direct contempt" is such conduct or language as interferes with the orderly administration of justice, and may consist of an open insult in the presence of the court to the person of the presiding judge, or a resistance to or defiance of the power and authority of the court. *Neely v. State*, 54 South. 315, 316, 98 Miss. 816, 33 L. R. A. (N. S.) 138, Ann. Cas. 1913B, 281.

Contempts are either direct or indirect. They are "direct" when committed in the immediate view and presence of the court or of the judge at chambers. *State ex rel. Breen v. District Court of Second Judicial Dist.*, 85 Pac. 870, 871, 34 Mont. 107; *Smythe v. Smythe*, 114 Pac. 257, 258, 28 Okl. 266.

Appearing in court and refusing to produce the body of a child pursuant to the requirements of a writ of habeas corpus, without a reasonable excuse, or willfully making an evasive or insufficient answer thereto, is a "direct contempt" committed in the presence of the court. *Smythe v. Smythe*, 114 Pac. 257, 258, 28 Okl. 266.

#### DIRECT DAMAGES

Damages are either "direct" or "consequential"; the former being such as result from an act without the intervention of any intermediate controlling or self-efficient cause. *Loiseau v. Arp*, 114 N. W. 701, 703, 21 S. D. 566, 14 L. R. A. (N. S.) 855, 130 Am. St. Rep. 741.

#### DIRECT DESCENDANTS

The words "direct descendants" as used in a will conveying certain property to be held in trust for the benefit of testator's son and his direct descendants, means his nearest



or immediate descendants; in other words, "children." *Ballantine v. Ballantine*, 152 Fed. 775, 776, 786.

Where testator's father established by his will a certain permanent fund, with reference to which he gave testator a power of appointment to the father's "direct descendants," a will bequeathing a certain fund to "testator's children" was a valid exercise of the power; they being the direct descendants of testator's father. *Stone v. Forbes*, 75 N. E. 141, 144, 189 Mass. 163.

A testator directed that the remainder of his estate be held by his executor upon trust to pay the income to his wife until the youngest child then living reach the age of 21 years, and on the death of his wife to pay income to his four children, naming them, "or to the direct descendant or descendants of either of them in equal shares," or if the youngest child should reach the age of 21 years during the life of the wife, to pay one-third of the income to his wife and two-thirds to his said children, "or such of them as may then be living, or to their direct descendant or descendants share and share alike." Held, that the children took a vested interest in the income, subject to the trusts created, and that on the death of the widow, there being no gift over of the corpus, the children or the direct descendants of those deceased would take the trust fund absolutely, and that the words "direct descendants," as used by the testator, mean descendants of any child dying during the existence of the trust, and not descendants of those of the children living at the death of testator's wife and the termination of the trust. *Frelinghuysen v. Frelinghuysen*, 85 Atl. 171, 172, 80 N. J. Eq. 482.

#### DIRECT EVIDENCE

See, also, Direct Testimony.

"Direct evidence" is proof of the facts by witnesses who saw the acts done or heard the words spoken." *Buckler v. Kneezell* (Tex.) 91 S. W. 367, 370.

"Direct evidence" is that evidence which is given by eyewitnesses who have seen the things about which they testify. *Knickerbocker v. Worthing*, 101 N. W. 540, 544, 138 Mich. 224.

"Direct evidence" is defined to be that which proves the fact in dispute directly, without an inference or presumption, and which, in itself, if true, conclusively establishes that fact. *Lake County v. Nellon*, 74 Pac. 212, 214, 44 Or. 14.

"Direct evidence" is such as the confessions of the accused, or the testimony of persons who saw the crime committed." *State v. Collins* (Del.) 62 Atl. 224, 226, 5 Pennewill, 263.

"Direct evidence" is that which immediately points to the question at issue. It is

positive in its character. It often depends upon the credibility and intelligence of the witnesses who testify to a knowledge of the facts. It may also be documentary in character. 'Direct' and 'circumstantial' evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is 'direct.' 'Circumstantial' evidence is composed of facts which raise a logical inference as to the existence of the fact in issue." *United States v. Greene*, 146 Fed. 803, 824.

"Circumstantial evidence" is a kind of evidence wholly different from evidence consisting of the direct and positive testimony of eyewitnesses. It is no stronger than the weakest link in the chain. It is inferior in cogency and effect to "direct evidence." The fallacy of the declaration that "circumstances cannot lie" lies in the fact that whether the facts constituting the chain of circumstances existed depends on the truthfulness of the witnesses deposing to the facts. There may be ten links in the chain of circumstantial evidence offered to convict a defendant. Each one of these links or circumstances is testified to by witnesses; and the difference, therefore, is, where the question is whether the defendant committed the homicide, that, if the testimony be direct, the killing may be established by the clear testimony of a single eyewitness, whereas, if the evidence be circumstantial, a number of witnesses necessarily must be examined to make out every link in the chain, every circumstance in the series, before the jury will be warranted in deducing from the circumstances the conclusion that the defendant did the killing. A statement by the court to the jury, therefore, that circumstantial evidence is as good as any other kind of evidence is tantamount to telling the jury that there is no difference between the nature of circumstantial evidence and the nature of direct testimony, and is therefore wholly misleading and erroneous. *Haywood v. State*, 43 South. 614, 615, 90 Miss. 461.

Where perjury was assigned on defendant's testimony that he had written certain telegrams while in a cell in Ogden, Utah, and immediately gave them to S., evidence of two police officers that before reaching the police station, after defendant was arrested at Ogden, S. took one of the telegrams from her hat and handed it to one of the officers, and that the other was found in defendant's grip, which the officer took charge of, when defendant was arrested, and searched immediately after reaching the police station, and before defendant was taken to his cell, constituted "direct" evidence of the falsity of defendant's testimony, under Code Civ. Proc. § 1881, defining "direct evidence" as that which proves the fact in dispute without inference or presumption, and which in itself, if true, conclusively establishes the fact. On a trial for perjury, "direct evidence" is not

limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial or which is absolutely incompatible with his evidence, or physically inconsistent with the facts testified to by him. *People v. Chadwick*, 87 Pac. 384, 386, 4 Cal. App. 63 (citing *People v. Green*, 54 Cal. 592; *People v. Barry*, 63 Cal. 62; *People v. Wells*, 37 Pac. 529, 103 Cal. 631; *People v. Porter*, 38 Pac. 88, 104 Cal. 415).

An instruction that evidence is of two kinds, direct and circumstantial, and that "direct evidence" is when a witness testified directly of his own knowledge of the main fact or facts to be proven, and that circumstantial evidence is proof of certain facts and circumstances in a certain case from which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind, is correct. *State v. Gatlin*, 70 S. W. 885, 888, 170 Mo. 354; *State v. Hillman*, 127 S. W. 102, 103, 142 Mo. App. 510.

#### DIRECT INJURY

A "direct injury to property" is a taking thereof within the constitutional meaning of that word relating to the taking of property for public use. *Leffmann v. Long Island Ry. Co.*, 93 N. Y. Supp. 647, 648, 47 Misc. Rep. 169.

"When soil is removed from its natural position by one owner and the soil of an adjoining owner is thereby permitted to fall, such result is not a consequential damage, but a direct injury. \* \* \* It is true that the word 'damaged' has been held to mean such damages as were recoverable at common law between individuals, but, in view of the rule of the carrying away of land by its own weight is not consequential damage, but is an actual infringement and 'taking of property,' we think the same rule should apply where the land is carried away by means of water which is released in a public street by any means which would amount to an actual 'taking' and a resulting damage." And hence where land is carried away by means of water which is released, in a public street through the operations of certain railroads in constructing a tunnel under the street, the damage so occasioned is an actual infringement and "taking of property" within the Constitution, declaring that private property shall not be "damaged" for public use without just compensation. *Farnandis v. Great Northern R. Co.*, 84 Pac. 18, 20, 21, 41 Wash. 486, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027.

#### DIRECT INTEREST

If the legal effect of a judgment will be to establish a claim against the witness, he has a "direct interest" in the event of the suit, within *Laws 1867*, p. 183, removing the

disqualification of witnesses on account of their interest in the event, except that a party interested shall not be allowed to testify of his own motion. A judgment against a street railway company for death caused by the alleged negligence of a motorman in an action to which the motorman was not a party would not be evidence against the motorman in a suit by the railway company to recover over against him, and hence such motorman was not interested in the suit against the railway company so as to be an incompetent witness for the defendant therein within such statute. *Feitl v. Chicago City R. Co.*, 71 N. E. 991, 994, 211 Ill. 279.

#### DIRECT LEGAL INTEREST

The interest of the president of a bank as a stockholder is a "direct legal interest," within Code Civ. Proc. § 329, which prohibits a person having such an interest from testifying as to a contract or transaction had with a decedent. *Dickenson v. Columbus State Bank*, 98 N. W. 813, 814, 71 Neb. 260.

#### DIRECT LOSS

The word "direct," as used in a fire policy, insuring a stock of merchandise in a described building against "all direct loss or damage by fire," except as provided therein, means no more and no less than proximate and immediate. *Insurance Co. of North America v. Leader*, 48 S. E. 972, 974, 121 Ga. 260.

The word "direct," as used in a policy of insurance against direct loss or damage by fire, means the immediate or approximate, as distinguished from the remote, cause but the approximate results of fire may include other things than combustion, as the resulting fall of a building, injuries to insured property by water, loss of goods by theft, exposure of goods during the fire, etc. A fire in a furnace of material so highly inflammable in character as to cause such volumes of heat and smoke to escape through the registers into the rooms, damaging the house and furniture, though without ignition outside of the furnace, is a "fire," within a policy of insurance against "direct loss or damage by fire." *O'Connor v. Queens Ins. Co. of America*, 122 N. W. 1038, 1049, 140 Wis. 388, 25 L. R. A. (N. S.) 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118.

#### DIRECT PAYMENT

"Direct payment," as used in Rev. St. 1887, § 4303, requiring an affidavit for attachment to set forth that defendant is indebted to plaintiff, specifying the amount of such indebtedness and whether on a contract for the direct payment of money, means absolute, unconditional, free from intervening agencies or conditions. *Ross v. Gold Ridge Min. Co.*, 95 Pac. 821, 14 Idaho, 687.

The word "direct," as defined by Webster, is immediate, express, absolute; and if

it is to be given any meaning as used in the attachment statute referring to actions on contracts for the payment of money it must distinguish a particular class of contracts for the payment of money from all other contracts for the payment of money. In other words, that class of contracts which provide for the direct payment of money must differ somewhat from all other contracts for the payment of money, or the term "direct" has no meaning whatever. An action against sureties on a bond conditioned to be void if the principal performed his contract is not an action on a contract for the "direct payment of money," within Code Civ. Proc. § 890, authorizing an attachment in such an action. *Ancient Order of Hibernians, Division No. 1, of Anaconda, v. Sparrow*, 74 Pac. 197, 199, 29 Mont. 132, 64 L. R. A. 128, 101 Am. St. Rep. 563, 1 Ann. Cas. 144.

The contract of an indorser of a promissory note or guarantor of a bill of exchange is a contract for the "direct payment of money," and a judgment may issue against the property of such indorser or guarantor, when action is brought to enforce payment of the debt, the same as against the acceptor or maker, under the provisions of Rev. St. 1887, § 4302. *Armstrong v. Slick*, 93 Pac. 775, 14 Idaho, 208.

#### DIRECT PROCEEDINGS

There is some confusion and apparent conflict in the decisions as to the term "direct proceedings," frequently used in reference to the method by which a judgment may be attacked. It arises, to some extent, from the fact that under an old system, when courts, law, and equity were separate, legal and equitable relief were administered on different sides of the docket. *Houser v. W. R. Bonsal & Co.*, 62 S. E. 776, 778, 149 N. C. 51.

Where it is sought to set aside a judgment for irregularity because of want of service of summons, a motion in the cause to correct the record and make it speak the truth, and show that there was no service of summons nor appearance by defendant, is a direct proceeding, and is the appropriate remedy. *Simmons v. Defiance Box Co.*, 62 S. E. 435, 148 N. C. 344.

#### DIRECT SERVICE

"Direct service," as used in connection with furnishing telephone service, means the exclusive use of a pair of wires running into the telephone exchange through the local cables. *Cumberland Telephone & Telegraph Co. v. Kelly*, 160 Fed. 316, 323, 87 C. C. A. 268, 15 Ann. Cas. 1210.

#### DIRECT SETTLEMENT

A "direct settlement," as used in designating a transaction on the board of trade, is effected at the close of business hours by a broker's offsetting such contracts in the

day's transactions as are similar in amount and time of delivery to counter contracts made with other members of the association, ascertaining therefrom the difference of the aggregate prices of such similar contract and charging it over against the other party or to his credit, as the case may be. It is then placed as a debit or credit on the clearing house sheet of the respective parties to the contracts. *Board of Trade of City of Chicago v. L. A. Kinsey Co.*, 130 Fed. 507, 509, 64 C. C. A. 669, 69 L. R. A. 59.

#### DIRECT TAX

A tax is "direct" if imposed upon property solely by reason of its ownership. The tax measured by the net annual income imposed by Act Aug. 5, 1909, § 38, upon the carrying on or doing of business in a corporate capacity, is an excise and not a "direct tax," and hence is not invalid because not apportioned among the several states according to population. *Flint v. Stone Tracy Co.*, 31 Sup. Ct. 342, 348, 220 U. S. 107, 55 L. Ed. 389 (quoting and adopting definition in *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 158 U. S. 601, 39 L. Ed. 1108).

#### DIRECT TESTIMONY

See, also, Direct Evidence.

Where the fact in controversy is proved by those who speak of their own actual and personal knowledge of its existence, the proof is established by "direct testimony." *State v. Blackburn* (Del.) 75 Atl. 536, 7 Pennewill, 479.

#### DIRECT TRUST

See Express Trust.

Trusts are classified into two general divisions, "direct or express trusts" (that is, those springing from agreement of the parties), and into 'constructive or implied trusts' (that is, those created by the rules and principles of equity). Under this latter class fall all of those trusts known distinctively as implied or constructive, as well as those called resultant; in short, all those that do not spring from the agreement of the parties. \* \* \* A constructive trust is one not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice." *Newman v. Newman*, 55 S. E. 377, 379, 60 W. Va. 371, 7 L. R. A. (N. S.) 370.

#### DIRECTED TO THE DEFENDANT

Under Rem. & Bal. Code, § 228, requiring that service made by mailing shall be "directed to the defendant," the mailing of process, addressed to the partnership, in the partnership name only, is not a mailing "directed to the defendant," since in the absence of statutes, a partnership cannot sue

or be sued apart from its members. *Yarborough v. Pugh*, 114 Pac. 918, 921, 63 Wash. 140, 33 L. R. A. (N. S.) 351.

### DIRECTED VERDICT

See Request for Directed Verdict.

In a criminal case, the court may direct a verdict against the state if the evidence is insufficient to overcome the presumption of innocence, but a verdict cannot be directed against the defendant, though the court may charge the jury that if they believe the evidence they will find the defendant guilty; that not being a "directed verdict." *Everett v. Williams*, 67 S. E. 265, 152 N. C. 117.

There is no difference between "permitting" and "directing" a verdict so far as those terms relate to the action of the judge or the effect upon the parties. *Brooks v. Boyd*, 57 S. E. 1093, 1096, 1 Ga. App. 65.

There is a distinction between a demurrer to plaintiff's evidence and a "directed verdict" by the court in plaintiff's favor. In order to sustain a demurrer to plaintiff's evidence for failure to make out a prima facie case, it is not necessary for the court to pass on the credibility of plaintiff's witnesses; their credibility is not only assumed, but the probative facts are given every reasonable intendment in order to ascertain the plaintiff's right of recovery. But a verdict for the plaintiff, peremptorily directed by the court upon evidence mainly oral in cases where the burden of proof is on the plaintiff, occupies an entirely different relation to the established principles of law. It has often been held that uncontradicted oral evidence of a party holding the burden of proof is not sufficient to command a directed verdict where the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men. *Link v. Jackson*, 139 S. W. 588, 596, 158 Mo. App. 63 (citing *Anthony v. Association*, 38 N. E. 973, 162 Mass. 354, 26 L. R. A. 406, 44 Am. St. Rep. 367).

### DIRECTION

See By the Written Direction of the Court; Under the Direction of.

The reference in appellants' bill of exceptions, that within a certain time after the trial of the cause a motion for a new trial was filed, as shown by entry of record at the time as appears on certain pages of the abstract, to the overruling of which the appellants excepted, did not amount to such a "direction to the clerk to copy the motion" for a new trial as is contemplated by Rev. St. 1899, § 866 (Ann. St. 1906, p. 815), providing that, if the bill of exceptions shall contain a direction to the clerk to copy the motion, and the same is copied, into the record, the motion need not be copied or set forth in the bill of exceptions. *State ex rel.*

*Waggoner v. Leichtman*, 130 S. W. 94, 95, 146 Mo. App. 295.

### As authority to control

One of the accepted meanings of the word "direction" is the act of governing, ordering, or ruling. *Kellyville Coal Co. v. Bruzas*, 79 N. E. 309, 311, 223 Ill. 595.

The terms "direction" and "control," in Laws 1906, c. 657, § 42a, providing that employes of a railroad company intrusted with superintendence or control of other persons in the same employ, or with the authority to control any other employé, or who have as a part of their duty physical control or direction of the movement of a signal, switch, locomotive engine, etc., shall be deemed "vice principals," mean that which proceeds from superior authority, and the mere fact that an engineer switching freight cars had to rely upon a rear brakeman to give signals would not give the brakeman authority to control the engineer within the meaning of the statute so as to make him a vice principal of the railroad company, so as to render the company liable for injuries to a station agent from the negligence of the brakeman who independently of the statute would be his fellow servant. *Hallock v. New York, O. & W. Ry. Co.*, 90 N. E. 1124, 1126, 197 N. Y. 450.

The words "order or direction," in the Employers' Liability Act making a corporation liable for injuries to its employes caused by the negligence of a person in its service, to whose order or direction the injured employé was bound to conform, apply to special orders as distinguished from general orders, and the protection of the statute does not extend to an employé injured by the negligence of his foreman while working under general directions. *Indianapolis St. Ry. Co. v. Kane*, 80 N. E. 841, 843, 169 Ind. 25.

### DIRECTLY

The word "directly," as used in a local option law, prohibiting sales made "directly" or indirectly, does not mean a sale by the accused himself, but an exchange for money, as distinguished by a sale by a device resorted to to evade the law, and a complaint, charging a violation of such local option law, which alleges that a sale was made directly, is supported by evidence of a sale by a barkeeper of accused. *State v. O'Brien*, 90 Pac. 514, 520, 35 Mont. 482, 10 Ann. Cas. 1006.

Under a quarantine resolution of a board of health that the chairman should quarantine all "directly" exposed persons, it was proper to keep members of the sick person's family secluded from the public, where he was confined to his home with them. *Kirby v. Harker*, 121 N. W. 1071, 1072, 143 Iowa, 478.

**As proximately**

In Laws 1907, p. 495, c. 254, making a railroad liable for injuries to employes caused in whole or in the greater part by the negligence of other employes, and requiring the court to submit to the jury whether the railroad or the person injured was guilty of "negligence directly contributing to the injury," the quoted words are used to convey the idea of negligence proximately contributing to the injury. *Zeratsky v. Chicago, M. & St. P. Ry. Co.*, 123 N. W. 904, 907, 141 Wis. 423.

Since the words "directly contributing" have been construed to mean "proximately contributing," the trial judge would have followed the better practice had he used the latter term instead of the former in his submission of questions to the jury under Laws 1907, c. 254, providing that in an action for injuries against a railroad company the question as to whether the person injured was guilty of any negligence which "directly contributed" to the injury should among others be given to the jury. *Jensen v. Wisconsin Cent. Ry. Co.*, 128 N. W. 982, 985, 145 Wis. 326.

**Reasonable time or as soon as possible**

"In *Duncan v. Topham*, 8 C. B. 225, the declaration alleged an order for goods to be delivered to the defendant within a reasonable time, but the proof showed a written order for 'five tons, etc., but it must be put on board directly,' to which the plaintiff replied, 'I shall ship you the five tons, etc., tomorrow.' Held, that the proof did not support the declaration and that 'reasonable time' was a more protracted delay than 'directly.'" *Henderson v. McFadden*, 112 Fed. 389, 394, 50 C. C. A. 304.

**DIRECTLY INTERESTED**

Under *Mills' Ann. St. § 4816*, by which no party to any civil action or person directly interested is allowed to testify therein of his own motion, where the adverse party defends as an administrator, a stockholder of the plaintiff bank, who was also cashier and a director, is a "person directly interested" and is incompetent to testify in an action against an administratrix to recover money of the bank misappropriated by the deceased. *Brown v. First Nat. Bank of Douglas County*, 113 Pac. 483, 484, 49 Colo. 393.

**DIRECTLY OR INDIRECTLY**

"Directly or indirectly to or for the public," includes service whether to a municipality or its inhabitants, or both, or by a municipality for itself or its inhabitants. *Calumet Service Co. v. City of Chilton*, 135 N. W. 131, 138, 148 Wis. 334.

A fraud order inquiry pending before the Post Office Department is a proceeding in which the United States, although having no direct money or pecuniary interest in the re-

sult, is "directly or indirectly interested," within the meaning of Rev. St. § 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is so interested. *Burton v. United States*, 26 Sup. Ct. 688, 695, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

A fire insurance policy provided that the company should "not be liable for loss caused, directly or indirectly, by invasion, \* \* \* or by order of any civil authority, or for loss or damage occasioned by or through \* \* \* earthquake." Held, that the words "directly or indirectly" did not apply to the provision respecting earthquake; that, construing such provision most strongly against the insurer, in accordance with the established rule, the word "occasioned" was equivalent to "caused," and related to the origin of the fire; and the provision exempted the company from liability for a loss only where an earthquake was the immediate, direct, and proximate cause of the fire which destroyed the property. *Baker & Hamilton v. Williamsburgh City Fire Ins. Co. of Brooklyn*, 157 Fed. 280, 282; *Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard*, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

A policy insuring against all direct loss by fire, except as thereafter provided, and then declaring that insurer shall not be liable for loss caused "directly or indirectly" by earthquake, makes insurer liable for loss by fire where an earthquake broke the water mains causing the water to escape, so that the fire department of the city had no water with which to extinguish the fire occurring the next day; the earthquake not being, in legal contemplation, the cause of the fire, for none of the parties contemplated that earthquake might cut off the water supply. It was averred that the earthquake broke the water mains so that the fire department had no water with which to extinguish the fire occurring the next day. It was clear that the averments failed to show that the earthquake was in legal contemplation the cause of the fire. It was averred on the part of the insurance company that the words "directly or indirectly" meant "proximately" or "remotely," and that the company was not liable for loss of which an earthquake was the remote cause, but this contention the court would not decide. *Pac. Union Club v. Commercial Union Assur. Co. (Cal.)* 107 Pac. 728, 732.

**DIRECTOR**

See Board of Directors; Dummy Director.

The words "directors, trustees, or managers," as used in Pub. St. 1901, c. 219, § 13, providing that service of writs against corporations may be made upon one of the

directors, trustees, or managers, have reference to the board of directors, board of trustees, or board of managers, in view of chapter 245, § 5, providing that a person doing business in this state and residing outside the state may be summoned upon trustee process by serving the writ upon his servant or agent having charge of such business, and chapter 2, § 9, providing that the word "person," as used in section 5, shall apply to "bodies corporate and politic as well as to individuals," and chapter 245, § 3, providing that a trustee writ, shall be served upon the defendant and trustee, like a writ of summons; and where a foreign corporation had no clerk, treasurer, cashier, or member of its executive board of control within the state, service of trustee process, in a suit commenced in M. county, was properly made on a person having charge of a timber lot in such county, though a vice president of the corporation and two superintendents of mills operated by it reside in C. county. *Dinnin v. Hutchins*, 76 Atl. 126, 127, 75 N. H. 470.

In Code Civ. Proc. §§ 1781, 1782, authorizing an action against one or more of the trustees, directors, or managers, or other officers of a corporation, to compel an accounting and payment to the corporation of any money or property which they have acquired themselves or transferred to others in violation of their duty, the word "director" is used in the same way that the words "trustee," "manager," or other officer of the corporation having a general superintendence of its concerns, so that a director of a foreign corporation, transacting business and having its principal office in the state, may sue former directors for an accounting and restoration of the moneys of the corporation alleged to have been misapplied by them, and such right of action is not restricted to domestic corporations only. *Miller v. Quincy*, 72 N. E. 116, 117, 179 N. Y. 294.

#### **As agent or trustee**

A "director" of a corporation is an agent thereof. *Marsters v. Umpqua Valley Oil Co.*, 90 Pac. 151, 153, 49 Or. 374, 12 L. R. A. (N. S.) 825.

"Directors" are trustees and representatives of the common property and the entire interests of all the stockholders of every class and description. *Jones v. Nassau Suburban Home Co.*, 103 N. Y. Supp. 1089, 1091, 53 Misc. Rep. 63.

A "director" of a corporation is not a trustee in the strict sense, though his duties are in many respects similar to those of a trustee, and his relation to the corporation is, in general, essentially that of a trustee. *Marr v. Marr*, 66 Atl. 182, 183, 72 N. J. Eq. 797.

#### **As managing agent**

See Managing Agent.

#### **As officer of corporation**

See Officer (of Corporations).

#### **As surety**

See Surety.

#### **As trustee**

See Trustee.

### **DIRECTORY STATUTE**

A clause in a statute is directory where it contains mere matters of direction, and is not followed by words of positive prohibition. *Gomez v. Timon* (Tex.) 128 S. W. 656, 657.

While difficult to formulate an exact rule for determining when a statute is "mandatory" and when it is "directory," as a general rule that interpretation will be adopted which will best subserve justice and the true legislative intent. A statute is mandatory when, if not all its provisions are complied with according to their terms, the thing done in reference to it is void. A "directory statute" is one whose provisions or part of them operate merely to advise the official or person who is to do or omit something therein pointed out, leaving the act or omission not destructive of the legality of what is done in disregard of the direction. *Ex parte St. Hilaire*, 64 Atl. 882, 883, 101 Me. 522, 8 Ann. Cas. 385 (citing Bish. Cr. Law, § 25; End. Interp. St. § 431).

A mandatory provision of a statute is one the omission to perform which renders proceedings void; while a directory provision is one the observance of which is not necessary to the validity of proceedings. *Bond v. City of Baltimore*, 84 Atl. 258, 260, 118 Md. 159.

Whether a statutory requirement is mandatory or directory depends on its effect. If no substantial rights depend on it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than that prescribed and substantially the same results obtained, then the statute will generally be regarded as directory, but if not, it will be mandatory. *Granite Bituminous Paving Co. v. McManus*, 129 S. W. 448, 452, 144 Mo. App. 593.

"By 'directory provisions' is meant that they are to be considered as giving directions which ought to be followed, but not so limiting the power in respect to the directions given that it cannot be effectually exercised without observing them." *Hubbert v. Campbellsville Lumber Co.*, 24 Sup. Ct. 28, 30, 191 U. S. 70, 48 L. Ed. 101 (quoting *Cooley*, Const. Lim. 74).

It is difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely "directory" and when mandatory or imperative; but, of all the rules mentioned, the test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing

to be accomplished, or, in other words, whether it relates to matter material or immaterial, to matter of convenience or of substance. In determining whether or not a statutory provision as to the proceedings of a public officer is mandatory, significance is to be attached to the nature of the act, and also the language and form in which it is couched, as, for instance, whether or not it is, on the one hand, affirmative and such as would naturally be chosen to prescribe directions for an orderly and proper dispatch of business, or, on the other, negative or prohibitive, or expressive of a condition precedent, or appropriate to the creation of a limitation of power. *Appeal of Spencer*, 61 Atl. 1010, 1011, 78 Conn. 301.

"Directory statutes" are such as are not of the substance of the thing provided for. *Wisconsin Laws 1869*, c. 68, requiring an officer or person making a service of summons to indorse on such copy, over his signature, the date of such service, and that the same is a true copy of the original, is mandatory and not directory. *Wendell v. Durbin*, 26 Wis. 390, 392.

Statutory requirements for the guide of officers in the conduct of business and designed to secure order and system are "directory." *French v. Edwards*, 13 Wall. (80 U. S.) 506, 511, 20 L. Ed. 702.

Where a statute specifies a time within which a public officer is to perform an official act regarding the rights of others, it is merely directory, unless from the nature of the act or the phraseology of the statute the designation of the time is a limitation on the power of the officer. *Hudson v. Williams*, 62 S. E. 1011, 1013, 5 Ga. App. 245.

"Words which in their ordinary acceptance, and when interpreted exclusive of the context and the subject-matter, imply a discretion of power, such as 'may,' 'it shall be lawful,' and the like, become, in the construction of statutes, mandatory, where such is the legislative intent. The general rule is stated as follows: 'Where a statute confers authority to do a judicial or, indeed, any other act, which the public interest or even individual right may demand, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having a right to make the application.' In giving one person the authority to do an act, the statute impliedly gives to others the right of requiring that the act be done; the power being given for the benefit, not of him who is invested with it, but of those for whom it is to be exercised. The Legislature in such cases imposes a positive and absolute duty, and not merely gives a discretionary power; and it must be exercised upon proof of the particular facts out of which the power arises. When, therefore, the language in which the authority is conferred is only 'di-

rectory,' permissive, or enabling (for instance, when it is enacted that the person authorized 'may' or 'shall if he deems it advisable,' or that 'it shall be lawful' for him to do the act), it has been so often decided as to have become an axiom that such expressions have a compulsory force, unless there are special grounds for a different construction." *In re Owens' Estate*, 85 Pac. 277, 279, 30 Utah, 351 (quoting and adopting definition in *Clark v. City of Elizabeth*, 40 Atl. 616, 737, 61 N. J. Law, 565, as quoted from *Maxw. Interp. St.* 218, 219).

## DIRT

See *Pay Dirt*.

Though Acts 1911, p. 605, c. 240, denouncing as unlawful the sale, keeping for sale, etc., of "milk containing visible dirt," fixed no standard by which visible dirt can be determined, it is not thereby rendered indefinite and incapable of enforcement, as the term "visible" has the common and specific meaning of being perceivable to the eye, and "dirt" contemplates any foul or filthy substance, or whatever, adhering to anything, renders it foul, unclean, or offensive. *State v. Closser* (Ind.) 99 N. E. 1057, 1060.

## DIRTY SLUT

The words "dirty slut" spoken of a woman do not impute unchastity; the word "slut" meaning a careless, lazy woman, one uncleanly in her person. *Cooper v. Seaverns*, 105 Pac. 509, 510, 81 Kan. 267, 25 L. R. A. (N. S.) 517, 135 Am. St. Rep. 359 (quoting the definition in *Cent. Dict.*).

## DISABILITY

See *During Disability*; *Total Disability*. Other disability, see *Other*.

The word "disability," as used in Ky. St. 1903, § 2525, providing that, if a person entitled to sue was, at the time the cause of action accrued, a married woman, the action may be brought within the number of years after the removal of the "disability of such person," does not mean, "disability to sue" but is merely descriptive of the condition of the person. *Terrell v. Maupin* (Ky.) 83 S. W. 591, 592.

"Disability to sue," as used in statutes of limitations, is used in the sense of a disability similar to minority, and refers to some characteristic of the person disqualifying him from acting freely in the protection of his rights, and not to an impediment to the suability of the particular cause of action. *Wescott v. Upham*, 107 N. W. 2, 3, 127 Wis. 590 (citing 5 Words and Phrases, p. 4060).

Where a statute enables married women who have property to pursue all remedies authorized by law in other cases, the mere social and marital influence of a husband

over the wife cannot be regarded as a "disability." *Brown v. Cousens*, 51 Me. 301, 305.

### Death

The word "disability" does not mean the same as the word "death," and is not ordinarily used to signify the same, and is defined as a want of competent power, strength, or physical ability, weakness, incapacity, impotence; and so a policy of insurance against loss on account of "temporary or permanent disability," without other words from which it was claimed liability for death was incurred, except a printed indorsement on the back stating it was a "limited health policy on the life" of insured, does not insure against death. *Hill v. Travelers' Ins. Co. of Hartford, Conn.*, 124 N. W. 898, 146 Iowa, 133, 23 L. R. A. (N. S.) 742.

### As physically disabled

The word "disability," as used in a statement in a benefit certificate, providing that it is also understood and agreed that the liability of the order to the said member or his beneficiary in case of his disability or death shall not exceed the amount of one assessment actually realized for the benefit fund from the membership in this division for the month in which the disability or death occurs, from which shall be deducted all accident and old age benefits previously paid hereunder, and not to exceed the principal sum named in this certificate, from which shall be deducted all accident and old age benefits previously paid hereunder, would cover any disability from accident, and not disability from old age. *Hall v. Royal Fraternal Union*, 61 S. E. 977, 979, 130 Ga. 820.

Under a contract for disability benefits to members, providing that the word "disability" should be held to mean physical inability to work, the term "disability" means inability to perform such labor as the injured party was engaged in at the time of his injury or similar work open and available to him whereby he could support and maintain himself as he was able to do before the accident, and not an inability to perform the ordinary duties in the employment in which he was engaged at the time of his injury. *Keith v. Chicago, B. & Q. R. Co.*, 116 N. W. 957, 959, 82 Neb. 12, 23 L. R. A. (N. S.) 352, 130 Am. St. Rep. 655.

A regulation of an employer's relief department that "whenever used in this regulation the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work," refers to physical inability to work, whether by sickness or accidental injury, and in case of injury the right to relief is not limited to persons who can do no work of any kind. *Sturgiss v. Atlantic Coast Line R. Co.*, 60 S. E. 939, 941, 80 S. C. 167.

The contract of an employé with the relief department of a railroad provided for payment for each day of disability by reason of accident. The regulations of the department provided that the word "disability" should be held to mean physical inability to work. It is held that the decision of the medical examiner that the employé who had suffered amputation of a leg by reason of his injury was "able to work" will not be construed to mean that the employé has recovered from his disability, when it is shown by the evidence that the examiner at the same time declared plaintiff "able to do light work at present, \* \* \* but he is still disabled." *Chicago, B. & Q. R. Co. v. Olsen*, 97 N. W. 831, 833, 70 Neb. 559.

A charge to allow compensation for bodily injuries and disabilities is not objectionable as allowing one recovery for bodily injuries and another for disabilities; the terms "injuries" and "disabilities" evidently referring to the same thing. *St. Louis Southwestern R. Co. of Texas v. Highnote (Tex.)* 84 S. W. 365, 368.

### Insolvency

Bankruptcy is not a "disability," as that term is used in Code Civ. Proc. § 40 (Gen. St. 1901, § 4468), providing that, in case of the death or disability of the party, the court may allow the action to continue by or against his representative or successor in interest. *Buck Stove & Range Co. v. Vickers*, 101 Pac. 668, 670, 80 Kan. 30, 34.

### Resignation

Rev. St. § 953, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270, provides that a bill of exceptions shall be authenticated, if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one sat on the trial, and in case the judge before whom the cause was tried, by reason of death, sickness, or other disability, was unable to hear and pass on the motion for a new trial and allow and sign the bill of exceptions, then the judge who succeeds such trial judge, or any judge of the court, if the evidence in such case has been or is taken in stenographic notes, or if the judge is satisfied by any other means that he can pass on such motion and allow a true bill of exceptions, shall pass on the motion and allow and sign the bill; but, if he is satisfied that he cannot fairly pass on the motion and allow and sign the bill of exceptions, he may in his discretion grant a new trial. Held, that the term "disability," as so used, was not limited to physical or mental disability, arising either from death, sickness, insanity, or disorder of like character, by reason of which the trial judge was disabled from performing his judicial functions, but meant "incapacity to do a legal act," and hence included incapacity of the trial judge to sign and settle a bill of exceptions, due to his resignation from the bench,



in which case, the evidence having been taken stenographically and transcribed, his successor had jurisdiction to sign and settle a bill of exceptions. *McIntyre v. Modern Woodmen of America*, 200 Fed. 1, 5, 121 C. C. A. 1.

The appointment of the District Judge before whom a cause was tried in a Circuit Court to be a Circuit Judge to serve in the Commerce Court and his acceptance of such appointment creates a "disability," which disqualifies him while so serving from allowing a bill of exceptions in such cause, and it may properly be allowed and signed by another judge appointed or designated temporarily to preside in such court, under Rev. St. § 953, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270, which provides that in case the judge before whom a cause is tried in a federal court is, "by reason of death, sickness or other disability," unable to hear and pass upon a motion for new trial and allow and sign a bill of exceptions, such bill may be allowed and signed by the judge who succeeds him or any other judge of the court in which the cause was tried holding such court thereafter. *Sanborn v. Bay*, 194 Fed. 37, 39, 114 C. C. A. 57.

## DISABLE

See Wholly Disabled.

Immediately disabled, see Immediately.

A regulation of an employer's relief department that "whenever used in this regulation the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work," refers to physical inability to work, whether by sickness or accidental injury, and in case of injury the right to relief is not limited to persons who can do no work of any kind. *Sturgiss v. Atlantic Coast Line R. Co.*, 60 S. E. 939, 941, 80 S. C. 167.

### Permanent injury

Where an instruction employed the expression, "will in the future disable him from earning money and making a support," the word "disable" is not modified by the adverb "totally," and evidently is used to describe the condition of permanency in the impairment of earning capacity rather than the complete destruction thereof. *Goodloe v. Metropolitan St. Ry. Co.*, 96 S. W. 482, 485, 120 Mo. App. 165.

## DISAGREE—DISAGREEMENT

A stipulation in a contract provided that, if any difference should arise between the parties, it should be submitted to arbitration. Held, that the word "difference" meant "disagreement," requiring arbitration before suit brought. *Fravert v. Fesler*, 53 Pac. 288, 290, 11 Colo. App. 387.

There is a "disagreement" within the meaning of the term as used in the arbitration clause of an insurance policy, providing that in the event of disagreement as to the amount of loss the same shall be ascertained by two competent and disinterested appraisers, so as to necessitate arbitration, where insured and the insurer have in writing stated their disagreement as to the amount of the loss, and have each selected an arbitrator. *Fowble v. Phoenix Ins. Co. of Hartford, Conn.*, 81 S. W. 485, 487, 106 Mo. App. 527.

The words "disagreement" and "inability to agree," in statutes authorizing condemnation proceedings in cases of disagreement or inability to agree, imply negotiations and an unsuccessful attempt to agree. In re *City of New York*, 91 N. Y. Supp. 987, 992, 45 Misc. Rep. 184.

Where the purchaser under an executory contract for the purchase of land assigns, without the joinder of his wife, his interest thereunder for a certain consideration, part of which is paid in cash, and by the terms of the assignment it is provided that, in case of "disagreement," the portion of the price so paid shall be returned to the assignee, a subsequent demand by the assignee upon the assignor for a perfect title by warranty deed from the assignor and his wife, and the refusal of such demand by reason of the wife's refusal to join in the deed, constitutes a "disagreement"; and hence specific performance cannot be had against the assignor upon his subsequent acquisition of the legal title from his vendor. *Kasal v. Hlinka*, 136 N. W. 569, 571, 118 Minn. 37.

## DISALLOW—DISALLOWANCE

The word "disallow" is defined by Webster's Dictionary to mean to refuse to allow, to deny the validity of, to disown or reject; and a judgment reciting that, objections being filed "in the nature of a claim," it was ordered that they be "disallowed" was not a statement that the ordinary heard evidence and passed on the question of title. The word is often applied to a refusal to allow an amendment to pleadings as indicating holding, as a matter of law, that such offered amendment is improper and not that the judge heard evidence in regard to the allegations and passed on the merits of them. *Dix v. Dix*, 64 S. E. 790, 791, 132 Ga. 630.

An order of the board of county commissioners, allowing \$50 "in full payment of the claim" for \$300, is not a disallowance of a definite and certain part of the claim, within *Mills' Ann. St. § 802*, authorizing appeals where any claim against the county shall be disallowed in whole or in part. *Washington County v. Murray*, 100 Pac. 588, 590, 45 Colo. 115.

Where a bankrupt's trustee indorsed a claim "disallowed as a preferred claim," such indorsement did not constitute an adjudication of the invalidity of an alleged lien held by the claimant, so as to bar the trial and determination of that question in an action against the trustee to enforce the lien. *Skilton v. Coddington*, 93 N. Y. Supp. 460, 463, 105 App. Div. 617.

Where a contract for the sale of certain patents was to be noneffective if the patents were "disallowed in substance," and several of the patents were not allowed, and one was allowed, but on account of its interference with a patent for a similar device was not issued, the patents were "disallowed in substance." *Murphey v. Well*, 61 N. W. 315, 316, 89 Wis. 146.

## DISAPPEARANCE

A provision, in an accident insurance policy, that it did not cover "disappearance" or any injury of which there was no visible mark of violence appearing on the body of the insured undoubtedly included disappearance by death or otherwise. *Standard Life & Accident Ins. Co. of Detroit, Mich., v. McNulty*, 157 Fed. 224, 226, 85 C. C. A. 22.

## DISAPPOINTMENT

As mental anguish, see *Mental Agony or Anguish*.

## DISAPPROVED

The word "disapproval," as used in Const. art. 7, § 15, providing that every bill passed by the Legislature making appropriations of money, embracing distinct items, shall, before it becomes a law, be presented to the Governor, and if he disapprove the bill, or any item or appropriation therein contained, he shall communicate such disapproval with his reasons therefor to the House in which the bill originated, and any item or items so disapproved shall be void unless repassed by a majority of each House according to the rules and limitations prescribed in the preceding section in reference to other bills, relate not simply to disapproval in the mind of the Governor, but to some act of disapproval, some manner of disapproval. That act or manner of disapproval provided for just above these words, and to which "so disapproved" clearly relates, is by communication with reasons to the House in which the bill originated. The very connection between the words "so disapproved" and "unless repassed" show that the Constitution intends that the disapproval of the Governor, to be a disapproval at all, must be communicated to the House of the Legislature in which the bill originated, so that the Legislature may again act upon the item, so that it may re-pass it, if the Governor's reasons for

disapproval do not persuade it to do otherwise, by a majority of each House according to the rules and limitations prescribed. Only by being "so disapproved" is the item declared void by the Constitution. Disapproval in any other form or manner does not affect it. *May v. Topping* (W. Va.) 64 S. E. 849, 850.

## DISASTER

The word "disaster" is defined to be misfortune, mishap, calamity; any unfortunate event especially sudden or great misfortune; a word used with much latitude, but most appropriately for some unforeseen event of a very distressing or overwhelming nature; hence an instruction which uses "disaster" rather than accident is not erroneous. *Colorado Springs Electric Co. v. Soper*, 88 Pac. 161, 165, 38 Colo. 126 (quoting and adopting definition in Cent. Dict.).

The sinking of a vessel, causing damage to its cargo, was the "disaster" causing the loss, within an open policy of marine insurance issued to a carrier on its cargoes, insuring them "for account of whom it may concern," containing a provision that no actions should be maintained thereon "unless commenced within the time of 12 months next after the disaster causing such loss or damage shall occur," and the insured had immediately a right of action for the benefit of any party in interest, independently of any antecedent recovery against it by the cargo owner, and that an action was barred in 12 months thereafter. *Lehigh Val R. Co. v. Providence Washington Ins. Co.*, 172 Fed. 364, 365, 97 C. C. A. 62.

## DISBARMENT PROCEEDING

As criminal action, see *Criminal Action*.

## DISBURSE—DISBURSEMENTS

See *Money Disbursed*; *Necessary Disbursements*.

See, also, *Appropriate—Appropriation*.

The appropriation of public money and its disbursement are two different and separate acts. Webster's definition of "appropriation," so far as here pertinent, is: "The act of setting apart or assigning to a particular use or person in exclusion of all other; application to a special use or purpose, as of money to carry out some object." "Disbursement" is of course the same as "payment." In our systems of government, federal and state, the appropriation and the payment of public moneys are always kept distinct, and appropriations are often coupled with some condition whose performance is to come after the appropriation, but before the actual payment. *Brown v. Honiss*, 68 Atl. 150, 158, 74 N. J. Law, 501.

**As costs**

See Cost.

**As expenditure**

The word "disbursements," as used in section 48 as amended, should be construed, with reference to receivers, to include the value of property taken possession of by the receiver and delivered to others in specie. In re Cambridge Lumber Co., 136 Fed. 983, 986.

**DISCARD**

An instruction that, if any witness had willfully testified falsely in regard to any material fact, the jury was at liberty to "disregard and discard his entire testimony" is not objectionable because of the use of the words "disregard" and "discard" instead of "distrust," as used in Code Civ. Proc. § 2061, subd. 3, providing that, when a witness is false in one part of his testimony he is to be "distrusted" in the others, since the court did not tell the jury that they ought to reject, or that they must reject, the entire evidence of the witness, but simply instructed them that they were at liberty to disregard and discard the whole evidence of a witness who had willfully testified falsely to a material fact in the case. Whitaker v. California Door Co., 95 Pac. 910, 911, 7 Cal. App. 757; People v. Soto, 59 Cal. 367.

**DISCHARGE**

See Brush Discharge; Legally Discharged; Port of Discharge; Release and Discharge; Release, Remise, and Forever Discharge.

Ready to discharge, see Ready.

See, also, Release.

**Of attachment**

In Ballinger's Ann. Codes & St. § 5374, as to the effect of giving a bond in attachment, expressly stating that the attachment shall be "discharged" and restitution made of property taken, the term "discharged" is used as referring to the attachment and must mean that the attachment then becomes a closed incident in the case. Section 5376 provides that at any time before or after the "release" of the property, or before an actual levy has been made, application may be made that the writ be discharged on the ground that it was improperly issued. This section cannot be consistent with section 5374, if it is held that application may be made to discharge the writ of attachment after it has already been discharged by the giving of the bond. It must therefore refer to a "release" of the property made voluntarily or authorized, but without a discharge of the writ. Brady v. Onffroy, 79 Pac. 1004, 1007, 37 Wash. 482.

**Of debt**

The word "discharge," as used in a memorandum in which plaintiff admitted a

certain payment and consented to discharge the defendant until he can pay the balance without distressing his family, can mean no more than giving a day of payment of the balance until payment could be so made. Austin v. Smith, 39 Me. 203, 204.

**Of debtor**

A "discharge" of a defendant from execution, not appearing to have been by authority of the plaintiff or to have been acquiesced in or approved by her or her administrator, does not discharge the judgment. Wood v. Tyrrell (R. I.) 67 Atl. 429 (citing Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42).

**Of employé**

To "suspend" or "discharge" means to remove either temporarily or permanently from employment, and to "reinstate" may mean to receive back into employment only, or to put back into the same position or situation from which removed. Under Code Supp. 1907, § 679h, authorizing the chief of police to suspend or discharge any member of the force, but giving such suspended person the right to appeal to the board which might reinstate him, upon reinstatement by the board of a police captain suspended by the chief of police, the chief is not compelled to reinstate him as a captain, but could require him to report for duty as police patrol. Markey v. Pickley, 132 N. W. 883, 885, 152 Iowa, 508.

"Any form of words which convey to the servant the idea that his services are no longer required are sufficient to constitute a discharge." Johnson v. Crookston Lumber Co., 100 N. W. 225, 92 Minn. 393.

**Of guardian**

The words "removal" and "discharge" are used indiscriminately in the statute to designate orders of court which have the effect of simply removing guardians, executors, etc., from office without exonerating them from liability to account. Code Civ. Proc. § 1805, requiring action on a guardian's bond to be commenced within three years from the "discharge or removal" of the guardian, applies to an action after a final order of the court removing or discharging the guardian, and does not include termination of the guardianship by the ward attaining majority. Cook v. Ceas, 77 Pac. 65, 68, 143 Cal. 221.

Under section 32, c. 34, Comp. St., providing that no action shall be maintained against the sureties in any bond given by the guardian, unless it be commenced within four years from the time when the guardian shall have been "discharged," the term "discharged" means any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival

of a minor ward at the age of 21, or otherwise. *Goble v. Simeral*, 93 N. W. 235, 236, 67 Neb. 276 (quoting and adopting statements in *Loring v. Alline*, 9 Cush. [63 Mass.] 68).

A guardian's death was his "discharge," within Rev. Laws, c. 149, § 35, providing that no action shall be maintained against the sureties on a guardian's bond, unless brought within four years from his "discharge." *Hill v. Arnold*, 85 N. E. 97, 199 Mass. 109.

#### Of officer

The ineligibility of a person to office because of official default in the past does not cease upon the amount of the default being made good by his sureties in satisfaction of their own obligation. A receipt to the sureties for payment made by them under their bond is not a "discharge" obtained by the officer, within Const. art. 182. *State ex rel. Stewart v. Reid*, 42 South. 662, 663, 118 La. 106.

#### Of official duty

Revisal 1905, § 1863, provides that game wardens shall possess all the powers held by a constable at common law and under the statutes. Section 3708 declares that the prohibition against carrying concealed weapons shall not apply to officers of the state or any county, city, or town, charged with the execution of the laws, while "discharging their official duties." Held, that a game warden, shown to have had a concealed pistol in his possession while not in the actual performance of his duties, was not within the exception of section 3708, even if invested with the power of a constable for all purposes. *State v. Simmons*, 56 S. E. 701, 702, 143 N. C. 613 (citing *State v. Hayne*, 88 N. C. 625; *State v. Boone*, 44 S. E. 595, 132 N. C. 1107).

#### Of prisoner

A "discharge" by a United States commissioner is not equivalent to an acquittal. *Williams v. State*, 82 N. E. 790, 791, 169 Ind. 384.

As used in New York City Charter, § 1398 (Laws 1897, c. 378, as amended by Laws 1901, c. 466), authorizing magistrates to discharge on Sunday persons who are under arrest, the word "discharge" has no reference to a trial but merely authorizes persons arrested to be discharged on Sunday, if there be no ground for holding them. *People ex rel. Price v. Warden of New York State Reformatory for Women, Bedford, N. Y.*, 76 N. Y. Supp. 728, 729, 73 App. Div. 174.

#### Of receiver

The "discharge" of a receiver relates to the termination of the receivership and is asked and ordered for the reason that there is no longer any necessity for continuing the receiver. It is thus distinguished from a removal, which is simply a change in the personnel of the receivership, which itself con-

tinues unaffected. *Pagett v. Brooks*, 37 South. 263, 264, 140 Ala. 257.

The "discharge" of a receiver relates to the termination of the receivership. *Riply v. Redwater Lumber Co.*, 106 S. W. 474, 478, 48 Tex. Civ. App. 311.

#### Of tax

The way to "discharge" a tax being to pay it, the property owner, who once pays taxes on his property in good faith, is thereby discharged from further liability for taxes thereon for the year for which the taxes paid were assessed. *Nyce v. Schmoll*, 82 N. E. 539, 540, 40 Ind. App. 555.

### DISCHARGE IN BANKRUPTCY

As decree, see Decree.

Bankr. Act 1898, § 17, provides that a "discharge in bankruptcy" does not release a bankrupt from provable debts not duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless the creditor had notice or actual knowledge of the proceedings. *Dight v. Chapman*, 75 Pac. 585, 586, 44 Or. 265, 65 L. R. A. 793.

### DISCHARGEABLE DEBT

A fine imposed, though after filing the petition, by a state court for a criminal contempt, is not a dischargeable debt under Bankr. Act July 1, 1898, c. 541, § 17a, 30 Stat. 550, and proceedings for its enforcement will not be stayed, if the contempt have itself occurred prior to filing the petition. *In re Hall*, 170 Fed. 721.

### DISCHARGED AS IMPROVED

The term "discharged as improved" is not the equivalent of "discharged as cured," within the meaning of the latter term as used in Gen. St. 1909, § 8484, providing for restoring the rights of persons discharged as cured of insanity. *Johnson v. Schoch*, 118 Pac. 696, 697, 85 Kan. 837.

### DISCHARGING

See Dispatch for Discharging.

### DISCIPLINE

The word "discipline," as used in Rev. Codes 1905, § 1752, relating to the National Guard, means system of drill; systematic training. *State v. Peake*, 135 N. W. 197, 201, 22 N. D. 457; 40 L. R. A. (N. S.) 354.

### DISCLAIMER

A "disclaimer" is a mode of defense. *Isham v. Miller*, 14 Atl. 20, 21, 44 N. J. Eq. 61.

#### As a plea

In ejectment, a plea by one of the defendants jointly sued that he was not in possession of the land sued for or any part thereof, that he was jointly sued with the

other defendant, who at the commencement of the suit and still was in active possession of all the land sued for, and that there was therefore a misjoinder of parties defendant in the action, for which the pleader prayed that the suit abate as to him, was in effect a "disclaimer" and did not operate as a plea in abatement. *Dennis v. Price*, 41 South. 840, 841, 148 Ala. 243 (citing *Bailey v. Selden*, 26 South. 909, 124 Ala. 403).

## DISCLOSE

See Truthfully Disclosed.

## DISCOMFORT

See Physical Injury and Discomfort.

## DISCONTINUANCE

As settlement, see Settle—Settlement.

### Of action

"Discontinued," with reference to an action, is synonymous with stricken from the docket, filed away. *Alkman v. South* (Ky.) 97 S. W. 4, 5.

A "discontinuance" is in effect an abandonment of the pending cause, and only a declaration of the party's willingness to stop the action, and it is not an adjudication of his cause by the proper tribunal, nor an acknowledgment by him that his claim is not well founded. *Farmers' Oil & Mfg. Co. v. Melton & Stuart*, 49 South. 225, 226, 159 Ala. 469.

Where, pending trial to a jury, the case was settled pursuant to stipulation before submission, it was not "discontinued," within Rev. St. § 824, allowing a discontinuance fee. *Howler v. Chicago, M. & St. P. R. Co.*, 166 Fed. 828, 831.

The continuance of a civil suit by a justice of the peace for more than 90 days from the return day of the summons, without the consent of the parties, is a "discontinuance" of the action, and therefore a final order, which may be reviewed by proceedings in error in the district court. *Tongue v. Lloyd*, 138 N. W. 738, 739, 92 Neb. 488.

An action in a justice's court is not "discontinued" by the mere fact that no orders of continuance or other orders are made on the docket therein. Where judgment was rendered in an action before a justice and on a writ of prohibition was held void, and a second judgment was rendered and a period of 18 months during pendency of the prohibition elapsed between the two judgments without any order in the action, there was no "discontinuance." *Thomasson v. Simmons*, 50 S. E. 740, 741, 57 W. Va. 576.

### Of business

In case of a sale to a firm on six months' credit, with condition that the account shall mature immediately on the "discontinuance

of business by the purchaser," there is such discontinuance where one of the parties sells his interest in the business, though the other and a new partner continue to carry on the business. *Warren & Lanier v. Cash*, 39 South. 124, 126, 143 Ala. 158.

### Of highway

An order by a board of street commissioners extending an avenue so as to include a certain street, widening the latter, and changing its name to that of the avenue, did not work a "discontinuance" of the street. *Jones v. City of Boston*, 74 N. E. 295, 297, 188 Mass. 53.

The building of fences across an old highway by direction of the selectmen, and the exclusion of travel therefrom, after the town, in town meeting, passed a vote accepting a proposition for opening of a new highway, was not a "discontinuance of the old highway," within Comp. Gen. St. 1838, pp. 344, 346 (Rev. St. 1849, p. 421), providing that the selectmen of a town might, with the approbation of the town, discontinue any public highway, and such discontinuance could only be accomplished by a vote to that effect by the selectmen. *Greist v. Amrhyne*, 68 Atl. 521, 523, 80 Conn. 280.

### Within law relating to ouster

"A 'discontinuance,' within the law relating to ouster, occurs when the feoffee of tenant in tail holds beyond the life of the feoffor, under a feoffment for a greater estate than the latter can convey, his possession thus retained being considered as an injury to the heir in tail, whose ancient legal estate is thereby destroyed or at least suspended or for a while discontinued." *Dobbins v. Dobbins*, 53 S. E. 870, 872, 141 N. C. 210, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682 (citing 3 Black. Com. 167).

## DISCONTINUE

Where the by-laws of a private corporation give the board of directors power to elect a secretary, treasurer, and other officers and agents that may be required, and to continue or discontinue them in office, the expression "discontinue" gives them the right to remove such officers and agents. *Darrah v. Wheeling Ice & Storage Co.*, 40 S. E. 373, 374, 50 W. Va. 417.

## DISCONTINUOUS EASEMENT

The distinction between easements "continuous and discontinuous" is found in the Civil Code of France, where easements or servitudes are divided into continuous and discontinuous, and are defined: "Continuous are those of which the enjoyment is or may be continued, without the necessity of any actual interference by man, as a water-spout or a right of light or air." "Discontinuous are those enjoyment of which can be had only by the interference of man, as rights of

way, or a right to draw water." *Fayter v. North*, 83 Pac. 742, 746, 30 Utah, 156, 6 L. R. A. (N. S.) 410 (quoting and adopting definition in Washburn, *Easements and Servitudes* [4th Ed.] 21).

Under Civ. Code, arts. 727, 766, defining "continuous servitudes" as those whose use is or may be continual without the act of man, and "discontinuous servitudes" as such as need the act of man to be exercised, and providing that discontinuous servitudes can be established only by title, a railroad for the transportation of sugar cane is a discontinuous servitude, and not prescriptible. *Ogborn v. Lower Terrebonne Refining & Mfg. Co.*, 56 South. 323, 129 La. 379.

## DISCOUNT

See Trade Discount.

"Discount," in finance, is "to purchase or pay the amount of in cash, less a certain per cent., as a promissory note, bill of exchange, etc., to be collected by the discounter or purchaser at maturity." Under a bank charter providing that certain classes of promissory notes and bills of exchange shall, "when discounted" by the bank, be upon the footing of foreign bills of exchange, a note is "discounted" by the bank when it deducts from the face of the note in advance the interest until maturity, and places the balance to the credit of the makers. *Eastin v. Third Nat. Bank*, 42 S. W. 1115, 1116, 102 Ky. 64 (quoting and adopting the definition in Cent. Dict.).

The purchase by a New Jersey corporation of the assets of a defunct building and loan association, with its own money, is not "discounting bills, notes, or other evidences of debt," within the meaning of the New Jersey corporation act. *Clark v. Assefs Realization Co.*, 115 Ill. App. 150, 152.

### As purchase

The "discounting" of promissory notes and other evidences of debt by national banks, under Rev. St. § 5136, is sufficiently comprehensive to include the acquisition both by way of purchase and by way of ordinary loan. *Morris v. Third Nat. Bank of Springfield, Mass.*, 142 Fed. 25, 31, 73 C. C. A. 211.

### As set-off or counterclaim

The word "counterclaim" is not synonymous with "discount." "Discount" is any deduction, while "counterclaim" is ordinarily used to signify some claim against the debt. An affidavit to a claim against a decedent, averring that there is "no legal offset or counterclaim" against the demand, does not comply with Ky. St. 1903, § 3870, requiring demands to be verified by an affidavit stating that there is no "offset or discount" against the same. *Spradlin v. Stanley's Adm'r*, 99 S. W. 965, 966, 124 Ky. 701.

## DISCOUNTED

A note given to a bank in payment of a debt, including interest for the ensuing year, is not "discounted," within a provision of the bank's charter that notes discounted by it are placed on the same footing as foreign bills of exchange. *Bramblette v. Deposit Bank of Carlisle (Ky.)* 79 S. W. 193, 194.

A petition alleging that an obligation was during business hours at the plaintiff's regular place of business, and before its maturity, "discounted" at, by, and to plaintiff, is sufficiently explicit, as the term "discounted" has a well-known legal definition, which involved the statement that the note had been bought by the bank and paid for, it deducting and reserving interest. *Davis v. Boone County Deposit Bank (Ky.)* 80 S. W. 161, 162.

The word "discounted," as ordinarily used, applies to completed transactions, but not necessarily so, and it may apply as well to future as to past transactions. Where one agrees to guarantee a bank on account of business paper discounted to amounts designated, and the bank at the time of the guaranty had already discounted paper for an amount less than that stated, the guaranty is a continuing one, covering not only past but future transactions. *National Bank of Chester County v. Thomas*, 69 Atl. 813, 814, 220 Pa. 360.

## DISCOVERED

In a parent's action for the death of a minor by being struck by a railroad train, the modification, by striking out the quoted word, of a requested instruction, that the duty of the engineer to make all reasonable effort to avoid striking the boy, did not arise till he "actually" discovered the boy in a position of peril, was not erroneous, since "discovered" means "actually discovered," and "actually discovered" does not mean more than "discovered." *Haddox v. Northern Pac. Ry. Co.*, 127 Pac. 152, 46 Mont. 185.

### DISCOVERED NEGLIGENCE

Plaintiff's claim that the conductor of the train which injured plaintiff discovered plaintiff's dangerous position in time to have prevented the injury if proper effort had been made by him, and failed, through negligence, to prevent the collision, was a claim made under what is familiarly termed "discovered negligence." *Ft. Worth & R. G. Ry. Co. v. Bowen*, 67 S. W. 408, 95 Tex. 364.

### DISCOVERED PERIL

See, also, *Discovered Negligence*; *Humanitarian Doctrine*; *Last Clear Chance*.

"Negligence in failing to discover appellant's perilous position is not the equivalent of 'discovered peril.'" *Hawkins v. Missouri*,

K. & T. Ry. Co. of Texas, 83 S. W. 52, 53, 36 Tex. Civ. App. 633.

The doctrine of "discovered peril" is a qualification of the rule that contributory negligence bars a recovery, and involves the principle that, though plaintiff was guilty of negligence in exposing himself to peril, he may recover where defendant, after knowing of the danger, could have avoided the injury by the exercise of ordinary care, but failed to do so. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r*, 67 S. E. 179, 181, 110 Va. 700.

By the doctrine of discovered peril is meant that, where the danger of inflicting an injury is discovered by the person inflicting it in time to have prevented the injury by the exercise of proper care, he will be liable for injury proximately resulting from his negligence, though the injury would not have occurred but for the previous negligence of the person injured. *Furst-Edwards & Co. v. St. Louis S. W. Ry. Co. (Tex.)* 146 S. W. 1024, 1026.

On an issue of "discovered peril" in reference to an accident at a railroad crossing, the essential questions are whether the engineer discovered that the injured person was attempting to cross the track in front of the train and the danger of his being struck by it, whether he then failed to use all the available means in his power, consistent with the safety of his train, to avert the danger and avoid injury, and whether the danger was discovered in time for the engineer to have prevented the accident by the use of the means at his command. *Missouri, K. & T. R. Co. v. King (Tex.)* 123 S. W. 151, 153.

## DISCOVERY

"Discovery" means something more than mere suspicion. It implies a certain degree of knowledge on the part of the person to be charged with the consequences of such discovery. Defendant deserted plaintiff, his wife, and left the state in 1891. In 1896 he obtained a divorce in Florida, which was void in this state because of lack of jurisdiction of the wife. During the same year plaintiff heard that he had married again, but when or where the marriage was contracted, or who his alleged second wife was, was not made known to her, and it did not appear that she ever knew where he was living, except that he was somewhere in Florida. In 1897 he left Florida and disappeared, and it was not until 1902 or 1903 that, through the efforts of plaintiff's brother-in-law, acting in her behalf, he was located in Baltimore, living with the woman he had so married. Held, that the information conveyed to plaintiff, more than five years prior to the commencement of her action for a divorce, that defendant had remarried would not preclude her obtaining a divorce, under Code Civ. Proc. § 1758, providing that a

plaintiff is not entitled to a divorce, although adultery is established, where the action is not commenced within five years after plaintiff's discovery of the offense charged. *Ackerman v. Ackerman*, 108 N. Y. Supp. 534, 536, 123 App. Div. 750 (citing Judge Brewer in the case of *Marlbourn v. McCormick*, 23 Kan. 38, 43; *Parker v. Kuhn*, 32 N. W. 74, 21 Neb. 413, 59 Am. Rep. 838; Judge Finch in the case of *Higgins v. Crouse*, 42 N. E. 6, 147 N. Y. 416).

The provision of Code, § 155 (9), declaring a three-year limitation for actions for relief on the ground of fraud or mistake, that the cause of action shall not be deemed to have accrued till "discovery" by the aggrieved party of the facts constituting such fraud or mistake, applies only when the "ground" of the action for relief is fraud or mistake; and the statute runs from the discovery of the facts constituting the fraud or mistake, and not from the discovery by a party of rights theretofore unknown by him. *Bonner v. Stotesbury*, 51 S. E. 781, 782, 139 N. C. 3.

### Of fraud—Knowledge distinguished

"Discovery," as employed in a statute or equitable rule of limitations, and "knowledge" are not convertible terms, nor does the former mean the result of a resort at leisure to known sources of information. The possession of the means of knowledge is equivalent to knowledge itself. A party who has the opportunity of knowing the facts of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches. *Williamson v. Beardsley*, 137 Fed. 467, 470, 69 C. C. A. 615.

The term "until discovery of the fraud," in the statute of limitations, does not necessarily mean until the party complaining had actual notice of the fraud alleged to have been committed. Constructive notice of the fraud is sufficient to set the statute in motion. Where the means of discovery lies in public records required by law to be kept, and which involve the very transaction in hand and the interests of the parties to the litigation, in such case the public records themselves are sufficient constructive notice of the fraud to set the statute in motion. *Black v. Black*, 68 Pac. 662, 666, 64 Kan. 689.

The phrase "until discovery of the fraud," in the third paragraph of Wilson's Rev. & Ann. St. 1903, § 4216, which provides a limitation of two years in case of action for relief on the ground of fraud, and which also provides that the cause of action in such cases shall not be deemed to have accrued until discovery of the fraud, does not necessarily mean until the party complaining had actual notice of the fraud alleged to have been committed, for constructive notice of the fraud is sufficient to set the statute in motion, even though there may be no actual notice. Where means of discovery lie in pub-

lie records, required by law to be kept, which involve the very transaction in hand, and the interests of the parties to the litigation, the public records themselves are sufficient constructive notice of the fraud to set the statute in motion. *Board of Com'rs of Garfield County v. Renshaw*, 99 Pac. 638, 640, 23 Okl. 56, 22 L. R. A. (N. S.) 207 (citing *Black v. Black*, 68 Pac. 662, 64 Kan. 689).

#### In mining law

See Prior Discovery.

Under the federal statute providing that no location shall be made till the "discovery" of the vein or lode within the limits of the claim, it is enough that gold and silver bearing rock showing on the surface is found. *Score v. Griffin*, 80 Pac. 331, 332, 9 Ariz. 295.

The "discovery" of mineral on a claim, within Rev. St. §§ 2320, 2329, providing that no location of a mining claim shall be made until the "discovery" of the mineral within the limits of the claim is located, means such a "discovery" of mineral thereon that an ordinarily prudent man, not necessarily a miner, would be justified in spending his time and labor thereon in the development of the property. *Cascaden v. Bartolls*, 146 Fed. 739, 741, 77 C. C. A. 496; *Fox v. Myers*, 86 Pac. 793, 796, 29 Nev. 169; *Murray v. White*, 113 Pac. 754, 756, 42 Mont. 423, Ann. Cas. 1912A, 1297.

When a locator of a mining claim finds therein any place containing mineral in certain quantity to justify him in expending the time and money necessary in prospecting and developing the claim, he has made a "discovery," whether the rock or earth is rich or poor, within Rev. St. U. S. § 2320, providing that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located, but something more permanent must be discovered than mere shale, slide rock, or debris. *Ambergis Min. Co. v. Day*, 85 Pac. 109, 115, 12 Idaho, 108 (quoting and adopting definition in *Migeon v. Montana Cent. R. Co.*, 77 Fed. 249, 23 C. C. A. 156).

Mere indications of oil, however strong, are insufficient to constitute a discovery of mineral within the limits of a mining claim in order to support an original location, especially where the substance found is claimed on one side to be oil, and on the other to consist only of shale grease. *Dean v. Omaha-Wyoming Oil Co. (Wyo.)* 128 Pac. 881, 884.

A "discovery" of a vein or lode, within the federal mining laws, which makes such discovery a necessary prerequisite to a valid location, takes place when the locator finds rock in place containing mineral, whether it assays high or low. It is the finding of the mineral in rock in place, as distinguished from float rock, that constitutes the discovery and warrants the location of a mining claim. Whether or not a discovery has been

made is always a question of fact. *Columbia Copper Min. Co. v. Duchess Mining, Milling & Smelting Co.*, 79 Pac. 385, 386, 13 Wyo. 244 (quoting and adopting Judge Hawley's definition as given in 1 *Lindley, Mines* [2d Ed.] p. 610).

"What may constitute a sufficient 'discovery' to warrant a location of a claim may be wholly inadequate to justify the locator in claiming or exercising rights reserved by the statute. What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to the adjoining owner. In determining what constitutes such a 'discovery' as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the definition of the terms 'lode' or 'vein,' that the tendency of the courts is toward marked liberality of construction, where a question arises between two miners who have located claims upon the same lode or within the same surface boundaries and toward strict rules of interpretation when the miner asserts rights in property which either prima facie belongs to some one else or is claimed under laws other than those providing for the disposition of mineral lands, in which latter case the relative value of the tract is a matter directly in issue." *Grand Central Min. Co. v. Mammoth Min. Co.*, 83 Pac. 648, 677, 29 Utah, 490.

To constitute a "discovery" which will support the location of a gold placer claim or other rock bearing gold or silver deposits, or which will support the location of a gold placer claim as against another mineral claim, it is not necessary that the gold should have been found thereon in paying quantity, but there must have been such a discovery of gold as gives reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location, and surroundings. *Lange v. Robinson*, 148 Fed. 799, 802, 79 C. C. A. 1 (citing *Book v. Justice Min. Co.*, 58 Fed. 106; *Migeon v. Montana Cent. R. Co.*, 77 Fed. 249, 23 C. C. A. 156; *Shoshone Min. Co. v. Rutter*, 87 Fed. 807, 31 C. C. A. 223; *Erhardt v. Boaro*, 5 Sup. Ct. 564, 113 U. S. 536, 28 L. Ed. 1113; *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673; *Book v. Justice Min. Co.*, 58 Fed. 106).

The uncovering of a mineral deposit in a known mineral-bearing lot and alongside of the old workings which had existed long prior to the inception of defendants' license from the landowner did not constitute a "discovery" within St. 1898, § 1647, providing that the discovery of a crevice or range containing ores shall entitle the discoverer to follow it until exhausted, free from the landowner's right to forfeit the license, etc.



St. Anthony Min. & Mill. Co. v. Shaffra, 120 N. W. 238, 239, 138 Wis. 507.

**In patent law**

See Inventive Discovery.

**In practice**

See Bill of Discovery.

"Discovery" means the production of evidence." The jurisdiction of equity to decree an accounting cannot be sustained on the ground that the complainant has a right to invoke the aid of equity for "discovery," where the complainant, as authorized by the chancery act, waives an answer under oath, and submits no interrogatory to be answered under oath, and elects to have the answer stand as a mere pleading. *Daab v. New York Cent. & H. R. Co.*, 62 Atl. 449, 450, 70 N. J. Eq. 489.

"Discovery" is the disclosure by the defendant of facts, titles, documents, or other things, which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery, as a part of a cause of action pending or to be brought in another court, or as evidence of his rights or title in such proceeding. *Rosenberger v. Shubert*, 182 Fed. 411, 413.

A "suit for discovery," belonging to the auxiliary jurisdiction exercised by court of equity in aid of an action at law or some other proceeding, should be carefully distinguished from the so-called "discovery" which may be and ordinarily is an incident of every equitable action. It is a part of the ordinary equity procedure that whatever be the relief sought, and whether the jurisdiction be exclusive or concurrent, plaintiff may, by means of allegations and interrogations contained in his pleading, compel defendant to disclose by his answer facts within his own personal knowledge which may operate as evidence to sustain plaintiff's contention. The name "discovery" is also given to this process of probing defendant's conscience and of obtaining admissions from him which accompanies almost every suit in equity; but it should not be confounded with "discovery" in its original and strict signification, nor with the suit for discovery in the technical sense which is sometimes made the ground for extending the concurrent jurisdiction of equity over cases otherwise belonging to the domain of the common-law courts. *Balfour v. San Joaquin Val. Bank*, 156 Fed. 500, 503 (quoting and adopting definition in *Pom. Eq. Jur.* [3d Ed.] § 144).

A motion in a divorce action for an order to examine defendant as to his property is for an "examination," and not for a "discovery," under Code Civ. Proc. §§ 803-809, relating to discovery of books and papers. *Bradley v. Bradley*, 122 N. Y. Supp. 626, 627, 137 App. Div. 751.

"The word 'discovery' is used in connection with bills of different classes or

kinds. It is used in connection with bills containing no averments to distinguish them as being bills of discovery. The word is also used with reference to bills technically called bills of discovery, which do not pray for any relief and seek a discovery only in aid of an action at law. The word is also used with reference to bills properly denominated bills for discovery and relief. This class of bills is distinguished from those first alluded to by containing certain statements, averments, and prayers, such as statements of the facts, a discovery of which is desired, an averment that they rest within the knowledge of the defendant alone and are incapable of other proof, and that a discovery of them is material to enable plaintiff to obtain relief. These allegations are not formal merely, but essential to enable defendants to put a point in issue and to have a decision upon it, if desirable, whether the discovery is such that it ought to be granted. *Woodman v. Freeman*, 25 Me. 531, 545.

## DISCRETION

See At Their Discretion; Best Skill and Discretion; Judicial Discretion; Sound Discretion.

Discretionary writ, see *Mandamus*.

"Discretion" is the freedom to act according to one's judgment. *State v. Foren*, 97 Pac. 791, 793, 78 Kan. 654.

"Discretion" is defined as deliberate judgment. *Stewart v. Stewart*, 62 N. E. 1023, 1025, 28 Ind. App. 378.

"Discretion" of court is a liberty or privilege allowed to a judge, within the confines of right and justice, to decide and act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law, to be exercised in accordance with a wise, as distinguished from a mere arbitrary, use of power, and under the law. *Gaar, Scott & Co. v. Nelson*, 148 S. W. 417, 421, 166 Mo. App. 51.

"Discretion" implies that, in the absence of positive law or fixed rule, the judge is to decide by his view of expediency or of the demands of equity and justice. *Graffam v. Cobb*, 56 Atl. 645, 647, 98 Me. 200.

By many authorities the word "discretion" is properly enough used to express that judicial judgment in discriminating as to weight and cogency between different witnesses, and between conflicting evidentiary documents and circumstances, which must be exercised in reaching every conclusion of fact from evidence. *Nash v. Fries*, 108 N. W. 210, 211, 129 Wis. 120.

"Discretion" in granting a new trial means an honest attempt, in the exercise of judicial duty, to see that justice is done to

establish a legal right. *Johnson v. Grayson*, 130 S. W. 673, 676, 230 Mo. 380.

The "discretion" of the court in granting or refusing specific performance does not mean caprice, but means sound "discretion." *Kirkpatrick v. Pease*, 101 S. W. 651, 657, 202 Mo. 471.

"Discretion," which a chancellor may exercise in granting specific performance, does not mean caprice. It is rather a discretion governed by solid and settled rules and principles, a sound—meaning judicial—discretion. *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 111 S. W. 480, 494, 211 Mo. 671, 14 Ann. Cas. 652 (quoting and adopting the definition in *Kirkpatrick v. Pease*, 101 S. W. 657, 202 Mo. 493, 494).

The court's "discretion" to relieve a party from a default is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. *Moody v. Reichow*, 80 Pac. 461, 462, 38 Wash. 303 (quoting and adopting definition in *Bailey v. Taaffe*, 29 Cal. 423).

The "discretion," under Civ. Code, § 137, vested in the trial court in a divorce suit to allow the wife costs on appeal, is a discretion guided by law, based upon sound judgment, and inspired by the desire to promote justice, and must not be arbitrary or capricious. On awarding a husband a divorce and all the property, it was an abuse of discretion to refuse to make some allowance for the wife's costs on appeal. *Cargnani v. Cargnani*, 116 Pac. 306, 309, 16 Cal. App. 96.

Const. art. 8, § 2, as amended in 1910, provides that the Supreme Court may in its own discretion take original jurisdiction in habeas corpus proceedings. Held, that it was the intent to allow to the court the widest latitude consistent with law and justice in determining whether it will act in any given case, "discretion" not meaning absolute or arbitrary power when vested in an officer and meaning when vested in a court the exercising of the best of the court's judgment upon the occasion that calls for it, and the section does not thrust upon the Supreme Court the burden of hearing and deciding in the first instance every application for habeas corpus which might be presented to it, but before taking jurisdiction the court should consider the condition of its business, the hardships of petitioner incident to a denial of the writ, and whether he has any plain, speedy, and adequate remedy in the circuit court, and a remedy by appeal, and where

the court's docket is greatly congested, so that if jurisdiction were taken other criminal cases equally meritorious, some involving the question of life and death, and nearly all involving the present imprisonment of the parties concerned, would have to be postponed, the court will refuse to take jurisdiction of a petition for habeas corpus by persons who have appeared in court and pleaded guilty to an offense, craving immediate sentence, on the ground that the clerk in entering the judgment failed to recite therein the crime for which they were sentenced, as expressly required by B. & C. Comp. § 1444; they having adequate remedy by application to the court to require the clerk to correct the judgment entry, by appeal to the Supreme Court, and by application for habeas corpus in the circuit court. *Ex parte Jerzman*, 112 Pac. 416, 418, 57 Or. 387, Ann. Cas. 1913A, 149.

The words "in his discretion," as used in Acts 1897, p. 499, § 2, providing that, whenever the mayor shall find a party charged before him guilty of violating a town ordinance, he may impose "in his discretion" a fine or imprisonment, in the alternative, not to exceed the limits prescribed for such violation by the town ordinances, and such imprisonment may be accompanied with the additional requirement of hard labor, are not inconsistent with the words "in the alternative," but refer to the extent of the punishments, and not to the question whether the mayor could impose a single, instead of an alternative, sentence. *Town of Union v. Hampton*, 64 S. E. 1017, 1018, 83 S. C. 46.

A "discretionary duty" of an officer may be executive or judicial, according to the nature of the subject-matter. *State v. Howard*, 74 Atl. 392, 395, 83 Vt. 6.

The phrase "in his discretion," as used in Act April 23, 1902 (95 Ohio Laws, p. 259), authorizing the court, in proceedings for detaching unplatted farm lands from the city or village, to make the order or decree detaching such lands "in his discretion," do not import an absolute discretion upon a matter of public policy affecting the municipal government, but rather judicial discretion, to be exercised upon the hearing of the cause in determining whether the alleged reasons for detachment have a foundation in fact, and whether the detachment of the lands would in fact substantially embarrass the municipality. *Incorporated Village of Fairview v. Giffey*, 76 N. E. 865, 867, 73 Ohio St. 183.

Though the excise commissioners of the city of Camden have discretionary power to grant or refuse licenses to sell intoxicating liquors, and though "discretion" means the exercising of the best of their judgment upon the occasion that calls for it, yet if this discretion be willfully abused it is criminal, and an indictment will therefore lie against such commissioners who grant or refuse such

a license from corrupt and improper motives. *State v. Sweeten*, 85 Atl. 309, 310, 83 N. J. Law, 364.

Where an officer's duty necessarily requires examination of evidence in the decision of questions of law and fact, the duty is not ministerial, but judicial or "discretionary." An act, however, is none the less ministerial because the person performing it may have to satisfy himself that a state of facts exists under which it is his right and duty to perform the act, though in doing so he must to some extent construe the statute by which the duty is imposed. *Stephens v. Jones*, 123 N. W. 705, 708, 24 S. D. 97.

As applied to public functionaries, "discretion" is defined to be a power conferred by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. It perverts and destroys the meaning of the word to hold that exercise of discretion may be reviewed or controlled by some other person or tribunal than the person on whom it is conferred. Ministerial duties resting on an executive officer have been enforced by the courts. Ministerial acts do not flow from the exercise of discretion, but involve a simple, definite duty imposed by law. *Farrelly v. Cole*, 56 Pac. 492, 497, 60 Kan. 356, 44 L. R. A. 464 (quoting and adopting definition in *Judges of Oneida Common Pleas v. People* [N. Y.] 18 Wend. 79).

The term "in their discretion," in *Balinger's Ann. Codes & St. § 3767*, providing that boards of county commissioners must cause to be opened and worked roads necessary for public convenience, and "in their discretion" let out by contract to the lowest bidder the construction or improvement of any road when the expense will exceed \$50, refers to the manner of letting the contract, and not to the letting of the contract, and vests in the board the right, when they let a contract involving an expenditure exceeding \$50, to call for bids and let it to the lowest bidder, or let it without calling for bids. *Giffin v. King County*, 97 Pac. 230, 231, 50 Wash. 327.

"Discretion," as applied to public functionaries, means the power or right to act officially, according to what appears just and proper under the circumstances. Courts will not interfere with the exercise of such discretion unless it has been abused. In order to constitute an abuse of such discretion, it must appear that it was exercised on grounds, or for reasons, clearly untenable to an extent clearly unreasonable." *Board of Com'rs of Rio Grande County v. Lewis*, 65 Pac. 51, 52, 28 Colo. 378.

A provision in a will authorizing the sale of property at the "discretion" of the executors imposes a special confidence in them, which they cannot delegate, and which

the law will not transmit in any way to others. *Chambers v. Tulane*, 9 N. J. Eq. 146, 156.

"Discretion" vested in a trustee is not absolute, but is a sound discretion, to be exercised according to his best judgment and in the best of faith. Discretion may excuse honest errors of judgment, but never excuses bad faith, which violates the fundamental principle upon which every trust rests, since a trust implies confidence, and confidence excludes bad faith. *In re Wilkin*, 75 N. E. 1105, 1107, 183 N. Y. 104.

The term "discretion," as used in the rule that, where a broker is vested with the least discretion, an employment of the broker by the other side in a similar capacity where his duty and his interests might clash will avoid all his right to compensation, does not mean discretion conferred on a broker to fix the terms of the contract or to accept or reject offers without communicating them to his principal, but means freedom to act according to one's own judgment, unrestrained exercise of choice or will, so that the rule applies where, by reason of such dual relation or employment, the broker's interests may conflict with his duties to his client. *Jacobs v. Beyer*, 125 N. Y. Supp. 597, 600, 141 App. Div. 49.

The word "discretion," as used in B. & C. Comp. § 3365, as amended, providing that the district boundary board in its "discretion" may on the petition of three or more legal voters change or divide the districts of the county, does not mean absolute or arbitrary power, to be exercised to the injury of another. *Nicklaus v. Goodspeed*, 108 Pac. 135, 136, 56 Or. 184.

The "discretion" vested in boards of county commissioners by an act which provides for the enforcement of payment, by judicial proceedings, of taxes upon real property sold to the state or county, and remaining unredeemed for more than three years, and giving to the several boards of county commissioners of all counties in the state a discretionary authority to institute the proceedings therein provided for, is nothing more than an administrative discretion to cause the proceedings therein provided for to be instituted and conducted. It is not the legislative discretion of determining the policy and expediency of the law, and deciding whether or not it shall be the law. It is an administrative discretion committed to them, as the fiscal agents of the county, to determine whether and when the machinery for the collection of real estate taxes provided by the act shall be set in motion. *Picton v. Cass County*, 100 N. W. 711-713, 13 N. D. 242, 3 Ann. Cas. 345.

Under a contract: "We, the undersigned, agree to pay the sum set opposite our names to the executive mill committee appointed at a meeting of the citizens of Petersburg

and vicinity, for the purpose of procuring and locating a flouring mill of from 40 to 50 barrels capacity in Petersburg, said amount to be paid when the mill is erected, at the discretion of the above committee"—it is clear that the "discretion" of the committee related only to the acceptance of the mill as a substantial compliance with the subscription contract and a declaration that the money represented by the several subscriptions should be paid. *Mefford v. Sell*, 92 N. W. 148, 150, 3 Neb. (Unof.) 566.

#### Absence of fixed rule implied

A judicial act is said to lie in "discretion" when there are no fixed principles by which its correctness may be determined and such determinations are not subject to review on appeal. *Palliser v. Home Telephone Co.*, 54 South. 499, 500, 170 Ala. 341.

"Discretion" is defined as that part of the judicial function which decides questions arising in the trial of a cause according to the particular circumstances of each case, and as to which the judgment of the court is not controlled by fixed rules of law. It is this discretion which courts of record exercise in revising or vacating their orders and judgments during the term at which they were made, and such discretion will not be controlled by courts of review unless manifestly abused. *Taylor v. State*, 57 S. E. 1049, 1 Ga. App. 539 (citing *Bouv. Law Dict.*).

#### As judicial discretion

The "discretion" of the chancellor to award specific performance is not an arbitrary or capricious discretion, but is a judicial discretion. *Heyward v. Bradley*, 179 Fed. 325, 330, 102 C. C. A. 509.

#### As legal discretion

The word "discretion," as used in section 3 of Act June 18, 1910 (36 Stat. 542, c. 309), creating the Commerce Court, means a legal discretion, a discretion controlled and limited by sound principles of law applied to the facts in each particular case. *Nashville Grain Exch. v. United States*, 191 Fed. 37, 39.

The word "discretion," when applied to a court of justice, means sound "discretion" guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, or fanciful, but legal and regular. *Jarrett v. High Point Trunk & Bag Co.*, 55 S. E. 338, 339, 142 N. C. 466.

## DISCRIMINATION

See Undue and Unreasonable Discrimination; Unjust Discrimination; Unlawful Discrimination.

The word "discriminate" may be defined as treating one differently from another. *Wimberly v. Georgia Southern & F. Ry. Co.*, 63 S. E. 29, 31, 5 Ga. App. 263.

"Discrimination" means to make a difference between—that is, as applied to shippers, to make a difference between them—and the motive therefor is favor, or coercion, or ill will. *Wynn v. Wabash R. Co.*, 86 S. W. 562, 563, 111 Mo. App. 642.

In the federal statute forbidding carriers to offer, grant, or give, and shippers to solicit, accept, or receive, any rebate, concession, or discrimination in respect of transportation, etc., the word "discrimination" in and of itself implies a comparison with, a measurement by, and a departure from a determined standard. *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, 390, 90 C. C. A. 364.

The term "discrimination," as used in the Elkins act (32 Stat. 847) in its common sense, as well as with whatever enlarged or more definite meaning the context of the amendment of 1906 (34 Stat. 587) gives to it, includes a case where a shipper is permitted to settle his charges by paying a less or "different" compensation to the carrier than other shippers shipping under similar circumstances are compelled to pay. *United States v. Sunday Creek Co.*, 194 Fed. 252, 254.

The use of the word "discrimination" in section 1 of the Elkins act (32 Stat. 847), as amended by Hepburn Act June 29, 1906, c. 3591, § 2, 34 Stat. 586, without the qualifying words "unjust," etc., used in Act Feb. 4, 1887, c. 104, §§ 2, 3, 24 Stat. 379, 380, was not intended to broaden the provisions of the earlier act in that respect; the word "discrimination" itself, as so applied, implying an unjust or unfair distinction. *United States v. Wells-Fargo Exp. Co.*, 161 Fed. 606, 610.

A railroad company practices a "discrimination" in respect to transportation, in violation of section 6 of the interstate commerce act (24 Stat. 380), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586, in favor of one interstate shipper and against others of the same class, shipping the same commodity from the same points and under substantially the same conditions as to time of shipment, destinations, connections, and manner of transportation and other details identifying the similarity of transactions, by the device of extending credit to such favored shipper for the freight charges, and exacting and collecting such charges from the other shippers. *United States v. Hocking Val. Ry. Co.*, 194 Fed. 234, 246.

Under Const. Pa. 1874, art. 17, §§ 1, 3, 7, the Interstate Commerce Act, prohibiting "discrimination" by carriers either in rates or transportation facilities, and P. L. Pa. 1846, p. 323, § 21, requiring railroads to transport cars owned by individual shippers on reasonable rules and regulations, a rule providing that, in the distribution of the cars of a railroad company available for the

transportation of coal, cars for the railroad's fuel supply, foreign railroad cars, specially consigned for the fuel supply of the consigning railroads, and individual cars owned by shippers and assigned to specified mines for loading, should be charged against the capacity of the mines at which they were placed, and that the difference between the rated capacity of the mine and the capacity of such assigned cars should be the rate on which all the other cars of the railroad company would be prorated, which rule operated slightly to the advantage of the owners of individual cars, was not objectionable as a "discrimination" against them. *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497, 503 (citing *United States ex rel. Coffman v. Norfolk & W. R. Co.*, 109 Fed. 831; *United States ex rel. Kingwood Coal Co. v. West Virginia Northern R. Co.*, 125 Fed. 252; *West Virginia Northern R. Co. v. United States ex rel. Kingwood Coal Co.*, 134 Fed. 198, 67 C. C. A. 220; *United States ex rel. Greenbrier Coal & Coke Co. v. Norfolk & W. Ry. Co.*, 143 Fed. 266, 74 C. C. A. 404; *State ex rel. Kohler v. Cincinnati, W. & B. Ry. Co.*, 23 N. E. 928, 47 Ohio St. 130, 7 L. R. A. 319; *United States ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co.*, 154 Fed. 108).

To constitute actionable "discrimination," there must be an undue, unjust, or unreasonable preference. Where all shippers in the same situation at a given point on a railroad are treated alike in the matter of furnishing coal cars, the mere fact that shippers who own spur tracks are furnished cars in preference to those who do not own tracks, but require the use of the railroad's side tracks, which are needed by the railroad to conduct its general business and serve the public, is not a "discrimination," within Const. art. 17, § 3, providing that all persons shall have an equal right to transportation on railroads, and forbidding undue or unreasonable "discrimination." Nor is such preference a violation of the act of March 11, 1899 (Acts 1899, p. 82, c. 53), providing a penalty for unlawful "discrimination." *Choctaw, O. & G. Ry. Co. v. State (Ark.)* 84 S. W. 502, 503 (citing *Little Rock & Ft. S. Ry. Co. v. Oppenheimer*, 43 S. W. 150, 64 Ark. 271, 44 L. R. A. 353).

The term "discrimination" is used in the section in its ordinary acceptance as meaning a delivery showing a preference for or against a shipper in the performance of any act essential to the completion of that service, and is synonymous with "delay" as used in the section. *Missouri, K. & T. Ry. Co. of Texas v. Thompson (Tex.)* 118 S. W. 618, 622.

Where a common carrier allowed the purchasers of hogs to ship them to a central point of the state and from there to ship them to foreign states, charging them only the interstate rate which was lower than the local rate, and these hogs came into compe-

tition with those of purchasers making only local shipments, there was an unjust "discrimination" against the local purchasers within the purview of Code, §§ 2124, 2125, respectively, providing that no common carrier shall give any preference to any particular person or persons. *Central Trust Co. of Illinois v. Chicago, R. I. & P. Ry. Co. (Iowa)* 135 N. W. 721, 727.

Where a railroad company, a common carrier, is engaged in voluntarily transporting and delivering between stations on its line employes and freight for one incorporated public telegraph company and refuses similar services to others, without giving sufficient excuse for such refusal, the railroad company as common carrier is guilty of unjust "discrimination," and may be compelled to perform like services, for a reasonable compensation, for another incorporated public telegraph company, even though the service being voluntarily rendered is under a contract, when it is not shown that such service differs from that performed by the railroad company as a common carrier for other shippers, except as to delivery between stations. *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 41 South. 705, 710, 52 Fla. 646, 12 L. R. A. (N. S.) 506 (citing *State ex rel. Lamar v. Jacksonville Terminal Co.*, 27 South. 225, 41 Fla. 377; *Chicago & N. W. Ry. Co. v. People ex rel. Hempstead*, 56 Ill. 365, 8 Am. Rep. 690; *Messenger v. Pennsylvania R. Co.*, 37 N. J. Law, 531, 18 Am. Rep. 754; *Cumberland Telephone & Telegraph Co. v. Morgan's L. & T. R. Co.*, 24 South. 803, 51 La. Ann. 29, 72 Am. St. Rep. 442; *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 63 Fed. 910; 6 Cyc. p. 372; *State ex rel. Cumberland Telephone & Telegraph Co. v. Texas & P. Ry. Co.*, 28 South. 284, 52 La. Ann. 1850; *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 40 South. 875, 51 Fla. 578; *Augusta Brokerage Co. v. Central of Georgia R. Co.*, 48 S. E. 714, 121 Ga. 48; *Tift v. Southern R. Co.*, 123 Fed. 789; *Agee & Co. v. Louisville & N. R. Co.*, 37 South. 680, 142 Ala. 344).

To bring a "discrimination" within Act Oct. 15, 1891 (Acts 1891, p. 155; Civ. Code, 1895, §§ 2299-2301), forbidding a railroad company to refuse to put on sale or to sell any ticket of any other railroad company with which it is directly or indirectly connected for passage over such connecting road, so as to entitle a recovery of the penalty prescribed by that act, it must appear, not only that the railroad company refused to sell tickets to a station on the line of a connecting railroad, but also that tickets to such station had been tendered it by such connecting railroad company to be sold for it. *Wimberly v. Georgia Southern & F. Ry. Co.*, 63 S. E. 29, 31, 5 Ga. App. 263.

The term "discrimination," as used in a statute imposing a penalty upon telegraph

companies for discrimination and partiality in the transmission and delivery of messages, does not imply willfulness and positive wrongdoing as distinguished from negligence. *Western Union Tel. Co. v. McClelland*, 78 N. E. 672, 673, 38 Ind. App. 578.

Act April 8, 1885 (Laws 1885, p. 151, c. 48), provides that every telegraph company shall transmit messages impartially, in good faith and in the order of time in which they are received, and shall in no manner discriminate in rates charged between any of its patrons, but shall serve individuals, corporations, and other telegraph companies with impartiality, and provides a penalty for violation. Held, that the terms "discrimination" and "partiality," as used in such act, do not imply willfulness and positive wrongdoing, as distinguished from negligence. *Western Union Telegraph Co. v. Braxtan*, 74 N. E. 985, 987, 165 Ind. 165.

For a telephone company to require one subscriber, when desiring to make long-distance connections, to go to the central office and pay cash in advance, when it is not required of other subscribers, but they are allowed to connect from their homes and places of business, a bill therefor being rendered at the end of the month, is an unreasonable and unnecessary "discrimination," for which a penalty is recoverable under Acts 1885, p. 178, § 11. *Yancey v. Batesville Tel. Co.*, 99 S. W. 679, 681, 81 Ark. 486, 11 Ann. Cas. 135.

That a telephone company, which was under no duty to extend its lines outside of the corporate limits of a city, where it maintained an exchange in fact, made such extensions for the accommodation of one or two persons, did not entitle another outside resident to demand the same service, and the refusal of the company to comply with such demand did not constitute an unlawful "discrimination" within the meaning of Kirby's Dig. Ark. 1904, § 7948, which requires such companies to supply all applicants for telephone connection and facilities without discrimination or partiality under penalty of \$100 for each day such connection of facilities are withheld. *Younts v. Southwestern Telegraph & Telephone Co.*, 192 Fed. 200, 205.

#### DISCRIMINATING REDUCED RATES

Acts 32d Gen. Assem. c. 112, entitled "An act to prohibit common carriers from giving free passes," or "discriminating reduced rates," does not violate Const. art. 3, § 29, providing that every act shall embrace but one subject and matters connected therewith, which shall be expressed in the title, simply because in the body thereof it broadened the literal meaning of "free pass" to include all transportation for anything other than money; "free pass" and "discriminating reduced rates" being of the same nature and the title of an act being sufficient if it answers as

a key to the subject-matter. *Schulz v. Parker* (Iowa) 139 N. W. 173, 177.

## DISEASE

See Bright's Disease; Infectious Disease; Serious Disease.  
Any disease, see Any.

#### Blood poisoning

Blood poisoning is a "disease," just as many other pathological conditions of the human system resulting from the introduction therein of other specific bacilli are diseases. It is, indeed, wholly immaterial whether the pathological condition which results in death is due to bacilli or not. *Delaney v. Modern Acc. Club*, 97 N. W. 91, 93, 121 Iowa, 528, 63 L. R. A. 603.

#### Insanity

"Infirmities or disease," within the meaning of a life and accident policy, exempting the insurer from liability for any bodily injury happening directly or indirectly in consequence of bodily infirmities or disease, does not include insanity, during the time of which the insured, while unconscious of what he was doing, kills himself. *Blackstone v. Standard Life & Accident Ins. Co.*, 42 N. W. 156, 163, 74 Mich. 592, 3 L. R. A. 486.

#### Malignant pustule

Malignant pustule, which is the result of an infection from coming in contact with poisonous animal matter, is a "disease." *Delaney v. Modern Accident Club*, 97 N. W. 91, 93, 121 Iowa, 528, 63 L. R. A. 603 (citing *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 390, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748).

#### Pregnancy

Pregnancy is not per se a condition of unsound health, nor a "disease," within the meaning of such terms used in an application for a policy of insurance. *Rasicot v. Royal Neighbors of America*, 108 Pac. 1048, 1053, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

#### Temporary ailment or disorder

The technical meaning of the word "disease" is "any derangement of the functions or alteration of the structure of the animal organs," so that it necessarily includes the slightest, most temporary, as well as the most serious and inveterate, ailments. Ordinarily, however, when speaking of an infirmity, we generally mean the state or quality of being infirm physically or otherwise, debility or weakness, and by disease to convey the impression of a morbid condition resulting from some functional disturbance or failure of physical function, which tends to undermine the constitution. In using either word we do not, as a rule, refer to a slight or mere temporary disturbance or enfeeblement. If this is true in our ordinary speaking and writing, it is certainly clear that the words should

be given no broader meaning when we find them used by an insurance company in a clause of its policy which it relies upon to defeat a recovery thereon. The language used is made up of words framed by the company or its legal advisers in an attempt to limit as narrowly as possible the scope of the insurance, and it is a universal as well as a fair rule, adopted by the courts everywhere, to construe the terms of the policy most strongly against the assurer, and resolve every doubt or ambiguity in favor of the assured and against the assurer. *Peterson v. Modern Brotherhood of America*, 101 N. W. 289, 291, 125 Iowa, 562, 67 L. R. A. 631 (quoting *Meyer v. Fidelity & Casualty Co.*, 65 N. W. 328, 96 Iowa, 378, 59 Am. St. Rep. 374).

The word "disease," as used in an accident policy providing that no recovery should be had in case of death resulting from disease in any form, either as cause or effect, does not apply to a temporary derangement of the stomach, so as to preclude a recovery for insured's death by being thrown from the platform of a railway train whence he had gone for the purpose of vomiting. *Preferred Acc. Ins. Co. of New York v. Muir*, 126 Fed. 926, 929, 61 C. C. A. 456.

The term "disease" does not mean a trifling illness, or an occasional physical disturbance resulting from accidental causes, not permanent in their effects, nor a temporary illness which readily yields to professional treatment and leaves no permanent injury or disorder calculated to, or having a tendency to, shorten life. *Logan v. Provident Sav. Life Assur. Soc. of New York*, 50 S. E. 529, 533, 57 W. Va. 394 (citing *Joyce, Ins.* § 1848).

"An affection, even though curable only by medical or surgical treatment, but nevertheless readily remediable, and so not necessarily tending to shorten life before it has become so far developed as to have some bearing in present upon the general health, is not a 'disease' as one would ordinarily understand that term; and a local affection is not a local disease within the meaning of a warranty in a policy of insurance, unless such affection has sufficiently developed to have some bearing upon the general health." *Cady v. Fidelity & Casualty Co.*, 113 N. W. 967, 971, 134 Wis. 322, 17 L. R. A. (N. S.) 260.

The question, in an application for life insurance, "Give full particulars of all 'diseases, injuries, and affections' which you have had," refers to only such diseases as affect the general health and are of a serious nature, and not to temporary or trivial ailments. *Des Moines Life Ins. Co. v. Clay*, 116 S. W. 232, 89 Ark. 230.

#### **Traumatic neuritis**

Where plaintiff, while operating a mow-

er, left an external mark visible to the eye and developed into traumatic neuritis, such affection was not a "disease" within an accident policy providing a lesser liability in case of claims for indemnity for injuries of which there was no external mark visible to the eye, or accidental injuries resulting from disease in any form. *Kenney v. Bankers' Accident Ins. Co. of Des Moines*, 113 N. W. 566, 569, 136 Iowa, 140.

#### **Wounds or injuries**

Where an accident policy provided for lesser liability in case of accidental injuries resulting from disease in any form, the term "disease" was used to denote a malady, affection, sickness, illness, or disorder entirely apart from a wound or hurt producing an injury or immediate functional disturbance. *Kenny v. Bankers' Accident Ins. Co.*, 113 N. W. 566, 569, 136 Iowa, 140.

#### **DISEASE PECULIAR TO WOMEN**

Since cancer is a disease from which men are not immune, the fact that a cancer attacks the womb of a female insured does not make it one of the "diseases peculiar to women," within the meaning of a provision of a mutual benefit insurance policy excepting such diseases from the risks assumed by the insurer. *Shuler v. American Benev. Ass'n*, 111 S. W. 618, 622, 132 Mo. App. 123.

#### **DISFIGURE**

"To 'disfigure' is to willfully and maliciously place any mark by means of a knife or other instrument upon the face or other part of the person." *Pool v. State*, 129 S. W. 1135, 1136, 59 Tex. Cr. R. 482 (referring to *White's Ann. Pen. Code*, art. 614).

Burning with a hot stove-lid lifter, thereby causing sores and lacerations, constitutes a disfigurement within *Rev. St. 1899, § 1949* (*Ann. St. 1906, p. 1279*); the word "disfigure," as it has no technical meaning, being considered in its ordinary sense as meaning to mar the figure and to render less perfect or beautiful in appearance. *State v. Nieuhaus*, 117 S. W. 73, 78, 217 Mo. 382.

#### **DISFRANCHISED VOTERS**

By "disfranchised voters" is meant (1) persons denied the right, by whatever means, to vote; (2) persons permitted to vote, but whose votes, by reason of fraud, violence, or other wrong, have not been counted as cast. Voters are to be deemed disfranchised where persons entitled to vote are denied the right to do so by whatever means, and also where persons are permitted to vote, but their votes, by reason of fraud, violence, and other wrongdoing, have not been counted at all, or have not been counted as cast. Where no election whatever was held in three precincts, and in nine other precincts the election officers of one of the political parties attempted to

hold the election in places other than those designated, and, removing the poll books to such places, attempted to vote the registration alphabetically, without the presence of the voters, and returned forged certificates, the entire registered vote of such precincts was disfranchised. Where the polls in a certain precinct were raided by a band of armed men at about the time they should have been closed, and the ballot box was seized, carried off, and the contents destroyed after 187 voters had voted, such voters were entirely disfranchised. Where, in a certain precinct, the ballots, certificate stubs, and everything connected with the election, save the ballot box, were fraudulently burned before the count had been completed, so that nothing remained but the statements of the election officers as to the condition in which the ballots were at the time they were destroyed, none of them having been counted, the entire precinct was disfranchised. Where, in an election contest, all that was presented from one precinct was a forged certificate of election and ballots which on their face bore unmistakable evidence that they had not only been tampered with, but much mutilated, and it appeared that the certificate and ballots were taken from the election officers by policemen, and while in their charge the certificate was forged and the ballots restamped, the entire registration of such precinct should be considered disfranchised. Where during an election the polls of one precinct were broken into before the count was completed by a band of men, who in the presence of policemen acted in such a threatening manner as to frighten the Republican officers of election, so that they left the polls and were afraid to return, and the certificate from such precinct was a forgery, showing 232 votes for one candidate for mayor and 10 votes for his opponent, while the ballots as found in the box showed 136 to 92 for the same candidates, the voters of such precinct were disfranchised. Owing to a dispute as to the filling of a vacancy occasioned by the nonappearance of a Republican judge in one election precinct, the polls were not opened until between 11:30 and 12 o'clock. Many people had come to vote, but, finding the polls were not open, had gone away. After the polls were opened, people voted constantly until they were closed, after having been open but four hours, when there were from 35 to 75 men standing in line who had not voted, and who demanded their right to do so. Held, that all of the voters who were denied the right to vote in such precinct should be considered disfranchised, and that their number should be determined by deducting the number of those who did vote from the registered vote of the precinct. Where, in one precinct, 76 old men from a charitable institution were voted illegally without first having been required to take the

statutory oath, but there was no proof as to how they voted, their votes should be counted as cast. *Scholl v. Bell*, 102 S. W. 248, 249, 256, 125 Ky. 750.

## DISGUISE

See In Disguise.

## DISHONESTY

Fraud and "dishonesty" are synonymous terms. Whatever is dishonest is fraudulent in *foro conscientiae*, and is so treated in a court of equity. *Ex parte Hollman*, 60 S. E. 19, 27, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105 (quoting *Ex parte Clark*, 20 N. J. Law, 648, 45 Am. Dec. 394).

"Fraud" and "dishonesty" are synonymous terms. Whatever is dishonest is fraudulent in *foro conscientiae*. If one acts unjustly and unlawfully, he acts fraudulently. An unjust man is a fraudulent man. *Ex parte Drayton*, 153 Fed. 986, 991.

"'Dishonesty' signifies an intentional violation of the truth. Substantial dishonesty means a reckless or entirely inexcusable disregard of the truth." *Godfrey v. Godfrey*, 106 N. W. 814, 819, 127 Wis. 47, 7 Ann. Cas. 176.

A letter from the defendant to plaintiff's employer, which stated representations made by plaintiff and other facts concerning him, and stated that he was dishonest, the word "dishonest" was used in the sense of a want of probity, or fairness, in business transactions. *Mitchell v. Morris*, 56 South. 502, 129 La. 543.

"Dishonesty," within Code Civ. Proc. § 2612, subd. 5, declaring one incompetent to serve as an executor, who, on proof, is found by the surrogate to be incompetent to execute the duties of such trust by reason of dishonesty, means dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor. After a brokerage firm had been dissolved by the death of the member who had contributed all its capital, and the winding up of its business, required by the will of deceased, was nearly complete, A., who had been manager of its cotton department, openly, and after asking permission of the liquidating partner, to which no answer was given, copied names from the mailing list of the firm, and used the copy in sending out circulars, stating his prior connection with such firm, and that he had associated himself with another firm. Held, that thereby he was not guilty of dishonesty within Code Civ. Proc. § 2612, subd. 5, declaring one incompetent to serve as an executor who, on proof, is found by the surrogate to be incompetent to execute the duties of such trust by



reason of dishonesty. In *re Latham's Will*, 130 N. Y. Supp. 535, 539, 145 App. Div. 849.

In a collector's fidelity bond guarantying against loss through the "dishonesty or any act of fraud amounting to larceny or embezzlement," the phrase "amounting to larceny or embezzlement," does not qualify "dishonesty," and the principal is liable for a loss sustained through the collector's conversion of rents, though the conversion would not subject him to indictment for larceny or embezzlement. *City Trust, Safe Deposit & Surety Co. v. Lee*, 68 N. E. 485, 486, 204 Ill. 69.

## DISHONOR

See Notice of Dishonor.

A negotiable instrument is "dishonored" when it is not paid on presentment for that purpose. *Kinsel v. Ballou*, 91 Pac. 620, 622, 151 Cal. 754 (referring to Civ. Code, § 3141).

A bill is "dishonored by nonacceptance" when it is duly presented for acceptance, and the statutory acceptance is refused or cannot be obtained. The person presenting it loses the right of recourse against the drawer and indorsers where he does not treat it as dishonored by nonacceptance. An immediate right of recourse against drawers and indorsers accrues to the holders, and no presentment for payment is necessary. *National Park Bank v. Saitta*, 111 N. Y. Supp. 927, 931, 127 App. Div. 624 (quoting and adopting the definitions in Negotiable Instruments Law [Laws 1897, c. 612] §§ 246, 247, 248).

## DISINTER

The word "disinter" is used in Pen. Code, art. 367, providing that if any person not authorized by law, or by a relative or friend, for the purpose of reinterment, shall "disinter" any human body, he shall be punished, etc., means that the body and the whole thereof should be removed from the grave. Where a grave was uncovered, and only the head of the body displaced and taken therefrom, this would not be an offense under the statute, because disinterring does not mean simply uncovering the grave, but includes removing of the whole body therefrom. *Williamson v. State*, 72 S. W. 600, 601, 44 Tex. Cr. R. 520.

## DISINTERESTED

Under Burns' Ann. St. 1901, § 433, providing that a deposition shall be written down by the officer or deponent, or some disinterested person, a clerk or stenographer in the employment of the attorney of one of the parties to the action cannot be considered a "disinterested person." *Knickerbocker Ice Co. v. Gray*, 72 N. E. 869, 871, 165 Ind. 140, 6 Ann. Cas. 607.

Municipal officers do not constitute a "disinterested tribunal" for the ascertainment of just compensation to be paid for land taken by the city for public use. *Peirce v. City of Bangor*, 74 Atl. 1039, 1041, 105 Me. 413.

Within the meaning of the appraisal clause of a standard fire insurance company, one is not disqualified, as a matter of law, from being a "disinterested" appraiser merely because he has previously made an estimate of the loss at the request of the insured. *National Fire Ins. Co. v. O'Bryan*, 87 S. W. 129, 130, 75 Ark. 198, 5 Ann. Cas. 334.

An arbitrator of a loss under an insurance policy, who, because of association with or employment for insurance companies, entered on an inquiry in a friendly attitude, to the company, and who had a considerable income from adjusting such losses, and whose attitude during the investigation indicated a purpose to reduce the amount of the award to the minimum, was not a "disinterested" person, within the rule relating to arbitrators, though his conduct may have been consistent with an honest judgment. *Produce Refrigerator Co. v. Norwich Union Fire Ins. Soc. (Minn.)* 97 N. W. 875.

All the referees provided for in the Maine standard fire insurance policy to fix the amount of the loss must be "disinterested" men, not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad, full sense of being competent, impartial, fair, and open-minded, and substantially indifferent in thought and feeling between the parties, and without partisanship or bias either way. *Young v. Aetna Ins. Co.*, 64 Atl. 584, 586, 101 Me. 294.

The adjective "competent" has a variety of meanings, depending on the connection in which it is used, and it does not mean "disinterested" in all cases. Competency may have reference to fitness, qualification, sufficient ability, and training to successfully execute the work to be undertaken. The term "competent," as used in Rev. St. 1898, § 1379—13, providing for the appointment of three competent persons as drainage commissioners, does not mean "disinterested," and owners of land within the proposed district are not disqualified. In *re Cranberry Creek Drainage Dist.*, 107 N. W. 25, 26, 128 Wis. 98 (citing *Crabb*, Eng. Synonymous; Stand. Dict.; 2 Words and Phrases, p. 1358; *Bowes v. Haywood*, 35 Mich. 241; In *re Pacheco's Estate*, 23 Cal. 476; *Aetna Ins. Co. v. Stevens*, 48 Ill. 33; Attorney General v. Hallett, 2 H. & N. 374; *Tenney v. State*, 27 Wis. 387).

### As without pecuniary interest

Members of a committee appointed on appeal from county commissioners in proceedings to lay out a highway are "disinterested," though owning lands liable to taxation in the town through which the highway

passes. The requirement to be "disinterested" is the equivalent of "not interested." The liability to taxation is not such an interest as disqualifies an action. *Selectmen of Andover v. County Com'rs*, 29 Atl. 982, 983, 86 Me. 185.

#### As not related

Under Rev. St. c. 1, § 6, rule 22, providing that, when a person is required to be "disinterested" or indifferent in a matter in which others are interested, the relationship by consanguinity or affinity within the sixth degree, according to the civil law, or within the degree of second cousin, inclusive, except by written consent of the parties, will disqualify him, a juror who was related to plaintiff within the fourth degree, and to defendant within the fifth degree, according to the rules of the civil law, but of which fact neither the plaintiff nor the defendant had knowledge, and the juror was not aware of it until after the verdict, was not "disinterested," and was not a legal member of the panel, and plaintiff was entitled to a new trial as a matter of law. *Jewell v. Jewell*, 24 Atl. 858, 859, 84 Me. 304, 18 L. R. A. 473.

#### DISINTERESTED WITNESS

A "competent witness," within *Burns' Ann. St. 1908*, § 3132, requiring a will to be witnessed by two or more "competent witnesses," is one competent to testify generally in courts of justice, and laboring under no legal disqualification, the word "competent" being synonymous with "credible," "disinterested," and meaning one who, at the time of subscribing the will, is competent to testify in a proper probate proceeding to the facts attested. *Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772, 774.

A subscribing witness to a will containing charitable gifts, who was an executor and trustee under the will, is not a "disinterested witness," where he was also an officer and trustee of a church to which the income and a portion of the corpus of the trust estate was bequeathed, and had an option to purchase certain shares of stock, which were a part of the trust, for religious and charitable uses, at a price to be agreed on by three disinterested persons, to be selected in a particular manner, he being one of the two trustees to whom the stock of the corporation was given in trust to vote at corporate elections, and whose duties required that dividends received be paid by them to the persons named, and in the proportions fixed in the will, and was also a stockholder and director in the corporation, as well as an officer and employé. *In re Kessler's Estate*, 70 Atl. 770, 773, 221 Pa. 314, 128 Am. St. Rep. 741, 15 Ann. Cas. 791.

#### DISK

"Disk" is "any flat or approximately or apparently flat circular plate or surface."

*Glauber v. H. Mueller Mfg. Co.*, 169 Fed. 110, 113, 95 C. C. A. 108 (quoting and adopting definition in Cent. Dict.).

#### DISLOYAL

A plea in an action for the wrongful discharge of an employé, which alleges as a ground for the discharge that the employé was "disloyal" in secretly accepting gifts from the persons from whom he bought goods for the employer, charges that the employé was untrue to his employer's cause, involving a corrupt or improper state of mind, and, if proved, justifies the discharge. *Wade v. William Barr Dry Goods Co.*, 134 S. W. 1084, 1086, 155 Mo. App. 405.

#### DISMISS

See *Motion to Dismiss*.

"Dismiss" is the equivalent of "cancel," within the meaning of a contract to "cancel" a suit. *Kiltze v. Smith*, 91 N. E. 748, 749, 46 Ind. App. 26.

The constitution of a mutual benevolent society organized in the New York City police department required a member to be in good standing for one year before he would be entitled to any benefit, except death or dismissal, and by another section a member who absented himself from duty for five days or more, and was therefore dismissed from the department relinquished all claim to benefits, and Greater New York Charter (Laws 1901, c. 466) § 308, in fact provided dismissal for such cause. The constitution of the society also deprived any member of benefits who was convicted of crime, or was exceptionally reckless, or who apparently sought dismissal. The society was incorporated about three years after the rendition of a decision by the Supreme Court holding that a constitutional provision of a similar society, giving benefits to a member dismissed from the force for a violation of duty, was invalid. Greater New York Charter (Laws 1901, c. 466) §§ 353, 354, 355, provided for the pensioning of policemen who were "relieved and dismissed" from the police force because of injuries sustained in the line of their duty, disability, or disease contracted without misconduct, and in case of veterans of the police force or war veterans after having served on the force for a certain period. Held, that a policeman who was retired because of physical infirmities, rendering him incapable of performing his duties, was "dismissed" within the first provision of the constitution set out, so as to be entitled to benefits, though he had not been a member for one year. *Foley v. New York Mut. Benev. Soc.*, 126 N. Y. Supp. 12, 14, 141 App. Div. 180.

#### As final disposition

An erroneous entry on a calendar of the word "dismissed" not made in the presence

of the court and not in consequence of its orders, is not to be taken as a final judgment dismissing the action. *Ledbetter v. Mandell*, 109 N. Y. Supp. 602, 608, 124 App. Div. 854.

Where defendant in a penal action dies after judgment against him and before its reversal, the action is not "dismissed" nor finally disposed of in favor of or against a party, within Code Civ. Proc. §§ 3228, 3229, and neither party is entitled to costs on the entry of judgment of abatement. *People v. Newcomb*, 135 N. Y. Supp. 151, 153, 75 Misc. Rep. 258.

Bankruptcy Act July 1, 1898, c. 541, § 12e, 30 Stat. 550, declares that on confirmation of a composition the consideration shall be distributed as the judge shall direct and the case dismissed. Held, that "dismissed" as so used meant only that the court should proceed no further with the administration of the estate under the bankruptcy act, and not that no further proceedings in the case should be taken to terminate the same, and hence did not deprive the referee of jurisdiction conferred by section 22a (1) to thereafter pass on the accounts of the trustee, and, after allowing the same, direct that the trustee be discharged and the estate closed. *United States v. Sondheim*, 188 Fed. 378, 380.

## DISMISSAL

See Decree of Dismissal.

Dismissal on the merits, see Merits.

Dismissal without prejudice, see Without Prejudice.

Reason for dismissal, see Reason.

"Dismissal" is the equivalent of cancellation." *Klitze v. Smith*, 91 N. E. 748, 749, 46 Ind. App. 26.

The "dismissal" of a count of an information is not an amendment thereof, but is in the nature of an election to proceed on the remaining counts. Under Pen. Code, § 1019, providing that a plea of guilty puts in issue every material allegation of the information, the dismissal of one count after the plea is entered, leaving another count, the allegations of which are complete and independent of the dismissed count, does not leave the case without issue joined. *People v. Danford*, 112 Pac. 474, 478, 14 Cal. App. 442.

The word "dismissal," in Pol. Code, § 1608, providing that a teacher in case of his dismissal before the expiration of his contract may appeal to the school superintendent, etc., does not imply a hearing, the word meaning the summary disposal of a case as distinguished from a trial of it, and the action of the county superintendent in approving after a hearing, the dismissal of a teacher by the board of trustees was binding on the trustees, and they could not be compelled by mandamus to reinstate the teacher. *Taylor v. Marshall*, 107 Pac. 1012, 1013, 12

Cal. App. 549 (citing 3 Words and Phrases, p. 2105).

A judgment of "nonsuit" and a judgment of "dismissal" serve the same purpose, have the same legal effect, and arrive at the same end, and hence should be treated alike and allowed the same office in the everyday administration of the law. *Wetmore v. Crouch*, 87 S. W. 954, 956, 188 Mo. 647, 3 Ann. Cas. 94.

"Dismissal," though not a final determination of the controversy, is a final ending of that particular suit." *Livingston v. New England Mortgage Security Co.*, 91 S. W. 752, 753, 77 Ark. 379 (citing *And. Dict. Def. Words*, "Dismiss," p. 364; "Discontinuance," p. 360; "Nonsuit," p. 712; 14 Cyc. p. 391).

"In those jurisdictions where the rule indicated by the word 'retraxit' has been recognized, the substance of the matter seems to be that a dismissal by agreement of the parties is equivalent to and is treated as a public renunciation on the part of the complainant of the claim asserted by him in his pleadings against the defendant, and he thereafter estopped to bring it forward again." *Lindsay v. Allen*, 82 S. W. 171, 174, 112 Tenn. 637.

A "dismissal," under Kansas practice, is a judicial act rather than an act of the party. Whether "with prejudice" or "without prejudice," it is in the nature of a judgment, and a judgment "with prejudice," not set aside or reversed, is a final disposition of the controversy. *Hargis v. Robinson*, 79 Pac. 119, 120, 70 Kan. 589.

## As final decree or judgment

See, also, Final Decree or Judgment.

While a "dismissal" for want of prosecution terminates a suit, it does not end the controversy; it being in effect a final judgment for defendant, but not precluding plaintiff from bringing new suit for the same cause. *State ex rel. Sheridan Pub. Co. v. Goodrich*, 140 S. W. 629, 630, 159 Mo. App. 422 (citing 3 Words and Phrases, p. 2105).

Where all the defendants except one appeared and confessed judgment, whereupon the case was ordered "filed away," such order was a final order of "dismissal" as to the defendant who did not appear, and a judgment could not be entered against him at a subsequent term without further notice. *Aikman v. South (Ky.)* 97 S. W. 4, 5.

A "dismissal" of a cause for want of prosecution, though not a final ending of a controversy, is a final ending of that particular suit. In effect, it is a final judgment for the defendant, though it does not preclude the plaintiff from bringing a new suit for the same cause. *State ex rel. Sheridan Pub. Co. v. Goodrich*, 140 S. W. 629, 630, 159 Mo. App. 422 (citing 3 Words and Phrases, p. 2105; *Livingston v. New England Mortgage Security Co.*, 91 S. W. 752, 77 Ark. 379).

Under Rev. St. 1887, § 4823, providing that the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal, the "dismissal of an appeal" for failure to furnish an undertaking is an affirmance of the judgment from which the appeal was taken, unless the order of dismissal is expressly made without prejudice to another appeal. *West v. Dygert*, 97 Pac. 961, 962, 15 Idaho, 350.

#### As strike from docket

"Stricken from the docket" is used as synonymous with "discontinued," "filed away," so that an order striking a cause from the docket amounts to a "dismissal." *Aikman v. South* (Ky.) 97 S. W. 4, 5.

#### DISMISSAL AGREED

"The words 'dismissed agreed,' entered as the judgment of the court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment." *Ex parte Loung June*, 160 Fed. 251, 258 (quoting and adopting definition in *Haldeman v. United States*, 91 U. S. 584, 23 L. Ed. 433).

#### DISMISSAL OF APPEAL

As decision of court, see *Decision* (Of Court).

#### DISOBEDIENCE

Though a pupil could ask to be excused from taking the part assigned to him in a dialogue and give his reasons for his request, if the principal regarded his reasons insufficient, it was the pupil's duty to obey, and his refusal to do so constituted "disobedience," and his continued disobedience and refusal of offers permitting his return on taking another part constituted insubordination, and was good cause for the suspension, under Ky. St. 1903, § 4367, requiring common school pupils to comply with legal regulations for their government, and making willful disobedience or defiance of teachers' authority, etc., ground for suspension, and section 4473, authorizing school trustees to adopt such legal regulations as they may deem necessary. *Cross v. Board of Trustees of Walton Graded Common School*, 110 S. W. 346, 347, 129 Ky. 35.

#### DISORDERLY

See *Idle and Disorderly*.

#### DISORDERLY CONDUCT

"Disorderly conduct" generally means some act which tends to a breach of the peace, or to disturb the portion of the public which may hear or see the conduct claimed to have been disorderly. *Sheppard v. City of Jackson*, 76 S. E. 367, 368, 11 Ga. App. 811.

The term "disorderly conduct," standing alone, may mean anything a police officer or

magistrate may wish, and there is no such criminal offense in the Criminal Code or under general conduct as "disorderly conduct"; but in New York City Charter (Consolidation Act, Laws 1882, c. 410) §§ 1448, 1458, driving or riding a horse through the streets faster than five miles an hour is a criminal offense, called "disorderly conduct," and the suffering of an unmuzzled vicious dog to be at large, and threatening, abusive, or insulting behavior with intent to provoke a breach of the peace, and the plying of her vocation in the streets by a lewd woman, constitute offenses also called "disorderly conduct." In *re Newkirk*, 75 N. Y. Supp. 777, 778, 37 Misc. Rep. 404.

Comp. Laws § 5923, enumerating certain acts which are thereby declared to constitute "disorderly conduct," and the actors disorderly persons, subject to punishment under its provisions, did not deprive the Legislature of power to authorize the city of Grand Rapids to declare other acts than those defined by the statute to constitute disorderly conduct under Grand Rapids City Charter, tit. 3, § 10, authorizing the city to provide for the punishment of vagrants and all disorderly persons, and to punish disorderly persons of all kinds, since the term "disorderly" will not be confined to its statutory definition. In *re Stegenga*, 94 N. W. 385, 387, 133 Mich. 55, 61 L. R. A. 763.

To constitute the offense of "disorderly conduct," under an ordinance providing that whoever shall be guilty of any violent, riotous, or disorderly conduct, or who shall use any profane, abusive, or obscene language, in any street, house, or place within the city, whereby the peace or quiet of the city is or may be disturbed, shall upon conviction pay a fine, the acts alleged to constitute the offense must have been committed in a street, house, or similar place within the city; the general word "place," as used in the ordinance, meaning a definite location within the city of the same kind and nature as a street or house. *Barton v. City of La Grande*, 22 Pac. 111, 112, 17 Or. 577.

Consolidation Act (Laws 1882, p. 366, c. 410) § 1458, provides that a person who shall use any threatening, etc., behavior with intent to provoke a breach of the peace, etc., shall be guilty of disorderly conduct. Section 1459 provides that, when it appears on oath of a credible witness before any police justice that any person has been guilty "of any such disorderly conduct as in the opinion of such magistrate tends to a breach of the peace," the magistrate may cause the person complained of to be brought before him to answer the charge. Held that, under section 1459, "disorderly conduct" is such conduct as in the opinion of the magistrate tends to a breach of the peace, and the section does not relate only to the acts specified in section 1458. *People v. Mansi*, 113 N. Y. Supp. 866, 868, 129 App. Div. 386.

The magistrates of the city of New York have jurisdiction to try persons charged with "disorderly conduct" tending to a breach of the peace, as defined in New York Consolidation Act (Laws 1882, c. 410) § 1458, one of which offenses is soliciting within a thoroughfare or public place. *People ex rel. St. Clair v. Davis*, 127 N. Y. Supp. 1072, 1075, 143 App. Div. 579.

#### **Drunkennes**

Drunkennes in a public place is a nuisance and "disorderly conduct," within Kirby's Dig. §§ 5438, 5461, authorizing municipal corporations by ordinance to prevent nuisances and disorderly conduct. *Dewitt v. Lacotts*, 88 S. W. 877, 878, 76 Ark. 250.

#### **Violation of official conduct**

One who, intrusted with official power, violates his public obligation, betrays his official trust, and loses the public confidence by selling his official influence or vote in a body of which he is a member, is guilty of "disorderly conduct in office." A charge that, in effect, alleges that a member of a city council agreed for a consideration to aid in securing a valuable contract with the city through a constituted board of the city, and to secure an increase in the appropriation for the purposes of the contract to unduly increase the profits, sufficiently sets forth conduct amounting to "disorderly behavior and malconduct in office," for which such officer may be expelled under the statute; and where there is evidence to sustain the charge, and no illegality appears in the proceedings of expulsion, the courts will not interfere by mandamus. Malconduct in office, like misconduct in office, includes such acts as amount to a breach of the good faith and the right action that are tacitly required of all officers. *Etzler v. Brown* (Fla.) 50 South. 416-418.

A member of a city council who is guilty of "grafting" is liable to expulsion for "disorderly conduct" within the meaning of Passaic City Charter, § 19, empowering the city council to punish or expel its members for disorderly conduct. *Darmstatter v. City Council of City of Passaic*, 79 Atl. 545, 546, 81 N. J. Law, 162, 37 L. R. A. (N. S.) 150.

The words "disorderly conduct," as used in a charter authorizing a city council to expel a member for disorderly conduct, have reference to the conduct of a member of a council acting in his official character. "He who, intrusted with official power, violates his public obligations, betrays his official trust, and abuses the public confidence by selling his official influence or vote in the body in which he is a member, is guilty of 'disorderly conduct.'" Any conduct which is contrary to law is within the definition of disorderly conduct as given by standard lexicographers, and any gross violation of duty on the part of the members of a common council is within the legal meaning of the

words used in the charter. *State v. Jersey City*, 25 N. J. Law, 516, 540, 541.

#### **DISORDERLY HOUSE**

Any place where illegal practices are habitually carried on is a "disorderly house." *State v. Martin*, 73 Atl. 548, 549, 77 N. J. Law, 652, 24 L. R. A. (N. S.) 507, 134 Am. St. Rep. 814, 18 Ann. Cas. 986.

A "disorderly house" may result from maintaining a place wherein any practices, such as tipling, fighting, or gaming, are permitted to be carried on. *State v. Moore*, 68 Atl. 165, 166, 75 N. J. Law, 619.

A charge that one is keeping a "disorderly house" means that he is so keeping a house as to make it a common nuisance to the neighborhood, and thereby renders himself liable to indictment. *Moore v. Beck*, 58 Atl. 166, 71 N. J. Law, 7.

A "disorderly house," within the statute punishing any person who shall maintain a common, ill-governed, and disorderly house, to the encouragement of idleness, gaming, drinking, fornication, and other misbehavior, must be a house of public resort, one frequented by the public, where illegal practices are habitually carried on, to the corruption of public morals and safety. The house is "ill-governed" if the law be habitually unobserved, and it is "disorderly" if the restraints of order and law are habitually violated. The term, therefore, includes a house in which the community are habitually permitted to assemble and buy liquors sold in violation of law. Isolated unlawful sale of liquor in a drug store, incident to the business, would not make the drug store a disorderly house; but where one operates a drug store in one room, and back of it in another room a bar, where liquors are habitually sold to the public in violation of law, such room is a disorderly house, the term "house" as so used embracing a single room in a house or building, or any place used as a shelter for disorderly conduct. *Walt v. People*, 104 Pac. 89, 91, 92, 46 Colo. 136.

A lessee who sublets rooms in a building, and who keeps a key to the building, and who reserves to himself the right of entry for the management of the premises, and who knows that the subtenants are of evil repute, and who occasionally participates in running the house as a disorderly house, keeps a "disorderly house," in violation of Comp. Laws 1897, § 11,697. *People v. Hoek*, 134 N. W. 1031, 1033, 169 Mich. 87.

#### **Gambling house**

A house in which persons are permitted to gather and gamble in violation of law is a "disorderly" one, however quietly it may be done. *Arenz v. Commonwealth*, 102 S. W. 238, 239, 125 Ky. 737.

Where a house is so kept that no one outside of its inmates is disturbed, annoyed,

or corrupted in their morals, it is not, as a general proposition, a "disorderly house"; but the annoyance or corrupting influence must reach beyond the inmates and affect the public peace or morals of the community. *People v. Hoffman*, 103 N. Y. Supp. 1000, 1001, 118 App. Div. 862.

"At common law a 'disorderly house,' in its broadest sense, may be defined as a house that is kept in such a way as to disturb, annoy, and scandalize the public generally or the neighborhood, or the passers-by on a highway, or in such a way as to encourage or promote breaches of the peace, or to corrupt the morals of the community." "A 'disorderly house' is a house in which people abide or to which they resort to the disturbance of the neighborhood, or for purposes which are injurious to the public morals, health, convenience, or safety." "Any place of public resort \* \* \* in which illegal practices are habitually carried on, or when it becomes the habitual resort of thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather together there for the purpose of gratifying their own depraved appetites, or to make it a rendezvous where plans may be concocted for depredations upon society, and disturbing either its peace or its rights of property." "The term 'disorderly house,' as defined by the common law, is one of very wide meaning, and includes any house or place the inmates of which behaved so badly as to make it a nuisance." It must be a place of public resort, or a place frequented by the public, kept or maintained so as to disturb or annoy the public, the neighborhood, or passers-by, or a place where illegal or immoral practices are habitually carried on, to the corruption of the public health, morals, or safety, or a place resorted to by idle, dissolute, vicious, or disorderly persons for the purposes of concocting depredations on society. It must have some of the above elements, from which it follows that it must have some of the elements of a public nuisance. *Mossman v. City of Ft. Collins*, 90 Pac. 605, 606, 40 Colo. 270, 11 L. R. A. (N. S.) 842, 122 Am. St. Rep. 1060 (quoting and adopting definitions in 14 Cyc. p. 482; *State v. Williams*, 30 N. J. Law, 102; *State v. Grososki*, 94 N. W. 1077, 89 Minn. 343).

#### As house of prostitution

"A 'disorderly house' is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation." There are three essential ingredients of the offense of keeping a disorderly house that must be established by the state by legal and competent evidence beyond a reasonable doubt: (1) That defendant is the owner, lessee, or tenant of said house; (2) that said house is run as a place where prostitutes are permitted to resort and reside for the purpose of plying their voca-

tion; (3) that prostitutes did resort and reside there for the purpose of plying their vocation. *Bass v. State (Tex.)* 66 S. W. 558.

Under Pen. Code 1895, art. 359, declaring that a "disorderly house" is one kept for prostitution, a disorderly house can be kept, although it is inhabited by only one prostitute; but a woman of bad reputation for chastity occupying a house frequented by men, which is a quiet and orderly house, in which no act of illicit intercourse is shown to have occurred, cannot be convicted of keeping a "disorderly house." *Ramey v. State (Tex.)* 45 S. W. 489, 490.

#### As a noisy place

To constitute a house a "disorderly house" in law, the noises, etc., must be usual, or common, and the disturbance must be general, and not of only one person in a thickly settled neighborhood. *Wilder v. State*, 60 S. E. 112, 113, 3 Ga. App. 443.

#### Place where usurious interest is taken

Those who maintain a place where usurious rates of interest are taken, and where the statutes prohibiting usurious interest are habitually violated, are indictable for keeping a "disorderly house." *State v. Diamant*, 62 Atl. 286, 73 N. J. Law, 131.

#### Sale of liquors

"The terms 'tippling shop' and 'disorderly house' have in law well-settled and well-defined meanings, and those meanings are not identical, nor is either necessarily included in the other." *Territory v. Robertson*, 92 Pac. 144, 145, 19 Okl. 149 (quoting and adopting definition in *City of Emporia v. Volmer*, 12 Kan. 622).

In this state, a house in which unlawful sales of liquor are habitually made is a nuisance, and one maintaining it is guilty of keeping a "disorderly house," and by the Werts law (2 Gen. St. p. 1810) any person selling any of the liquors named without a license obtained for that purpose is guilty of the offense of keeping a disorderly house. Under that act, a conviction for keeping a disorderly house may be had on proof of a single sale in violation of its provisions. *Parker v. State*, 39 Atl. 651, 652, 61 N. J. Law, 308 (Citing *State v. Fay*, 44 N. J. Law, 474).

"A 'disorderly house' is any place of public resort in which unlawful practices are habitually carried on, or which becomes a rendezvous or place of resort for thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather there to gratify their depraved appetites, or for any purpose; for such persons are regarded as dangerous to the peace and welfare of the community, and their presence at any place in considerable numbers is always a just cause for alarm and apprehension. \* \* \* And a place where liquor is sold under a license in excessive quantities, whereby per-

sops become intoxicated, and where brawls result therefrom, is a disorderly house, and indictable as a nuisance, for no person has a right to carry on upon his own premises or elsewhere for his own gain or amusement any public business clearly calculated to injure and destroy public morals or to disturb the public peace." *State ex rel. Crow v. Canty*, 105 S. W. 1078, 1082, 207 Mo. 439, 15 L. R. A. (N. S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787 (quoting *Wood*, Nuis. § 38); *Reaves v. Territory*, 74 Pac. 951, 954, 13 Okl. 396 (quoting *Wood*, Nuis. p. 43, § 38).

To constitute a "disorderly house" where intoxicants are sold, spirituous, vinous, or malt liquors must be sold or kept for sale without a license, and a single sale is insufficient. *Morford v. State*, 131 S. W. 568, 569, 60 Tex. Cr. R. 190.

Under the Penal Code, defining a "disorderly house" as one where spirituous, vinous, or malt liquors are kept for sale without first having obtained a license, an indictment for keeping a disorderly house is not insufficient for failure to allege that the liquors kept for sale were intoxicating. *Tacchini v. State*, 126 S. W. 1139, 1140, 59 Tex. Cr. R. 55.

The Penal Code, defining a "disorderly house" as a house where intoxicating liquors are kept for sale and sold without a license, or any house located in prohibition territory in which nonintoxicating malt liquor is sold or kept for sale, so as to require the seller to obtain an internal revenue license under the federal laws, etc., does not include persons not previously included, but merely provides that, where by law a license is required, the carrying on of the business without a license gives to the house the quality of a disorderly house, and a club organized to maintain golf and other sports which maintains a clubhouse where its members may obtain intoxicating liquors, does not maintain a disorderly house. *State v. Duke*, 137 S. W. 654, 662, 104 Tex. 355.

A single sale or gift of intoxicating liquor to two minors of the age of 19 years or over, by a dramshop keeper, does not make his place of business a "disorderly house," within Ann. St. 1906, § 3012, authorizing the revocation of a license on it appearing that a dramshop keeper has not at all times kept an orderly house, since a disorderly house is any house to which people resort to the disturbance of people lawfully within the place, a house used or resorted to for the purpose of gaming, or immoral purposes. *State ex rel. Arnold v. Lichta*, 109 S. W. 825, 827, 130 Mo. App. 284.

The title of Laws 1907, p. 246, c. 132, being an act to amend Pen. Code 1895, tit. 10, c. 4, art. 359, defining a "disorderly house" as a house in which liquors are sold without a license, and adding article 359a, defining the offense of procuring, and to amend articles

361, 362, stating who shall be guilty of the offense of keeping a disorderly house, etc., is sufficient, under Const. art. 3, § 35, to include a provision defining a disorderly house as a house where intoxicating liquors are sold without having a license, and punishing a keeper of a disorderly house; and it is valid, though it be assumed that article 359a is not fairly embraced within the title, that matter being clearly separable, and, if not within title, not affecting the remainder of the act. *Bumbaugh v. State*, 120 S. W. 423, 424, 56 Tex. Cr. R. 331; *Joliff v. State*, 109 S. W. 176, 178, 53 Tex. Cr. R. 61.

### DISORDERLY PERSON

Under the express provisions of Cr. Code, § 899, subd. 3, persons who pretend to tell fortunes are "disorderly persons." *Fay v. Lambourne*, 108 N. Y. Supp. 874, 876, 124 App. Div. 245.

A wife sued for the alienation of her husband's affection. On failure to recover the parties separated. For 17 years he contributed to her support, when he refused so to do, though earning good wages, on the ground that he was not liable unless she lived with him. Held that, on evidence that her own earnings were insufficient for her support, he was properly convicted as a "disorderly person," under Code Cr. Proc. § 899 (1). *People v. Romaine*, 109 N. Y. Supp. 1100, 1101, 57 Misc. Rep. 571.

To justify a conviction of being a "disorderly person," under Code Cr. Proc. § 899, defining disorderly persons as those who abandon their wives or children without adequate support, or leave them in danger of becoming a burden to the public, the proof must show that the family of accused is liable to become a public burden. *People v. Smith*, 124 N. Y. Supp. 57, 139 App. Div. 361.

### DISPATCH

See Customary Dispatch; Reasonable Dispatch.

The term "dispatch" is a technical one in the postal service, and means a mass of matter to be sent to a certain place at a certain time. The term "trip" is also technical, and refers to the wagon which will carry the whole or a part of the dispatch. *Utah, N. & C. Stage Co. v. United States*, 39 Ct. Cl. 420, 438.

### DISPATCH FOR DISCHARGING

A charter party providing for the unloading of a cargo with "dispatch for discharging" requires a discharge according to the custom of the port. *The Joseph W. Brooks*, 122 Fed. 881, 884.

### DISPATCHER

See Train Dispatcher.

## DISPENSARY

It was not intended by the use of the word "dispensary" in the act of August 1, 1906 (Acts 1906, p. 114), to provide for local option elections in counties where the sale of liquor is unlawful except in dispensaries, to make a class out of any of these various forms of a dispensary that are found under the different laws providing for the establishment of such institutions. The General Assembly evidently intended, by the use of the word "dispensary," to describe a place where liquor is sold by governmental authority, without reference to whether the officers in charge were officers of the state, county, or municipality, or how the profits of the dispensary were to be divided. The legislative intention was to enable the people of the county where any one of the different forms of a dispensary appeared to express their preference as to whether the dispensary should continue in that county or whether it should be suspended. *City of Barnesville v. Means*, 57 S. E. 422, 426, 128 Ga. 197.

### As person

See Person.

## DISPENSARY COMMISSIONER

As state officer, see State Officer.

## DISPENSE

"Dispense" means to deal out in portions; to distribute; to give. *State v. Ball*, 123 N. W. 826, 827, 19 N. D. 782.

"Dispense" has been defined: "To deal out in portions; to distribute; to give." Webster's New International Dictionary. "To deal out; to apportion; to distribute. To dispense is to deal out generally or indiscriminately; to distribute, deal out to, or divide among individuals." Worcester's Dictionary. "To deal or divide out; give forth diffusively, or in some general way; practice distribution of." Century Dictionary. A restaurant keeper who serves to his patrons at his premises intoxicating liquors to whomsoever orders and pays for the same "dispenses" liquor within the meaning of the statute. It has also been held that giving away liquors constituted dispensing. *Sawyer v. Frank*, 132 N. W. 861, 152 Iowa, 341 (citing *Johnson v. Chattanooga*, 36 S. W. 1092, 97 Tenn. 247).

## DISPONE

"Dispone" has been held to be equivalent to disposition, and to mean alienate. In *re Hubbell Trust*, 113 N. W. 512, 515, 135 Iowa, 637, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640.

## DISPOSAL

The words "disposal" and "distribution" are often used synonymously. *Scully v.*

*Squier*, 90 Pac. 573, 577, 13 Idaho, 417, 30 L. R. A. (N. S.) 183.

The ninth clause of a will was divided into three seemingly distinct parts, the first part giving and bequeathing to testator's wife, after debts and bequests made in other clauses of the will had been paid, all the residue of the property, both personal and real, "to have and to hold during her lifetime, to manage and control without having to give bonds, and this is to be in lieu of her dower interest in my estate, for the benefit and support of herself and my two minor children \* \* \* excepting" certain described land, which by the second part of the clause he devised to two sons. The third part of the clause provided "the remainder of the estate after these bequests are made shall be at my wife, M. I.'s disposal, but it is expressly provided that if any of my children mentioned in this will shall die before they come in possession of their bequest, it will revert to the estate and shall be subject to the same conditions as the estate according to the terms mentioned in the will." *Held*, that the will, aside from the third part of the ninth clause, having disposed of all of testator's property, the word "remainder" as used in such third part must be held to refer to the remainder after the wife's life estate, and, as the word "disposal" indicates the power of absolute disposition, the life estate granted by the first part of the ninth clause was raised to a fee simple by the third part of the clause, and hence the wife took a fee rather than a life estate in the property devised and bequeathed to her by the ninth clause. *Ironside v. Ironside*, 130 N. W. 414, 416, 150 Iowa, 628.

The word "disposal," as used in Rev. St. U. S., § 2387, providing that whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it shall be lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office the land so settled and occupied in trust for the several use and benefit of the occupants thereof, and that the execution of such trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, shall be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated, means distribution, when applied to the lots that were actually occupied and possessed, for under the section such lots are already disposed of; that is, they became the property of the occupants, and the occupant of a town lot, at the time of the entry of the townsite, is its real owner. *Scully v. Squier*,



90 Pac. 573, 577, 13 Idaho, 417, 30 L. R. A. (N. S.) 183.

### DISPOSABLE PORTION

A will by a resident of Louisiana of the "disposable portion" of all the property she might leave passed all property located in Mississippi, though under the laws of Louisiana testatrix's disposable property was only one-third of her estate. *L'Hote v. Roca* (Miss.) 58 South. 655, 656.

### DISPOSE OF

See Sell and Dispose of; Sell, Give Away, or Otherwise Dispose of.

Any way dispose of, see Any.

Otherwise dispose of, see Otherwise.

To "dispose of" means to part with, to relinquish, to get rid of, to alienate, to effectually transfer. *Connely v. Putnam*, 111 S. W. 164, 166, 51 Tex. Civ. App. 233.

The definitions, that to "dispose of" property is to alienate it, assign it to a use, bestow it, direct its ownership, and that it is to part with, to sell, to alienate, embrace both the popular and legal significance of the word, when used in an attachment law in connection with property. *Pearre v. Hawkins*, 62 Tex. 434, 437 (quoting and adopting *Abb. Dict.* and *Webst. Dict.*).

The words "disposed of" are not of legal technicality, but are in general use. Great variety and many shades of meaning have been assigned to them in judicial definitions. Webster defines them as "to determine the fate of; to exercise the power of control over; to fix the condition, application, employment, etc., of; to direct or assign for a use; to exercise finally one's power of control over; to pass over into the control of some one else, as by selling." Where a will gave trustees testamentary power to sell certain lands, which power they did not exercise, the lands did not fall within another cause relating to lands not otherwise "disposed of." *Whitfield v. Thompson* (Miss.) 38 South. 113, 117.

"Dispose," in the sense in which it is used in the Constitution of the state of New York, means "to part with to another," "to put into another power and control," or "to give away or transfer by authority." *Newcomb v. Newcomb*, 12 N. Y. 603, 620.

The word "tried," as used in Code Civ. Proc. § 976, providing that an issue of law may be brought and tried as a contested motion, is to be deemed as synonymous with the words "disposed of." *People v. Bleecker St. & F. F. R. Co.*, 124 N. Y. Supp. 786, 787, 67 Misc. Rep. 582.

Rev. St. 1909, § 2294, subd. 8, authorizing an attachment where defendant has fraudulently "disposed of" his property so as to hinder or defraud creditors, does not apply to conveyances of property; subdivision 7

only applying thereto. *Conran v. Fenn*, 140 S. W. 82, 86, 159 Mo. App. 664.

Mortgaging exempt property is not a disposal thereof, within Code 1906, § 2158, providing that, where an owner "disposes of" exempt property, it shall not thereby become liable to his debts. And so section 2139, cl. 10, par. "b," exempting the proceeds of a sale of such property, does not apply where a homestead is mortgaged in acquiring another place, to which the occupant removed, and an execution is thereupon levied against the homestead; there having been no sale of the property and no attempt to subject the proceeds of a sale to the creditor's debts. *Bennett Bros. v. Dempsey*, 48 South. 901, 902, 94 Miss. 406, 136 Am. St. Rep. 584.

A lease of land for any number of years does not violate a provision in an instrument of trust that the property shall not be sold or "disposed of," since a voluntary parting with anything short of an estate in the land is not a "disposal" of it. *In re Hubbell Trust*, 113 N. W. 512, 515, 135 Iowa, 637, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640.

Ky. St. § 3941a, authorizes persons to pool tobacco raised by them for the purpose of grading and storing it to obtain a higher price therefor than they could obtain by selling their crops separately. Subsection 3 (section 1786) provides that the agent appointed for the parties to such contract as provided in the act shall have the sole right to sell the crops pooled, and that it shall be unlawful for any owner of crops so pooled to "dispose of" it without written consent of the agent. Held, that where a pooling contract was made in M. county, and agents appointed to sell the tobacco pooled were in that county, the mere removal of tobacco pooled by one who had entered into the contract from M. county without consent of the agents and with intent to sell it without their consent, in violation of the contract, was a disposal of it within the statute, though it was actually sold in another state, and the offending person could be indicted and tried in M. county. *Collins v. Commonwealth*, 133 S. W. 233, 234, 141 Ky. 564; *Malone v. Same*, 133 S. W. 235, 141 Ky. 570.

The term "dispose of," as used in Pen. Code 1895, § 680, providing that any cropper who shall sell or otherwise dispose of any part of the crop grown by him shall be guilty of a misdemeanor, includes only those transactions in which there has been a transfer by the defendant of either title or absolute possession of the property, or else some such disposition of it as would destroy it in whole or in part. It means to alienate, to effectually transfer. It covers "all such alienations of property as may be made in ways not otherwise covered in the statute; for example, such as pledges, pawns, gifts, bailments, and other transfers and alienations." "To dispose of" in a popular sense,

as used in reference to property, means to part with a right to or ownership of it; in other words, a change of property. If this does not take place, it would scarcely be said the property was disposed of. It differs in meaning from the word "secrete." When it is associated in the context with the word "sell," then under the principle contained in the legal expression "noscitur a sociis" its meaning takes on some limitation from the association. Where the expression is "sell or otherwise dispose of," the other disposition must be somewhat in the nature of a sale. It does not include a mere removal of the property. In a statute prohibiting "the selling, giving away, or otherwise disposing of" certain property under certain conditions, the expression "otherwise dispose of," in the absence of any expression of a legislative intent otherwise, must be construed to apply only to such a disposition as a sale or gift. *Scott v. State*, 64 S. E. 1005, 1006, 6 Ga. App. 332 (citing *United States v. Hacker*, 73 Fed. 292, 294; *Bullene v. Smith*, 73 Mo. 151, 161; *Reynolds v. State*, 73 Ala. 3; *Franklin v. State*, 12 Md. 246, 248; *Pearre v. Hawkins*, 62 Tex. 434, 437; *In re Carr*, 19 Atl. 145, 16 R. I. 645, 27 Am. St. Rep. 773; *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855; *Hawthurst v. Rathgeb*, 51 Pac. 846, 119 Cal. 531, 533, 63 Am. St. Rep. 142; *Robberson v. State*, 3 Tex. App. 502, 503; *Robberson v. State*, 14 South. 554, 100 Ala. 37).

To "dispose of liquor in any manner" might, unqualified by anything else, mean the giving of it away; but in a statute providing that any persons who shall barter, sell, or dispose of in any manner any spirituous liquor, without first having obtained a license, shall be fined, it meant to part with it for some consideration, or with some motive of gain, and did not prohibit the giving of it away. It was intended to reach those cases where persons by some artifice or indirection attempted to cover up a sale, and thus evade the penalties of the law. *Litch v. People ex rel. Town of Sterling*, 75 Pac. 1079, 1080, 19 Colo. App. 421 (citing *Wood v. Territory*, 1 Or. 223).

#### **Sell**

The grant of a power to "dispose" of property is equivalent to the power to alienate or direct the ownership of the property. *Ironside v. Ironside*, 130 N. W. 414, 416, 150 Iowa, 628.

That the words "sell" and "dispose," as used in a will, were synonymous, was indicated by the words "either at public or private sale" appearing after the direction for the executrix to "sell and dispose" of the property as she might think best. *Rutledge v. Crampton* (Ala.) 43 South. 825, 826.

"Whilst it may be true that when the words 'disposed of' are used in connection with the word 'sell,' in the phrase 'to sell

and dispose of,' they may often be construed to mean a disposal by sale. The word is nomen generalissimum, and standing by itself, without qualification, has no technical signification." *Phelps v. Harris*, 101 U. S. 370, 381, 25 L. Ed. 855.

#### **Sell on credit**

Land was conveyed to a district agricultural association in trust as a place for holding agricultural exhibitions, a part thereof to be sold or disposed of to the best advantage for the purpose of improving the agricultural grounds and for meeting the expenses of the trust, including the expenses of litigation. The trustees of the association thereafter deeded part of the latter tract to B. in payment of legal services rendered the association and of services to be rendered in future. Held, that the power of disposition of the tract was not limited to a sale for cash, and even giving the word "sale" the definition of Civ. Code § 1721, as an exchange of property for a money consideration, the association was also authorized to "dispose" of the property which would empower it to transfer the property itself in payment of legal expenses. *Mansfield v. District Agr. Ass'n No. 6*, 97 Pac. 150, 151, 154 Cal. 145.

#### **DISPOSING MIND AND MEMORY**

"A 'disposing memory' exists when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them and act with sense and judgment in regard to them." *In re American Board of Com'rs for Foreign Missions*, 66 Atl. 215, 221, 102 Me. 72 (quoting and adopting the definition in *Hall v. Perry*, 33 Atl. 161, 87 Me. 572, 47 Am. St. Rep. 352).

"A 'disposing mind and memory' may be said to be one which is capable of presenting to the testator all of his property, and all the persons who come reasonably within the range of his bounty; and if a person has sufficient understanding and intelligence to understand his ordinary business, and to understand what disposition he is making of his property, then he has sufficient capacity to make a will." *Jones v. Thomas*, 117 S. W. 1177, 1188, 218 Mo. 508 (quoting and adopting definition in *Benoist v. Murrin*, 58 Mo. 322).

To constitute a "disposing mind and memory," it is not essential that the mind should be unbroken, unimpaired, unshattered by disease or otherwise. The testator should be capable of recollecting the property he is about to bequeath, the manner of distributing it, and the objects of his bounty.

His mind and memory should be sufficiently sound to enable him to know and understand the business in which he is engaged at the time. *Sloan v. Maxwell*, 3 N. J. Eq. 563, 568, 573; *Jones v. Collins*, 51 Atl. 398, 399, 94 Md. 403 (quoting and adopting the definition in *Sloan v. Maxwell*, 3 N. J. Eq. 563).

A testator has a "disposing mind and memory" when his mind and memory are sufficiently sound to enable him to recollect the property he is about to bequeath, the objects of his bounty, and the manner of distributing it; that is to say, to know and to understand the business in which he was engaged at the time he executed the will, though his memory be very imperfect and greatly impaired by age or disease. *Stackhouse v. Horton*, 15 N. J. Eq. 202, 206.

### DISPOSITION

See Final Disposition; Unlawful Disposition of Mortgaged Goods.

Other disposition, see Other.

By "disposition," according to the lexiconographers, is meant the tendency, bent, propensity, or inclination for or toward a particular thing. This may exist without the intent or design of doing it. *State v. Thompson*, 111 N. W. 319, 321, 133 Iowa, 741.

In reply to counsel's argument that the term "codicil," used by the notary, designated the last bequest as a separate act, and not as a part of the one will, the district court said that the notary did not use the term "codicil" alone, but styled the additional bequest a "codicil and addition to the will," but if he had used the term "codicil" alone, he would have been using a term synonymous with the word "bequest" or "disposition"; that the Civil Code uses the word "codicil" as synonymous with the word "disposition," or "legacy," in the provision that no "disposition" mortis causa shall henceforth be made otherwise than by a last will or testament, but the name given to the act of last will is of no importance, and dispositions may be made by testament, or under that institution or heir, of legacy, codicil, donation mortis causa, or under any other name indicating the last will, provided that the act be clothed with the forms required for the validity of the testament, and the clauses it contains, clearly establish that it is a "disposition" of last will. The conclusions of the district court were affirmed. *Oglesby v. Turner*, 50 South. 859, 864, 124 La. 1084.

### DISPOSSESS

The word "dispossess," in a lease authorizing the landlord, in case of default in the payment of rent, to re-enter by force or otherwise, and providing that on any default by the lessee the landlord may either dispossess the lessee or resort to a deposit made by the lessee to secure the performance of

covenants, includes removal from premises by the remedies afforded to a landlord to regain possession for nonpayment of rent. *Anzalone v. Paskusz*, 89 N. Y. Supp. 203, 206, 96 App. Div. 188.

The word "repossess," as used in a covenant in a lease authorizing the landlord, on the tenant's breach of covenant, to re-enter the premises and repossess himself of the same, was not equivalent to "dispossess," as used in the statute providing for regaining possession of real property by summary proceedings. *Kleinstei v. Gonsky*, 118 N. Y. Supp. 949, 950, 134 App. Div. 266.

When the owner of an easement is deprived of his right, he is not referred to as having been "dispossessed" of the land, but it is referred to as an "interference," "obstruction," or "disturbance." The remedy is on the case for damages for the injury done, or, if this is inadequate, permanent injunction is the proper remedy. *Kansas & C. P. R. Co. v. Burns*, 79 Pac. 238, 240, 70 Kan. 627.

### Disseisin distinguished

See Disseisin.

### DISPROPORTIONATE TO THE VALUE

In a statute relating to sale of land in probate proceedings, providing that the court must examine the return of the sale, and if the proceedings were unfair, or the sum bid "disproportionate to the value," the words quoted mean disproportionate to the value at the time of the bid. It would not be sufficient for the court to merely find that a sum exceeding the bid by 10 per cent. might be obtained, but it must also find that the bid, when it was made, was disproportionate to the value, or that the proceedings were unfair. In *re Leonis' Estate*, 71 Pac. 171, 173, 138 Cal. 194; *McGregor v. Jensen*, 109 Pac. 729, 731, 18 Idaho, 320.

In a complaint for specific performance, alleging that the consideration which plaintiff was to pay was adequate and "not disproportionate to the value" of the lands, the expression "not disproportionate to the value" is rather a circumlocutory form for "equal in value," and meets the requirement that the adequacy of the consideration must be shown. *Kerr v. Moore*, 92 Pac. 107, 108, 6 Cal. App. 305.

### DISPUTABLE PRESUMPTION

"Disputable presumptions of law" do not belong to the law of evidence, but to a much larger topic; the topic of legal reasoning in its application to particular subjects. They are aids to reasoning and argumentation, and assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind, or merely on policy

and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of them, by taking something for granted, by assuming its existence; and the exact scope and operation of these *prima facie* assumptions are to cast upon the party against whom they operate the duty of going forward in argument or evidence on the particular point to which they relate, but they are not in themselves either argument or evidence, although for the time being they accomplish the result of both. In *re Cowdry's Will*, 60 Atl. 141, 142, 77 Vt. 359, 3 Ann. Cas. 70 (citing Thayer, Prelim. Treatise, Ev. 314).

## DISPUTE

See Amount in Dispute; Matter in Dispute; Real and Substantial Dispute; Substantial Dispute; Value in Controversy or Dispute.

The treaty between the United States and Germany, giving consuls general, consuls, etc., exclusive charge of the internal order of the merchant vessels of their nation, and exclusive power to determine differences of every kind arising, either at sea or in port, between captains, officers, and crews, does not prevent an action in the courts for personal injuries from negligence on the part of the owners, agents, servants, and crew of such a vessel, although such an action might bring into question contradictions or differences in the statements of occurrences by the various officers or members of the crew. This is a question of evidence, and not such a matter of substantial rights as to be legally termed a "dispute or difference," in the sense of meaning a case at law or a claim to be litigated. *The Baker*, 157 Fed. 485, 487.

## DISPUTED CLAIM

Where an executor, in giving notice of a dispute or rejection of a claim under Code Civ. Proc. N. Y. § 1822, at the same time does or says anything from which claimant may reasonably infer that the determination to dispute or reject is not final, but the claim will be further examined and considered, it is not a "disputed claim" within the meaning of the statute. In *re Lathan's Will*, 130 N. Y. Supp. 535, 539, 145 App. Div. 849.

## DISQUALIFY

See Mental Disqualification; Permanently Disqualified.

Otherwise disqualified, see Otherwise.

Under Rev. St. c. 3, § 18, which provides that administration shall be granted to the husband upon the estate of his wife, if he will accept the same and is not disqualified, a husband is not "disqualified," so as to justify the county court in refusing him letters of administration, because of a post-

nuptial contract by which he relinquished all his right and interest in his wife's estate. *Orear v. Crum*, 25 N. E. 1097, 1098, 135 Ill. 294.

## DISQUALIFYING INTEREST

The "disqualifying interest" precluding a person from testifying to a transaction by him with a person since deceased, as provided by Code, § 4604, is an interest in the event of the case, and not in the question to be decided, and the witness' liability to a like action or his standing in the same predicament, if the verdict cannot be given in evidence for or against him, is an interest in the question only, which does not disqualify. *Mollison v. Rittgers*, 118 N. W. 512, 514, 140 Iowa, 365, 29 L. R. A. (N. S.) 1179.

## DISREGARD

In an instruction that "you are not at liberty to disregard such testimony entirely," to "disregard" means to overlook, to pay no attention to, to ignore; and as it was their duty to consider the evidence, to properly regard and weigh it, and then believe or disbelieve it as they should see fit, the province of the jury was not invaded in any manner by the instruction. *Everson v. State*, 93 N. W. 394, 396, 4 Neb. (Unof.) 109.

An instruction that, if any witness had willfully testified falsely in regard to any material fact, the jury was at liberty to "disregard and discard his entire testimony," is not objectionable because of the use of the words "disregard" and "discard," instead of "distrust," as used in Code Civ. Proc. § 2061, subd. 3, providing that, when a witness is false in one part of his testimony, he is to be "distrusted" in the others, since the court did not tell the jury that they ought to reject, or that they must reject, the entire evidence of the witness, but simply instructed them that they were at liberty to disregard and discard the whole evidence of a witness who had willfully testified falsely to a material fact in the case. *Whitaker v. California Door Co.*, 95 Pac. 910, 911, 7 Cal. App. 757; *People v. Soto*, 59 Cal. 367.

## DISSEISE

### DISSEISIN

"A 'disseisin' is when one enters, intending to usurp the possession and to oust another of the freehold." *Toney v. Knapp*, 106 N. W. 552, 553, 142 Mich. 652 (quoting and adopting definition in 1 Greenl. Cruise, 51).

"'Disseisin' is the wrongful putting out of him that is seised of the freehold, an attack upon him who is in the actual possession and turning him out, an ouster from a freehold in deed." *Dobbins v. Dobbins*, 53 S. E. 870, 872, 141 N. C. 210, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682 (citing 3 Black. Com. 167).

"It is \* \* \* laid down that if A. executes to B. a lease for the lands of C., and B. enters, this is a 'disseisin' by A., and the reason assigned is that the demise to B. is equivalent to a command to enter the land of C." *Bradstreet v. Huntington*, 5 Pet. (30 U. S.) 402, 434, 8 L. Ed. 170.

#### Dispossession distinguished

Disseisin is always a wrongful dispossession; i. e., it is never supported by a good title. "Disseisin" and "ouster" mean very much the same thing as "adverse possession." *Earnest v. Little River Land, etc., Co.*, 75 S. W. 1122, 1128, 109 Tenn. 427 (citing *Feld. Real. Prop.* §§ 693, 694; *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 59 S. W. 634, 105 Tenn. 574).

#### Possession

Taking possession and occupancy of vacant land by a mere squatter does not work a "disseisin" of the true owner, nor will such possession ripen into title. *Jasperson v. Scharnikow*, 150 Fed. 571, 573, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178.

An adverse possession cannot begin until there has been a disseisin, and to constitute a "disseisin" there must be an actual expulsion of the true owner for the full period prescribed by the statute. *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1071, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

The possession of land by a tenant in common may become adverse, if he, by his acts and conduct, disses his co-tenants by repudiating their title and claims adversely to them; it being necessary to constitute "disseisin" that there be outward acts of exclusive ownership, and such as by their own import would impart notice to the co-tenants that an actual disseisin was intended. *Carpenter v. Fletcher*, 88 N. E. 162, 239 Ill. 440.

Since there could be no adverse possession of public land on which a mining claim was located while the title was in the United States, there was no "disseisin" sufficient to start the statute of limitations in operation, as against the locator of such claim, prior to the issuance of a government patent to him therefor. *Tyee Consol. Min. Co. v. Langstedt*, 136 Fed. 124, 128, 69 C. C. A. 548 (citing *United States v. De la Maza Arredondo*, 6 Pet. [31 U. S.] 743, 8 L. Ed. 547).

Color of title and mere possession thereunder by one or more of a number of tenants in common, however long continued, does not amount to a "disseisin" of the co-tenants out of possession, and is therefore not adverse. The possession of one tenant in common is the possession of all. *Russell v. Tenant*, 60 S. E. 609, 611, 63 W. Va. 623, 129 Am. St. Rep. 1024.

#### DISSEIZIN

See Disseisin.

## DISSENT

Where testator's son, though named as such, refused to act as director of the corporation, and testator's wife, who acted as such, disagreed as to voting the stock with the remaining persons designated as trustees who had accepted the trust, there was not a "dissent" of two of the directors within the meaning of the will so as to confer any authority as to voting the stock upon the corporate executor or trustee. *Elger v. Boyle*, 126 N. Y. Supp. 946, 948, 69 Misc. Rep. 273.

#### DISSENT FROM VERDICT

After a verdict in favor of defendants had been rendered, a statement of one of the jurors that the jury intended that plaintiff should have the building, and be permitted to remove it, to which defendants at once agreed, did not constitute a "dissent from the verdict," within Kirby's Dig. §§ 6203, 6204, providing that, if any juror dissents, the jury must be again sent out for deliberation, and therefore did not justify the court in refusing to accept the verdict, and to enter judgment thereon. *Harris v. Graham & Bordley*, 111 S. W. 984, 986, 86 Ark. 570.

## DISSIMILAR CONDITION

The ownership or nonownership by the shipper of the goods tendered for carriage is not a "dissimilar condition," within the meaning of Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379, prohibiting inequality and discrimination in rates. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 31 Sup. Ct. 392, 398, 220 U. S. 235, 55 L. Ed. 448.

## DISSOLUTION

See De Facto Dissolution.

By a "dissolution" in law is meant a dissolution which may take place either by a judgment of a court of competent jurisdiction, or by a legislative repeal of a charter of a corporation where the right of repeal has been reserved in the statute granting the charter, or in the Constitution or in the general law, or by the expiration of the period named in the charter as the period of the duration of the life of the corporation. *Yoree v. Home Town Mut. Ins. Co. of Warrensburg*, 79 S. W. 176, 178, 180 Mo. 153 (citing *Thomp. Corp.*).

The word "dissolution," as used in a charter provision as to the disposition of property on the dissolution of a subordinate council of a beneficiary order having governmental powers to grant charters, enact laws, levy taxes, and dissolve subordinate councils, should be construed as meaning what it would mean when we speak of a corporation being dissolved by an act of government or judicial proceedings. *State Council of Junior Order of United American Mechanics of New Jersey*

v. Enterprise Council No. 6, 72 Atl. 19, 20, 75 N. J. Eq. 245.

#### Of corporation

Good cause for, see Good Cause.

A "dissolution" of a corporation, within the contemplation of the law, is the death of the corporation. It means a disintegration, a separation, a going out of business. *Theis v. Spokane Falls Gaslight Co.*, 74 Pac. 1004, 1006, 34 Wash. 23.

Civ. Code 1901, par. 772, providing that a corporation may be dissolved by a majority vote of its members, and Laws 1903, No. 82, providing for the dissolution of a corporation by direction of the holders of the majority of its outstanding stock represented at the meeting, does not authorize the reorganization of a corporation into another corporation by a majority vote of its members, as the "dissolution" of the corporation means its complete destruction and the liquidation and distribution of its assets, and Act 82 does not authorize the majority of the stockholders to give away the corporate assets, or to place upon nonassenting stockholders the necessity of being parties to a continuation of the business under a new corporate franchise. *Farish v. Cieneguita Copper Co.*, 100 Pac. 781, 783, 12 Ariz. 235.

"Dissolution," in the sense in which the term is used in Gen. St. 1906, § 2681, consummating the right of corporate creditors to proceed against the stockholders for the collection of their claims upon a dissolution of the corporation, takes place when the corporation comes into the condition of having debts and no assets and has ceased to act and exercise its corporate functions, or has suffered acts to be done which end the object for which it was created. *Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 46 South. 285, 289, 55 Fla. 728.

## DISSOLVE

#### Corporation

A corporation which for two years has failed to pay its franchise tax, so that its charter and powers have, under Franchise Tax Act (21 Del. Laws, c. 166) § 10, become inoperative and void, and whose charter the Governor has proclaimed repealed, as required by section 11, is within General Corporation Act (22 Del. Laws, c. 166) § 43, providing that "when a corporation \* \* \* shall be dissolved" in any manner whatever" a court of chancery may appoint a receiver for it. *Harned v. Beacon Hill Real Estate Co.* (Del.) 80 Atl. 805, 808.

#### DISSOLVING CONDITION

The Code, recognizing conditional contracts, recognizes a classification of conditions; it recognizes "conditions precedent" and "conditions subsequent," "suspensive conditions" and "dissolving or resolutive conditions," and it affixes to each their appropriate

legal effect. The claim of a vendor to property immobilized by the purchaser and seized and sold in enforcing a pre-existing mortgage, made under a condition in the contract of sale that the title was to remain in the vendor until the entire price was made was not the "resolutive or dissolving condition," but the "suspensive condition." *W. T. Adams Mach. Co. v. Newman*, 32 South. 38, 41, 42, 107 La. 702.

## DISTANCE

See Convenient in Point of Distance; Same Distance.

## DISTILLATION

"The 'distillation' of spirits, and the rectification of them after they are distilled, appear to be distinct and separate acts." *United States v. Tenbroek*, 2 Wheat. (15 U. S.) 248, 258, 4 L. Ed. 231.

#### DISTILLED OIL

So-called olein, a distillate from wool grease, in the form of an oil, is not "wool grease," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 279, 30 Stat. 172, but is dutiable as a "distilled oil," under Schedule A, par. 3, 30 Stat. 151. *Swan & Finch Co. v. United States*, 172 Fed. 173.

#### DISTILLED LIQUOR

Liquor as including, see Liquor.

#### DISTILLED SPIRITS

Bay rum is not within the enumeration of "distilled spirits," defined in section 3248, Rev. St., as "ethyl alcohol, \* \* \* including all dilutions and mixtures of this substance." *Anderson v. Newhall*, 161 Fed. 906, 908, 88 C. C. A. 511.

#### DISTILLER

A "distiller" may act in the capacity of a warehouseman. *Commonwealth v. Walker*, 89 S. W. 180, 181, 121 Ky. 274 (citing Ky. Stat. 1903, § 2572a, subsec. 6).

## DISTINCT

#### DISTINCT SPECIFICATION OF ERROR

The term "distinct specification of error," within Courts of Civil Appeals rule 25 (67 S. W. xv), defining the term as a requirement that an assignment of error shall not only point out the particular part of the proceedings complained of, but also the particular matter in which the judgment is erroneous, contemplates that the error shall be pointed out and a statement in what it consists made. *Cobb v. Johnson* (Tex.) 105 S. W. 847, 850.

#### DISTINCTIVE FORCE

Under Laws 1909, p. 277, c. 187, including a definition of intoxicating liquors as a

beverage retaining the alcoholic principle as a "distinctive force," a defendant having sold liquor labeled "Purity Malt," commonly sold in the state as a substitute for beer, and containing 1.75 per cent. of alcohol by volume and 1.40 per cent. of alcohol by weight, was guilty in violation of the prohibitory law. *State v. Fargo Bottling Works Co.*, 124 N. W. 387, 389, 19 N. D. 396, 26 L. R. A. (N. S.) 872; *Same v. American Bottling Ass'n*, 124 N. W. 396, 19 N. D. 344.

### DISTINCTLY

A protest did not set forth the importer's objections "distinctly and specifically," within the meaning of the Customs Administrative Act (26 Stat. 137), where goods, which should have been classified free of duty under a paragraph relating to "jute bagging," were asserted in the importers' protest to be free under a paragraph relating to "bur-laps," and there was no suggestion that the importers at the time of filing the protest had in mind the former provision. *Corbitt & Macleay Co. v. United States*, 153 Fed. 648, 650.

While alternative grounds of dissatisfaction may properly be stated in protests against decisions by collectors of customs, this rule does not permit the enumeration of a long list of paragraphs, many of which are entirely remote, with the purpose of covering everything. Under the provision in the Customs Administrative Act (26 Stat. 137), that protests shall set forth "distinctly and specifically" the importers' grounds of objections, it is not enough that the provision ultimately relied upon can be found somewhere in the protest. Protests each covering 24 separate provisions of the tariff, which carry about 50 different rates of duty, are invalid as not setting forth the importers' objections "distinctly and specifically," within the intent of the Customs Administrative Act. *J. H. Lichtenstein & Co. v. United States*, 175 Fed. 1016, 1017.

### DISTINGUISH

#### DISTINGUISH BETWEEN RIGHT AND WRONG

The phrase "distinguish between right and wrong," as applied to the defense of insanity, means that the defendant had not the mental capacity to know that he was doing a moral wrong. If his mind is not so diseased at the time of the crime as to prevent him from knowing the nature and quality of his act, or if he did know the nature and quality of his act, that he was morally doing a wrong, he has sufficient mental capacity to be responsible for his acts. *State v. Wetter*, 83 Pac. 341, 347, 11 Idaho, 433.

#### DISTINGUISHED BALLOT

Webster defines "distinguishing" as "constituting a difference or distinction from everything else." The election law provided that if on the face or back of any ballot

there shall be any mark, sign, designation, or device other than permitted by the act, whereby the ballot may be identified or distinguished from any other ballot, it shall be absolutely void. Held, that official ballots indorsed with a fac simile of the signature of the municipal clerk are not marked ballots which can be "distinguished" from any other ballot, within the meaning of the statute. *Bliss v. Wooley*, 52 Atl. 835, 836, 68 N. J. Law, 51.

A "distinguished ballot" is one which bears an identification mark made by the voter, or with his connivance, knowledge, or consent, to distinguish it from other ballots cast. *Town of Eufaula v. Gibson*, 98 Pac. 565, 567, 22 Okl. 507.

#### DISTINGUISHING MARK

To constitute a "distinguishing mark," within the election laws declaring that no ballot bearing any "distinguishing mark" shall be counted, it must appear that the mark, whether made by the use of a letter, figure, or character, is such a mark as shows an intention on the part of the voter to identify or distinguish his particular ballot from others of the class, and any mark inadvertently made on the ballot, or made through carelessness or ignorance, which does not show on the face of the ballot that such mark was made with the intention of distinguishing that ballot from others of the same class, or that that result would be accomplished by the mark, will not be treated as a "distinguishing mark." *McClelland v. Erwin*, 83 Pac. 283, 287, 16 Okl. 612.

The "distinguishing mark" prohibited by the law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of a mark put upon the ballot to indicate who cast it, and to furnish the means of evading the law as to secrecy. *Winn v. Blackman*, 82 N. E. 215, 220, 229 Ill. 198, 120 Am. St. Rep. 237; *Pierce v. People*, 64 N. E. 372, 374, 197 Ill. 432; *Rexroth v. Schein*, 69 N. E. 240, 248, 206 Ill. 80.

Numerals placed upon election ballots with honest intent by the election officials are not "distinguishing marks," within the provision of the statute, and the ballots cannot be disregarded for that reason. *Hardy v. Beaver City (Utah)* 125 Pac. 679, 683.

A ballot had a cross in the circles at the head of the Democratic and Republican columns and a cross in front of the name of the Democratic candidate for village trustee. There were two other offices to be filled, and there was a cross in front of the names of each Republican candidate for the two offices and a cross in front of the name of one of the Democratic candidates. Held, that the ballot was not void on the ground that it was marked by the voter to enable his ballot to be identified, but should be count-

ed for the Democratic candidate for trustee. *People ex rel. Moran v. Sniffin*, 108 N. Y. Supp. 243, 244, 123 App. Div. 730.

A ballot marked through inadvertence or carelessness has not been given a "distinguishing mark," so as to render it an illegal ballot. *Town of Eufaula v. Gibson*, 98 Pac. 565, 567, 22 Okl. 507.

Where a voter was required by law to mark his ballot by making a cross opposite the names of the candidates voted for, and was furnished with a stamp for the purpose, but, either because the stamp was defective or he used it improperly, he made only rectangular marks or blotches, the ballot was properly rejected as containing "distinguishing marks"; but where another voter so applied the stamp that all or a portion of the rectangular outline of the stamp was left upon the ballot surrounding the cross, but not rendering it indistinguishable, the defect only appearing in what was probably the first mark made on the ballot, it being opposite the first name, and all the other crosses on the ballot being clear, the ballot was valid. *Strosnider v. Turner*, 90 Pac. 581, 582, 29 Nev. 347.

Not every mark made by a voter on his ballot, which may separate and distinguish the particular ballot from other ballots cast at the election, will necessarily result in the declaration that the ballot is invalid. If it appears from the face of the ballot that such marks or writings were placed thereon as the result of an honest effort on the part of the voter to indicate his choice of candidates among those to be voted for at the election, and that the voter did not thereby intend or attempt to indicate who voted the ballot, the ballot should not be rejected as to candidates for whom there is thereon a choice expressed in compliance with the requirements of the statute. The fact that a ballot bore the printed words "For Constable" and below that a printed dotted line with a square opposite the dotted line, so that the voters desiring to vote for such office could have written in the name of the candidate on the line and placed a cross in the square, and that the name of the person was written below the dotted line, though on the margin of the ticket; that a ballot bore in pencil on a dotted line under the words "For Constable" the capital letters "H. A"; that the name of a candidate written on a proper dotted line on a ballot extends beyond that line; that in the square opposite the name of the candidate on a ballot there was a distinct cross and near the square opposite the name of another candidate for another office, in which there was a cross, appeared a mark made with a pencil after the square; that marks constituting crosses, or nearly completed crosses, in the circle at the head of the column on a ballot had been erased by the voters, the column of opposing candidates bear-

ing a proper mark in the circle at the head; that a voter placed a cross in the square opposite the name of a candidate for each office, and that there was an erasure in the square opposite the name of one candidate, and the proper cross in the square opposite the name of the opposing candidate; that a ballot has a cross in the circle at the head of a column of candidates, and also some other pencil marks in the circle; that a ballot bore dotted lines, above which were the printed words "For Justice of the Peace," but they were voted in precincts where no justice of the peace was to be elected, and names were written on such dotted lines—did not constitute "distinguishing marks" on any of such ballots within the meaning of a statute rendering invalid ballots containing "distinguishing marks." *Rexroth v. Schein*, 69 N. E. 240, 248, 206 Ill. 80.

## DISTRESS

See Unreasonable Distress.

"Distress" is "the taking of a personal chattel out of the possession of a wrongdoer into the custody of the party injured to procure satisfaction of the wrong committed; the act of taking possession of personal property to hold as a pledge for the payment of a debt, the discharge of a duty, or for reparation of some injury done." "Distress" is not a judicial process, and under it only such property can be taken as is tangible and capable of seizure and sale. *Acme Harvesting Mach. Co. v. Hinkley*, 122 N. W. 482, 483, 23 S. D. 509, 21 Ann. Cas. 743.

As judicial process

See Judicial Process.

For rent

"Distress for rent" is a remedy of the landlord for the collection of rent, and applies whenever the relation of landlord and tenant exists. All goods on demised premises, by the common law or the statutory law of Pennsylvania, may be considered as under a quasi pledge to the landlord, which gives superiority to the specific lien acquired by a distraint, and such a lien is not one obtained through legal proceedings, within Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565, and is not divested by the bankruptcy of the tenant within four months thereafter. In re *West Side Paper Co.*, 162 Fed. 110, 111, 89 C. C. A. 110, 15 Ann. Cas. 384.

Of mind

"The word 'distressed' has application to physical as well as mental suffering." *International & G. N. R. Co. v. Gonzales*, 91 S. W. 597, 598, 42 Tex. Civ. App. 22.

Since the word "distress," being a generic term, includes anguish or suffering, both of mind and body, and since "humiliation" and mortification are simply phases of mental anguish, allegations in a petition, in



an action against a sheriff and his deputy, that they wrongfully and unlawfully entered into a house and premises occupied by plaintiff under a lease and dispossessed him, and put his household goods and personal property in the public highway, and so put plaintiff to great trouble and distress, properly authorize a recovery for humiliation and mortification, or any phase of "mental anguish." *Perkins v. Ogilvie*, 146 S. W. 735, 738, 148 Ky. 309.

## DISTRIBUTE

See Fully Distributed.

"Distribute" is defined as "to divide among several or many; to deal out; to allot." *State ex rel. Shaw v. Thompson*, 131 N. W. 231, 235, 21 N. D. 426.

The word "distributed" is not a technical word in conveyancing; but, if it has any technical meaning, it is with reference to decrees of distribution in probate courts. In *re Heberle's Estate*, 95 Pac. 41, 153 Cal. 275 (citing *In re Dunphy's Estate*, 81 Pac. 315, 147 Cal. 95).

A direction in a will directing the executors to "distribute equally to testator's legal heirs" is equivalent to a direction to make distribution in accordance with the statutes providing for descent and distribution. *Barr v. Denney*, 87 N. E. 267, 268, 79 Ohio St. 358.

The use of the word "distributed," in a will providing that one-fifth of the income of trust fund shall be paid quarterly to testator's daughter, and at her death one-fifth of the principal of the estate shall be transferred and "distributed" as she may by will direct, would not show an intention to create a trust to convey, or that testator supposed that a conveyance by the trustee was necessary to pass title. In *re Dunphy's Estate*, 81 Pac. 315, 317, 147 Cal. 95.

The averment of the petition for grant of administration, under Rev. Laws, c. 137, § 4, more than 20 years after death of deceased, because of undistributed property, averring that there were funds of a certain amount in the hands of the state treasurer which remained to be administered, and which the state auditor was unwilling to pay to any but an administrator, though not in the precise statutory form, is equivalent thereto; it being impossible that money in the hands of the state officials could have been "distributed," within the meaning of the statute. *Dallinger v. Morse*, 94 N. E. 701, 702, 208 Mass. 501, Ann. Cas. 1912A, 982.

In a note promising to pay a certain sum in consideration of the promise by the payer to "distribute" a certain sum after the maker's death for masses, another sum to a sister, and to keep the balance, the word

"distribute" is inconsistent with the idea that the payer is to make payments out of her own funds and reimburse herself by enforcing the note, but consistent with the idea that she is to obtain the money from the payee's estate. *McCourt v. Peppard*, 105 N. W. 809, 812, 126 Wis. 326.

The term "fully distributed," as used in Rev. Laws Mass. c. 167, § 127, which provides that, where an attachment has been dissolved by the appointment of a receiver, the receiver shall not be discharged until all the assets which have come into his hands have been "fully distributed," is not satisfied by a remission of the property to a receiver in another jurisdiction; the word "distributed" implying a division, apportionment, and delivery. *Second Nat. Bank of Pittsburgh v. J. C. Lappe Tanning Co.*, 84 N. E. 301, 302, 198 Mass. 159 (citing 1 Bouv. Law Dict. 550; *Thomson v. Tracy*, 60 N. Y. 174-180; *William Hill Co. v. Lawler*, 48 Pac. 323, 116 Cal. 359-361; *Rogers v. Gillett*, 9 N. W. 204, 56 Iowa, 266-268).

### As relating to real property

While the word "distribute" is usually applied to money and personal property, it also designates a division of real estate among heirs or devisees; so that where an academy, to which real estate had been devised, provided it had on hand a certain endowment fund, otherwise to revert to the testator's heirs and be distributed among them, failed to accumulate the fund, the title to the real estate vested in the testator's heirs at law. *Clark v. Fleischmann*, 116 N. W. 290, 293, 81 Neb. 445.

## DISTRIBUTABLE PROPERTY

Switches and industrial tracks off the main right of way, but used as a part of the general system, and for the same purposes as switch tracks on the right of way are used, must be assessed as "distributable" property, but all buildings, coal bins, round-houses, machine shops, depot buildings, and other structures located on the terminal yards must be assessed as "localized" property, within Acts 1897, p. 102, c. 5, requiring railroads to file a schedule setting forth the length in miles of its railroad bed, switches, and side tracks, and the value of the whole, providing that the road of any railroad shall include side tracks, switches, etc., and that the roadbed, rolling stock, franchises, choses in action, and personal property having no actual situs shall be known as "distributable property," and shall be valued separately, and that the depot buildings and other property, real, personal, and mixed, having an actual situs, shall be known as the "localized property," and shall be valued separately. *Nashville, C. & St. L. Ry. Co. v. Patterson*, 122 S. W. 467, 469, 122 Tenn. 1.

**DISTRIBUTEES**

As legal representatives, see Legal Representatives.

As heirs, see Heir.

The words "heir" and "distributee," as used in Rev. St. 1893, § 2316, relating to actions for wrongful death, and declaring that every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and, if there be none such, then for the benefit of the heirs at law or distributees of the person whose death shall have been so caused, etc., mean the same thing. *Kitchen v. Southern Ry.*, 48 S. E. 4, 6, 68 S. C. 554, 1 Ann. Cas. 747.

The word "distributees," as used in the statute granting administration to distributees where there is no will, means those who would be entitled under the statute of distribution to the personal estate of the decedent if he had died intestate; and where the statute granted administration with the will annexed to the person who would have been entitled to administration if there had been no will on the refusal of an executor, a devisee and legatee had no preferable right to be appointed, such person not being a "distributee." *Smith v. Lurty*, 59 S. E. 403, 404, 107 Va. 548.

While the words "distributive share" ordinarily refer to personal property, and "distributee" denotes the person on whom such property devolves by act of law in case of intestacy, yet in view of the item in a will, whereby testatrix, in terms, devises that negroes be kept together on her plantation, and that it be carried on as in her lifetime, till one of her three children reaches the age of 21, and then the property, both real and personal, shall be equally divided between them, the words "distributive share" in the next item, in terms devising that half of each distributive share to her children, "as directed above," shall be settled on each of them, so that he shall have the use of it for life, and at his death it shall be divided between his children, disposes of real as well as personal property. *Jones v. Myatt*, 69 S. E. 135, 136, 153 N. C. 225.

**DISTRIBUTION**

See Decree of Distribution; Just and Equal Distribution; On Final Distribution.

Ratable distribution, see Ratable Distribution.

Ready for distribution, see Ready.

The words "disposal" and "distribution" are often used synonymously. *Scully v. Squier*, 90 Pac. 573, 577, 13 Idaho, 417, 30 L. R. A. (N. S.) 183.

"Distribution" means the act of distributing or dispensing; the act of dividing or portioning among several or many; appor-

tionment. Under Mechanics' Lien Act, § 1, amended by Laws 1893, Act No. 199, providing that the owner of a building is not to be protected in payment to the contractor unless the same is distributed to the subcontractors, etc., the term "distribution" means a prorating to all entitled to take, and not a payment of the entire contract price to one. *Fairbairn v. Moody*, 75 N. W. 469, 470, 116 Mich. 61 (quoting definition in *Webst. Dict.*); *Blitz v. Fields*, 76 N. W. 119, 118 Mich. 85 (citing and adopting *Fairbairn v. Moody*, 75 N. W. 469, 116 Mich. 61).

Within a statute providing for an allowance to a referee of commissions when he is required to distribute any of the proceeds of a sale, a payment of the proceeds to the parties entitled in accordance with their respective rights is not a "distribution" of such proceeds. *Harrington v. Bayles*, 82 N. Y. Supp. 379, 388.

The executors of an estate met and determined to distribute to themselves as trustees a large part of the estate of a decedent, and pursuant thereto transferred certain securities and other property, and opened a new inventory, in which the securities transferred were marked as belonging to the trustees, and gave notice and filed lists with the assessors of the various municipalities, but failed to file their final account as executors, or to have it allowed in the probate court. Held that, because of such want of a final approved account, there was no "distribution of the estate for the purpose of taxation," within the meaning of St. 1909, c. 490, pt. 1, § 23, cl. 7, specifying where the personal property of the estates of deceased persons shall be assessed after it has been distributed. *Welch v. City of Boston*, 97 N. E. 893, 897, 211 Mass. 178.

"Distribution," as used in a statement by the court in an action to recover for death by wrongful act, where the father was the sole beneficiary, and the recovery would be for his exclusive benefit, that the recovery shall be distributed the same as personal property of the deceased would be distributed under the laws of the state, meant division, and yet there could be no distribution of the recovery in the sense of a division, because there was but a single beneficiary (the father), and the recovery, whatever the amount, would be for his exclusive benefit as compensation for his pecuniary loss, and none other. *Swift & Co. v. Johnson*, 138 Fed. 867, 871, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161.

A contract between an inventor and capitalists, who had each contributed \$250 for the perfection of a machine, provided that the capitalists were to contribute a certain amount of money, and that the inventor, in lieu of money, was to give his process and time to the enterprise, and that when it was under way a corporation should be formed to

manufacture the desired product. It further provided that the interest of the inventor in the capital stock of the corporation should be three-fifths, and the interest of the capitalists two-fifths, and that the capital stock should be distributed accordingly. The capitalists were entitled to two-fifths of the capital stock of the corporation after it was formed. The privilege of going into the market and buying stock of the concern at market rates would not seem to be an interest which satisfies either the meaning of the agreement or the equities of the parties, and such purchase would scarcely be a "distribution" of stock. *Hunter Smokeless Powder Co. v. Hunter*, 91 N. Y. Supp. 620, 623, 100 App. Div. 191.

#### Of estate

The "distribution" of an estate includes the determination of the persons who are legally entitled thereto, and also the proportions or parts to which each of these persons is entitled, and the parts of the estate so distributed may be segregated or undivided portions thereof. A proceeding for "distribution" is in the nature of a proceeding in rem, the res being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. *Snyder v. Murdock*, 73 Pac. 22, 23, 26 Utah, 233.

The word "distribution," used by the testatrix in requesting the legatee to make distribution of a portion of the property, would tend strongly to indicate an intention not to make an absolute gift; but this is not conclusive, where other parts of the will show a contrary intention. In *re Murray*, 108 N. Y. Supp. 1047, 1050, 124 App. Div. 548.

#### Same—Partition distinguished

"We lay aside, as not open to dispute, the proposition that there is a difference between 'distribution' and 'partition.' Distribution neither gives a new title to property, nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests; while partition, in most, if not in all, of its aspects, is an adversary proceeding, in which a remedial right to the transfer of property is asserted, and resulting in a decree which, either ex proprio vigore or as executed, accomplishes such transfer." How. Ann. St. c. 226, § 2, requires the probate court in partition to assign the estate of a decedent to the persons entitled thereto; section 5 provides that when the estate assigned to two or more heirs, etc., shall be in common, partition and distribution may be made by commissioners appointed by the probate court; and section 18 provides that the partition, when confirmed, shall be conclusive on all the heirs, etc. Held, that a decree of the probate court making partition among dev-

isees, and deciding that one of them held a life estate in the part allotted to her, acquiesced in by her, precluded her from thereafter asserting a different tenure. *Parkinson v. Parkinson*, 102 N. W. 1002, 1004, 139 Mich. 530 (quoting and adopting definition in *Robinson v. Fair*, 9 Sup. Ct. 34, 128 U. S. 76, 2 L. Ed. 415).

#### Same—Payment of debts

"While the word 'distribution' is generally used to indicate a division among legatees, or heirs of the personal estate of a decedent, it is likewise often used as referring to the payment of the decedent's debts by the administrator. The expression 'distribution among creditors' is by no means uncommon in the law books." *Dinning v. Conn's Adm'r*, 99 S. W. 914, 915, 124 Ky. 623.

#### DISTRIBUTIVE SHARE

While the words "distributive share" ordinarily refer to personal property, and "distributee" denotes the person on whom such property devolves by act of law in case of intestacy, yet in view of the item in a will, whereby testatrix, in terms, devises that negroes be kept together on her plantation, and that it be carried on as in her lifetime, till one of her three children reaches the age of 21, and then the property, both real and personal, shall be equally divided between them, the words "distributive share" in the next item, in terms devising that half of each distributive share to her children, "as directed above," shall be settled on each of them, so that he shall have the use of it for life, and at his death it shall be divided between his children, disposes of real as well as personal property. *Jones v. Myatt*, 69 S. E. 135, 136, 153 N. C. 225.

"'Distributee's share' is his proportionate part of whatever is left after the debts and expenses of administration have been paid. The distributee is not entitled to a share of the specific rights and credits and goods and chattels which came into the administrator's hands, but only to a share of the fund produced by administering them; that is, by reducing them to money." *Wright v. Holmes*, 62 Atl. 507, 508, 100 Me. 508, 3 L. R. A. (N. S.) 769, 4 Ann. Cas. 583.

The words "distributive share," as used in Code 1896, § 1506, declaring that a widow having a separate estate at least equal to her dower interest and "distributive share" shall not be entitled to dower, and section 1507, providing for dower less the widow's separate estate worth less than the dower interest and the "distributive share," mean the share a person takes of personal property in case of intestacy. *Guice v. Guice*, 43 South. 199, 201, 150 Ala. 552.

Rev. St. c. 77, § 13, prior to Laws 1909, c. 260, provides that, where testator's widow waives the provision made for her in the will, she shall receive the same distributive

share of the personal estate as is provided by law in intestate estates. Section 18 provides that the personal estate of intestate, except that portion assigned to his widow by law and by the judge of probate, shall be applied first to the payment of debts, funeral charges, and charges of settlement, and the rest shall be distributed by the rules provided for the distribution of real estate. Held, that the phrase "distributive share" in section 13 refers to that share which the widow would receive in the distribution of the residue of an intestate estate under section 18, and she is entitled to one-half of the personal estate if there are no issue, after deducting the widow's allowance and the debts, funeral charges, and expenses of administration. In *re Fogg's Estate*, 74 Atl. 1133, 1134, 105 Me. 480.

Where testator gave his residuary estate to a trustee to pay enumerated bequests and convert the residue into money and invest the same in real estate and pay the net income to his two daughters and granddaughter until they reached the age of 30, and further provided that, as each arrived at that age, she could demand and receive a third as her "distributive share" to hold the same to her and her heirs forever, and, if either of the daughters or granddaughter died without issue and before receiving her distributive share, her share should go to the surviving daughters or granddaughter, the words "distributive share" merely referred to the quantum of the estate which the beneficiaries were to take if they took at all, and the words could not be considered as terms of devise. In *re Blake's Estate*, 108 Pac. 287, 293, 157 Cal. 448.

Testamentary trustees are entitled to pay the income from trust funds to the guardian of an infant beneficiary pending proceedings for settlement of their accounts without requiring a bond; such income not being a "distributive share," within Code Civ. Proc. § 2746. In *re Williams*, 123 N. Y. Supp. 383, 384, 66 Misc. Rep. 417.

The right given to a beneficiary by a will to receive a stated share of the net income from the entire residuary estate of the testator, left in trust until the time fixed for its distribution, is not a "distributive share," within the meaning of such terms as used in War Revenue Act, 30 Stat. 464; and, under Act June 27, 1902, c. 1160, § 3, 32 Stat. 406, which provides that no tax shall be assessed under said section 29 in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to July 1, 1902, the only interest of the legatee in such income which was subject to taxation was the amount thereof actually received by him prior to said July 1, 1902, provided such amount was \$10,000 or more. *Lynch v. Union Trust Co. of San Francisco*, 164 Fed. 161, 165, 90 C. C. A. 147.

The term "distributive share," as used in War Revenue Act June 13, 1898, imposing a tax on the "distributive share" in the hands of administrators, executors, or trustees, means a definite portion in money of the residue of a personal estate of an intestate. *Diaston v. McClain*, 147 Fed. 114, 117, 77 C. C. A. 840.

A power of attorney to complainant to collect all moneys, legacies, bequests, inheritance, and distributive share of defendants in a certain estate, and for his taking possession of and attending to all landed property which they may be entitled to as heirs of deceased, and assigning to complainant such an interest in the property, estate, or inheritance to which they are entitled as heirs or next of kin as will secure to complainant his fees for services, not to exceed 50 per cent. of "our distributive share of said decedent's estate as such heirs or next of kin," does not by the words "distributive share," in view of the word "heirs," limit the assignment to personal property. *Adams v. Schmitt*, 60 Atl. 345, 350, 68 N. J. Eq. 168.

## DISTRICT

See Assessment District; Civil Districts; Drainage District; Original District; Prohibition District; Proper District; School District; Street Improvement District; Subdistrict; Tax District; Town School District; Within the District.

Under the provision of Bill of Rights, § 9, guaranteeing to accused persons a trial by jury of the county or "district" in which the offense is alleged to have been committed, no district created by the Legislature can extend beyond the limits of a county. *People v. Rodenberg*, 98 N. E. 764, 766, 254 Ill. 386.

The words "precinct" and "district" in the election law are frequently used interchangeably, and the meaning must be gathered very largely from the connection in which they are used. *Welsh v. Shumway*, 88 N. E. 549, 555, 232 Ill. 54.

The words "district" and "precinct" as used in the election law since the present Constitution was adopted, have not always been used with the same meaning. Sometimes they have been so used that the word "precinct" meant a larger territory than the word "district"; a district being a subdivision of a precinct. This is usually, but not always, the case in the general election law. Sometimes they have been used so that the word "precinct" covered a smaller territory than the word "district." This is the case with reference to the election act passed in 1885, now in force in the city of Chicago, when taken in connection with certain primary laws, although generally in primary laws the term "primary district" is used. Some-

times "district" and "precinct" are used interchangeably, as will be shown from a careful reading of the present general election law. They will be found to be so used in paragraph 30 of chapter 46 (Hurd's Rev. St. 1905, c. 46, par. 30, p. 860); hence the meaning of these words must be gathered very largely from the connection in which they are used in each instance. For the purpose of town elections only, polling places and election districts in a town having been established by the county board, under the law, solely for the convenience of the voters, for that election the entire town, as to the qualifications of the electors, is considered one voting district. *People ex rel. Delaney v. Markiewicz*, 80 N. E. 253, 258, 225 Ill. 563.

The word "district" in Pol. Code, § 2763, which empowers the board of supervisors of a road division to issue the bonds of said division payable out of the funds of such division, and which provides that the money shall be raised by taxation upon the property in said "district" for the redemption of the bonds, means "division," the district in fact becoming a division, and, so construed, the section is not void for uncertainty. *Potter v. Santa Barbara County*, 116 Pac. 1101, 1103, 160 Cal. 349.

The word "district," as used in Rev. St. § 1014, providing that, where any offender is committed in any district other than where the offense is to be tried, it shall be the duty of the judge of the district where the offender is imprisoned to issue a warrant for his removal to the district where the trial is to be had, applied, at the time of the original act, to one of the judicial districts into which, by that act, the United States was divided; but by virtue of Act Feb. 21, 1871, c. 62, 16 Stat. 426, declaring that the Constitution and laws of the United States which are not locally inapplicable shall have the same force and effect within the District of Columbia as elsewhere within the United States, the word "district" includes the District of Columbia, and hence section 1014 authorizes the removal of a federal offender to the District of Columbia for trial of an offense committed there. *In re Benson*, 130 Fed. 486, 488.

Naturalization Law (Act June 29, 1906, c. 3592, 34 Stat. 599) § 10, provides that, in case the petitioner for naturalization has not resided in the state, territory, or district for five years continuously immediately preceding the filing of his petition, he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than a year, and the remaining period of his five years' residence within the United States required to be established may be proved by the deposition of two or more witnesses who are citizens of the United States, on notice to the Bureau of Immigra-

tion and Naturalization and the United States attorney for the district in which the witnesses reside. Held, that the word "district," as used in such section, meant a federal district, and not the District of Columbia; and hence, where an applicant for naturalization had not resided continuously for five years in the district where he applied for citizenship, his residence in another state, territory, or district sufficient to establish a five years' residence in the United States could be proved by deposition. *United States v. Kolodner*, 199 Fed. 809, 810.

Rem. & Bal. Code, § 7571, makes it unlawful for any first-class city to order an improvement, the cost of which is to be charged to abutting property, when such cost exceeds 50 per cent. of the value of the real estate, exclusive of improvements within the proposed improvement district, etc. Held, that the "district" referred to in such section was not limited to the real estate within the boundaries of a specified locality which might ultimately be legally assessed to pay the cost of the improvement, but included all the real estate within the physical outer boundaries of the defined district, though some of it was subsequently found not benefited, and therefore not subject to assessment. *Hapgood v. City of Seattle*, 125 Pac. 935, 936, 69 Wash. 497.

#### As city or town

To give the word "district" its common meaning, it would unquestionably embrace a township as well as many other subdivisions of territory, although in its application it would in many cases include less territory than a township, such as an election district or a school district. The word "district," as used in Act May 8, 1889 (P. L. 136), providing for the incorporation of electric light companies, and section 2, authorizing such corporations to supply light, heat, and power to the public in the borough, town, city, or district where it may be located, includes a township. *Brown v. Radnor Tp. Electric Light Co.*, 57 Atl. 904, 905, 208 Pa. 453.

Rev. Pol. Code, § 1802, provides that every office shall be vacant on the officer ceasing to be a resident of the state, district, county, township, or precinct in which the duties of his office are to be exercised or for which he may have been elected; and section 810, as amended by Laws 1905, provides for the nomination of county commissioners by the county instead of by commissioner district conventions, and they are to be regarded as county officers. Held, that the term "district," as used in section 1802, referred to a subdivision of the state embracing more than one county, so that a county commissioner did not disqualify himself by removing to a different commissioner district from that in which he was elected, within the same county. *Gray v. Board of*

Com'rs of Beadle County, 110 N. W. 30, 37, 21 S. D. 97.

To understand the signification of the words "municipal legislation," as used in Const. art. 11, § 2, prohibiting the Legislature from amending the charters of cities and towns, the right of which is reserved to the voters thereof, and article 4, providing that the referendum may be demanded by the people, which power is reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation of every character in and for their respective municipalities and districts, requires an interpretation of the term "local and special legislation," the right to formulate rules in relation to which is impliedly denied to cities and towns, on the principle that the expression of one thing is the exclusion of another. The qualifying words "local and special" are synonymous, and, in the sense in which they are used, mean any enactment that is plainly intended to affect a particular person or thing or to be in effect in some specified locality only. The words "municipality" and "district," as used, are evidently expressions of equivalent import, for a district legally created from a designated part of the state and organized to promote the convenience of the public at large is a municipal corporation. The authority of such a corporation has been heretofore derived from an act of the legislative assembly creating it, and as such statute is applicable to and enforceable in a part of the state only, it is a local or special law. The change in the organic law deprives the legislative assembly of all authority to enact, amend, or repeal any charter of a town, the legal voters of which reserve to themselves the exercise of all such power, except the right of repeal, and it was evidently the intention of the framers of such constitutional provision, and also the people who ratified it, to vest an incorporated city or town with authority to provide the manner of exercising the initiative and referendum powers as to amendments of a charter, which change is reasonably within the term "municipal legislation." *Acme Dairy Co. v. City of Astoria*, 90 Pac. 153, 154, 49 Or. 520.

#### **As corporation**

See Corporation.

#### **As county**

The term "district," as employed in Const. art. 1, § 10, guaranteeing to accused a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, is not synonymous with county; but it was intended to designate and include a place or jurisdiction other and distinct from that of the county in which the offense was committed. *State ex rel. Hornbeck v. Durlinger*, 76 N. E. 291, 292, 73 Ohio St. 154.

The word "district," as used in a constitutional provision, providing that in criminal prosecutions the accused shall have a trial by jury of the county or district in which the offense is alleged to have been committed, is synonymous with the term "county." *State v. O'Brien*, 90 Pac. 514, 518, 35 Mont. 482, 10 Ann. Cas. 1006.

The word "district," as used in the Constitution, providing that the accused in all criminal prosecutions shall have the right to a trial by jury of the county or district in which the offense is alleged to have been committed, means "county." *City of Chicago v. Knobel*, 83 N. E. 459, 460, 232 Ill. 112.

A county is an involuntary civil or political division of the state, created in the administration of government, and is not synonymous with the word "district." *Adams v. Southern Ry. Co.*, 52 South. 439, 441, 167 Ala. 383.

"County," as used in Const. art. 1, § 10, guaranteeing to an accused party a "speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed," is not synonymous with "district," but the latter term is used to designate and include a place or jurisdiction other and distinct from that of the county wherein the offense was committed, and therefore Rev. St. 1906, § 7263, which permits the court to direct that the person accused be tried in some adjoining county, where it appears that a fair and impartial trial cannot be had in the county in which the offense is committed, is not unconstitutional, as allowing the trial to be held in a county other than that in which the offense was committed, on motion of the state, properly supported by affidavits. *State ex rel. Hornbeck v. Durlinger*, 76 N. E. 291, 292, 73 Ohio St. 154.

A county is within Const. art. 4, § 1a, reserving the initiative and referendum powers to the voters of every municipality and district, and the people of the several counties are authorized, by article 9, § 1a, to regulate taxation and exemptions within their several counties, as provided by article 4, § 1a, in a manner subservient to any general law which may be enacted, though the word "district," as used in article 4, § 1a, has a broader signification than "county," and may designate a territory comprising more than a county, or containing less area. *Schubel v. Olcott*, 120 Pac. 375, 379, 60 Or. 503.

#### **As judicial district**

Under the constitutional right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, the word "district" has uniformly been construed to mean the trial district, or territory from which the jury is summoned. In this state, where unorganized territory may be attached to an organized county for judicial purposes, the phrase "judicial subdivision," frequently

found in our statutes, would have more accurately defined the right than the word "district." In *re Nelson*, 102 N. W. 885, 887, 19 S. D. 214.

In the Constitution, providing for courts to be presided over by a judge, elected by the voters of a number of counties, called a "district," the word "district" is used to distinguish this class of courts from the Supreme and other classes of courts, and likewise to designate the territory over which the particular judge shall preside. *State v. Ely*, 113 N. W. 711, 716, 16 N. D. 569, 14 L. R. A. (N. S.) 638.

The word "district," like the word "county," in the provision giving to accused the right to a trial in the district or county in which the offense charged was committed, is used in a restrictive sense, and designates the precise portion of territory or division of the state over which a court at any particular sitting may exercise power in criminal matters. *Moran v. Territory*, 78 Pac. 111, 114, 14 Okl. 544.

Under Act Cong. May 28, 1896, c. 252, §§ 7, 9, 29 Stat. 180, 181, the territory of Arizona, though divided for the administration of law and for the holding of district courts with powers of the District and Circuit Courts of the United States into five judicial districts, with boundaries as established by the justices, is one "district," within Act Cong. March 3, 1901, c. 845, 31 Stat. 1098 (U. S. Comp. St. 1901, p. 1327), authorizing the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States to designate the commissioner within such district before whom such person shall be taken for hearing, and the district attorney of the territory may designate a commissioner within the First judicial district of the territory as the commissioner before whom a Chinese person arrested in the second judicial district shall be taken for hearing. *Lee Kim Fong v. United States*, 108 Pac. 237, 13 Ariz. 47.

**As municipal corporation**

See *Municipal Corporation*.

**As port**

What constitutes a "port" for purposes of the revenue act is of necessity a matter of proof in each case. The term is broader than the word "harbor," and may mean more in one connection than in another. "Port" is often used as synonymous with "district," where the limits of the port and district are the same. *Hartwell Lumber Co. v. United States*, 128 Fed. 306, 308 (quoting and adopting *Ayer v. Thacher*, 2 Fed. Cas. 269, 3 Mason, 155).

**DISTRICT ATTORNEY**

As court officer, see *Court Officer*.  
As magistrate, see *Magistrate*.

As officer of United States, see *United States Officer*.

As state officer, see *State Officer*.

See, also, *County Attorney*.

The "district attorney" is not only an officer of the state, but also, in common with other attorneys, an officer of the court. *Taylor v. State*, 38 South. 380, 384, 49 Fla. 69.

As used in Laws 1882, p. 371, c. 410, § 1482, providing that forfeiture of bail shall not be remitted without the certificate of the "district attorney," the words "district attorney" mean the person who was district attorney at the time the recognizance was forfeited, and not some subsequent district attorney. In *re Sayles*, 81 N. Y. Supp. 258, 259, 40 Misc. Rep. 135.

Const. art. 4, § 1, created the office of Attorney General, requiring him to perform such duties as should be prescribed by the Constitution and by law; and by Rev. St. 1908, § 6168, he was required to appear for the state, prosecute and defend all actions and proceedings, civil and criminal, in which the state should be a party or interested, when required to do so by the Governor or General Assembly. By Laws 1891, pp. 240-242, the courts were invested with the same power and jurisdiction to try prosecutions on information as they had been authorized to do by indictment, section 2 providing that all informations should be filed in term time in the court having jurisdiction of the offense by the district attorney of the proper county as informant and his name should be subscribed thereto either by himself or by his deputy. Section 4 prescribed a form of information in which the district attorney appeared as the charging officer, and section 5 declares that all provisions of law applicable to prosecutions on indictments, to writs and process therein, and the issuing of service thereof, to motions, pleadings, trials, and punishments, or to the passing or execution of any sentence, and to all proceedings in cases of indictment, whether in court of original or appellate jurisdiction, shall apply to informations and to all prosecutions and proceedings thereon. Held, that the words "district attorney," as used in such act, should be construed as synonymous with "public prosecutor," and hence the Attorney General has authority to charge by information in the name of the people the commission of a felony and to prosecute the proceedings in the district court. *People v. Gibson*, 125 Pac. 531, 532, 53 Colo. 231.

**DISTRICT COURT**

"Judge of the District Court" and "District Court" are not, strictly speaking, convertible terms, but they are so in a popular sense," and under section 6 of the act of March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. 828, c. 517), which gives such courts the power to review by appeal or writ of error final decisions in the District

Court, an appeal lies to such court from a judgment of a District Court rendered on appeal from an order of a commissioner for the deportation of a Chinese person arrested under section 13 of the exclusion act of September 13, 1888 (25 Stat. 479, c. 1015), which authorizes an appeal from a conviction before a commissioner "to the judge of the District Court for the district." *Tsol Yli v. United States*, 129 Fed. 585, 586, 64 C. C. A. 153 (quoting and adopting definition in *United States v. Gee Lee*, 50 Fed. 271, 1 C. C. A. 516).

"The name 'commissioners' court' is as distinctly the name of that court as is the 'district court' the name of the court presided over by the district judge. \* \* \* While the district and county courts were established for the trial of litigated cases, the commissioners' court is a political body; the powers and duties of its members being largely legislative and ministerial." *Robinson v. Smith County*, 76 S. W. 584, 585, 33 Tex. Civ. App. 251.

Const. art. 6, vests the judicial power of the state as to matters of law and equity in a Supreme Court, district court, county court, justices of the peace, and such other courts as may be provided by law. It then provides the jurisdiction of various courts designated, "district court," "county court," and "criminal court," and for the election of judges thereof. Article 14 treats of counties and county officers, not including the judge of the county court, and article 20, creating the city and county of Denver, and providing for the termination of the terms of office of county officers, declares that district and county judges and the district attorneys should serve their full term, respectively, for which they had been elected. Held, that the words "district," "county," and "criminal" in Const. art. 6, as prefixed to the word "court," had no other significance than to give appropriate names to the tribunals of government, and that a judge of the county court in the city and county of Denver was not a county officer within Const. art. 20, and hence, after the adoption of such article and the charter of the city and county of Denver, he continued to hold his office under Const. art. 6, and not under the charter, and this, notwithstanding the charter, provided additional duties for such office and also for two incumbents. *Dixon v. People*, 127 Pac. 930, 932, 53 Colo. 527; *Sartin v. Snell*, 125 Pac. 47, 48, 87 Kan. 485.

#### DISTRICT COURT JUSTICE

Const. art. 6, § 17, requires town electors to elect justices of the peace at the annual town meeting, or at such other time as the Legislature directs, and provides that justices of the peace and district court justices may be elected in the different cities in such manner as is prescribed by law, and that all other judicial officers in cities shall be chosen by the electors or appointed by local au-

thorities. Held, that the term "district court justices" included justices of the municipal court, and hence such offices should be filled by election. *Markland v. Scully*, 131 N. Y. Supp. 364, 371, 148 App. Div. 350.

#### DISTRICT JUDGE

As state officer, see State Officer.

#### DISTRICT MEETING

Under Rev. St. 1899, § 535 et seq., relating to district meetings of school districts, the term "district meeting" means a coming together, an assembling, of the electors in a body at a stated time and place. *Parker v. School Dist. No. 4 of Sweetwater County*, 101 Pac. 944, 945, 17 Wyo. 534.

#### DISTRICT OF COLUMBIA

As state, see State.

Supreme Court as Court of United States, see Courts of the United States.

#### DISTRICT OF HIS DOMICILE

Where two petitions in bankruptcy have been filed against the same individual, one in the district in which the alleged bankrupt has resided during the greater part of the preceding six months and the other in a district into which he has recently removed and established his residence, the former is the "district of his domicile," within the meaning of General Order No. 6 (32 C. C. A. v), in which the first hearing should be had unless the case is transferred for convenience of parties under the provisions of Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 554. In re *Isaacson*, 161 Fed. 779, 782.

#### DISTRICT OF HIS RESIDENCE

Where a person worked a farm, keeping a furnished room in the house thereon, which he occupied when there, and claimed his residence there, but generally and continuously lodged with his parents in another school district because they were old and helpless and he considered it his duty to stay with them at night, returning to his farm every morning, the district where his farm was situated was the "district of his residence," within Rev. St. 1899, c. 149 (Ann. St. 1906, pp. 4198-4322), providing that all personal property shall be assessed in the county and district where the owners reside. *State ex rel. Kelly v. Shepperd*, 117 S. W. 1169, 1171, 218 Mo. 656, 131 Am. St. Rep. 568.

As used in Act March 3, 1887 (24 Stat. 552, c. 373), as corrected by Act Aug. 13, 1888 (25 Stat. 433, c. 866), declaring that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of certain actions, and providing that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the "district of the residence" of either the plaintiff or the



defendant, "the phrase 'district of the residence' of a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen." *Ex parte Wisner*, 27 Sup. Ct. 150, 153, 203 U. S. 449, 459, 51 L. Ed. 264 (quoting *Shaw v. Quincy Min. Co.*, 12 Sup. Ct. 935, 936, 145 U. S. 444, 446, 36 L. Ed. 768, 770).

#### DISTRICT OF SEIZURE

Jurisdiction of a proceeding for the forfeiture of smuggled goods exists only in the "district of seizure," which is the district in which the goods, if on hand, are found; a collector cannot, by carrying them into another district and there making the formal seizure, confer jurisdiction of the proceeding on the court in such district. *United State v. Larkin*, 153 Fed. 113, 116, 82 C. C. A. 247 (citing *The Abby*, 1 Fed. Cas. 26, 1 Mason, 360; *Four Packages v. United States*, 97 U. S. 404, 24 L. Ed. 1031).

#### DISTRICT OFFICER

The words "district officer" used in section 3 of article 20 of the Constitution refer to the district attorney and district judge, but the words were used to designate the geographical limits within which such officer performed the duties of his office, and did not refer to the nature and grade of the office. *State v. Romero* (N. M.) 125 Pac. 617, 618.

Const. § 152, provides that, if the unexpired term of an elective office will end at the next succeeding annual election at which either city, town, county, district, or state officers are to be elected, the office shall be filled by appointment for the remainder of the term. On June 30, 1906, defendant was appointed as trustee of a town of the sixth class to fill a term expiring in November, 1907. An election of a Congressman for that district was held November 6, 1906, and plaintiff procured his own election at that time as trustee to fill the unexpired term. Held that, a Congressman not being a "district or state officer" within the meaning of the Constitution, the election held November 6, 1906, was not such an election as warranted the filling of the vacancy in question at that time. *Provence v. Lucas* (Ky.) 107 S. W. 755, 756.

#### DISTRICT SCHOOL

The ward schools of a city are "district schools," within Const. art. 10, § 3, requiring the establishment of district schools. *Maxcy v. City of Oshkosh*, 128 N. W. 899, 908, 144 Wis. 238, 31 L. R. A. (N. S.) 787.

#### DISTRINGAS

"Distringas" is a writ addressed to the sheriff, demanding him to distrain one of his

goods and chattels to enforce compliance with an order of court. *Fiedler v. Bambrick Bros.* Const. Co., 142 S. W. 1111, 1114, 162 Mo. App. 528.

#### DISTRUST

An instruction that if any witness had willfully testified falsely in regard to any material fact the jury was at liberty to "disregard and discard his entire testimony" is not objectionable because of the use of the words "disregard" and "discard," instead of "distrust," as used in Code Civ. Proc. § 2061, subd. 3, providing that when a witness is false in one part of his testimony he is to be "distrusted" in the others, since the court did not tell the jury that they ought to reject, or that they must reject, the entire evidence of the witness, but simply instructed them that they were at liberty to disregard and discard the whole evidence of a witness who had willfully testified falsely to a material fact in the case. *Whitaker v. California Door Co.*, 95 Pac. 910, 911, 7 Cal. App. 757; *People v. Soto*, 59 Cal. 367.

#### DISTURB

Under B. & C. Comp. § 1930, providing for the punishment of persons who willfully and wrongfully commit any act which grossly disturbs the public peace or health, the word "disturb" is defined by Webster to mean to throw into disorder or confusion; to interrupt the settled state of; to excite from a state of rest; to render uneasy. The statute therefore simply means that one who knowingly and without authority of law commits an illegal act which greatly or painfully annoys or scandalizes the community, and agitates and disturbs the quiet and tranquility of the public, or outrages public decency and is injurious to the public morals, is guilty of an offense. A pool room on one of the principal thoroughfares of a city, in which persons daily congregate to bet upon horse races reported to the proprietor by telegraph, is a gaming house, punishable as a nuisance under the statutes. *State v. Nease*, 80 Pac. 897-899, 46 Or. 433.

The word "disturb," according to Webster, means "to interrupt a settled state of," and "proprietary" means "belonging or pertaining to a proprietor, considered as property owned," and the words "the property shall not be disturbed or the proprietary rights of the owner divested," as used in Const. Okl. art. 2, § 24, providing that private property shall not be taken or damaged for public use without just compensation, and until the compensation shall be paid to the owner or into court for the owner the property shall not be disturbed nor the proprietary rights of the owner divested, seems to mean that possession thereof shall not be taken, nor the property taken, nor shall the title thereof be divested, until compensa-

tion therefor has been first paid to the owner or into court for the owner. *Edwards v. Thrash*, 109 Pac. 832, 837, 26 Okl. 472, 138 Am. St. Rep. 975.

### **DISTURBANCE**

The unlawful striking of one with a hard substance is not a "disturbance" of his peace and quiet, within *Mansf. Dig. Ark. § 1800* (*Ind. T. Ann. St. 1899, § 1143*), providing punishment for a breach of the peace. *Miles v. United States*, 103 S. W. 598, 599, 7 *Ind. T. 11*.

When the owner of an easement is deprived of his right, he is not referred to as having been "dispossessed" of the land, but it is referred to as an "interference," "obstruction," or "disturbance." The remedy is on the case for damages for the injury done, or, if this is inadequate, permanent injunction is the proper remedy. *Kansas & C. P. R. Co. v. Burns*, 79 Pac. 238, 240, 70 Kan. 627.

### **DISTURBANCE OF PEACE**

See Breach of the Peace.

### **DISTURBING RELIGIOUS WORSHIP**

Under the statute inhibiting the "disturbance of a congregation, or a part of a congregation," any member is a part of the congregation; and hence, where accused, before a large part of a Sunday school audience had left, unhitched an old shabby horse and buggy belonging to prosecuting witness, and, with the intent to mortify her, drove it up in front of the Sunday school, accused violated the statute. *Wyatt v. State*, 119 S. W. 1147, 1148, 56 *Tex. Cr. R. 50*.

Under Code 1896, § 4654, prohibiting "disturbance of an assemblage for divine worship," the nature or form of worship is immaterial; it being sufficient if the exercise was intended as a celebration of the birth, life, death, and resurrection of Christ, and in commemoration of the beginning of the Christian era. Where defendant willfully committed an assault on his companion with a fire shovel, not in self-defense, during the dismissal of a Sunday school Christmas tree entertainment, at which there had been prayer, singing, and a scriptural talk by the minister, he was properly convicted of "disturbing an assemblage for divine worship," prohibited by Code 1896, § 4654. *Stafford v. State*, 45 *South. 673, 674, 154 Ala. 71*.

### **DITCH**

Said ditch, see *Said*.

A "ditch" is no more than a right of way for the passage of water. *Smith v. Hampshire*, 87 Pac. 224, 225, 4 *Cal. App. 8*.

A "ditch" is as much an artificial mechanism as a pump, when applied to diversion of water from a stream or a disturbance of the natural order of things. *Garvey Water*

*Co. v. Huntington Land & Improvement Co.*, 97 Pac. 428, 432, 154 *Cal. 232*.

No technical effect in conveyancing has been attributed to the word "ditch." Plaintiffs declared in ejectment for a strip of land 14 feet wide and about 600 feet long, extending to tidal waters, and designated in their deed as "a certain ditch." At the trial their claim of title rested on a deed containing the following clause: "And also the said party of the second part [the plaintiffs] is to have the exclusive privilege and use of a certain ditch that leads," etc. The grant of this exclusive privilege was not a conveyance of land, for the recovery of the possession of which the action could be maintained. *Conover v. Atlantic City Sewerage Co.*, 57 *Atl. 897, 898, 70 N. J. Law, 315*

The words "ditch" and "drain" have no exact or technical meaning; they both may mean a hollow or open place in the ground, natural or artificial, where water is collected or conducted off, and if sufficiently defined they may bound land as other natural objects. *Sherrod v. Battle*, 70 S. E. 834, 836, 154 *N. C. 345*.

*Rev. St. Ohio 1908, § 4511*, defines the word "ditch" as a drain or water course, and provides that a petition for improvement of the ditch shall be held to include any site, lateral, spur, or branch ditch, drain, or water course necessary to secure the object of the improvement. *Greek v. Joy*, 90 *N. E. 932, 934, 81 Ohio St. 315*.

A conduit through which a water power company conducts the water from its dam across a river to the place of use is not strictly a "ditch" or a canal, but is a conduit through which water is diverted from the natural channel in which it would flow if left unobstructed, and the company is liable for the fees imposed by Act March 11, 1903 (*Sess. Laws 1903, p. 233*) § 10, providing that upon the issuance of a certificate by the state engineer in relation to the completion of any canal, ditch, or other works, a fee to cover the expense of the examination of such works shall be paid to the state engineer. *Idaho Power & Transportation Co. v. Stephenson*, 101 *Pac. 821, 824, 16 Idaho, 418*.

A mere excavation, though called a "ditch," on a person's land, cannot be construed as coming within the purpose and intention of the statutes relating to ditches and priorities of water rights. A ditch with rights is referred to; and a ditch that is built without authority, the building of which conveys no authority upon the owner to divert water, is not such a ditch as the statute mentions. *Whalon v. North Platte Canal & Colonization Co.*, 71 *Pac. 995, 998, 11 Wyo. 313*.

Structures common in all highways for collecting surface water and keeping it out

of the traveled part of the road are usually called "ditches" or gutters. A gutter beside a roadway, by reason of which ice gathered in the roadway, causing plaintiff's injury, was not a sluiceway, within a statute making towns liable for damages to any person traveling on a sluiceway, by reason of any defect making it unsuitable for travel. *Drew v. Town of Bow*, 65 Atl. 831, 74 N. H. 147.

Hurd's Rev. St. 1905, c. 42, § 151, providing that, where two or more parties on adjoining lands requiring a system of combined drainage have voluntarily constructed ditches which form a continuous line or line and branches, and where needed repairs and improvements are not made by voluntary agreement, any owner of part of such ditch may petition the commissioners of highways of the township for the formation of a drainage district to include all lands to be benefited by maintaining these ditches, a ditch constructed by highway commissioners in a highway, draining not only adjoining lands but the highway, and forming a part of a continuous line, is to be regarded as a "ditch of an owner of land," within the meaning of the act, so as to authorize the organization of a drainage district under the act, on petition of any owner of part of the ditch. *People v. Magruder*, 86 N. E. 615, 617, 237 Ill. 340.

L. O. L. § 5136, provides that the owner of a "ditch or mining flume, or water right appurtenant thereto," who fails to operate or exercise ownership over such property for a period of five years shall lose the title, claim, and interest therein, etc. Held that, as a "ditch" is an "aqueduct," which is a water carrier or leader, and "flumes" are usually portions of ditches, a reservoir is not included within the statutory provisions; and nonuser thereof for the period named would forfeit no right. *Moore v. United Elkhorn Mines (Or.)* 127 Pac. 964, 966.

**As aqueduct**

See Aqueduct.

**As water course**

See Water Course.

**DITCH COMPANY**

As common carrier, see Common Carrier.

**DITTO**

As writing, see Write—Writing.

The word "ditto" and its abbreviation "do." and the dots and marks that stand for the word are in common use, and have a perfectly well-defined meaning known to persons generally, and which should not be disregarded in an election return wherein dots are used under figures or words set against a person's name. *Opinion of the Justices*, 70 Me. 560, 567.

"Ditto marks" are marks which are generally understood to mean "the same as above." *Duerr v. Snodgrass*, 52 S. E. 531, 532, 58 W. Va. 472.

"Ditto marks" must be read as a representation of what appears written above them, and as meaning "the same as above," since the abbreviations commonly used in the English language may be used in general writing, and legal documents and records, as parts of the English language. *Chase v. Maxcy*, 114 N. W. 832, 134 Wis. 435.

A notice of a tax sale in the following form:

Name and Description	Valuation.	Taxes Perc'tg Costs.
	\$	\$
Miller E S lot 2 b 170 R R Del Diablo		
5 acres	175	6.97
imp.	600	22.18
Mirandetti J lot 4 b 718 "		
14 42-100 acres	505	19.17

—shows by means of "ditto marks" that the property in the second description was in the "R R Del Diablo." *Best v. Wohlford*, 94 Pac. 98, 100, 153 Cal. 17.

Under Rev. St. 1908, § 4096, requiring that the date of signing the petition for a local option election and the residence address of the signer shall be written opposite his name, the use of "ditto marks" is permissible, for writing consists of any symbols generally used to transmit ideas, and as no particular style is required, ditto marks, which are to be read as a repetition of the line above, and are as much a part of the English language as punctuation marks, may be used. *People v. Newell*, 113 Pac. 643, 646, 49 Colo. 349 (citing 3 Words and Phrases, p. 2141).

**DIVERS**

A plaintiff, in an action for slander, who alleges that the words were spoken by defendant in the presence and hearing of "divers" persons, must prove that the words were spoken in the presence of at least three persons; the word "divers" meaning "several," which means any number more than two. *Day v. Becker (Tex.)* 145 S. W. 1197, 1199.

**DIVERSE CITIZENSHIP**

Where plaintiff and defendant are citizens of different states, there exists what, for the purpose of removal to a United States court, is termed "diverse citizenship." *Carolina Coal & Ice Co. v. Southern R. Co.*, 57 S. E. 444, 445, 144 N. C. 732.

Whether the jurisdiction of the federal Circuit Court depended on "diverse citizenship" alone, within the meaning of the act of March 3, 1891, § 6, making the decrees of the Circuit Courts of Appeals final in such cases, or was rested on other grounds as well, must be determined from the complain-

ant's statement of his own cause of action as set forth in the bill, without regard to any questions that might have been brought into the suit by the answers or in the course of the subsequent proceedings. *Shulthis v. McDougal*, 32 Sup. Ct. 704, 706, 225 U. S. 561, 56 L. Ed. 1205.

## DIVERSION—DIVERT

See Public Diversion.

Revised Charter and Ordinances of Tacoma, § 96, pp. 79, 80, provides that moneys collected by taxation for special funds provided by law shall remain therein, and that all funds raised by a vote of the people or by special taxation for a special purpose shall be used for that purpose and none other, and that no fund shall be "diverted" from the purpose for which it was originally assessed or collected or voted by the people, without submission of the question to a vote of the people, etc. Held, that the word "diverted" contemplates the permanently turning of a fund from its purpose, the equivalent of appropriation for some other use, and not the temporary transfer of the general fund to another fund with an assured income under the control of the city when necessary to expedite the city's business. *Griffin v. City of Tacoma*, 95 Pac. 1107, 1110, 49 Wash. 524.

### Of water

It is a "diversion" of waters onto plaintiff's land, to its detriment, which is not permissible, where water is collected by defendant's ditches, and carried by them through his land and that of the next lower proprietor, and there ceases to be carried further to a natural water way, but is allowed to ooze through and water-sob plaintiff's land. *Briscoe v. Parker*, 58 S. E. 443, 444, 145 N. C. 14 (citing *Staton v. Norfolk & C. R. Co.*, 13 S. E. 933, 109 N. C. 341; *Porter v. Durham*, 74 N. C. 767; *Jenkins v. Wilmington & W. R. Co.*, 15 S. E. 193, 110 N. C. 444, 447).

## DIVESTITURE

See Reserved Power of Divestiture.

## DIVIDE

See Equally Divided.

Where the Legislature, after fixing the boundaries of counties, refers to "streams which divide counties," it must be understood as meaning streams in which are situated the boundary lines which "divide" counties. *Dodge County v. Saunders County*, 97 N. W. 617, 618, 70 Neb. 442.

Where several persons agreed to go in and buy some whisky, each man who was to share in the whisky signing his name to a paper showing how much money he had

contributed to the fund, it is commonly known as a "divide"; and where one of such persons purchased five gallons for the purpose of dividing according to the agreement, it is not a violation of Act April 15, 1884 (1 Acts 1883-84, p. 1404, c. 789), and of the acts amendatory thereof, regulating the sale of intoxicating liquor in the counties of Knox and Whitley, and forbidding a sale of less than five gallons, unless the liquor was sold with the knowledge, understanding, or design that it would be so received. *Farris v. Commonwealth*, 104 S. W. 288, 289, 126 Ky. 463.

By his will, a testator devised and bequeathed unto his trustees all his estate, including real property, to pay the income to his wife during her natural life, and upon her death to divide the estate into three equal parts, and to assign one part to each of two sons, and hold the remainder in trust to pay the income to his daughter during her life. Civ. Code, § 847, forbids trusts of real property, save those specified; and section 857 provides that express trusts in real property may be created to sell, mortgage, or lease, to receive the rents and profits and pay them to the use of any person, and to accumulate the rents and profits. Held that, as the word "equal," used in the direction to divide the estate into three equal parts, implies parts equal in all respects—in quantity, character, and value—and as the term "divide" does not, of itself, import a physical segregation in distinct shares, the directions to the trustees were not to make an actual physical division, it apparently being the intention of the testator to devise his property to his children as tenants in common; and hence the trustees did not take absolute title, but took only sufficient title to support their duty of apportioning the share of the daughter and paying over the income, and so the absolute devises to the children were not invalid, because based on trusts to physically divide, which were invalid. In re *Spreckels' Estate*, 123 Pac. 371, 373, 162 Cal. 559.

### Apportion synonymous

See Apportion.

### As creating tenancy in common

As a rule, when a bequest is made to several persons of income to be "divided equally" among them, they take as tenants in common, and not as a class or as joint tenants. *Loomis v. Gorham*, 71 N. E. 981, 982, 186 Mass. 444.

### As devise

A will creating a trust in favor of testator's daughter, and providing that in case of the death of the daughter without issue the property should be "divided" among certain of testator's relatives, did not create a trust as to the relatives specified, but constituted a direct devise to them in the event of the testator's death. In re *Heywood's Estate*, 82 Pac. 755, 758, 148 Cal. 184.

**As divide equally**

Since the word "divide" in common parlance means, when used by two contracting parties, a severance or partition into equal parts, a complaint in an action by a broker for commissions, which alleges that plaintiff was employed to assist in making a sale, that defendants promised to pay plaintiff for his services a half of the commissions received, on a sale being made, that a sale was made through services of plaintiff, and that defendant received a specified sum for commissions, is supported by evidence that defendants agreed to "divide" the commissions with plaintiff. *Graves v. White*, 95 Pac. 347, 348, 43 Colo. 131, 127 Am. St. Rep. 106.

**DIVIDING COUNTIES**

See Water Course Dividing Counties.

**DIVIDING LINE**

"Dividing line," as used in a plea in an action of trespass to try title, describing the land as "being the same land plaintiff sued for, except a strip nine feet wide along said dividing line throughout its entire length, and being the same land to which the pleas of limitation herein apply," were used as describing the land claimed with reference to both the east and west sides of the tract. *Cochran v. Moerer*, 105 S. W. 1138, 1142, 47 Tex. Civ. App. 372.

**DIVIDEND**

See Cash Dividend; Preferred Dividend; Stock Dividend.

Set apart dividend, see Set Apart.

The word "dividend" has a peculiar and definite significance, and means a distributive sum, share, or percentage arising from some joint venture, as a corporation, or a proportionate amount arising from a bankrupt or other estate. *Simcoke v. Sayre*, 126 N. W. 816, 817, 148 Iowa, 132.

A bequest of interest arising from bank stock, to be paid "as the same shall be declared by said bank," entitles the beneficiary only to "dividends declared," and not dividends earned. *Howell v. Westbrook*, 66 Atl. 417, 69 N. J. Eq. 641.

It is the characteristic feature of a "dividend declared and paid wholly from the net profits" or undivided earnings that it diminishes the property of the corporation by exactly the amount of the dividend so paid out, while it leaves the fractional interest represented by each share of the capital stock exactly what it was before. *Gray v. Hemenway*, 98 N. E. 789, 790, 212 Mass. 239.

A transfer of assets by a railway company to a trustee and subsequent issue of participation certificates by the trustee do not constitute a "dividend" on stock, so as to entitle a life tenant under a stockholder's will to it as against the remainderman. In re

*Bunker's Estate*, 137 N. Y. Supp. 104, 109, 77 Misc. Rep. 320.

Under New Jersey laws authorizing a corporation to retire preferred stock on which it shall have continuously declared and paid "dividends" for a period of at least one year preceding the meeting at which the resolution authorizing the retirement was adopted, the payment of "dividends" must begin at or before the period, and must include the last of the regular or continuous payments before the end of the period; and where a corporation paid quarterly "dividends," it must have declared and paid out of its earnings five regular dividends before it is entitled to retire its stock. "Earnings" for the period of a year before the meeting may be said to accrue from the beginning of the year, but "dividends" have no existence under the by-laws until and as they are declared out of the earnings, and therefore "dividends" cannot be said to accrue at the beginning of the year. *Hodge v. United States Steel Corp.*, 53 Atl. 601, 606, 64 N. J. Eq. 90.

**As division of profits**

A "dividend" is a corporate profit set aside, declared, and ordered by the directors to be paid to the stockholders upon demand or at a fixed time. *People ex rel. Pullman Co. v. Glynn*, 114 N. Y. Supp. 460, 461, 130 App. Div. 332.

A division of profits of a corporation is a "dividend," though not called or considered such by the directors or stockholders. *Barnes v. Spencer & Barnes Co.*, 127 N. W. 752, 756, 162 Mich. 509, 139 Am. St. Rep. 587.

A "dividend" has been defined as that portion of the profits and surplus funds of a corporation which has been actually set apart by a valid resolution of the board of directors or by the shareholders at a corporate meeting for distribution among the shareholders according to their respective interests, in such sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively. Other definitions are "a profit set aside, declared by the board of directors of a corporation, and ordered by them to be distributed among the holders of its stock"; "a fund which the corporation sets apart from its profits to be divided among its members." The doctrine is that a "dividend" is considered parcel of the mass of corporate property until declared, and therefore incident to and parcel of the stock up to the time it is declared, and before its declaration will pass with a sale or devise of the stock. Whoever owns the stock prior to the declaration of a dividend owns the dividend also, but the moment the dividend is declared it becomes then separate and distinct from the stock, and falls to him who is proprietor of the stock of which it was theretofore incident. *McLaran v. Crescent Planing Mill Co.*, 93 S. W. 819, 821, 117 Mo. App. 40 (quoting

2 *Thomp. Corp.*, § 2126; 2 *Cook, Corp.* [4th Ed.] 534).

"The word 'dividends,' when used in connection with corporate stock, means a proportionate part of the profits which have arisen from corporate transactions. They are payable out of the profits alone." Defendant guaranteed payment of a semiannual dividend to plaintiff on certain corporate stock of 3 per cent. for 10 years, or until his stock was purchased. In pursuance of such contract the stockholder, who was treasurer of the corporation, resigned his office and surrendered his stock and certain accrued dividends. Held that, the corporation having been dissolved and its corporate rights forfeited, defendant was no longer liable on his guaranty. *Columbus Trust Co. v. Moshier*, 100 N. Y. Supp. 1066, 1067, 51 Misc. Rep. 270 (citing *Tayl. Corp.* §§ 563, 565; 2 *Purdy's Beach Priv. Corp.* §§ 451, 453).

Commonly speaking the word "dividend" signifies such portions of accumulated net earnings, or surplus, as the directorate of a corporation may deem expedient to be distributed, and in appropriate proceedings is by them ordered to be distributed among those entitled by law to receive it. It is *ex vi termini* the part of a thing which has been set apart for distribution. *United States Life Ins. Co. v. Spinks (Ky.)* 96 S. W. 889, 892, 13 L. R. A. (N. S.) 1053.

The word "dividends," as used in Corporation Tax Act (Act Cong. Aug. 5, 1909, c. 6, 36 Stat. 112) § 38, imposing an excise tax on insurance companies equivalent to 1 per cent. on the entire net income above \$5,000 received from all sources during the year, exclusive of amounts received as dividends on stock of other corporations, etc., subject to the tax, such income to be ascertained by deducting all losses sustained and not compensated by insurance or otherwise, including a reasonable allowance for depreciation and sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds, was used in its popular sense as representing profits; and so-called dividends of a mutual company doing business on the level premium plan, consisting merely of the portion of the loading of the premium charged in excess of the cost of insurance and returned annually to the policy holders after the first year, so far as the same were used to reduce subsequent premiums, were not "income \* \* \* received," and were, therefore, not subject to taxation. Such rule, however, does not apply to a "dividend" declared in the case of a full-paid participating policy, wherein the policy holder has no further premium payments to make, which dividend constitutes a participation in the profits and income of the invested funds of the company. *Mutual Ben. Life Ins. Co. v. Herold*, 198 Fed. 190, 202.

A will bequeathed certain stock to the executor in trust to apply the dividends to testator's sister so long as she should live, and at her death to transfer the stock to B., but that if the sister at testatrix's decease, or at any time thereafter, shall have her present income increased to as large an amount as the dividends would increase it, then the stock was to go to B. at once. Held, that the word "dividends" was sufficiently broad to include all distributions of profits, whether in cash, stock, or bonds, and was not qualified by the provision for termination of the life estate prior to the life tenant's death. *Thayer v. Burr*, 119 N. Y. Supp. 755, 757, 134 App. Div. 889.

A contract between the owners of mining claims and persons intending to form a corporation to work such claims provided that the owner should sell the claims for cash and a certain amount of stock in the corporation. Part of the remaining stock was to be set apart as treasury stock, to be sold and the proceeds to be used for developing of the claims, and the remainder to be sold to pay the cash payment on the price. The contract also provided that, if there should be a production from the claims sufficient to make the cash payment or any part thereof, the vendors should receive dividends on a certain number of shares of stock absolutely, but that the dividends on the balance of the stock of the corporation, not purchased and held by persons other than the purchasers of the claims, should be applied upon the payment for the property as rapidly as such dividends might accrue, and that the purchasers were not to receive any part thereof until the cash payment should have been made in full. It was further agreed that the purchasers were to take care of the company's pay roll and guarantee its payment while the contract remained in force. Held, that the word "dividends" was intended to mean the net receipts or profits after payment of all expenses in the operation of the plant, and not the gross proceeds from the sale of ore, and the gross proceeds could not be applied to payment of the cash consideration for the claims or as dividends upon their stock. *Farrell v. Garfield Mining, Milling & Smelting Co.*, 111 Pac. 839, 842, 49 Colo. 159.

#### **As income**

See Income.

#### **As payable in money**

Where the word "dividend" is used without qualification or explanation, it signifies dividends payable in money. *Lancaster Trust Co. v. Mason*, 68 S. E. 235, 236, 152 N. C. 660, 136 Am. St. Rep. 851 (citing 3 Words and Phrases, pp. 2143, 2147).

#### **As principal**

See Principal.

#### **Profits distinguished**

The term "profits" has a larger meaning than "dividends," and covers benefits of any

kind, excess of value over cost, acquisition beyond expenditure, gain or advance. *Simcoke v. Sayre*, 126 N. W. 816, 817, 148 Iowa, 132.

"Profits" and "dividends" of a corporation are not necessarily synonymous terms. *Boothe v. Summit Coal Min. Co.*, 104 Pac. 207, 212, 55 Wash. 167, 19 Ann. Cas. 1255 (citing *City of Allegheny v. Pittsburgh, A. & M. Pass. R. Co.*, 36 Atl. 161, 179 Pa. 414).

#### **DIVIDEND (In Bankruptcy)**

##### **Payments to secured creditors**

Under Bankr. Act July 1, 1898, c. 541, § 65a, 30 Stat. 563, providing that dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured, the word "dividends" as used in the bankruptcy act applies only to claims of general unsecured creditors and not to secured creditors, except as to the amount of the claim in excess of the security. *Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co.*, 116 Pac. 122, 124, 50 Colo. 342.

#### **DIVIDEND ADDITIONS**

Under a clause in a life policy providing for expenditures for such term as the amount of the cash surrender value of the policy will produce, and providing that the cash surrender value shall be computed by deducting 1 per cent. of the amount insured, the "dividend additions" are additions to the insurance from the dividends declared by the company. *Mutual Ben. Life Ins. Co. v. O'Brien* (Ky.) 116 S. W. 750, 752.

"Dividend additions," as used in connection with life insurance, was originally a term sometimes employed to represent additional insurance set apart by the insurer to a policy whose dividends had accumulated to a period of distribution, and which had not been otherwise applied. "The method of dealing with the surplus on policies entitled to participate therein, which was intended by the founders of the Equitable of London, was \* \* \* to divide the same to the insured at frequent intervals in cash. The method actually adopted by the Equitable of London \* \* \* was to grant reversionary bonuses, payable at the death of the insured, and to make apportionments every seven years. The application of surplus earnings to purchase reversionary bonuses, known in this country as paid-up additions, reversionary additions, or merely dividend additions, was also employed in this country at an early date." *Laws N. Y. 1892, p. 1969, c. 690, § 88*, requiring the application of the reserve, on a policy lapsed after being in force three full years, to the payment for extended insurance, and providing that "reserve" should include "dividend additions," meant that the surplus on a lapsed policy, as well as the reserve thereon, should be applied in purchasing extended insurance in case of lapse after

a policy was in force three years, though the words "dividend additions" may have meant, in a technical sense in life insurance, additions on account of surplus to the face of a policy, payable at death while the insurance was in force. *United States Life Ins. Co. v. Spinks* (Ky.) 103 S. W. 335, 336 (citing *Dawson's Elements of Life Insurance*, p. 105).

#### **DIVIDEND IN SCRIP**

A corporation expended a portion of its income, otherwise applicable to the dividends, to the purchase of real estate and permanent improvements, and issued to its stockholders dividends and obligations equal to the amount so spent. Held, that such obligations are "scrip dividends," and are the property of the life tenant, rather than remaindermen, under a deed of trust directing that all dividends on stock, whether in money or scrip, were to go to the life tenant. The court said: "A scrip dividend is a dividend of certificates, giving the holder certain rights which are specified in the certificate itself. These dividends are usually declared when the company has profits which are not in the shape of money, but are in other forms of property, and the company wishes to anticipate the time when the property may be sold for cash, and the cash distributed by a money dividend. \* \* \* Sometimes the certificate so far partakes of the character of a certificate of stock as to entitle the holder to dividends. \* \* \* A 'dividend in scrip'—i. e., a paper entitling the holder to dividends equal to dividends thereafter declared on the capital stock—is practically a stock dividend, except that the scrip cannot vote, and provision is generally made for taking it up in some manner." In *re Robinson's Trust*, 67 Atl. 775, 777, 279 Pa. 481 (quoting and adopting definition in *Cook, Corp. § 535*, and note thereto, and citing *Gordon's Ex'rs v. Richmond, F. & P. R. Co.*, 78 Va. 501; *Thomp. Corp. § 2193*; *Lowry v. Farmers' Loan & Trust Co.*, 64 N. E. 796, 172 N. Y. 137).

#### **DIVIDEND-PAYING STOCK**

Ky. St. 1903, § 4707, forbidding a personal representative to sell any "dividend-paying stocks" owned by decedent until so ordered by the court, applies only to stocks actually paying dividends, and not to stocks which may at some time pay dividends. *Chappell v. Chappell* (Ky.) 99 S. W. 959, 960.

#### **DIVIDENDS, ISSUES, AND PROFITS**

Where, under a will, the stock of a certain corporation was placed in trust, "the dividends, issues, and profits thereof" to be paid to the beneficiaries, the words "dividends, issues, and profits" were interchangeable with "income," and referred to the earnings paid over by the officers of the corporation in the form of dividends to the trustees. In *re Stevens*, 95 N. Y. Supp. 297, 305, 46 Misc. Rep. 623.

Where a will created a trust fund, giving the dividends, rents, and profits of trust property to testator's widow for life, and on her death the corpus to certain remaindermen, in ascertaining the rights of the wife under the trust, the phrase "dividends, rents, and profits" will be treated as synonymous with "use and income." *Boardman v. Boardman*, 62 Atl. 339, 342, 78 Conn. 451, 12 L. R. A. (N. S.) 779.

Testator bequeathed the "dividends, rents, and profits" of a trust fund of \$200,000 to his widow for life, with remainder to the uses and appointments set forth in his will. During the widow's life, through a change in the investments, profits were added by the sale of securities or increase in valuation amounting to \$53,575.77. There were also certain rights to participate in new stock issues of corporations in which the trust fund was invested, which were sold by the trustees for \$15,758.41, and in other instances the trustees elected to take new stock, a part of the price being paid by appropriations of surplus by the corporation, realizing profits amounting to \$50,849.45. Held, that none of such amounts belonged to the life tenant, but they were all an increase in the corpus of the estate which passed to the remaindermen. *Boardman v. Mansfield*, 66 Atl. 169, 170, 79 Conn. 634, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178.

## DIVINE HEALING

As practice of medicine, see Practice of Medicine.

## DIVINE SERVICE

Where two church congregations build a church in which, by their articles of association, divine service only was to be held, Sabbath schools are not included in the term "divine service." *Craig v. First Presbyterian Church of Pittsburgh*, 88 Pa. 42, 48, 32 Am. Rep. 417.

In popular usage, the expression "religious services" is synonymous with "divine service." *McDaniel v. State*, 63 S. E. 919, 920, 5 Ga. App. 831.

## DIVISIBLE CONTRACT

A contract whereby one undertook to do all the necessary excavating for a building according to the plans and specifications, and another agreed to pay therefor at the rate of 40 cents per cubic yard of earth and \$1.00 per cubic yard of rock removed, was an entire and not a "divisible contract," all of which, both as to the earth and rock, had to be performed by the former as a condition precedent to his right of payment for any of the work. *Toher v. Schaefer*, 91 N. Y. Supp. 3, 4, 45 Misc. Rep. 618.

A "divisible contract" is one in its nature and purposes susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. *Cantwell v. Crawley*, 86 S. W. 251, 253, 188 Mo. 44; *Green v. Security Mut. Life Ins. Co.*, 140 S. W. 325, 331, 159 Mo. App. 277; *Strauss v. Yeager*, 93 N. E. 877, 880, 48 Ind. App. 448.

An "indivisible contract" of sale is one in which, by its terms, the price for a portion of the goods is not fixed or cannot be ascertained, and is the opposite of a "divisible contract" of sale, defined in Laws 1907, c. 99, § 76, as a contract of sale in which, by its terms, the price for portions of the goods is fixed or ascertainable by computation, though, as provided by section 9, the contract price may be fixed by the course of dealing between the parties. *Boyd v. Second Hand Supply Co. (Ariz.)* 123 Pac. 619, 620.

## DIVISION

See Conventional Division of Charges; Final Division; Subdivision.

Where a division arose in an independent self-governing congregation, and neither faction withdrew therefrom, but each claimed to be the majority, with the right to rule, there was a "division," within Ky. St. 1903, § 322, providing that, in case a division shall take place in a society, the trustees shall permit each party to use the church for worship a part of the time, etc., and the faction excluded from the use of the property of the congregation was entitled to a judgment giving them the right to use such property on designated occasions; but the excluded faction was not entitled to recover possession of the old church record, but was entitled to a copy thereof, the cost of the making of which should be divided between the factions. *Poynter v. Phelps*, 111 S. W. 699, 703, 129 Ky. 381, 24 L. R. A. (N. S.) 729.

### Of court

The circuit court of the city of St. Louis, which is the Eighth judicial circuit, is one court, composed of many parts, called "divisions"; each division being, for certain purposes, in itself a complete court, and independent of the other divisions. A suit is not begun in any division. It is begun in the circuit court, and, under rules of the court, is assigned to a division. When a cause is assigned to a division, that division becomes as to that cause a whole court, and has as exclusive jurisdiction of it as a circuit court of an adjoining county has of a cause pending in it. *Goddard v. Delaney (Mo.)* 80 S. W. 886, 891.

## DIVISION FENCE

The words "division fence" in Civ. Code, § 1301, relating to division fences between



coterminous owners, mean that the fence is to be one dividing the contiguous property. *Hoar v. Hennessy*, 74 Pac. 452, 454, 455, 29 Mont. 253.

#### **DIVISION LESS THAN A COUNTY**

A city is a "division less than a county," within the meaning of the statute providing that in such divisions the petition to place a candidate's name on the official ballot shall have 20 signers. *Jones v. Wilshire*, 33 S. W. 199, 98 Ky. 391.

#### **DIVISION POINT**

A "division point," within Acts 1905, p. 593, § 1, making it unlawful for any railroad company to build or repair railroad equipment "without first erecting and maintaining at every division point a building or shed over the repair tracks, the same to be provided with a floor, where such construction or repair work is permanently done, so as to provide that all men permanently employed in the construction and repair of cars, trucks," etc., shall be sheltered from the weather, was either a place where the officials of a division were permanently located or a place where trains are regularly made up and terminate their runs, and train crews are regularly changed, and a town which was not the headquarters of the division officials, and where no trains were regularly changed or made up or train crews regularly changed, only local trains on a branch ending their runs there, and the engineer and fireman remaining there for the night to make the return trip, was not a "division point." *St. Louis, I. M. & S. R. Co. v. State (Ark.)* 143 S. W. 913, 915.

#### **DIVISION WALL**

"A 'division wall' may become a party wall, by agreement, either actual or presumed, and although such wall might have been built exclusively upon the land of one." *Coggins & Owens v. Carey*, 66 Atl. 673, 676, 106 Md. 204, 10 L. R. A. (N. S.) 1191, 124 Am. St. Rep. 468 (quoting and adopting the definition in *Dorsey v. Habersack*, 35 Atl. 97, 84 Md. 126; *Barry v. Edlavitch*, 35 Atl. 171, 84 Md. 111, 33 L. R. A. 294).

### **DIVORCE**

See Absolute Divorce; Decree for Divorce.

See, also, Legal Separation.

The term "divorce," in its accurate sense, denotes dissolution or suspension by law of the marital relation. As a legal term and unaided by context, it means a dissolution of the bond of matrimony. When a marriage is dissolved, the action of the court proceeds upon the proof that a valid marriage existed and created rights and liabilities. The decree of divorce usually proceeds to make a full adjustment of these liabilities. The decree of annulment declares, in effect, that no

valid marriage ever existed, and restores the parties to their former position, and relieves them from civil and criminal liabilities. The decree of divorce operates from the time it is rendered, but the nullity decree relates back to the time the void marriage was entered into. Session Laws 1907, c. 132, § 1, making certain conditions as to residence a prerequisite to an action for divorce, did not apply to an action for annulment of a marriage. *Montague v. Montague*, 127 N. W. 639, 25 S. D. 471, 30 L. R. A. (N. S.) 745, Ann. Cas. 1912C, 591 (quoting and adopting *Nelson, Divorce and Separation*, § 556).

A decree annulling a marriage on the ground of the wife's insanity at the time of marriage is not a "decree of divorce" within the statute securing homestead rights, but simply operates to declare the union not a marriage, and the woman has no homestead rights as a divorced wife. *Floyd County v. Wolfe*, 117 N. W. 32, 33, 138 Iowa, 749.

Even in those slave states where a marriage custom prevailed, marriage was an obligation of such imperfect character that a separation of the parties at or before emancipation was deemed a "divorce." *Speese's Heirs v. Shores*, 116 N. W. 493, 494, 81 Neb. 593.

"Separation from bed and board" and "divorce" are not convertible terms under our law. They are kept distinct and separate in the Code and in all our legislation. Divorce includes separation from bed and board, but the converse is not true; separation from bed and board does not include divorce. The broad distinction between the two is that divorce puts an end to the marriage, whereas separation from bed and board does not. *Connella v. Connella*, 38 South. 690, 114 La. 950.

#### **Decree of nullity**

"The word 'divorce,' as now used, means a dissolution of the bonds of matrimony, although, as used in the statutes of many of the states, it includes both nullity and divorce. \* \* \* The jurisdiction of courts to annul marriages is usually conferred by statutes, including both causes for annulment and causes for divorce, without attempt to distinguish one from the other. \* \* \* The nullity suit, like a suit for divorce, is a proceeding to establish the status of the parties. Therefore the proceeding must be brought where the parties are domiciled. The law of domicile will be the same as in divorce proceedings." *Pierce's Code*, § 335, subd. 4 (*Balinger's Ann. Codes & St.* § 4877), authorizing service of summons by publication on a nonresident defendant in an action for divorce, authorizes like service in an action for the annulment of a marriage. *Piper v. Piper*, 91 Pac. 189, 190, 46 Wash. 671.

Section 2973 of the Code provides that a widow or widower, though without children,

shall be deemed a family within the meaning of the chapter while continuing to occupy the real estate used as a homestead at the death of the husband or wife, and such right shall continue to the party to whom it is adjudged in a decree of divorce during continued personal occupancy. A man obtained a decree annulling his marriage to a woman who was confined in an insane asylum on the ground of her insanity at the time of marriage. Held, that the decree of annulment was not a decree of "divorce" within the statute, but simply operated to declare the union not a marriage, and hence the woman had no homestead rights as a divorced wife. *Floyd County v. Wolfe*, 117 N. W. 32, 33, 138 Iowa, 749.

"Divorce" means primarily the dissolution or partial suspension by law of the marital relation, and presupposes the existence of a valid marriage; but it sometimes also applies to a sentence of nullity, which establishes the fact that a supposed pretended marriage either never existed or at least was voidable at the election of one or both of the parties. *Leckney v. Leckney*, 59 Atl. 311, 312, 26 R. I. 441 (citing Cyc. Law Dict. 291).

#### DIVORCE A MENSA ET THORO

An action for "divorce a vinculo" differs in every respect from an action for "divorce a mensa et thoro," both being statutory proceedings, proceeding upon different sections, and being founded upon a different state of facts, and aiming at different results. *Stewart v. Stewart*, 66 Atl. 16, 17, 18, 105 Md. 297 (quoting and adopting *Schwab v. Schwab*, 49 Atl. 331, 93 Md. 385, 52 L. R. A. 414, and *Robertson v. Robertson* [N. Y.] 9 Daly, 53).

A divorce "a mensa" is by section 12, c. 64, of the Code, a decree of perpetual separation. It operates upon the after-acquired property of the parties, and upon their personal rights and legal capacities, the same as a decree "a vinculo," except that neither party is permitted to marry again during the life of the other; and by section 11 of said chapter, such decree may perhaps be made to operate upon property previously acquired. *Chapman v. Chapman*, 74 S. E. 661, 663, 70 W. Va. 522.

Under Comp. Laws 1897, § 8686, providing wives with property and maintenance from their husband's estates when neglected or deserted, etc., or when the husband has committed any offense sufficient to entitle the wife to a decree of divorce or separation, where a bill of complaint was in form substantially a bill for absolute divorce, except the prayer, which was for an allowance for separate maintenance, coupled with a prayer for general relief, the decree thereon for separate maintenance for life was a decree of separation, formerly called "a mensa et thoro," and was a "decree for divorce." *Horning v. Horning*, 127 N. W. 275, 276, 162 Mich. 130.

#### DIVORCE A VINCULO

Distinguished from divorce a mensa et thoro, see Divorce a Mensa et Thoro.

#### DIVORCE SUIT

The phrase "suit for divorce" is often used in statutes and in the decisions of the courts to include, not only the proceeding more accurately so termed, which has for its object the dissolution of the bonds of an existing legal marriage, but also those which seek to annul asserted marriages on grounds that render them either void or voidable from the beginning, and when used in its most general sense it may justly be held to embrace all such proceedings. Such term, however, does not include an action for annulment of marriage under a statute authorizing such annulment for mental incapacity. *Schneider v. Rabb*, 97 S. W. 463, 464, 100 Tex. 211 (citing 1 Bish. Mar. & Div. § 136; 2 Bish. Mar. & Div. §§ 226, 292, 293).

A "suit for divorce" is a proceeding to alter the status of a person and not to punish a crime. *Adams v. Adams*, 61 Atl. 628, 629, 101 Md. 506.

##### As civil action

See Civil Action—Case—Suit—etc.

##### As proceeding in rem

See In Rem.

#### DIVORCED PERSONS

As unmarried, see Unmarried.

#### DIVORCEMENT

"Divorcement," as used in Rev. St. 1899, § 7895, providing that insurance policies for the benefit of insured's wife shall inure to her separate benefit, etc., provided that in the event of the death or divorcement of the wife before the husband's death he shall have a right to designate another beneficiary by written notice to the insurer, means a dissolution of the marriage tie, a legal dissolution of the marriage contract by a court or other body having competent authority, without reference to whether the fault authorizing the divorce was that of the husband or of the wife; and hence though the wife had a vested interest in a policy on her husband's life from the date of its issue, on her procuring a divorce for his fault she could not prevent his changing the beneficiary by notice to the company, though the policy also provided that, in case of the wife's death before the husband, the policy should be payable to the husband's executors, administrators, or assigns. *Haven v. Home Ins. Co.*, 130 S. W. 73, 74, 149 Mo. App. 291.

#### DO

See, also, Ditto.

The word "do," used as an abbreviation for "ditto" in a return of sales of land sold for taxes, to designate the purchaser, will serve to do so, if the name of the purchaser

appears in the same column and immediately above such word. *Duerr v. Snodgrass*, 52 S. E. 531, 532, 58 W. Va. 472.

### DO ALL IN HIS POWER

An undertaking by one person for another to "do all in his power" to prevent the confirmation of a certain land claim depending before Congress, etc., does not import that any unfair or improper means are to be resorted to, but evidently means that he shall exert his utmost diligence and ability. *Hunt v. Test*, 8 Ala. 713, 720, 42 Am. Dec. 659.

### DO AND PERFORM

The words "do and perform," as used in the condition of a bail bond that the debtor shall "abide, do and perform the judgment," mean "submit to," "stand to," or "abide," and are evidently a useless iteration to add force and expression to the idea conveyed by the words "to abide." *Hewins v. Currier*, 62 Me. 236, 239.

### DO AS SHE PLEASES

The words in a will empowering a widow to "do as she pleases" with the property bequeathed to her are inconsistent with the existence of an estate over, and she takes an absolute estate in fee. *Breeden v. Welker*, 2 Tenn. Ch. App. 109, 111.

### DO NOT KNOW

Whether the answer "do not know" to a special finding of fact, returned by a jury, is equivalent to "yes" or "no" depends upon the form of the question answered. Generally, such an answer shows that the party whose duty it was to establish the fact involved in the question failed in his proof. In a case where it was the duty of the defendant to prove that E. did not sign a certain promissory note, and the jury returned the following finding and answer: "Did E. sign the note in question? Do not know"—such answer is equivalent to "yes." *Croan v. Baden*, 85 Pac. 532, 533, 73 Kan. 364.

### DOCILITY

See Ordinary Docility.

### DOCK

See Dry Dock.  
See, also, Pier.

"A 'dock' is an artificial basin in connection with a harbor, used for the reception of vessels in the taking on or discharging of their cargoes, and provided with gates for preventing the rise and fall of the waters occasioned by the tides, and keeping a uniform level within the docks." *Perry v. Haines*, 24 Sup. Ct. 8, 13, 191 U. S. 17, 48 L. Ed. 73.

The term "dock," as defined by Webster, is an artificial basin or inclosure in connec-

tion with a harbor for the reception of vessels, and the slip or water way extending between two piers or projecting wharves, or cut into the land for the reception of ships. Water ways are included within the term. Under a city charter authorizing the city to incur a bonded debt to acquire or construct and operate public wharves, docks, piers, or moles along the seashore in connection with the transportation of passengers and freight, etc., the city was authorized to contract indebtedness for the construction of docks, wharves, and warehouses, including the maintaining of streets and highways to navigable waters, and the construction and maintenance of canals and water ways. *Clark v. City of Los Angeles*, 116 Pac. 966, 969, 160 Cal. 317.

### DOCKAGE

See Dry Dockage.

The word "wharfage" is sometimes used synonymously with "dockage" or "moorage" to describe the charge made by the owner of a dock or basin for the privilege of allowing a vessel to lie there. *Mayor, etc., of City of Baltimore v. Baltimore & P. Steamboat Co.*, 65 Atl. 353, 358, 104 Md. 485.

### DOCKET

See Bench Docket; Charge Docket; Court Docket; Judgment Docket; Property Docketed; Subpoena Docket.

### As a record

See Record.

### DOCKET ENTRY

Within Sp. Laws 1885, c. 119, § 7, relating to the municipal court of the city of Mankato, and providing that every person in whose favor a judgment is rendered, in said municipal court, for an amount exceeding \$5 besides costs may, upon paying the fee therefor, demand and shall receive from such clerk a transcript of the "docket entries" of such judgment duly certified, and may file the same in the office of the clerk of the district court of the county of Blue Earth, it is doubtful if the term "docket entries," as used in the municipal court act, was intended to refer to entries in a judgment docket book which the clerk was not required to keep, but which might properly be kept, if the judge so ordered, as a convenient index of the judgment debtors; it is more probable that the term refers to the entries in the minute book or docket that the clerk is required to keep by the provisions of section 7. *Funk v. Lamb*, 92 N. W. 8, 9, 87 Minn. 348.

### DOCKET FEE

A deposit made with the clerk of the court, which under the rules is required to be made whenever a cause is filed there, is generally called by the profession a "docket fee." *People ex rel. Denver Engineers' Sup-*

ly Co. v. District Court of City and County of Denver, 80 Pac. 1069, 1070, 33 Colo. 416.

### DOCKETING JUDGMENT

The "docketing of a judgment" is a proceeding ministerial in character, which cannot occur until there is a judgment rendered. It is not the making or giving of a judgment, but the act of a mere clerk, and it necessarily implies the pre-existence of the judgment to be docketed. In California the docketing must not only await the rendition of the judgment, but it is to be done after the filing of the judgment roll, which takes place after the judgment is entered. *Ridgley v. Abbott Quicksilver Min. Co. of Illinois*, 79 Pac. 833, 834, 7 Cal. Unrep. 200.

### DOCKING

Where a charter party provided that, in the event of loss of time by reason of docking, there should be an abatement of hire money, the expression "docking" referred to loss of time in case it should be necessary to dry dock the vessel, and not to loss of time in waiting to reach a dock, so that it could be coaled. *Anderson v. Bowring & Co.*, 197 Fed. 675, 678.

### DOCTOR

An indictment alleging that accused practicing medicine without a license treated a physical disease in the capacity of a physician or doctor or both is not objectionable because in the disjunctive; the words "physician" and "doctor" being synonymous. *Milling v. State (Tex.)* 150 S. W. 434, 436.

The term "doctor," as defined by the lexicographers, signifies or means, in one respect, a person who practices medicine. One who held himself out to the public as a "doctor" located in a certain city, with stated office hours, gave all persons to understand that he was engaged in the practice of curing diseases by some method adapted to that purpose, notwithstanding the fact that he disclaimed the use of medicine of the character of drugs in his treatment of disease. *Witty v. State*, 90 N. E. 627, 630, 173 Ind. 404, 25 L. R. A. (N. S.) 1297.

### DOCTRINE

See Comity; Cy Pres; Entity Doctrine; Humanitarian Doctrine; Precedent; Stare Decisis.

### DOCUMENT

See Foreign Official Document; Papers and Documents; Private Papers and Documents; Public Document.

The indictments against a person are "records or 'documents' filed in a public office under authority of law." Code Cr. Proc. § 272; Code Civ. Proc. § 866. They are the

property of the state, and a willful and unlawful removal of them constitutes a crime under Pen. Code, § 94. *People v. Mills*, 70 N. E. 786, 789, 178 N. Y. 274, 67 L. R. A. 131.

Bankr. Act July 1, 1898, c. 541, § 1, cl. 13, 30 Stat. 544, defines a "document" to include any books, deeds, or instruments of writing, and includes deeds, all other muniments of title, contracts, securities, bills receivable, notes, bankbooks, bills of exchange, account books, and all papers and books relating to the business of a bankrupt, and these books and papers are regarded by the bankrupt act as personal property, the title to which, by operation of law, is vested in the trustee. *In re Hess*, 134 Fed. 109, 111.

A motion for inspection of a picture, the property involved in the action and bearing the purported signature of the artist, will be denied; it not being a "document or other paper" within the meaning of Code Civ. Proc. § 803, authorizing inspection. *Wilson v. Collins*, 109 N. Y. Supp. 660, 662, 57 Misc. Rep. 363.

St. 1898, § 2921, authorizes the recovery of "necessary disbursements," and section 2028 declares that, when there are charges in a bill of costs for attendance of witnesses or copies or exemplifications of documents or papers, such charges for copies shall not be taxed without an affidavit that the copies were actually and necessarily used or necessarily obtained for use, or unless they shall appear to have been necessary and reasonable in amount. Held, that the words "documents or papers" did not include a copy of testimony taken before a referee, claimed by plaintiff's attorneys to have been necessary to enable them to argue the case before the referee, and hence plaintiff was not entitled to charge for such copy as a necessary disbursement. *Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co.*, 111 N. W. 237, 250, 132 Wis. 1.

#### Record book of corporation

The corporate records and stock books passed on an adjudication in bankruptcy against the corporation to the trustee, by virtue of the provisions of Bankr. Act July 1, 1898, c. 541, § 1, subd. 13, § 70, 30 Stat. 544, 465, vesting in such trustee the title of the bankrupt to all documents relating to his property, and section 1, subd. 13, providing that the word "documents" shall include any book, deed, or instrument in writing. *Babbitt v. Dutcher*, 30 Sup. Ct. 372, 374, 216 U. S. 102, 54 L. Ed. 402, 17 Ann. Cas. 969.

### DOFFER

A "doffer," in cotton mills, is one whose duty is to take off the full bobbins when the frame stopped, lay them aside, and put empty ones in their place. *Dougherty v. Dobson*, 63 Atl. 748, 214 Pa. 252, 8 L. R. A. (N. S.) 90.

**DOG****As animal**

See Animal.

**As property**

See Personal Property; Property.

**As stock**

See Stock.

**As thing of value**

See Thing of Value.

**DOG HOUSE**

The appliance on a harvester, which is made of canvas, and is near the smokestack, and is used as a header draper, is called a "dog house." *Quint v. Dimond*, 82 Pac. 310, 312, 147 Cal. 707.

**DOG TAIL COTTON**

"Dog tail cotton" is cotton of a poor grade and of little value. *Soudan Planting Co. v. Stevenson*, 102 S. W. 1114, 1116, 83 Ark. 163.

**DOGS—DOGGER**

The term "dogs," as used in a sawmill, are devices for holding the logs securely in position to saw. *O'Brien v. Page Lumber Co.*, 82 Pac. 114, 39 Wash. 537.

The carriageman in a sawmill is sometimes called the "dogger." *Evans v. Louisiana Lumber Co.*, 85 South. 736, 737, 111 La. 534.

A "dogger," in a mill, is one required to ride backwards and forwards on the saw carriage, and to attach the dogs to the log on the carriage. *O'Brien v. Page Lumber Co.*, 82 Pac. 114, 116, 39 Wash. 537.

**DOING BUSINESS**

See Seeking to Do Business.

Doing a plumbing business, see Plumbing Business.

Doing a shipping business, see Shipping Business.

See, also, Carry on Business; Transacting Business.

While the extent to which a foreign corporation must "do business" in a state to justify the service of process upon it there is not clearly defined, the transaction of some substantial business must be established. *Cody Motors Co. v. Warren Motor Car Co.*, 196 Fed. 254, 255.

The drawing of bills of exchange by a foreign corporation on a drawee in this state does not imply the "transaction of business" in the state. *H. T. Woodall & Son v. People's Nat. Bank of Leesburg, Va.*, 45 South. 194, 195, 153 Ala. 576.

A foreign corporation, receiving dividends on stock in another corporation whose stock it is one of its purposes to hold, is "doing business" for a profit, so as to render it

taxable within the Tax Law. *People ex rel. Manhattan Silk Co. v. Miller*, 109 N. Y. Supp. 866, 868, 125 App. Div. 296.

The doing of matters of which the ordinary business of a foreign corporation does not consist, but which it does in the exercise of its general rights for the purposes of its safety, or in order to do justice to its creditors, or to comply with some other provision of the local law, is not the "doing of business" within a state, but it consists only of carrying on the operations of its trade for the making of profit. *American Copying Co. v. Eureka Bazaar*, 108 N. W. 15, 16, 20 S. D. 526, 9 L. R. A. (N. S.) 1176 (citing 19 Cyc. p. 1280).

A contract by a foreign corporation for the sale and delivery in the state of paving blocks manufactured in another state, negotiated largely by correspondence and afterwards reduced to writing, the deliveries to extend over a period of about ten months, does not constitute "doing business in the state" by such corporation, so as to require a certificate from the Secretary of State authorizing it to do such business, as provided by Corporation Law, § 15. *Haddam Granite Co. v. Brooklyn Heights R. Co.*, 116 N. Y. Supp. 96, 98, 131 App. Div. 685.

The General Corporation Law provides that no foreign stock corporation other than a moneyed corporation shall do business in this state without first having procured a certificate, etc., and that no foreign stock corporation doing business in this state shall maintain any action upon any contract made by it in the state unless prior to the making thereof it shall have procured such certificate, etc. Plaintiff was a corporation organized under the laws of another state and manufactured its products there. It dealt with about 35 people of this state during the last eight years. The president of the company came here once in a while as its representative, and as a rule, when coming to transact business, remained two or three days. Sales of some of plaintiff's machines to other parties had been canceled, and the machines were transferred to defendant for the notes in suit. There was no other evidence as to its doing business in the state. Held, that plaintiff was not "doing business in this state" within the meaning of the statute, so as to warrant dismissal of the complaint. *Novelty Tufting Mach. Co. v. Hutkoff*, 107 N. Y. Supp. 88-90, 56 Misc. Rep. 522.

The expression "doing business in this state," as used in *Hurd's Rev. St. 1905*, c. 32, § 26, imposing duties and restrictions on foreign corporations both doing business in the state, means doing the business or character of business for which the corporation was organized. *People ex rel. Stead v. Chicago, I. & L. R. Co.*, 79 N. E. 144, 146, 223 Ill. 581, 7 Ann. Cas. 1 (citing *Bradbury v. Waukegan*

& Washington Mining & Smelting Co., 113 Ill. App. 600; *Mandel v. Swan Land & Cattle Co.*, 40 N. E. 462, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124.

A foreign corporation doing interstate business, or a corporation selling an article in another state to a citizen of Idaho, is not "doing business in the state" within Const. art. 11, § 10, providing that no foreign corporation shall do business in the state without having one or more offices and an authorized agent therein upon whom process may be served and Rev. Codes, § 2792, providing that every foreign corporation before "doing business in this state" must file its articles of incorporation and designate an agent upon whom process can be served. *Foore v. Simon Piano Co.*, 108 Pac. 1038, 1042, 18 Idaho, 167.

The term "doing business in the city" in the Roanoke City Charter, specifying various kinds of business or employment on which the city may levy a license tax, and providing that a license may be required of any person "doing business in the city," whether the business or employment be of a like character as that the statute meant or not, does not include a person selling on the market square country produce from his wagon. *Brown's Case*, 36 S. E. 485, 487, 98 Va. 366.

The question as to whether a foreign corporation is "doing business" in the state so as to be subject to service of process under R. L. 1905, § 4109, is entirely distinct from the question as to whether such a corporation is "doing business" in the state within the purview of the Somerville Law (R. L. 1905, §§ 2888-2890), relative to the conditions upon which a foreign corporation may be allowed to do business in the state; and it does not follow that business which, by reason of the Interstate Commerce Law, does not bring the corporation within the Somerville Law, may not nevertheless bring it within R. L. 1905, § 4109. *Kendall v. Orange Judd Co.*, 136 N. W. 291, 292, 118 Minn. 1.

The fact that motor cars built by defendant, a foreign corporation located at Detroit, and having no certificate authorizing it to do business in New York, and no established place of business in the state, where shown in a space leased by defendant at a New York automobile exhibition, and that defendant's officers were present conferring with different persons, including local sales agents, all of the complete cars exhibited, however, being owned by a local concern, did not constitute a "doing business in the state" which will sustain service of summons upon it therein to give jurisdiction to a federal court. *Cody Motors Co. v. Warren Motor Car Co.*, 196 Fed. 254, 255.

A corporation organized for the purpose of owning and renting an office building, but which has wholly parted with the control and management of the property, and by the terms of a reorganization has disqualified

itself from any activity in respect to it, its sole authority being to hold the title subject to a lease for 130 years, and to receive and distribute the rentals which may accrue under the terms of the lease, or the proceeds of any sale of the land, if it shall be sold, is not "doing business" within the meaning of Act Aug. 5, 1909, c. 6, § 38, imposing an excise upon the doing or the carrying on of business in a corporate or quasi corporate capacity. *Zonne v. Minneapolis Syndicate*, 31 Sup. Ct. 361, 362, 220 U. S. 187, 55 L. Ed. 428.

The purchase at execution sale of property in satisfaction of a judgment procured in an interstate transaction is not in itself "doing business," within Const. art. 11, § 10, and Rev. Codes, § 2792, prohibiting a foreign corporation "doing business" in this state without first filing its articles of incorporation and designating an agent, as those provisions do not apply to a foreign corporation doing interstate business, or a corporation that sells an article in another state to a citizen of this state, and which thereafter finds it necessary to resort to the courts of this state for the collection of the debt. *Foore v. Simon Piano Co.*, 108 Pac. 1038, 1042, 18 Idaho, 167.

The making of a collateral trust mortgage to secure a bond issue and an underwriting agreement to sell part of the bonds, the procuring of defendant's signature to such an agreement, the receipt of money from defendant on his contract, the delivery to him of the bonds to be paid for, and the assignment of the underwriting contract to another to secure a note, does not constitute "doing business," within General Corporation Law (Laws 1892, p. 1805, c. 687) § 15, prohibiting the maintenance of an action by a foreign corporation "doing business" in this state until after payment of a license fee, etc. *Union Trust Co. of Rochester v. Sickels*, 109 N. Y. Supp. 262, 265, 125 App. Div. 105.

Where a foreign corporation came into the state of New Jersey and organized and controlled a corporation, causing it to issue its bonds and stock, and took them and purchased stocks held in various New Jersey corporations, and also took from such stockholders sums of money as further consideration, and gave a guaranty that another corporation would pay the interest on its bonds, such transactions amounted to a "doing of business," within P. L. 1896, p. 307, providing that foreign corporations, as a condition precedent to doing business shall take certain steps. *Groel v. United Electric Co. of New Jersey*, 60 Atl. 822-832, 69 N. J. Eq. 397.

While as a general rule a foreign corporation can be sued and served with process in a state court only when it is doing business, in such state, it being often a matter of extreme nicety to determine whether or not at the time of service the corporation

was in contemplation of law "doing business" within the state, the state may properly provide that before any foreign corporation shall transact business within its borders it shall designate an agent in the state upon whom process may be served in a suit brought before or after it has ceased to do business in the state. The act of Idaho of March 10, 1903, requiring such a designation of an agent, which designation shall run from the time of filing until his successor is appointed or his resignation filed, permits valid service or process to be made on an agent, whose appointment has neither been resigned nor revoked, in suits against the corporation growing out of its business in the state, even though it has ceased such business and sold its property, and although the agent is no longer connected with it aside from such designation, since otherwise, if "doing business" implies, as has been held, corporate continuity of conduct in that respect, a foreign corporation might comply with the requirements of the act, so as to have its advantages, and yet "flit into the state and out again in such a way that it would be almost impossible successfully to serve process upon it." *Hill v. Empire State-Idaho Mining & Developing Co.*, 156 Fed. 797, 809.

A petition in involuntary bankruptcy was filed in the district of Massachusetts against a Maine corporation, which had carried on the mercantile business for which it was incorporated in Boston. About six months prior to the filing of the petition it sold the most of its stock in trade and gave up its place of business, and two months later receivers were appointed by a court of Maine, who took charge of and kept its remaining property in Boston. Held, that the corporation was not "doing business" in any proper sense after the appointment of the receivers, and had not had its principal "place of business" in Massachusetts for the greater part of the six months preceding the filing of the petition, within the meaning of Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545, and that the court in that district was without jurisdiction of the proceedings. In *re Perry Aldrich Co.*, 165 Fed. 249, 251.

A bank, which has gone into voluntary liquidation, paid off its depositors, surrendered to the bank commissioner its certificate of authority to transact business, and ceased to transact any business, except to collect debts owing it and to distribute the proceeds among its stockholders by way of closing up its affairs, is not "doing business," within Gen. St. 1901, § 1283, requiring financial statements to be filed with the Secretary of State by corporations doing business in the state as a condition precedent to the maintenance of an action. *Wilson v. First State Bank of Jetmore*, 95 Pac. 404, 405, 77 Kan. 589.

Defendant, a Virginia railroad company, neither owned nor operated any railroad lo-

cated in Pennsylvania, and maintained no office in that state, though three directors and its assistant secretary resided there, who may, at various times, have received and given information indirectly affecting the corporation's business elsewhere. Defendant's cars, both freight and passenger, were transported through Pennsylvania by other railroads, for the convenience of passengers and shippers, such railroads, however, paying for the use of the cars, and receiving the freight and passenger rates for that portion of the haul that was done in Pennsylvania. Defendant was also a member of a freight transportation line which maintained an agency in Pennsylvania for the solicitation of freight to be shipped under through bills of lading, each line receiving a proportionate share of the freight, and each contributing to the expenses of the agency; and another railroad located in Pennsylvania sold coupon tickets in connection with its own tickets only, good over defendant's road, accounting each month to defendant for its proportion of the proceeds. The facts did not justify a finding that defendant was "doing business" in Pennsylvania, so as to authorize it to be sued in that state. *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. 235, 237.

Where a railroad operates boats in the waters of New York, and delivers coal in that state, it is "doing business" therein, and subject to service of process there, though its railroad is not within the state. *Cafasso v. Philadelphia & R. Ry. Co.*, 169 Fed. 887.

If a foreign insurance company unauthorized to do business in this state issues policies through a licensed broker acting pursuant to the statute authorizing the obtaining by such a broker of policies issued by foreign insurance companies unauthorized to do business in this state, such foreign insurance company is not "doing business" in this state contrary to the statute. *Equitable Mut. Fire Ins. Co. v. McCrae*, 156 Ill. App. 467, 471.

Rev. Laws Mass. c. 119, § 11, relating to fraternal benefit corporations conducting business under the provisions of the chapter, provides that an agreement for the transfer of membership of such corporations shall be approved by a two-thirds vote of the certificate holders of each corporation, etc. Plaintiff and defendant were Grand Lodges of a fraternal insurance order; plaintiff being the Grand Lodge of Connecticut, and defendant the Grand Lodge of Massachusetts. The latter formerly had included the members of the order in Connecticut and other states, but plaintiff had been created a separate Grand Lodge by the Supreme Lodge of the order, acting under its constitution and laws. Thereafter plaintiff and defendant had entered into an agreement for the proportionate division of the funds held by defendant at the time of the separation, and plaintiff brings this action for an accounting thereof.

Defendant demurred to the complaint because, besides other reasons therefor, it did not appear that plaintiff had authority to carry on its business in Massachusetts, or that two-thirds of the certificate holders of defendant had consented to the contract alleged between plaintiff and defendant. Held, that as it did not appear that plaintiff had ever undertaken to do business in Massachusetts, and as the division of territory by the Supreme Lodge, a foreign corporation, and creating plaintiff a Grand Lodge in another state, was not the "doing of business" in Massachusetts within the meaning of the statute, its provisions, under the circumstances, had no application. *Grand Lodge A. O. U. W. of Connecticut v. Grand Lodge A. O. U. W. of Massachusetts*, 70 Atl. 617, 625, 81 Conn. 189.

The words "doing business" in this state, as used in Rev. St. 1878, § 1954, providing that every life or accident insurance corporation doing business in this state shall on or before the 1st day of March in each year file in the office of the commissioner of insurance a statement of its business standing and affairs, etc., and imposing a penalty for neglect to comply therewith, which by the next section is made a ground for revoking the authority, license, or certificate granted to such a corporation, necessarily imply and refer to corporations which have the lawful right or authority to make contracts of insurance, such corporations as the state may have jurisdiction over, and not to unlicensed nonresident corporations. *State v. United States Mut. Acc. Ins. Co.*, 33 N. W. 90, 92, 69 Wis. 78.

Corporations organized for and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus are engaged in business within the meaning of Act. Aug. 5, 1909, c. 6, § 38, imposing an excise upon the doing or the carrying on of business in a corporate or quasi corporate capacity. A corporation owning and leasing taxicabs and collecting rents therefrom is "engaged in business" within the meaning of Act. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), imposing an excise upon the doing or carrying on of business in a corporate or quasi corporate capacity. *Flint v. Stone Tracy Co.*, 31 Sup. Ct. 342, 357, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

Where the proprietor or keeper of a saloon maintains a billiard table in connection therewith, it will be held that such table is kept and used in "doing business" within Const. art. 7, § 2, authorizing the Legislature to impose a license tax on persons and corporations doing business in the state, though no separate or specific hire is exacted or charge made for the playing of games on the

table; the incidental advantage the table affords to the business in connection with which it is used being sufficient to bring it within the purview of "doing business." *In re Gale*, 95 Pac. 679, 680, 14 Idaho, 761.

Under Laws 1905, p. 807, c. 491, authorizing the Governor to employ competent accountants necessary to investigate the various state departments, the Governor may employ a foreign corporation, chartered as public accountants, and such corporation while engaged in such examination on behalf of the state is not "doing business" within the state within the meaning of Bush law, requiring foreign corporations to obtain a permit to do business within the state. *Haskins & Sells v. Kelly*, 93 Pac. 605, 606, 77 Kan. 155.

S. urged M. to buy a place, telling him he had been "doing business" with defendant for a long time, that he (S.) could be trusted, that M. could steal horses enough to make the payments, and that defendant would take and handle them for him. Held, that S., in using the expression "doing business," intended to be understood as saying that he had been stealing horses for a long time, and that defendant had been handling them for him. *State v. Allen*, 87 Pac. 177, 179, 34 Mont. 403.

#### Agent as doing business

The specific tax "upon all agents of packing houses doing business in this state," which is levied by paragraph 19 of section 2 of a general tax act approved December 21, 1900 (Acts 1900, p. 21), is a vocation or occupation tax; and, construing together the various provisions of the act applicable to this tax, it is apparent that the act in effect declares that an agent representing a packing house and carrying on its business in any county of this state is pursuing a vocation or occupation, and is himself "doing business" in this state, and is liable to the tax. *Stewart v. Kehrner*, 41 S. E. 680, 682, 115 Ga. 184.

An agent representing a packing house and carrying on its business as the alter ego of the principal is "doing business" within an ordinance imposing a tax on agents of packing houses having a place of business or stock of merchandise in the city and selling to customers therein, and is liable for the tax. *City of Savannah v. Cooper*, 63 S. E. 138, 139, 131 Ga. 670.

A foreign corporation, which, through a resident agent, makes a contract in the state to furnish labor and material for construction work, and in pursuance thereof sends laborers and employes, together with a superintendent, into the state, to perform the contract, "engages in business" within the state within Rev. St. 1895, art. 745, requiring foreign corporations to file their articles with and receive from the Secretary of State a permit to transact business in the state, and



is not engaged in interstate commerce. *St. Louis Expanded Metal Fireproofing Co. v. Belharz* (Tex.) 88 S. W. 512, 514.

Under Pub. St. 1901, c. 245, § 5, providing that a person doing business in the state may be summoned upon trustee process, the property of a nonresident landowner in the charge of his resident agent may be attached by a creditor on such process; the care of real estate being in nature of "doing business in this state." *Bennett v. Hebbard*, 68 Atl. 537, 74 N. H. 411.

Under Act April 22, 1874 (P. L. 108), making it unlawful for a foreign corporation to do business in the state without having a place of business and a registered authorized agent, the same person may be both the commercial agent of a corporation and its authorized registered agent; but where he resigns his position as commercial agent, without having his appointment as registered agent canceled, he continues to act as such, so that the corporation is still "doing business" in the state with a duly appointed registered agent. *De La Vergne Refrigerating Mach. Co. v. Kollischer*, 63 Atl. 971, 974, 214 Pa. 400.

#### Accepting premiums and paying losses

A foreign insurance company, though it has ceased to solicit new business, is still "doing business" in the state, so that jurisdiction may be acquired by service on an agent, where it still has outstanding policies in the state, on which it collects dues, and, in case of losses thereunder, adjusts them and makes remittances. *Johnston v. Mutual Reserve Fund Life Ins. Co.*, 87 N. Y. Supp. 438, 441, 43 Misc. Rep. 251.

A foreign accident insurance company which has policies outstanding in the state, and has and exercises the right to investigate losses thereunder, to examine the body of the deceased insured, and to adjust and settle losses within the state, is "doing business" therein so as to support service of process upon a local agent, conformably to Rev. St. Mo. 1899, § 7992, providing for the service of process in actions against foreign insurance companies. *Commercial Mut. Accident Co. v. Davis*, 29 Sup. Ct. 445, 446, 213 U. S. 245, 53 L. Ed. 782.

The receipt by a foreign insurance company at its home office of premiums upon policies theretofore issued, together with four isolated acts extending over a period of three years, consisting in rewriting an existing policy, sending a check in payment of a policy, to be delivered upon receipt of certain unpaid assessments, and two adjustments within the state of claims which have accrued, do not constitute "doing business" within the state after the company's asserted withdrawal therefrom in good faith, so as to preclude it from revoking its designation of the state insurance commissioner as its agent to receive service of process. *Hunter*

*v. Mutual Reserve Life Ins. Co.*, 31 Sup. Ct. 127, 128, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686.

A foreign insurance company is "doing business" within the state, so far as the question of the power of a federal court, sitting in that state, to obtain jurisdiction over such corporation, is concerned, where, under the terms of its policies covering property in that state, it sends its agents there to adjust losses. *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 25 Sup. Ct. 483, 485, 197 U. S. 407, 49 L. Ed. 810.

A life insurance company, which has surrendered its license to do business in the state, withdrawn its agencies, and transacts in the state only such business as is necessary under its outstanding policies, though "doing business" in the state so as to subject it to reasonable regulations for the benefit of resident policy holders, is not "doing business" within St. 1898, § 1954, as amended by Laws 1907, c. 597, requiring every life insurance company doing business in the state to file, on or before March 1st in each year with the insurance commissioner, an annual statement, giving a complete account of its business and financial condition covering the year ending the preceding December. *State v. Columbian Nat. Life Ins. Co.*, 124 N. W. 502, 503, 141 Wis. 557.

Where a foreign assessment insurance company, with its home office in the state of its origin, issued policies there to a domestic corporation on applications sent by mail to the home office by the treasurer of the domestic corporation from his home in New York, or in a sister state, and the policies were sent by mail, either to the company in New York or to its treasurer in the sister state, and were retained, and the insurer had neither office nor agent in New York, and did not solicit business in New York, the transaction did not constitute "doing business" there, within the insurance law (Laws 1892, c. 690, as amended by Laws 1893, c. 725), relating to foreign corporations transacting the business of insurance, or within General Corporation Law (Consol. Laws, c. 23) § 15, denying a foreign corporation not having its certificate of regularity, the right to sue in New York. *Stone v. Penn Yan, K. P. & B. R. Co.*, 90 N. E. 843, 846, 197 N. Y. 279, 134 Am. St. Rep. 879.

The operations of a life insurance agent in soliciting insurance, receiving applications, obtaining policies, and collecting premiums constitute a "doing and conducting of an insurance business," within an ordinance levying a license therefor. *City of Lake Charles v. Equitable Life Assur. Soc.*, 38 South. 578, 579, 114 La. 836.

A foreign insurance company, writing insurance on property in the state for residents, is "doing business" in the state, within Act March 11, 1901 (*Burns' Ann. St. 1908*, §

4798), so as to be subject to process, though not licensed to do business in the state and maintaining no office therein. *McCord v. Illinois Nat. Fire Ins. Co.*, 94 N. E. 1053, 1054, 47 Ind. App. 602.

#### Appointing agents

The appointment of an agent to transact the company's business is not "doing business" within the meaning of the statute. *Verdigris River Land Co. v. Stanfield*, 105 Pac. 337, 340, 25 Okl. 285.

The provisions of a statute requiring agents of foreign corporations to deposit in the county where they purpose to do business the authority under which they act as agents before entering upon their duties in the state, and requiring such agents to file with the clerk of the circuit court of the county where they propose to do business, before commencing the duties thereof, the consent of the corporation to be sued in the state and authorization of service of process, are applicable to the persons who propose to engage in business in the state as agents of foreign corporations, but not to transactions by an agent in the conduct of business of a corporation which has no permanency in the state. They do not apply to a nonresident manager or agent, who comes to the state to appoint agents. *Hollowell v. Smith Agricultural Chemical Co.*, 83 N. E. 772, 41 Ind. App. 361.

A complaint by a foreign business corporation showing a contract made within the state for the employment by it of a district manager for a specified state "or other territory" warrants an inference of the "doing of business within the state" within General Corporation Law (Consol. Laws, c. 23) § 15, prohibiting suits by foreign stock corporations on contracts made in the state before procuring a certificate from the Secretary of State. *Chicago Crayon Co. v. Slattery*, 123 N. Y. Supp. 987, 990, 68 Misc. Rep. 148.

#### Bringing or maintaining action

By instituting and prosecuting a suit a foreign corporation is not "doing business" within the meaning of statutes imposing conditions precedent thereto. *Cooper v. Ft. Smith & W. R. Co.*, 99 Pac. 785, 788, 23 Okl. 139 (citing *St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 18 S. W. 43, 55 Ark. 163; *Christian v. American Freehold Land & Mortgage Co.*, 7 South. 427, 89 Ala. 198; *Ginn v. New England Mortgage Security Co.*, 8 South. 388, 92 Ala. 135; 2 *Morawetz, Corp.*, § 662; *Cook v. Rome Brick Co.*, 12 South. 918, 98 Ala. 409; *St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia*, 30 S. W. 350, 60 Ark. 325, 28 L. R. A. 83).

The institution of a suit by a foreign corporation is not an "act of business" in the state, and may be done without having a place of business or an agent in the state. *H. T. Woodall & Son v. People's Nat. Bank of Leesburg, Va.*, 45 South. 194, 195, 153 Ala. 576.

The bringing of an action in the state by a foreign corporation is not "doing business in the state," so as to require the foreign corporation to pay an annual license fee, within Laws 1907, c. 140, providing that no corporation shall be permitted to maintain any suit in any court of the state without alleging and proving that it has paid its annual license fee last due, which refers only to corporations doing business in the state. *Lilly-Brackett Co. v. Sonnemann*, 97 Pac. 505, 50 Wash. 487.

Bringing an action is not "doing business," within Banking Law, Laws 1892, p. 1861, c. 689, § 31, providing that no foreign corporation incorporated for carrying on the business specified in article 5 shall transact business in the state without a certificate from the Superintendent of Banks. *Western Nat. Bank of Louisville v. Kelly*, 95 N. Y. Supp. 574, 48 Misc. Rep. 366.

The bringing of a suit does not constitute "doing business," within Gen. St. 1901, § 1283, requiring financial statements to be filed with the Secretary of State by corporations doing business in the state as a condition precedent to the maintenance of an action; that phrase being intended to comprehend only the exercise of corporate functions in the attainment of the ends for which the corporation was organized. *Wilson v. First State Bank of Jetmore*, 95 Pac. 404, 406, 77 Kan. 589.

The phrase "exercise or attempt to exercise any power," within Code 1906, c. 82, § 136, relating to proceedings against corporations, delinquent as to license taxes, should be read as if it said "carry on the business" of the corporation, and "doing business," as found in such statutes, is construed as not extending to the mere act of suits in respect to contracts made or rights acquired while the corporation had power to do business. *Comstock v. J. R. Droney Lumber Co.*, 71 S. E. 255, 256, 69 W. Va. 100.

The enforcement of a contract in the courts of the state by a foreign corporation is not the "doing of business in the state" within the statute prohibiting foreign corporations from doing business within the state until they comply with the laws thereof. *United Shoe Machinery Co. v. Ramlose*, 132 S. W. 1133, 1141, 231 Mo. 608.

The prosecution of an action by a foreign corporation to recover on a contract for the purchase of lawbooks did not constitute "doing business" in Arkansas, within Act Feb. 16, 1899, p. 18, c. 19, requiring a foreign corporation to file a copy of its articles with the Secretary of State as a prerequisite to its right to do business within the state. *Alley v. Bowen-Merrill Co.*, 88 S. W. 838, 840, 76 Ark. 4, 113 Am. St. Rep. 73, 6 Ann. Cas. 127 (citing *Buffalo Zinc & Copper Co. v. Crump*, 69 S. W. 572, 70 Ark. 525, 91 Am. St. Rep. 87; *St. Louis, A. & T. Ry. Co. v. Fire*

Ass'n of Philadelphia, 18 S. W. 43, 55 Ark. 174).

Where a nonresident corporation brings an action, and the issue is raised by answer that plaintiff has not complied with the corporation laws (Gen. St. 1901, § 1283), and the evidence shows that plaintiff had for years before suit traveling men in its employ in the state obtaining contracts from implement dealers, providing that the title of goods shipped under the contract from Missouri should remain in the corporation until paid for, and the corporation sent agents thereafter to Kansas to receive payment, it is error to assume in the instructions that, though the dealer in Kansas paid the freight, the goods were delivered to the carrier in Missouri, as the property of the dealer in Kansas. *Elliott v. Parlin & Orendorff Co.*, 81 Pac. 500, 503, 71 Kan. 665.

The prosecution, by a foreign corporation, of an action in the state for collection of a debt contracted in another state, and payable in that state, does not constitute "doing business" in Idaho, within Const. art. 11, § 10, providing that no foreign corporation shall do any business within the state without having a place of business and an authorized agent therein upon whom process may be served, and Rev. Codes, § 2792, requiring certain steps to be taken by foreign corporations before doing business in the state. *Bonham Nat. Bank of Fairbury v. Grimes Pass Placer Mining Co.*, 111 Pac. 1078, 1079, 18 Idaho, 629.

A suit to foreclose a real estate mortgage transferred to plaintiff in another state before maturity, and for which plaintiff, a foreign corporation, comes into the courts for the purpose only of maintaining such action, is not "doing business" within the state, within Const. art. 11, § 10, and Rev. Codes, § 2792. *Diamond Bank v. Van Meter*, 113 Pac. 97, 98, 19 Idaho, 225.

A statute providing that no foreign corporation shall have or exercise any corporate powers, or be permitted to do business within the state, until a required fee shall have been paid, does not prohibit a foreign corporation from suing to protect its property or other rights, or from acquiring property in the state, until such fees are paid, as such acts are not "doing business within the state." *Craig v. A. Leschen & Sons Rope Co.*, 87 Pac. 1143, 1144, 38 Colo. 115.

The institution and prosecution of suits in the courts of this state by a foreign corporation is not "doing business" therein within the meaning of section 43, art. 9, of the Constitution, or of article 23, c. 18 (sections 1225-1227) *Wilson's Rev. & Ann. St. 1903*. *Freeman-Sipes Co. v. Corticelli Silk Co.*, 124 Pac. 972, 973, 34 Okl. 229.

#### Consigning goods to factors

A foreign corporation which has no warehouse, office, or place of business, and

which neither incurs nor pays any of the expenses of receiving, handling, and selling its goods in a state to which it consigns them to its factor, who conducts all the business there, assumes and pays all expenses, is not "doing business" in the latter state within the meaning of statutes relative to the admission of foreign corporations. Where a New Jersey corporation entered into a factorage contract with a corporation in Colorado, the Colorado corporation ordering, receiving, storing, and selling merchandise of the New Jersey corporation at its own expense in consideration of the factorage secured to it by the contract, the New Jersey corporation was not "doing business" in Colorado within the meaning of the Constitution and statutes of that state. *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 20, 84 C. C. A. 167.

Where a foreign corporation furnishes wagons to an agent on board cars in Ohio for sale in Kentucky under an "agent's commission contract," retaining title in the corporation and requiring the proceeds to be kept separate as its funds, the corporation "does business" in Kentucky, within Ky. St. 1903, § 571, requiring foreign corporations to designate a local agent upon whom process may be served. *Milburn Wagon Co. v. Commonwealth*, 104 S. W. 323, 324, 139 Ky. 330.

A foreign corporation shipped liquors without the state to a factor within Michigan, retaining title thereto and contemplating that the factor should make sales to its customers within Michigan. The foreign corporation sent a man to supervise the keeping of the books and the handling of the funds by the factor, and the factor paid him. It was agreed that the book accounts should belong to the foreign corporation. Held, that the foreign corporation did not "transact business" in Michigan within the laws regulating the doing of business by foreign corporations, but the transactions partook of the character of interstate commerce. In re *Monongahela Distillery Co.*, 186 Fed. 220, 225.

#### Construction work

Plaintiff, a corporation not registered in Pennsylvania, was engaged in engineering and contracting. It had no factory or workshop where anything was made and did not manufacture the machinery which it designed and sold; its capital being chiefly invested in patterns, drawings, and the good will of its business, and its usual agreements contemplating a particular plant contracted for in accordance with such an agreement as was in controversy with defendant. Held, that plaintiff's purchasing and assembling the necessary parts to complete the plant it had agreed to construct for defendant, was not interstate commerce, but constituted "doing business" in Pennsylvania, where the

plant was to be erected, in violation of Act Pa. 1874 (P. L. 108), prohibiting foreign corporations from "doing business within the state" without having complied with such act, and hence plaintiff could not recover on the contract. *Buffalo Refrigerating Mach. Co. v. Penn Heat & Power Co.*, 178 Fed. 696, 698, 102 C. C. A. 196.

A foreign corporation engaged in the manufacture and installation of elevators contracted in New York to furnish and install elevators in a building in New York City. It had an office in New York, and brought suit for the amount due on the contract, alleging a substantial performance. Held, that its acts constituted "doing business within the state," within General Corporation Law (Laws 1892, p. 1805, c. 687) § 15, as amended by Laws 1904, p. 1250, c. 490, prohibiting the "doing of business within the state" without having first secured a certificate from the Secretary of State, etc. *Portland Co. v. Hall & Grant Const. Co.*, 106 N. Y. Supp. 649, 654, 121 App. Div. 779.

Where a foreign corporation entered into a contract with defendant bank to furnish materials and construct certain fixtures in defendant's bank building in Alabama, involving the construction of brick walls, putting on of finished plaster, and the furnishing and construction of different articles making up the furniture and fixtures of the bank, such work constituted "doing business" within the state, and the corporation, not having complied with Code 1907, §§ 3642, 3644, regulating foreign corporations, it could not maintain a suit to enforce a lien therefor. *Geo. W. Muller Mfg. Co. v. First Nat. Bank (Ala.)* 57 South. 762, 763.

#### Continuance implied

Within a statute requiring foreign corporations doing business in the state to obtain a certificate of authority from the Secretary of State, the carrying on through an agent of the business of selling agricultural implements and farm machinery of various kinds for many years, which, instead of being merely casual or incidental, was continuous and carried on as such a business is ordinarily conducted, constitutes the "doing of business in the state." *Osborne & Co. v. Shilling*, 88 Pac. 258, 259, 74 Kan. 675, 11 Ann. Cas. 319.

"To be 'doing business in this state' implies a corporate continuity of conduct in that respect, such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on a business." A foreign corporation engaged in buying and selling fruit, which had an arrangement with a commission dealer in the state by which the corporation was to buy peaches in Michigan and ship them to the commis-

sion dealer, billing them at cost price in Michigan, and accompanying them with draft on the commission dealer, who was to pay the same, sell the peaches, and divide the profits, was not "doing business within the state," within section 15 of the general corporation law (Laws 1892, p. 1805, c. 687), providing that no foreign stock corporation doing business within the state shall maintain any action upon any contract made by it in the state until it shall have procured a certificate permitting it to transact business within the state. *Alfred J. Brown Seed Co. v. Richardson*, 103 N. Y. Supp. 243, 245, 53 Misc. Rep. 517 (quoting and adopting definition in *Penn Collieries Co. v. McKeever*, 75 N. E. 935, 183 N. Y. 98, 2 L. R. A. [N. S.] 127).

A corporation, to be "doing business," must transact within the state some substantial part of its ordinary business, continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligation. Where a foreign railroad corporation only maintained an advertising agent within the state, whose duties were only to explain to intending travelers and shippers of freight the advantages of traveling and shipping over such railroad, and the agent possessed no power to sell tickets or contract on behalf of the railroad company, the railroad was not doing business within the state, so as to authorize service of summons on it by delivering a copy to such agent. *Rich v. Chicago, B. & Q. R. Co.*, 74 Pac. 1008, 1009, 34 Wash. 14.

"It is impossible to assent to the proposition that 'doing business' within a state means a persistent or continuous condition of doing or offering to do business, usually leading to the appointment of an agent or the establishment of an office within the state." An officer and authorized agent of defendant, a manufacturing corporation of another state, was in Connecticut on business connected with a contract made with plaintiff by the predecessor of defendant, to whose rights and liabilities it had succeeded, when he was served with summons in an action brought by plaintiff against defendant in the federal court for Connecticut for breach of the same contract. Neither defendant nor its predecessor had ever maintained an office or agent in Connecticut, but they had made a number of sales in the state, including the one to plaintiff which was in controversy. Held, that the service was good, and gave the court jurisdiction of defendant. *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.*, 130 Fed. 605, 608.

"The term 'doing business in the state,' with reference to a foreign corporation, implies a continuity of conduct in that respect,

such as might be evidenced by the investment of capital with the maintenance of an office "or the transaction of the corporation's business and those incidental circumstances which attest the corporate intent to avail itself of the privilege of carrying on business." *Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 150 Fed. 666, 671 (quoting and adopting definition in *Penn Collieries Co. v. McKeever*, 75 N. E. 936, 183 N. Y. 103, 2 L. R. A. [N. S.] 127. *Simmons Burks Clothing Co. v. Linton*, 117 S. W. 775, 776, 90 Ark. 73 (quoting and adopting definition in *Penn Collieries Co. v. McKeever*, 75 N. E. 935, 183 N. Y. 98, 2 L. R. A. [N. S.] 127); *Ozark Cooperage Co. v. Quaker City Cooperage Co.*, 98 N. Y. Supp. 113, 115, 112 App. Div. 62 (quoting *Penn Collieries Co. v. McKeever*, 75 N. E. 935, 183 N. Y. 98, 2 L. R. A. [N. S.] 127).

#### Correspondence schools

A foreign corporation conducting a correspondence school, whose business involves the solicitation of students in Kansas by local agents, who are also authorized to collect and forward to the home office tuition fees, and the systematic intercourse by correspondence between the company and its scholars, and the transportation of books, papers, etc., in the course of instruction, is "doing business," within the statute prohibiting the maintaining of an action in the courts by any corporation doing business in the state without filing with the Secretary of State a statement of its condition. *International Text-Book Co. v. Pigg*, 30 Sup. Ct. 481, 482, 217 U. S. 91, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

A foreign corporation operating as a correspondence school is "doing business" in the state within such statute, where it has agencies in various parts of the state to solicit persons to contract with it for instruction, each district office being charge of a district superintendent of the corporation having under him a corps of the corporation's representatives, where the rent and other expenses of each of the offices are paid by the corporation, including the salaries of the superintendent and his corps of assistants, and the payments made by students are collected by the division superintendent, deposited in a special account in his own name in a bank in the city where his office is situated and sent by him from time to time to the corporation, and each of the division superintendents and representatives in the state is required to be qualified to give instruction in mathematics to its students, and assistance in mathematics is given by such superintendents at their division offices to such students as desire it. *International Text-Book Co. v. Connelly*, 124 N. Y. Supp. 603, 605, 67 Misc. Rep. 49.

A foreign corporation conducting a correspondence school by soliciting students in

Missouri by local agents, who collect and forward the tuition, and by intercourse by correspondence between the corporation and its students and agents, and by the transportation of needful books, papers, and apparatus, is "doing business" in Missouri within Rev. St. 1899, §§ 1024-1026, requiring foreign corporations to obtain a certificate to do business in the state, in order to sue in the courts of the state. *International Text-Book Co. v. Gillespie*, 129 S. W. 922, 923, 229 Mo. 397.

Where plaintiff, a foreign corporation, rented and fitted up an office in this state and placed an agent in charge thereof for the purpose of soliciting persons to enroll for instruction by correspondence, some of the documents necessary for the instruction being kept there, and monthly payments were made to the agent by students for remittance to plaintiff, it was "doing business" in the state within Acts 1902, No. 20, § 55, prohibiting a foreign corporation, doing business herein without having paid the annual license tax, from maintaining an action in this state. *International Text-Book Co. v. Lynch*, 81 Vt. 101, 69 Atl. 541, 542.

A Pennsylvania corporation contracted with a citizen of Wisconsin for the furnishing, by the usual transportation agencies, of instruction continuously for a considerable period of time. The contract was accepted and to a great extent performed in Pennsylvania, and included only incidentally the transfer of articles of property to Wisconsin, which were not objects of sale, but instrumentalities through which the instruction was furnished. Held, that the contract was in violation of St. 1898, § 1770b, as amended by Laws 1899, p. 653, c. 351, § 27, and Laws 1901, p. 620, c. 484, requiring foreign corporations "doing business" in the state to take certain steps, forbidding any such corporation which has not complied with the statute to transact business in the state, and declaring that every contract made by or on behalf of a corporation failing to comply with the statute, "affecting the personal liability thereof," or relating to property within the state, shall be void in its behalf. *International Text-Book Co. v. Peterson*, 113 N. W. 730, 731, 133 Wis. 302, 14 Ann. Cas. 965.

#### As doing present business

An act requiring fire insurance companies doing business in incorporated cities or towns having regularly organized fire departments to pay specific sums to create a pension fund imposed a tax, and not merely a condition upon which they would be permitted to do business, since the use of the word "doing" implied that the corporations were already in existence, carrying on business, and that the licenses had already issued. *Ætna Fire Ins. Co. v. Jones*,

59 S. E. 148, 149, 78 S. C. 445, 13 L. R. A. (N. S.) 1147, 125 Am. St. Rep. 818.

### Exchange of property

A contract between plaintiff and a foreign corporation, providing for the exchange of stock of the corporation for advertising in a paper represented by plaintiff, in order to sell the corporate stock to raise money for development purposes, was not "doing business," within a statute making void contracts of a foreign corporation doing business in the state without complying with the statutes, but related to furnishing capital with which to do business. *Clark v. Kansas Petroleum Co.*, 129 S. W. 466, 144 Mo. App. 182.

### Keeping office and maintaining agency in state

The fact that a corporation had an office in the state and was authorized to do business there did not make it "doing business" within the state, within the meaning of a statute providing that nonresidents doing business in the state shall be taxed upon the capital invested to the same extent as if they were residents of the state. *People ex rel. Dives-Pelican Min. Co. v. Feltner*, 78 N. Y. Supp. 1017, 1018, 77 App. Div. 189.

The phrase "doing business" within a state is not ambiguous or elastic, but has been defined by the federal courts. A foreign building and loan association, having no office or general agent in the state, but having a special agent intrusted with authority to solicit subscriptions for stock, receive application for loans, and receive payment of dues, interest, and premiums, loaning money to a shareholder in the state, makes a contract governed by the laws of the state, notwithstanding the payment to be made in a foreign state. *Nat. Mut. Bldg. & Loan Ass'n v. Brahan*, 81 South. 840, 847, 80 Miss. 407, 57 L. R. A. 799.

Where it is admitted that for seven years prior to the commencement of an action a corporation has maintained a branch office transacting business at a specified place in San Francisco, and had been there represented by general managers, who were at all times in charge thereof, there was a sufficient showing that it was doing business within the state, when coupled with the pleadings and facts shown at the trial. *Black v. Vermont Marble Co.*, 82 Pac. 1060-1062, 1 Cal. App. 718.

General Corporation Law, Laws 1892, p. 1805, c. 687, § 15, prohibiting foreign corporations, "doing business in the state" without complying with the corporation law, from maintaining actions, etc., applies only to corporations maintaining a place of business and pursuing business within the state, and does not prohibit a California corporation from suing in the New York courts for breach of a contract made or approved in

California through a broker of New York. *Fresno Home Packing Co. v. Turle & Skidmore*, 111 N. Y. Supp. 839, 840, 60 Misc. Rep. 79.

A foreign corporation, engaged in the business of buying and selling lumber, which maintains an office in the state in charge of a resident agent, who makes no sales, but who looks after the purchasing business in adjacent states, does not engage in business in the state, within Acts 1895, c. 81, prohibiting any foreign corporation from "doing business in the state" without complying with the acts as to the registration of its charter, though it was a party to two or three isolated transactions had in the state. *Advance Lumber Co. v. Moore*, 148 S. W. 212, 213, 126 Tenn. 313.

A foreign corporation, publishing a magazine, which keeps a local office in the state to enable agents to solicit business, which is accepted at its home office, where its magazine is published and from which it is distributed, is not "doing business in the state," within General Corporation Law (Consol. Laws, c. 23) § 15, requiring a foreign corporation to secure a certificate of authority. *System Co. v. Advertisers' Cyclopdia Co.*, 121 N. Y. Supp. 611, 612.

A foreign corporation's maintenance of an office for the registration of transfers of shares of stock only and for meetings of directors, together with the keeping of a bank account in the state, is not "doing business in this state." *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96, 99.

A foreign corporation, the office of which is in another state, and which merely has an agent in this state, who maintains an office for his own convenience, and does not have exclusive control of the business in the state, and keeps no books nor bank account, and makes no contracts for the sale of goods, but reports everything to the home office, and who usually makes sales to parties outside the state, and, while a particular sale was made of coal situated in the state to a resident, it had been previously sold to a party without the state, who had rejected it, is not "doing business in the state," within Laws 1892, p. 1805, c. 687, as amended by Laws 1901, p. 1326, c. 538, prescribing the conditions on which foreign corporations may do business in the state. *Penn. Collieries Co. v. McKeever*, 87 N. Y. Supp. 869, 870, 93 App. Div. 303.

Under General Corporation Law, § 15, which provides that no foreign corporation doing business in the state shall maintain any action here upon any contract made here unless it shall have procured a certificate of compliance with the statutes, a company having an office in this state used by its president, but which at the time of making the contract did no business in this state, and whose property was in the state of Florida,

whose books had been sent from this state to Florida, and which made no contract here except the insurance contract, was not "doing business," since that term as used in the statute relates to the ordinary business which a corporation was organized to do, and has no relation to the incidental contract of a foreign corporation. *Kline Bros. & Co. v. German Union Fire Ins. Co. of Baltimore*, 132 N. Y. Supp. 181, 182, 147 App. Div. 790.

Acts 1887, p. 386, c. 226, § 1, provides that a foreign corporation doing business in the state shall be subject to suit to the same extent as a domestic corporation as to "any transaction had in whole or in part within this state, or any cause of action arising here." Section 2 of said act defines "doing business in this state" as: "Having any transaction with persons, or having any transaction concerning any properties situate in this state through any agency whatever, acting for it within the state." Section 3 authorizes process to be served on any agent. Held, that a foreign railroad corporation, operating a line of road wholly outside of the state and having only a soliciting agent in the state, which negligently handles a nonresident's freight passing over its line as intermediate carrier, is not "doing business in the state" within sections 1 and 2, although the wrong is not discovered until the freight reaches its destination here. Hence service on the traveling agent, having no connection with the shipment, does not give jurisdiction. *Atlantic Coast Line R. Co. v. Richardson*, 117 S. W. 496, 497, 121 Tenn. 448.

A corporation organized under the laws of Delaware by residents of Pennsylvania for the purpose of owning the stock of and financing certain Pennsylvania corporations having the same officers and substantially the same stockholders and which in fact did nothing else, but maintained its office, held its directors' meetings, registered its bonds, and made the loans to the other corporations in Pennsylvania, was doing business in that state within the meaning of Act Pa. April 22, 1874, and its failure to file its statement and otherwise comply with the requirements of that act rendered its contracts made within the state void and unenforceable. In re *Montello Brick Works*, 163 Fed. 621; *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, 312, 97 C. C. A. 144.

The making by a West Virginia corporation of a contract to build a railroad in Canada and having an office therein constitute "doing business," under Winding-Up Act (Rev. St. Canada, c. 129) § 3, as amended by St. 52 Vict. c. 32, § 3. *Hyde v. Scott*, 133 N. Y. Supp. 904, 906, 75 Misc. Rep. 487.

A nonresident corporation dealing in farm machinery maintained an agency in the state to store and deliver goods to purchasers in the state, to whom sales were made by traveling salesmen, subject to the approval

of the corporation at its home office; the agent in the state having no authority to sell property stored with it, or receive orders therefor. Held, that the corporation was not "doing business within the state" in violation of Gen. Laws 1899, pp. 68, 71, cc. 69, 70, prescribing certain conditions on which foreign corporations may do business in the state. *Rock Island Plow Co. v. Peterson*, 101 N. W. 616, 618, 93 Minn. 356.

Laws 1892, p. 1805, c. 687, § 15, provides that no foreign stock corporation doing business in the state shall maintain any action in the state on any contract made by it in the state unless prior to the making of the contract it shall have procured a certificate from the Secretary of State permitting it to do business. Held, that "doing business" means maintaining an office and having capital invested and carrying on a regular business, and the mere furnishing, under a contract with the owner, of materials for a building, by a foreign corporation, was not a doing of business, so as to preclude an action on a contract. *New York Architectural Terra Cotta Co. v. Williams*, 92 N. Y. Supp. 808, 811, 102 App. Div. 1 (citing *National Knitting Co. v. Bronner*, 45 N. Y. Supp. 714, 20 Misc. Rep. 125; *People v. Garabed*, 45 N. Y. Supp. 827, 20 Misc. Rep. 127; *Cooper Mfg. Co. v. Ferguson*, 5 Sup. Ct. 739, 742, 113 U. S. 727, 735, 28 L. Ed. 1137; *Vaughan Mach. Co. v. Lighthouse*, 71 N. Y. Supp. 799, 801, 64 App. Div. 138, 142; 6 *Thomp. Corp.* § 7936; *Potter v. Bank of Ithaca* [N. Y.] 5 Hill, 490; *Suydam v. Morris Canal & Banking Co.* [N. Y.] 6 Hill, 217; *Cummer Lumber Co. v. Associated Manufacturers' Mut. Fire Ins. Corp.*, 73 N. Y. Supp. 668, 67 App. Div. 151; In re *Simonds Furnace Co.*, 61 N. Y. Supp. 974, 30 Misc. Rep. 209).

A mining corporation having no properties and doing no mining or smelting business in this state is not "doing business within this state," within General Incorporation Act, § 26, merely by opening an office within the state and placing a safe and other furniture therein for the convenience and use of the secretary and treasurer of the company, notwithstanding stock certificates may have been issued from such office, the books kept, and directors' meetings, etc., held there. *Bradbury v. Waukegan & W. Mining & Smelting Co.*, 113 Ill. App. 600, 602.

A foreign corporation, whose mine and plant are located in another state, is "doing business" in New York, so as to render it liable to the license tax and franchise tax imposed on foreign corporations for the privilege of doing business in the state, based on the amount of capital therein, where it has its only business office in the state at which the entire negotiation for the sale of its product is conducted. *People ex rel. Union Sulphur Co. v. Glynn*, 109 N. Y. Supp. 868, 869, 125 App. Div. 328.

A foreign business corporation, having its principal office in the state and branch offices and agencies in other cities, managed from the main office, is "doing business within the state," within the meaning of the tax law, providing for the taxation of nonresidents doing business within the state. *People ex rel. International Banking Corp. v. Raymond*, 102 N. Y. Supp. 85, 87, 117 App. Div. 62.

Where a foreign corporation, not having complied with the statute prohibiting such corporations from doing business within the state until they have filed a certified copy of their charter or articles of incorporation, etc., made a contract in Michigan with defendant, by which, in consideration of a specified payment, defendant was appointed the corporation's agent in L. county to sell the corporation's product, appoint subagents, and to make county contracts subject to the corporation's approval in counties not already contracted for, such transaction constituted "doing business" within the state; the test applicable being, not the consummation of a single transaction or the shipment of goods pursuant to orders taken, but the establishment of an agency or branch office within the state. *Neyens v. Worthington*, 114 N. W. 404, 406, 407, 150 Mich. 580, 18 L. R. A. (N. S.) 142.

A foreign corporation is "doing business" in the state, when it sells scholarships in many branches of learning and collects pay therefor, maintaining a local agency for that purpose through which it has done quite an extensive business with numerous customers, and is evidently seeking and intending to pursue and extend such business, such scholarships entitling the owner to certain books and instructions, which are transferable when paid for, and, though prepared and forwarded from another state, are ordered and partly paid for in advance through the local agent. *International Text-Book Co. v. Pigg*, 91 Pac. 74, 76, 76 Kan. 323.

Defendant was a corporation of France, having its principal place of business in Paris, and operating a line of passenger steamers between Havre and New York. It maintained a general agency in New York, with a resident agent, who represented it in the United States and Canada. It had numerous ticket agents throughout the United States, who sold its tickets, among others a company in Philadelphia. Such company maintained offices in the principal cities of the United States and Europe, and arranged tours and sold tickets over the principal railway and steamship lines of the world. It sold tickets over defendant's line, among others, at its Philadelphia office, receiving a commission therefor, and also \$600 per year on account of its office rent. It painted defendant's name on its office door, as also the names of other steamship and railway lines. Except for the sale of such tickets, no busi-

ness was done on behalf of defendant in the Eastern district of Pennsylvania. Held, that it was not "doing business" in the district in such sense that a federal court there obtained jurisdiction over it by service on the local agent. *Goepfert v. Compagnie Générale Transatlantique*, 156 Fed. 196, 199.

Service of process in this District on an officer of a West Virginia corporation, whose only business is that of constructing and operating a railroad in that state, is sufficient under the provision of section 1537, Code D. C. (31 Stat. 1419, c. 854), that, in actions against foreign corporations "doing business" in the District, process may be served here, where it appears that defendant maintains an office here in which its president, secretary, and treasurer, transact business, that bids for the construction of its road were here opened, considered, and accepted, and that the arbitration agreement out of which the suit arose was agreed upon here, and the proceedings thereunder were here conducted; and it is immaterial that the office here is maintained primarily for the convenience of the president and treasurer. *Ferguson Contracting Co. v. Coal & Coke Ry. Co.*, 33 App. D. C. 159, 170.

Contracts were made in Maryland, through the Merchants' & Miners' Transportation Company, a domestic corporation, for the Central of Georgia Railway Company, a foreign corporation, which the foreign company recognized as binding. The domestic corporation sold tickets and issued bills of lading good over its own line and also over the lines of the foreign corporation, collecting the whole fare in the case of a passenger, and collecting the entire charge for the carriage in the case of freight. An agent within the state was appointed jointly by the two companies to solicit traffic over both lines, which were advertised under the name of the "Central Savannah Line." In the window of the building occupied by the domestic company there was a sign "Central Savannah Line via Central of Georgia Railway & Merchants' and Miners' Transportation Company." In this building the joint agent had his office, and solicited freight for transportation over parts of the entire line. The advertising folders of the Central of Georgia Railway stated that tickets over that line could be purchased at any of the Merchants' & Miners' ticket offices. Held, that the Central of Georgia Railway Company was "transacting business" in Maryland within the meaning of Code Pub. Gen. Laws 1904, art. 23, § 409, providing that any corporation not chartered by the state which shall transact business therein shall be deemed to hold and exercise its franchises within the state, and shall be liable to suit in any of the courts of the state on any dealings or transactions therein. *Central of Georgia R. Co. v. Elchberg*, 68 Atl. 690, 692, 107 Md. 363, 14 L. R. A. (N. S.) 389.



Plaintiff, a foreign corporation, is not shown to be "doing business" in the state within the general corporation law by evidence of a traveling salesman of his having an office in the state for the transaction of business, in absence of knowledge of plaintiff that such office was maintained. *L. C. Page Co. v. Sherwood*, 120 N. Y. Supp. 837, 838, 65 Misc. Rep. 543.

A foreign corporation transacting business in a sister state, from which its goods are shipped and in which payments are received, is not "doing business" in New York, within General Corporation Law (Consol. Laws, c. 23) § 15, requiring foreign corporations to procure a certificate authorizing it to do business in the state, though a witness called by the corporation inadvertently stated that he was an official transacting all the business of the corporation, while he was only its resident salesman doing the business which the corporation did in the state. *Rundle Spence Mfg. Co. v. Gainsborough Const. Co.*, 123 N. Y. Supp. 785.

General Corporation Law (Consol. Laws c. 23) § 15, forbids any foreign corporation to "do business" in the state without first procuring a certificate of authority so to do from the Secretary of State, and further forbids any such corporation doing business in the state to sue on any contract made in the state until such certificate is obtained. Plaintiff, a foreign corporation, maintained a general agent for the sale of its product with a district covering a large part of the eastern end of the state, and an office operated under plaintiff's name, the records and data of which were plaintiff's property. Goods were sold to defendant by the agent on a written order, subject to acceptance at the home office; the order providing that the advance payment should be returned to defendant on nonacceptance. A note for the balance of the price, given under a misunderstanding, was returned to defendant; the balance due being stated to be left on open account. Held, that the advance payment, to be returned on rejection of the order, was to be paid in the state, as was the balance of the account, and that the requirement of a foreign acceptance of the order was ineffective to make the contract other than a New York contract, so that plaintiff having no certificate of authority, and its contract, were both within the statute, and no action could be maintained on the contract. *American Case & Register Co. v. Griswold*, 128 N. Y. Supp. 206, 207, 143 App. Div. 807.

#### Loaning money

A foreign corporation, whose business it is to loan money on real estate mortgages, "does business in the state" when it pays in New York a draft attached to a note and mortgage executed in South Carolina on lands in the state on application forwarded by a resident borrower. *British-American Mortg. Co. v. Jones*, 58 S. E. 417, 77 S. C.

443 (citing *Chattanooga Nat. B. & L. Ass'n v. Denson*, 23 Sup. Ct. 630, 189 U. S. 408, 417, 47 L. Ed. 870); *British American Mortg. Co. v. Jones*, 56 S. E. 983, 984, 76 S. C. 218.

A brick company incorporated in another state and not registered in the state of Pennsylvania as required by the law of that state, which advanced money to a company in that state in consideration of its duebills, was "doing business" in that state. In re *Montello Brick Works*, 174 Fed. 498, 499 (citing and adopting *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, 97 C. C. A. 144).

A Delaware corporation whose principal business, which was authorized by its charter, was the acquiring of stock in other corporations and lending them money, which maintained its principal business in Pennsylvania and there let money to another corporation in which it owned a controlling interest, taking duebills therefor, was "doing business" in Pennsylvania. In re *Montello Brick Works*, 163 Fed. 621, 623.

#### Maintenance of railroad in state

Where a part of defendant's railroad passed into K. county, Ky., defendant did business in that state, so that some court of that state had jurisdiction of an action against it, though none of them were within *Civ. Code Prac. Ky.* § 73, providing that an action against a carrier for injury to a person must be brought in the county in which defendants or either of them reside, in which plaintiff is injured, or in which he resides, if he resides in a county into which the carrier passes. *Fisher v. Cleveland, C., C. & St. L. Ry. Co.*, 169 Fed. 956, 957.

#### Maintenance of salesroom

Evidence that a manufacturing corporation of another state maintains a warehouse in Chicago, advertised as a "salesroom," where it stores goods before sale, and from which deliveries are made, but which does not go to the extent of showing that any sales are made there, or at any other place than at the home office of the company, is not sufficient to show that it is "doing business" in Illinois, within the meaning of the statute of that state, prohibiting foreign corporations "doing business in the state" from maintaining actions therein unless they comply with its requirements. *Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co.*, 185 Fed. 431, 434, 107 C. C. A. 501.

Where a foreign corporation maintains a salesroom in a city of this state, where no goods except samples are kept, and orders are sent to the home office in another state, where they are accepted, and the goods are shipped from there directly to purchasers, and the books of account are kept at the home office, from which all employes are paid directly, and there is no bank account in this state, the corporation is not "doing business in this state," within the meaning of

General Corporation Law, requiring compliance with certain conditions by foreign corporations doing business in the state. *E. T. Burrowes Co. v. Caplin*, 111 N. Y. Supp. 498, 499, 127 App. Div. 317.

#### **Ownership, acquisition, and lease of land**

Holding real estate by a foreign corporation for investment is not "doing business within the state." *Singer Mfg. Co. v. Granite Spring Water Co.*, 123 N. Y. Supp. 1088, 1090, 66 Misc. Rep. 595.

Under Pub. St. 1901, c. 245, § 5, providing that a person doing business in the state may be summoned upon trustee process, the property of a nonresident landowner in the charge of his resident agent may be attached by a creditor on such process, the care of real estate being in nature of "doing business in this state." *Bennett v. Hebbard*, 68 Atl. 537, 74 N. H. 411.

A corporation incorporated for the purpose of buying and acquiring half a certain tract of real estate in the borough of Brooklyn, which begins business in the state of New York and has a principal place of business in Brooklyn, is "doing business in the state," within Tax Law, § 182 (Laws 1901, c. 558), as amended by Laws 1906, c. 474, imposing a tax on the capital of a corporation doing business in the state. *People ex rel. Vandervoort Realty Co. v. Glynn*, 87 N. E. 434, 194 N. Y. 387.

The ownership of land in this state by a foreign corporation, and the lease of the same on shares, and the assignment of the rent by it, do not constitute doing business in this state, in such sense as to require such corporation to obtain a permit from the Secretary of State. *Wilson v. Peace*, 85 S. W. 31, 38 Tex. Civ. App. 234.

Acts 1895, p. 123, c. 81, § 1, provides that a foreign corporation desiring to own property or carry on business in the state shall first file with the Secretary of State a copy of its charter; and by section 2, p. 124, it is unlawful for such corporation to do business in the state until it has complied with section 1. Held, that a purchase of real estate by a foreign corporation which had not at that time complied with the statute was not unlawful, it not being the doing of business, and hence the failure to observe the statute before the purchase was no bar to recovery by the corporation for damage to the land from the change of grade of a street. *Louisville Property Co. v. Nashville*, 84 S. W. 810, 811, 114 Tenn. 213.

#### **Ownership of and subscription to stock**

The mere ownership of stock by a foreign corporation in a domestic corporation, even if it be a controlling interest, does not constitute the doing of business in the state. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, 150.

New York General Corporation Law, § 15, provides that no foreign stock corporation other than a moneyed corporation can do business within the state without first having procured a certificate that it has complied with the requirements of law. Held, that a subscription to the stock of a foreign corporation and the issuance of the stock subscribed for to a resident of New York do not constitute "doing business within the state" by the corporation. A foreign corporation before suing in this state must obtain a certificate from the Secretary of State that the license fee has been paid, permitting it to do business in this state, but this rule does not apply to a suit brought by the trustee in bankruptcy of a foreign corporation to recover a balance due on certificates of stock issued by the corporation, as an effort to dispose of its stock in order to obtain the requisite capital with which to engage in business is not "doing business" within the meaning of the statute, which requires a payment of the license fee and the issuance of the certificate before a foreign corporation may do business in the state. *Southworth v. Morgan*, 128 N. Y. Supp. 598, 600, 71 Misc. Rep. 214.

#### **Settling accounts**

Where the president of a foreign corporation came to New York to settle a claim for the wrongful killing of plaintiff's decedent in the state of the corporation's domicile, such business did not constitute a doing business by the corporation in New York, so as to confer jurisdiction on the New York courts by service of process on the president while so engaged. *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889, 891.

#### **Single act or transaction**

A single transaction by a foreign corporation may constitute a doing of business in the state, within the statutes making certain requirements of foreign corporations conditions precedent to their doing business in the state, where such transaction is a part of the ordinary business of such corporation, and indicates a purpose to carry on a substantial part of its dealings in the state. *Tomson v. Iowa State Traveling Men's Ass'n*, 129 N. W. 529, 530, 88 Neb. 399.

A single act of business is not within 1 Mills' Ann. St. §§ 499, 500, 1868, prohibiting foreign corporations from engaging in business in Colorado until they have conformed thereto; and where, in an action by a foreign building and loan association to foreclose a mortgage, it does not appear that plaintiff transacted any business in the state, except that involved in the action, the statute is no defense. *Roseberry v. Valley Bldg. & Loan Ass'n*, 83 Pac. 637, 638, 35 Colo. 132.

The single act of taking title to a tract of real estate does not constitute "doing business" within the meaning of constitutional or statutory provisions as to foreign cor-

porations. *War Eagle Consol. Min. Co. v. Dickie*, 94 Pac. 1034, 1035, 14 Idaho, 534.

The crucial test in "doing business," within the meaning of the statute requiring foreign corporations to obtain a license to do business in the state, "is not an isolated transaction within the state, or the transshipment of goods from the home office pursuant to orders taken by drummers within the state, but it is the establishment of an agency or branch office within the state limits." Authorities hold "that a single sale of goods or a single business transaction by such corporation cannot be held to amount to carrying on business where there is no purpose to do any further business." *Neyens v. Worthington*, 114 N. W. 404, 406, 407, 150 Mich. 580, 18 L. R. A. (N. S.) 142 (quoting and adopting definition in *Vaughn Mach. Co. v. Lighthouse*, 71 N. Y. Supp. 799, 64 App. Div. 138, and citing 19 Cyc. p. 1268).

A single transaction in another state, such as a contract for the sale of goods, does not constitute "doing business" in the state within the meaning of foreign corporation laws. *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 293, 76 C. C. A. 172, 7 Ann. Cas. 219.

A single transaction by a foreign corporation does not constitute "doing business" within the state, within Code Civ. Proc. § 411, authorizing service of summons in a suit against a foreign corporation "doing business" and having a managing and business agent, cashier, or secretary within the state, by delivering a copy to such agent, cashier, or secretary. *Jameson v. Simonds Saw Co.*, 84 Pac. 289, 290, 2 Cal. App. 582.

A single transaction by a foreign corporation within the state does not necessarily constitute "doing business" within the state under a statute requiring foreign corporations to comply with certain specified requirements before "doing business" within the state. *First Nat. Bank v. Leeper*, 97 S. W. 636, 637, 121 Mo. App. 688.

A single and isolated transaction, such as the sale and delivery of a machine by a foreign corporation to a person within the state, is not "doing business" within the state within the meaning of chapters 69, 70, pp. 68, 71, Laws 1899. *W. H. Lutes Co. v. Wysong*, 110 N. W. 367, 368, 100 Minn. 112.

A single transaction by a foreign corporation may constitute a "doing of business in this state" within the meaning of section 1283, Gen. St. 1901, making certain requirements of foreign corporations doing business in the state, where such transaction is a part of the ordinary business of the corporation, and indicates a purpose to carry on a substantial part of its dealings here. *John Deere Plow Co. v. Wyland*, 76 Pac. 863, 864, 69 Kan. 255, 2 Ann. Cas. 304.

The doing of a single act of business by a foreign corporation is not the "doing of business," within Act Cong. Feb. 18, 1901, c. 379, prescribing the conditions upon which a foreign corporation may "do business" in Indian Territory. *Poole v. Peoria Cordage Co.*, 97 S. W. 1015, 1018, 6 Ind. T. 298.

A single act of business by a foreign corporation within Const. art. 12, § 15, providing that no foreign corporation shall be allowed to transact business in the state on more favorable conditions than are prescribed by law to similar domestic corporations, must be an act within the ordinary business of the corporation, and a single sale of real estate by a foreign corporation organized for religious, missionary, educational, and charitable purposes, with the incidental power to take and sell real estate, is not a transaction of business, and the failure of the corporation to comply with Civ. Code, § 598, and obtain an order for the sale, does not render the sale invalid. *General Conference of Free Baptists v. Berkey*, 105 Pac. 411, 412, 156 Cal. 466.

Under the rule that a mere solitary transaction within the state is not doing business, within General Corporation Law, § 15, requiring a foreign corporation to procure a certificate of authority to transact business in the state, the indorsement in the state to a foreign corporation of a note executed in the state is not "doing business." *People's Sav. Bank of Bay City, Mich. v. Fulton Contracting Co.*, 119 N. Y. Supp. 622.

Acts 1901, p. 386, regulating the business of foreign corporations, provides (section 1) that before a foreign corporation shall be authorized to establish a business in the state, or to continue business therein, it shall file a copy of its articles of incorporation with the Secretary of State, etc. Section 2 provides that no foreign corporation may make any contract in the state, nor sue thereon, until it has complied with the provision of the preceding section. Held, that the term "business" as used in the act means an established, continuing business, rather than mere single, isolated acts done in the state, either in connection with, or apart from, some business that has its domicile in another state. *Simmons Burks Clothing Co. v. Linton*, 117 S. W. 775, 776, 90 Ark. 73.

The sale by a foreign corporation of five car loads of cement to one in this state was not "transacting business" in the state in violation of a statute providing that foreign corporations which have not complied with its terms shall not be permitted to transact business in the state; being only a single transaction. *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 91 N. E. 480, 481, 244 Ill. 354.

Act May 18, 1905 (Laws 1905, p. 124), is entitled "An act to regulate the admission of

foreign corporations for profit, to do business in the state," and section 1 provides that, before such corporations shall be permitted to transact any business or exercise any of its corporate powers in the state, they shall comply with the provisions of the act and be subject to all regulations prescribed for domestic corporations. Sections 2 to 5, inclusive, provide the steps for admission of such corporations to the state, and section 6 imposes a penalty for neglect to comply with the act, and in addition thereto forbids any foreign corporation, failing to comply with the act, to sue upon any claim, legal or equitable. Held, that the terms "doing business" and "transacting business" meant only the transaction of the ordinary business in which the corporation was engaged, and did not include the prosecution of actions; and, in view of the title of the act, the inhibition against the exercise of any "corporate powers" did not change its meaning, "corporate powers" referring to those powers or franchises conferred upon the corporation to enable it to prosecute the business in which it was engaged, together with those implied powers necessary thereto, so that merely bringing a suit in this state by a foreign corporation was not "transacting business" so as to require compliance with the act before bringing such suit. *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 91 N. E. 480, 481, 244 Ill. 354.

The words "doing business," as used in the provisions prohibiting corporations from doing business in the state without having a place of business, etc., referred to a general transaction of business, and not to an isolated transaction or to single or wholly collateral acts. The doing of a single act or the making of a single contract by a foreign corporation in the line of its business within the state, without having complied with the statutes regulating foreign corporations, does not constitute "doing business" within the state. *A. Booth & Co. v. Weigand*, 83 Pac. 734, 737, 30 Utah, 135, 10 L. R. A. (N. S.) 693.

The fact that foreign corporations proposing to do business here are required to establish a place of business within the state makes it clear that the term "doing business" does not mean a single isolated transaction. It is not reasonable to suppose that the Constitution or the statute intended that a foreign corporation, without intending a continuance of its business in the state, could not collect a debt or make any contract or demand that its property rights should be respected unless it had previously acquired a situs or domicile within our borders. The object of laws of this character is to require foreign corporations which undertake to carry on their business generally in this state to establish a domicile or situs here, so that they shall, like domestic corporations, be within reach of the process of our courts. The term

"transacting or doing business," as used in laws of this character, implies continuity, and does not mean a single isolated transaction within the borders of the state, without any purpose of engaging generally in the carrying on of its business here. *State, to Use of Hart-Parr Co., v. Robb-Lawrence Co.*, 106 N. W. 406, 408, 15 N. D. 55.

Corporation Law, Laws 1892, p. 1805, c. 687, § 15, which requires a foreign corporation to procure certificate of authority to transact business in the state, implies, by the phrase "doing business in this state," a continuity of conduct in that respect; and a sale of a single cargo of coal in the city of New York by a foreign corporation through an agent whose territory was the New England district and the state of New Jersey, though he had an office in the city of New York, does not constitute doing business in the state, so as to require a certificate from the Secretary of State in order to maintain an action for the price of coal. *Penn Collieries Co. v. McKeever*, 75 N. E. 935, 936, 183 N. Y. 98, 2 L. R. A. (N. S.) 127.

The presence of an officer of a corporation in another state than that of its domicile, for the purpose of discussing a proposed adjustment of a single controversy, does not constitute a "doing of business within the state" by the corporation such as to subject it to the jurisdiction of a federal court therein by service of process on such officer. *Wilkins v. Queen City Savings Bank & Trust Co.*, 154 Fed. 173 (citing *Connecticut Mut. L. Ins. Co. v. Spratley*, 19 Sup. Ct. 308, 172 U. S. 602, 43 L. Ed. 569; *Goldey v. Morning News*, 15 Sup. Ct. 559, 156 U. S. 518, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 23 Sup. Ct. 728, 190 U. S. 406, 47 L. Ed. 1113; *Houston v. Filer & Stowell*, 85 Fed. 757; *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008; *Clews v. Woodstock Iron Co.*, 44 Fed. 31).

#### **Taking orders, soliciting business, or making sales by agent**

The mere solicitation of business by agents of a foreign corporation is not such a "doing business" within the statute as to subject the foreign corporation to the jurisdiction of the courts of the state in which the business is solicited. *Berger v. Pennsylvania R. Co.*, 65 Atl. 261, 262, 27 R. I. 583, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941.

A foreign corporation, whose salesmen solicit orders in the state for intoxicating liquor, subject to its approval, and which when accepted are filed by shipping the liquor. *f. o. b.*, is engaged in business in the state. *State v. Wm. J. Lemp Brewing Co.*, 102 Pac. 504, 506, 79 Kan. 705, 29 L. R. A. (N. S.) 44.

Const. art. 12, § 232, fixes the venue of suits against a foreign corporation in any country where it does business, by service of process upon an agent anywhere in the state,

and section 4207, Code 1896, in any county in which it does business by agent. Held, that the act of a corporation in constituting agents, with no power or authority to bind it, but simply to solicit traffic, was not "doing business" within the constitutional or statutory provisions. *Abraham Bros. v. Southern Ry. Co.*, 42 South. 837, 838, 149 Ala. 547.

A foreign corporation, having no place of business in the state, and employing a soliciting agent, whose orders are filled by shipment direct to the purchaser from the home office, is not "doing business" within the state, within Laws 1894, p. 49, c. 61, regulating the service of process against foreign corporations. *Saxony Mills v. Wagner & Co.*, 47 South. 899, 900, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199.

Soliciting through its district freight and passenger agent in Philadelphia freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago, is not "doing business" within the Eastern district of Pennsylvania in such a sense that process can be served upon the corporation there. *Green v. Chicago, B. & Q. R. Co.*, 27 Sup. Ct. 595, 596, 205 U. S. 530, 51 L. Ed. 916.

Where an agent of nonresident railroad companies was soliciting within the state passenger and freight to be routed over their lines, the railroad companies were not doing business in the state within Rev. Laws 1905, § 4109, subd. 3, authorizing the service of summons on an agent of a foreign corporation doing business in the state. *North Wisconsin Cattle Co. v. Oregon Short Line R. Co.*, 117 N. W. 391, 392, 105 Minn. 198.

The fact that a person soliciting freight and passenger business routed it over the connecting line of a foreign railroad company, as he did over all other lines connecting with the companies by whom he was employed, did not make him an agent of the former company on whom process might be served within Ballinger's Ann. Codes & St. § 4875, where all contracts were issued as the contracts of one or the other of the latter companies to whom he alone reported, and they, in turn, arrange a division of the charges with the connecting lines upon an agreed basis. Such an arrangement did not constitute "doing business within this state" within the meaning of the Codes. *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 102 Pac. 650, 651, 53 Wash. 629.

Where a foreign corporation was engaged in publishing a magazine in Illinois, and employed an agent in New York, who merely solicited orders for advertisements, which orders were required to be forwarded to Illinois for acceptance, and, if accepted, the advertisements appeared in the magazine, such transactions did not constitute "doing busi-

ness" in New York, within General Corporation Law, requiring foreign corporations doing business in New York to obtain a certificate from the Secretary of State and pay a license tax. *American Contractor Pub. Co. v. Bagge*, 91 N. Y. Supp. 73, 74.

Under Hurd's Rev. St. Ill. 1908, c. 32, § 26, which authorizes services of process upon an agent of a foreign corporation only in case that corporation is doing business in the state, the presence in the state of a traveling salesman representing a foreign corporation having no place of business there, with authority to take orders for goods, to be submitted to the corporation for approval, does not constitute "doing business within the state" by the corporation, which will subject it to suit therein. *William Grace Co. v. Henry Martin Brick Mach. Mfg. Co.*, 174 Fed. 131, 132, 98 C. C. A. 167.

A foreign corporation, which sells and delivers goods, merchandise, machinery, or other articles of trade and commerce in this state upon orders taken therefor by its agents and traveling salesmen, and forwarded to it, and not otherwise, and transacts no other business in the state, does not transact or carry on business in this state, within the meaning of section 30 of chapter 54 of the Code, as amended by section 31, c. 35, p. 108, of Acts 1901, and is not required to comply with the provisions of said statute, nor denied by it the power to bring and maintain suits and actions for the enforcement of such contracts. *Underwood Typewriter Co. v. Piggott*, 55 S. E. 664, 666, 60 W. Va. 532 (citing 19 Cyc. pp. 1270, 1272).

A foreign corporation had its principal office in a sister state where its goods were manufactured. An order for goods was signed in New York addressed to the corporation at its home office; the order not being signed by the corporation or any one in its behalf. The company maintained no office in New York. The goods were shipped to the buyer, who signed notes for the price and an agent of the corporation transmitted them to the home office. Held, that the corporation was not doing business within the state within General Corporation Law, § 15, prohibiting foreign corporations from doing business in the state without procuring a certificate. *Acorn Brass Mfg. Co. v. Rutenberg*, 132 N. Y. Supp. 600, 601, 147 App. Div. 533.

Bakery wagons, which made regular trips from house to house in the streets of defendant city, selling and taking orders for bread, were "doing business" within the city, so as to be subject to an ordinance making it unlawful for any person or corporation to engage in certain businesses or occupations without obtaining a license, imposing a license for vehicles, including bakery wagons, and prohibiting any person from participating in doing business, within the city, for which a license is required, or assisting, di-

rectly or indirectly, in doing such business as agent or servant without a license, though the bakery was located, in another city. *Woner v. City of Cartersville*, 125 S. W. 861, 863, 142 Mo. App. 120.

Where a foreign corporation, in pursuance of a sale of its products made by its traveling salesman, entered into a written contract in Colorado, to furnish manufactured materials f. o. b. at its plant and office, the sale and delivery of the materials did not constitute "doing business" within a statute prescribing the terms on which a foreign corporation may do business within the state. *International Trust Co. v. A. Leschen & Sons Rope Co.*, 92 Pac. 727, 730, 41 Colo. 299, 14 Ann. Cas. 861.

Where a manufacturing corporation was organized and had its principal place of business in Ohio, its employment of an agent residing in the city of New York, who sold goods for it under a written contract addressed to and accepted by the corporation in Ohio, did not constitute "doing business" in New York, within Corporation Law (Laws 1896, p. 856, c. 908) § 181, requiring foreign corporations doing business in New York to pay a specified license fee. *Harvard Co. v. Wicht*, 91 N. Y. Supp. 48, 49, 99 App. Div. 507; *Milliken v. Fullerton*, 91 N. Y. Supp. 1104.

An employer, living in another state, sending a man over to Kansas to make contracts with implement dealers in the state, and sending agents to the state to settle accounts and receive cash or notes in settlement thereof, is doing business in Kansas. *Elliott v. Parlin & Orendorff Co.*, 81 Pac. 500, 502, 71 Kan. 665.

The sale of goods by a foreign corporation, and the delivery of the merchandise and collection of the price, is not a doing business, within statutes prescribing the conditions of doing business in such state or territory. *Bruner v. Kansas Moline Plow Co.*, 168 Fed. 218, 220, 93 C. C. A. 504.

A foreign corporation, that manufactures farm machinery in another state and sells the same to citizens of the state on orders to be approved by it, taken by an agent, and which, if the contract is approved, ships the machinery into the state, is not "doing business" within the state, within the provisions of Rev. St. 1887, § 2653, as amended by Act March 10, 1903 (Laws 1903, p. 49). *Belle City Mfg. Co. v. Frizzell*, 81 Pac. 58, 59, 11 Idaho, 1.

Ky. St. 1903, § 571, requires every foreign corporation having a place of business in the state to file with the Secretary of State a statement naming its agents thereat upon whom process may be served. An Illinois corporation agreed to furnish its goods f. o. b. Cairo, Ill., to a retail firm in Kentucky, the latter to pay for such goods as it sold

on specified terms. The corporation further agreed to carry over or take up such goods as were not sold at the expiration of the contract, provided they were delivered to it in good condition f. o. b. Cairo, Ill. The firm agreed to keep the goods insured in favor of the corporation. Held, that the contract did not make the firm the corporation's agent, but merely provided for a series of sales upon the terms set out therein, and the corporation was not doing business in the state in violation of the statute. *Three States Buggy & Implement Co. v. Commonwealth*, 105 S. W. 971, 972.

Where a foreign corporation having its factory in another state received and filled an order at its factory and shipped the goods by freight from its factory to a place in this state, this did not constitute a "doing business" within the state within the statute making the filing of a certificate a condition precedent to a foreign corporation's doing business in the state. *A. H. Freiberg & Co. v. Cheseling*, 78 N. Y. Supp. 1106, 1107, 38 Misc. Rep. 740 (citing *Vaughan Mach. Co. v. Lighthouse*, 71 N. Y. Supp. 799, 64 App. Div. 138; *Cummer Lumber Co. v. Associated Mfrs.' Mut. Fire Ins. Corp.*, 73 N. Y. Supp. 668, 67 App. Div. 151; *Waller v. Rothfield*, 73 N. Y. Supp. 141, 36 Misc. Rep. 177).

Statement in action by foreign corporation showing that it had bought of defendant 300 cases of tomatoes, which defendant agreed to ship to it, to be paid for on their arrival and inspection, did not show on its face that plaintiff was "doing business" in the state, within the meaning of Rev. St. 1899, § 1026, so as to require it, before suing, to comply with the state laws governing foreign corporations. *Groneweg & Schmoentgen Co. v. Estes*, 119 S. W. 513, 514, 139 Mo. App. 36.

Defendant, in New York, gave the traveling salesman of plaintiff, a Massachusetts corporation, an order for goods, which he mailed to plaintiff's office in Massachusetts. Held, that as, in the absence of special authority in the salesman, the order would have to be accepted by his principal, it will, in the absence of further evidence, be considered that the order was accepted, and the contract made, in Massachusetts, so that General Corporation Law, § 15, forbidding action in the state by a foreign corporation, doing business in the state, on a contract made in the state, unless it shall have obtained a certificate of authority to do business in the state, does not apply. *L. C. Page Co. v. Sherwood*, 120 N. Y. Supp. 837, 838, 65 Misc. Rep. 543.

A foreign publishing corporation had no office or place of business within the state, but its president and salesman would visit and take orders, which were sent to the home office, passed upon, and the goods shipped from there, though in a few cases some

of the books were bound in New York. Held, that the corporation was not "doing business within the state," within General Corporation Law, §§ 15, 16, prohibiting an action upon any contract made in the state unless a certificate be procured from the Secretary of State. *L. C. Page & Co. v. Sherwood*, 131 N. Y. Supp. 322, 323, 146 App. Div. 618.

A foreign corporation which merely files an order for goods and delivers the same in Pennsylvania, without maintaining an office in this state or transferring any portion of its capital to this state, or prosecuting its ordinary business here, may maintain an action of replevin without having previously registered in compliance with Act April 22, 1874 (P. L. 108). *Hall's Safe Co. v. Walenk*, 42 Pa. Super. Ct. 576, 578.

Where a foreign corporation with its principal western office in Chicago employed an exclusive broker in St. Louis for the sale of its products in St. Louis, which broker took an order for goods of such corporation, which was sent to the Chicago office for acceptance or rejection and the order was accepted and the buyer notified thereof, and the goods shipped to the buyer f. o. b. cars at a point without Missouri, the broker maintaining its own office and having no power to make contracts binding upon the foreign corporation, the transaction constituted interstate commerce, and not the doing of business in Missouri, and the foreign corporation was not precluded from suing on the contract of sale in Missouri because of its failure to comply with Rev. St. 1899, §§ 1024, 1025, 1026, requiring certain steps to be taken by a foreign corporation before obtaining the right to do business in the state, and providing that such corporations not complying with the statute cannot sue in any of the courts of the state on any contract; such sections not applying to interstate commerce. *Corn Products Mfg. Co. v. Western Candy & Bakers' Supply Co.*, 135 S. W. 985, 986, 156 Mo. App. 110.

Rev. St. 1899, §§ 1024, 1026, and Laws 1903, p. 121, requiring foreign corporations to obtain a license and a certificate to do business, apply to corporations having a place of business in the state in charge of a local agent for the purpose of selling goods sent to him for subsequent sale, and not to corporations selling goods through traveling salesmen to be delivered from a foreign house. *F. N. Ellis Lumber Co. v. Johns*, 133 S. W. 633, 634, 152 Mo. App. 516.

Where a nonresident corporation had local agencies in Mississippi in control of salesmen, selling in a limited number of counties and reporting to such local agency, which reported to a district agency in another state, the corporation was doing business within the state and taxable on credits, as provided by Rev. Code Miss. 1880, § 497, but not so when it did business only through traveling

salesmen, who transmitted all cash collected and contracts arising from the disposition of machines to agencies outside the state. *Singer Mfg. Co. v. Adams*, 165 Fed. 877, 879, 91 C. C. A. 461.

A foreign corporation by soliciting and taking orders in the state by commercial travelers, having no capital employed, or goods stored, or branch office, in the state, is not "doing business within" the state, so as to require it, under Corporation Law, Laws 1892, pp. 1805, 1806, c. 687, §§ 15, 16, to obtain a certificate in order to maintain an action. *Vio Chemical Co. v. Studholme*, 103 N. Y. Supp. 463, 464, 53 Misc. Rep. 470.

The complaint in an action by a foreign corporation was in the usual form, for goods sold and delivered on an agreed price, without alleging where the goods were sold. An itemized statement filed in response to the demand of defendant recited that the goods were sold to defendant on orders obtained by a traveling salesman of the corporation at New York and were received by defendant there. Held, that the statement was not inconsistent with proof that the sales were made at the residence of the foreign corporation when the orders were approved and that the delivery was made to defendant by a delivery to a carrier, sufficient to show that the corporation was not "doing business in the state," within General Corporation Law, Laws 1890, p. 1063, c. 563, § 15, as amended by Laws 1901, pp. 267, 1326, cc. 96, 533, and Laws 1904, p. 1250, c. 490, prohibiting a foreign corporation which has not procured a certificate authorizing it to do business in the state from maintaining an action on a contract made by it in the state. *St. Albans Beef Co. v. Aldridge*, 99 N. Y. Supp. 398, 400, 112 App. Div. 803 (citing *Tallapoosa Lumber Co. v. Holbert*, 39 N. Y. Supp. 432, 5 App. Div. 559; *Murphy Varnish Co. v. Connell*, 32 N. Y. Supp. 492, 10 Misc. Rep. 553; *Novelty Mfg. Co. v. Connell*, 34 N. Y. Supp. 717, 88 Hun, 254; *Jones v. Keeler*, 81 N. Y. Supp. 648, 40 Misc. Rep. 221; *Vaughn Mach. Co. v. Lighthouse*, 71 N. Y. Supp. 799, 64 App. Div. 138; *Penn Collieries Co. v. McKeever*, 75 N. E. 935, 183 N. Y. 98, 2 L. R. A. [N. S.] 127).

#### Taking orders for goods

Where a person in this state orders two car loads of iron of a corporation located in another state, to be delivered at a place in this state, the contract is made in the other state, and the iron is sold and delivered there, as delivery to the carrier was a delivery of the iron, and therefore the corporation did not do "business in this state," within the meaning of the law regulating foreign corporations doing business in this state. *National Rolling Mill Co. v. Rubenstein*, 147 Ill. App. 84, 85.

In the sale of goods upon an order the contract is completed where the order is re-

ceived and accepted, and the sale is completed and delivery made to the buyer by delivery of the goods to a common carrier for conveyance to the buyer, unless a contrary intention of the parties is shown, and hence where a foreign corporation contracted for the sale of goods and their delivery on board cars in another state, consigned to persons in question upon their order, the transaction did not constitute "doing business in the state," requiring a certificate of authority as expressly provided by Gen. St. 1909, § 1726. *Hessig-Ellis Drug Co. v. Sly*, 109 Pac. 770, 771, 83 Kan. 60, Ann. Cas. 1912A, 551.

#### As transacting business

"Doing business," as used in statutes prohibiting a foreign corporation from doing business until it has filed a certificate, etc., is equivalent to the words "transacting business," and in most jurisdictions it is held that such statutes have reference to a continuation in some form of business, and do not apply where a foreign corporation does a single act of business within the state. *General Conference of Free Baptists v. Berkeley*, 105 Pac. 411, 412, 156 Cal. 466.

The phrase "transacting business" in Rev. St. 1895, arts. 745, 746, requiring foreign corporations desiring to transact business in the state to secure a permit, is not necessarily synonymous with doing business, as to do business in the state imports a carrying on of business of the corporation for the purpose of its organization, while the transaction of business rather imports the idea of isolated transactions. To "do business" is to carry on any particular occupation or employment for a livelihood or gain, as agriculture, trade, mechanic arts, or profession. *S. R. Smythe Co. v. Ft. Worth Glass & Sand Co.*, 142 S. W. 1157, 1159, 105 Tex. 8.

#### DOING BUSINESS WITHOUT THE UNITED STATES

The words "doing business without the United States," within Laws 1897, p. 313, c. 384, § 30, giving corporations "doing business without the United States" until May 1st to make their annual report, must be construed with reference to the object sought to be accomplished by the statute, requiring corporations to file an annual report as of the 1st day of January, so that a corporation doing a meat and poultry business within the United States and a poultry and game business in England, Canada, and Germany, having an agency in England, and dealing with firms in Canada and Germany, was "doing business without the United States" within such act. *Hoboken Beef Co. v. Hand*, 93 N. Y. Supp. 834, 836, 104 App. Div. 390.

A corporation, the business of which is to manufacture and sell a patented article, is not "doing business without the United States," so as to be entitled under the statute as amended to a longer time for filing its annual report without making its directors li-

able for its debts, where all it is doing abroad is endeavoring to sell its stock there, preparing a couple of machines for exhibition, and obtaining foreign patents to prevent the manufacture of its products by foreigners. *West v. Grosvenor*, 92 N. Y. Supp. 429, 430, 102 App. Div. 266 (citing *People ex rel. Lembeck & Betz Eagle Brewing Co. v. Roberts*, 47 N. Y. Supp. 949, 22 App. Div. 282; *Cummer Lumber Co. v. Associated Mfrs.* Mut. Fire Ins. Corp., 73 N. Y. Supp. 668, 67 App. Div. 151; *Penn. Collieries Co. v. McKeever*, 87 N. Y. Supp. 869, 93 App. Div. 803).

#### DOING HIM

Where defendant, in response to an inquiry for renewal of a note, wrote that the note was "outlawed," whether he acknowledged ever owing it or not, but that he had no idea of "doing him," the language was susceptible of but one interpretation, and that was that he did not intend to rely on the statute of limitations or any technical defense. *Cleland v. Hostetter*, 79 Pac. 801, 802, 13 N. M. 43.

#### DOING WORK BY CONTRACT

According to the ordinary acceptance of the term "doing work by contract," it means the letting of the work, or some portion thereof, to some one who agrees to deliver it completed for a specified price, and does not include the case of one who himself constructs an improvement by means of materials purchased directly by him and artisans and laborers directly employed and paid wages by him. *Perry v. City of Los Angeles*, 106 Pac. 410, 412, 157 Cal. 146.

#### DOLLAR

Dollar mark, see Signs.

The judgment of a police magistrate for the sum of 383.18, with nothing to show that this represents "dollars," is void for uncertainty. *Avery v. Babcock*, 35 Ill. 175, 177.

The judgment must show definitely the amount of tax for which it was rendered; figures without some mark indicating for what they stand, in a column, at the head of which are the words "Tax, Coll., Clerk, Pri.," are not sufficient. *Randolph v. Metcalf*, 6 Cold. (46 Tenn.) 400, 408.

Where the commissioners in their report use only numerals to express the valuation of the land taken and the damages to that not taken, and it is evident from the report that the commissioners intended that such numerals should represent dollars and cents, the report is not void because the commissioners omitted to use either the dollar mark or the words "dollars" and "cents," or some abbreviation of the same. *Hunt v. Smith*, 9 Kan. 137, 151.



Where the dollar mark has been omitted, and there is no mark, dot, or line to separate dollars and cents, and to show what is meant, it has been held void. *Tidd v. Rines*, 2 N. W. 497, 500, 26 Minn. 201.

Where the dollar mark was omitted and a perpendicular line used to separate dollars and cents, held, the meaning was sufficiently clear. *Gutzwiller v. Crowe*, 19 N. W. 344, 32 Minn. 70; *Smith v. Headley*, 33 Minn. 384, 23 N. W. 550, 552.

Under section 1125, Comp. Laws 1897, in an indictment for embezzlement of public moneys, an allegation that the defendant "having then and there in his possession the sum of [a certain number of] 'dollars' in money, a better description of the kinds and character of which is to the grand jurors unknown," is sufficient both as to description of the money and the value thereof. *Territory v. Hale*, 81 Pac. 583, 584, 13 N. M. 181, 13 Ann. Cas. 551.

A tax sale is not void because in the delinquent list the amount due was indicated only by the word "amount," and immediately under it the figures "4 00," without any dollar sign, but with a space between the figure "4" and the two ciphers as they usually appear when intended to mean "dollars." *Carter v. Osborn*, 89 Pac. 608, 609, 150 Cal. 620.

#### As coined dollar

"The dollar note is an engagement to pay a dollar, and the dollar intended is the coin dollar of the United States; a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government. No other dollar had before been recognized by the legislation of the national government as lawful money." *New York ex rel. Bank of New York v. Board of Sup'rs of New York County*, 7 Wall. (74 U. S.) 26, 30, 19 L. Ed. 60.

#### Confederate money

Where a note was given in December, 1862, when there was nothing in circulation as money but Confederate notes, it was proper to further show on an issue as to whether the note was payable in Confederate money that the value of the articles for which the note was given was much less in good money than the price the maker, by the note, agreed to pay for them. *Dean v. Campbell*, 57 Ala. 372, 373.

#### As expression of value

The word "dollar" means a certain amount of money, and is of some value. An information for false pretenses, which alleges that accused with intent to defraud prosecutor obtained from prosecutor the sum of \$20, the property of prosecutor, is not objectionable as failing to allege that the money was worth something. *State v. Ryan*, 76 Pac. 90, 92, 34 Wash. 597.

"The term 'dollars' is an expression of value as well as the name of a kind, and

hence the word 'dollars' is uncertain as a description, since it may be used to denote a number of cents or dimes as well as dollars proper; but it is certain as an expression of value." An indictment for embezzlement, charging that the defendant embezzled \$3,659.59 in money, was not objectionable for failing to allege the value of the money. *Richberger v. State*, 44 South. 772, 774, 90 Miss. 806.

#### As legal tender

The word "dollars" means money in the form of the lawful currency of the United States. *Kelley v. Sullivan*, 87 N. E. 72, 73, 201 Mass. 34.

#### As unit of value

"A dollar is the unit of our currency. It always means money, or what is regarded as money." *United States v. Van Auken*, 96 U. S. 366, 368, 24 L. Ed. 852.

The word "dollar" is used to signify the money suit of the United States of the value of 100 cents. It imparts to the common understanding the meaning of a thing of value. *McDonald v. State*, 58 S. E. 1067, 1068, 2 Ga. App. 633.

The "dollar" is the legal unit of money of the United States, and, when figures are used to denote a sum of money such figures are understood to represent dollars, unless a different intention is fairly expressed. *Newlove v. Mercantile Trust Co. of San Francisco*, 105 Pac. 971, 975, 156 Cal. 657.

The term "dollar" implies the money unit of the United States. It means simply money. Hence a provision in a will which gives to a legatee, to be paid by the executor, the interest annually during his life of \$1,000, which the executor is directed to invest and keep safely invested, the \$1,000 to be paid at the decease of the legatee to his children or their issue, and, in case he die without children or issue, then to another named, and provides, further, that the legatee may at any time secure to the executor the return to him of the \$1,000 at the death of the legatee, and upon the offer of such security the said sum shall be delivered to said legatee, is a provision for the payment of money only, and not for the delivery of securities. *Devenney v. Devenney*, 77 N. E. 688, 689, 74 Ohio St. 96.

An indictment for robbery is sufficient on the question of value to allege that the 50 "dollars" in money was of the value of \$50, as the courts will judicially recognize that the word "dollar" is the money unit of the United States and is of the value of 100 cents. *Maxwell v. State*, 72 S. E. 445, 9 Ga. App. 875 (citing *McDonald v. State*, 58 S. E. 1067, 2 Ga. App. 633).

#### DOLLAR BILL

See Five Dollar Bill.

## DOLLS

Bath babies and position babies are "dolls," within the meaning of Schedule N, par. 418, 30 Stat. 191, and are dutiable as such, rather than as china toys, under Schedule B, par. 95, 30 Stat. 156. *United States v. Butler Bros.*, 180 Fed. 1005.

## DOMAIN

See Eminent Domain; Private Domain; Public Domain.

## DOMESTIC

"Domestic," derived from "domus," a house, means "belonging to the house or household, concerning or relating to the house or family." The term has a widely varying meaning, though primarily it relates to the house or home. Its significance must be determined with reference to the subject-matter and the relation in which it appears. *Kimball v. Northeast Harbor Water Co.*, 78 Atl. 865, 866, 107 Me. 467, 32 L. R. A. (N. S.) 805.

The word "domestic," as defined by Webster's International Dictionary, means "of or pertaining to one's house or home, or one's household or family; relating to home life." *Mitchell v. Tulsa Water, Light & Power Co.*, 95 Pac. 961, 966, 21 Okl. 243.

## DOMESTIC ANIMALS

Of ordinary docility, see Ordinary Docility.

Rev. St. Ohio 1892, § 3324, requiring railroads to construct and maintain along the road fences sufficient to turn stock, and at highway crossings, cattle guards sufficient to prevent "domestic animals" from going upon such railroad, do not require railroads to fence as against persons, since stock and domestic animals only are mentioned, and these words do not include persons. *Lake Shore & M. S. R. Co. v. Lidtke*, 69 N. E. 653, 656, 69 Ohio St. 384.

A town ordinance required every person keeping certain domestic animals named "within the limits of the town" to keep them on his own premises, except when temporarily passing through the streets, etc. Section 2 provided that the poundkeeper should provide a pound for "impounding any domestic animals found running at large within the city limits." Held, that the "domestic animals" referred to in section 2 were those specified in section 1, and that the ordinance had no application to animals running at large on the common range outside the limits of the town which might stray within such limits. *City of Red Lodge v. Maryott*, 83 Pac. 485, 486, 33 Mont. 299.

### As personal property

See Personal Property.

### As stock

See Stock.

2 WDS. & P. 2D SER.—9

## DOMESTIC BILL

A domestic bill, under the Mississippi statutes, is one drawn by a person in the state, or dated at a place in the state, or drawn on a person living therein. *Ragsdale v. Franklin*, 25 Miss. 143, 145.

## DOMESTIC COMMERCE

While interstate commerce and the instrumentalities by which it is carried on are within the exclusive control of Congress, the domestic commerce of a state and the facilities by which it is conducted are within the control of the state, and the Legislature may make such reasonable rules governing its domestic commerce as seem best fitted for the interest of its citizens, provided such regulations do not burden or interfere with the interstate commerce of the nation. *State v. Missouri Pac. Ry. Co.*, 115 N. W. 614, 616, 81 Neb. 15.

## DOMESTIC CORPORATION

Under Civ. Code S. C. 1902, § 1791, a foreign railroad corporation filing a copy of its charter granted in another state, with the Secretary of State, becomes a "domestic corporation." *Geraty v. Atlantic Coast Line R. Co.*, 60 S. E. 936, 938, 80 S. C. 355 (citing *Southern Ry. v. Tompkins*, 25 S. E. 982, 48 S. C. 49; *Calvert v. Southern R. Co.* [S. C.] 36 S. E. 750; *Id.*, 41 S. E. 963, 64 S. C. 139; *Black's Dill. Rem. Causes*, § 101).

The term "resident" contemplated by Code Civ. Proc. § 340, which defines the jurisdiction of county courts and provides that such jurisdiction extends to an action where the defendant at the time of its commencement is a resident of the county, and by Const. art. 6, § 14, which declares that the jurisdiction of county courts shall not be extended to an action in which any person not a resident of the county is a defendant, may include a "domestic corporation," within Code Civ. Proc. § 341, which provides that, in determining the jurisdiction of a county court, a domestic corporation is to be deemed a resident of the county in which its principal place of business is located, and under section 431, which provides for personal service of summons on a domestic corporation by delivering a copy thereof, if the action is against the city of New York to the mayor, comptroller, or counsel to the corporation, New York City is such a "domestic corporation," and is therefore a resident of the borough of Manhattan and may not be sued in the county court of another county. *Maisch v. City of New York*, 111 N. Y. Supp. 645, 647, 127 App. Div. 424.

"Railroads are creatures of the law, invested with certain powers to promote the public interest, for which reason they may be required to conduct their affairs in furtherance of the public objects of their creation, and it is because of this public character that courts assume jurisdiction to en-

force the public duties required of them." "A 'railroad corporation' created by a state is for all purposes of local self-government a domestic concern, even when its road connects, as most railroads do, with railroads in other states, and the state which created the corporation may make all needful regulations of a police character for the government of the corporation while operating its road in that jurisdiction. It may prescribe the location of the place of construction of the road, the rate of speed at which trains shall run, and the places at which they shall stop, and make any other reasonable regulation for their management in order to secure the objects of the corporation and the safety, good order, convenience, and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state." *Louisville & N. R. Co. v. Central Stockyards Co.*, 97 S. W. 778, 782, 133 Ky. 148 (quoting from *Commonwealth v. Louisville & N. R. Co.*, 85 S. W. 712, 120 Ky. 91; *Gladson v. State of Minnesota*, 17 Sup. Ct. 627, 166 U. S. 435, 41 L. Ed. 1064).

"A railroad corporation created by a state is, for all purposes of local government, a 'domestic corporation,' and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience, and comfort of the passengers and of the public." *Railroad Com'rs v. Atlantic Coast Line R. Co.*, 50 S. E. 641, 642, 71 S. C. 130.

**As private party**

See Private Party.

**As resident**

See Resident.

**DOMESTIC DUTIES**

Services rendered by a wife in the home of her husband to a lodger residing with them, though consisting largely of personal attendance of the wife and including the nursing of the lodger when sick, were "domestic duties," for which, in the absence of an express promise by the lodger to pay the wife she could not recover; the implied promise being to pay the husband, and not the wife. *Stevenson v. Akarman*, 85 Atl. 166, 167, 83 N. J. Law, 458.

**DOMESTIC EGG COAL**

"Egg coal," as known to the trade, is coal run over screens with a 3-inch mesh,

and another screen with a 1¼-inch mesh. There are two grades of egg coal, the higher grade, known as "domestic egg coal," being made by running the coal over the screens twice, and the lower grade, known as "steam egg," by running the coal over the screens but once. There is more slack in the lower grade than in the higher grade, and the higher grade is more expensive. *Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 84 N. E. 776, 777, 41 Ind. App. 658.

**DOMESTIC FIXTURES**

"Domestic fixtures" are such articles as a tenant attaches to a dwelling house to render his occupation more comfortable or convenient, and may be separated from it without doing substantial injury. *Hayford v. Wentworth*, 54 Atl. 940, 942, 97 Me. 347 (quoting and adopting *Tayl. Land. & Ten.* [8th Ed.] § 547).

An electric chandelier, annunciator, and like contrivances or devices attached to the ceiling or walls of a house by a tenant, at his own expense and for his personal comfort and convenience, come within the legal definition of "domestic or ornamental fixtures" when so placed that they can be readily detached without injury to the premises. In the absence of any understanding to the contrary, such fixtures may be removed by the tenant at any time during his term or occupancy, and even thereafter, if he be deprived of the opportunity to remove them by a wrongful retaking of possession of the premises by the landlord. Not being annexed to the rented structure with any view to their becoming permanently attached thereto as a part of the realty, they do not lose their identity as chattels, and a possessory warrant will lie to recover them from a landlord who wrongfully withholds possession thereof from the tenant. *Raymond v. Strickland*, 52 S. E. 619, 620, 124 Ga. 504, 3 L. R. A. (N. S.) 69.

**DOMESTIC FOWLS**

As poultry, see Poultry.

**DOMESTIC GUARDIAN**

Guardian as including, see Guardian.

**DOMESTIC MACHINERY**

A buggy or wagon purchased for use at the purchaser's home is not "domestic machinery," within Laws 1903, c. 16, relating to licensing peddlers on sale of all articles except domestic machinery. *Territory v. Russell*, 86 Pac. 551, 552, 13 N. M. 558.

**DOMESTIC MANUFACTURES**

"We may properly and accurately speak of 'domestic manufactures,' meaning not those of the household, but those of a county, state, or nation, according to the object in contemplation." *United States v. Edgar*, 140 Fed. 655, 659 (quoting and adopting the definition of Justice McKenna in *United*

States v. United Verde Copper Co., 25 Sup. Ct. 222, 196 U. S. 207, 49 L. Ed. 449).

### DOMESTIC MEDICINE

The Century and Imperial Dictionaries define the phrase "domestic medicine" as "medicine as practiced by unprofessional persons in their own families." The Encyclopædias define it as "the practice or use of medicine by unprofessional persons in their own households." Appleton's Medical Dictionary and Gould's Illustrated Dictionary of Medicine define the phrase as "the use of domestic remedies"; but, as neither attempts to give the meaning of "domestic remedy," the definition is not illuminating. If, however, "domestic medicine" is the use of medicine in one's own family, and is also the use of domestic remedies, it would seem logically to follow that domestic remedies or domestic medicines are those which one uses in his own household. Foster's Encyclopædic Medical Dictionary contains, under the word "domestic," "pertaining to the household, to one's own home; \* \* \* of remedies, prepared in one's own house or kept there for use in the absence of a physician." But the matter is not to be determined by mere reference to the dictionaries. Lippincott's Medical Dictionary says that "domestic medicine" is "medicine as practiced by nonprofessional persons." But the acceptance of that definition would make the phrase, as used in an exception in a statute relating to the practice of medicine and surgery, providing that the act shall not apply to the administration of domestic medicines, as broad as the act. The real meaning of the law must be sought by considering it as a whole, in the harmonious construction of its various parts. As used in an exception in a statute relating to the practice of medicine and surgery, which provides that nothing in the act shall apply to the administration of "domestic" medicines, it does not refer to medicines of home manufacture or to those manufactured from vegetables grown at home. *State v. Huff*, 90 Pac. 279, 283, 75 Kan. 585, 12 L. R. A. (N. S.) 1094.

### DOMESTIC PURPOSES

Other domestic purposes, see *Other*.

Where a water company was authorized to charge specific rates for the use of water for "domestic purposes," such rates did not include water used for lawns. *Ward v. Birmingham Waterworks Co.*, 44 South. 570, 571, 152 Ala. 285.

The word "domestic," in Act Cong. June 3, 1878, § 1, providing that all citizens of the United States shall be permitted to fell and remove for building, agricultural, mining, or other "domestic" purposes, any timber, has a meaning consistent with the intentional use of the word "other." "It may relate, it is true, to the household, but keeping its idea of locality it may relate to a broader entity

than household. We may properly and accurately speak of 'domestic' manufactures, meaning not those of the household but those of a county, state, or nation, according to the object in contemplation." And hence the word "domestic" applies to the locality in which the statute is directed and gives permission to the industries there practiced to use the public timber. *United States v. United Verde Copper Co.*, 25 Sup. Ct. 222, 224, 196 U. S. 207, 49 L. Ed. 449.

The words "domestic purposes," as used in an ordinance granting a franchise to a water company, include "all uses which contribute to the health, comfort, and convenience of the family, in the enjoyment of their dwelling as a home." *Mitchell v. Tulsa Water, Light, Heat & Power Co.*, 95 Pac. 961, 966, 21 Okl. 243 (quoting and adopting definition in *Crosby v. City Council of Montgomery*, 18 South. 723, 108 Ala. 498).

The right to cut timber from public mineral lands, subject to mineral entry only, for building, agricultural, mining, or other "domestic purposes," given to any bona fide resident of certain states and territories by Act June 3, 1878, c. 150, 20 Stat. 88, extends to all such lands in the state or territory, without limitation to any local subdivision. Under such statute, a resident of Montana, where he observes the regulations made by the Secretary of the Interior for the protection of undergrowth, etc., may lawfully cut timber for firewood from public mineral lands within the state, and ship the same to any part of the state for sale and use there in households, hoisting works in mines, smelters, or other local purposes, all of which are "domestic purposes" within the meaning of the statute. *United States v. Edgar*, 140 Fed. 655, 659.

"Domestic purposes," as used in a contract whereby a gas company agreed to pay a city one-fifth of the net profits from the sale of gas for such purposes, includes gas furnished, not only to the homes of the city, but to offices, stores, churches, and the like, where its principal use is for heating and lighting, and not for power. *City of Erie v. Erie Gas & Mineral Co.*, 97 Pac. 468, 470, 78 Kan. 348.

Priv. Laws 1883, c. 168, chartering a water company to supply water for "domestic" purposes, requires the company to furnish water to operate an elevator in a summer hotel; such use not being a development of power for commercial or industrial purposes. *Kimball v. Northeast Harbor Water Co.*, 78 Atl. 865, 866, 107 Me. 467, 32 L. R. A. (N. S.) 805.

A contract by a water company to furnish a town with water "for domestic purposes, the extinguishment of fires, and other lawful uses," and also "for public and domestic uses and purposes of the inhabitants" of the town, did not authorize the corpora-

poration to furnish water for the purpose of creating any power for mechanical purposes either by the means of the creation of steam or for the propelling any water motor to the prejudice of the town for domestic and fire uses. Mayor, etc., of Town of Boonton v. United Water Supply Co., 64 Atl. 1064, 1065, 70 N. J. Eq. 692.

### DOMESTIC REMEDY

"The expression 'family medicines' is synonymous with such expressions as 'domestic remedies,' 'household remedies,' etc., found in the statute of other states and common in general parlance. It includes such things as camphor, quinine, paregoric, spirits of turpentine, castor oil, and salt peter, epsom salts, etc., but not a preparation containing sulphuric acid." Lewis v. Brannen, 65 S. E. 189, 190, 6 Ga. App. 419.

In determining the meaning of the phrase "usual domestic remedies and medicines," as used in the pharmacy act, providing that, "in rural districts where there is no registered pharmacist within five miles, it shall be lawful for retail dealers to procure license from the board of pharmacy \* \* \* to sell the 'usual domestic remedies and medicines,'" judicial and legislative construction are an aid. "In Cook v. People, 125 Ill. 278, 17 N. E. 849, it was said that under a similar statute the jury were warranted in finding from the evidence that quinine was not one of the 'usual domestic remedies' referred to. In People v. Fisher, 83 Ill. App. 114, the court approved an instruction reading: 'Although the jury may believe from the evidence that the defendant sold iodine and quinine, yet if they further believe from the evidence that they are domestic remedies, then the defendant is not liable for such sales.' \* \* \* The New York pharmacy act originally contained a provision permitting 'the sale of the usual domestic remedies by retail dealers in the rural districts.' Later a definition was added of which the following was the substance and finally the form: 'The term "usual domestic remedies," here employed, means medicines, a knowledge of the properties of which and dose has been acquired from common use and includes only such remedies as may be safely employed without the advice of a physician.' \* \* \* It will be observed that the meaning pointed to in these expressions is in a way a modification of that adopted by the trial court. The phrase 'domestic medicines,' referring to those remedies which are in fact used by a nonprofessional person in his own home, appears to have been diverted from its original and literal import, perhaps in part by the addition of the qualification 'usual,' so as to signify such substances as are commonly kept by nonprofessional persons in their own homes for use as remedies in the absence of a physician, being necessarily substances the effect of which is a matter of general knowledge, so that no special training is required for their safe ad-

ministration. \* \* \* It would defeat the manifest purpose of the law to hold that under these provisions a defendant, charged and proved to have received money for recommending a certain substance as a cure for disease, might exculpate himself by showing that the substance he recommended was a domestic medicine, in the sense that it was a well-known remedy, the effect of which was a matter of common knowledge." State v. Huff, 90 Pac. 279, 283, 75 Kan. 585, 12 L. R. A. (N. S.) 1094.

### DOMESTIC SERVANTS—DOMESTICS

A "domestic servant," according to Webster's International Dictionary, as well as Bouvier's Law Dictionary, is a "house servant; a household assistant; one who lives in the family of another." The term does not extend to workmen and laborers out doors. Toole Furniture Co. v. Ellis, 63 S. E. 55, 57, 5 Ga. App. 271.

#### Farm hand

A farm tenant who sometimes worked in a store, but never about the storekeeper's house, was not a "domestic servant," so as to require submission of his status as such in a trial for burglary of the house. Williams v. State (Tex.) 143 S. W. 634, 636.

### DOMESTIC SERVICE

A husband suing for wrongful injuries to his wife cannot recover compensation for the loss of his wife's services as a clerk in his store; such services not being the domestic services which a wife owes her husband because of the marital relation, the duty of support being placed by the law upon the husband, and the wife having the correlative duty of caring for the household and administering to the needs of the family. Kirkpatrick v. Metropolitan St. R. Co., 107 S. W. 1025, 1026, 129 Mo. App. 524.

### DOMESTIC USE

"Domestic use," as the term is used in the ordinance, means the use to which water is applied by the family, for family use, and includes the watering of animals, but it does not include the use of water in public parks or public pleasure resorts maintained by the city, or the temporary quenching of the thirst of animals while engaged in labor upon the streets. Water Supply Co. of Albuquerque v. City of Albuquerque (N. M.) 128 Pac. 77, 79, 43 L. R. A. (N. S.) 439.

The exclusive right under an ordinance to construct and operate waterworks for supplying the streets, lanes, alleys, squares, and public places, and for extinguishing fires, is not limited by a provision of the ordinance that water supplied for "domestic use" shall be brought from wells adjacent to a designated river, and, in emergency, from the river, to a waterworks supplied from wells adjacent to that river, and, in an emergency, from the river; water for "domestic use" not in-

cluding water for supplying the streets, etc., but pertaining to uses which contribute to the health, comfort, and convenience of the family in the enjoyment of their dwelling as a home. *Mitchell v. Tulsa Water, Light, Heat & Power Co.*, 95 Pac. 961, 964, 21 Okl. 243.

### DOMESTICATED

Where defendant contended that the plaintiff corporation was subject to the insolvent law because it was "domesticated" in the state, the court presumed the word "domesticated" was intended to convey, in conciliatory form, the information that plaintiff was "domiciled" in the state and therefore barred by the language and legal operation of the act. *Bergner & Engel Brewing Co. v. Dreyfus*, 51 N. E. 581, 532, 172 Mass. 154, 157, 70 Am. St. Rep. 251.

### DOMICILE

See District of His Domicile; Lose a Domicile.

Change of domicile, see Change.

"Domicile" is a "place where a person lives, or has his home; that is, where one has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. The habitation fixed in any place without any present intention of removing therefrom." *Schmoll v. Schenck*, 82 N. E. 805, 807, 40 Ind. App. 581 (quoting and adopting the definition in *Anderson's Law Dict.*); *Barron v. City of Boston*, 72 N. E. 951, 952, 187 Mass. 168 (quoting and adopting definition in *Viles v. City of Waltham*, 32 N. E. 901, 157 Mass. 542, 34 Am. St. Rep. 311); *Ruby v. Pierce*, 104 N. W. 1142, 1143, 74 Neb. 754 (citing *Wood v. Roeder*, 63 N. W. 853, 45 Neb. 311); *In re Titterington's Estate*, 106 N. W. 761, 762, 130 Iowa, 356; *In re Owings*, 140 Fed. 739, 740 (citing *Shelton v. Tiffin*, 6 How. 163, 12 L. Ed. 387). To constitute a "domicile" but two elements are necessary, the act and the intention. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140 (citing *State ex rel. Lowe v. Banta*, 71 Mo. App. 32; *Greene v. Beckwith*, 38 Mo. 384; *Johnson v. Smith*, 43 Mo. 499; *Tiller v. Abernathy*, 37 Mo. 196); *United States Trust Co. of New York v. Hart*, 135 N. Y. Supp. 81, 82, 150 App. Div. 413; *Anderson v. Blakesley*, 136 N. W. 210, 213, 155 Iowa, 430; *Eaves Costume Co. v. Pratt*, 22 N. Y. Supp. 74, 75, 2 Misc. Rep. 420; *Ex parte Petterson*, 166 Fed. 536, 541; *Guggenheim v. City of Long Branch*, 76 Atl. 338, 339, 80 N. J. Law, 246; *Holt v. Hendee*, 93 N. E. 749, 752, 248 Ill. 288, 21 Ann. Cas. 202. "A residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." *Pope v. Williams*, 56 Atl. 543, 544, 98 Md. 59, 66 L. R. A. 398, 103 Am. St. Rep. 379 (quoting and adopting definition

in *Mitchell v. United States*, 21 Wall. [88 U. S.] 350, 22 L. Ed. 584). "The place where a person lives and has his home." *Humphrey v. Humphrey*, 91 S. W. 405, 406, 115 Mo. App. 361 (citing *Mitchell v. United States*, 21 Wall. [88 U. S.] 350, 22 L. Ed. 584; *Anderson v. Anderson's Estate*, 42 Vt. 350, 1 Am. Rep. 334; *Borland v. City of Boston*, 132 Mass. 89, 42 Am. Rep. 424). The act of residence does not alone constitute the "domicile" of a party, but it is the fact of residence accompanied by an intention of remaining which constitutes domicile. *Marks v. Marks*, 75 Fed. 321, 324. It means residence in a particular place with an intention to remain for an indefinite period of time. *Inhabitants of Palmer v. Inhabitants of Hampden*, 65 N. E. 817, 818, 182 Mass. 511. As applied to the marriage relation, means a home where the husband and wife dwell together in amity. *Buchholz v. Buchholz*, 115 Pac. 88, 90, 63 Wash. 213, Ann. Cas. 1912D, 395. It denotes the actual or constructive presence of a person in a given place, coupled with an intention to remain there permanently. *People ex rel. Brooklyn Children's Aid Soc. v. Hendrickson*, 104 N. Y. Supp. 122, 124, 125, 54 Misc. Rep. 337.

Where a person lives is *prima facie* his "domicile," unless there is a motive for that residence not inconsistent with a clearly established intention to retain a permanent residence elsewhere. *Ennis v. Smith*, 14 How. (55 U. S.) 400, 423, 14 L. Ed. 472.

"Domicile" is the place where one has his true fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and where he exercises his political rights. There must exist in combination the fact of residence and the *animus manendi*. Residence within the district, to give the court jurisdiction of proceedings in bankruptcy, must be *bona fide*; and the removal of a person from one district to another, for the express purpose of filing a petition in bankruptcy therein, and with the intent of leaving the district as soon as he obtained a discharge, does not make him a resident, so as to confer jurisdiction on the court. *In re Garneau*, 127 Fed. 677, 678, 62 C. C. A. 403.

Every person must have a domicile. He can have but one, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence. The question is one of fact, and it is often difficult to determine. A person who has left his home in the country, and moved with his family to a city, where he has a residence, with no fixed intention of returning to his country home, which he has rented on shares, reserving three rooms in the house for his own use, becomes a resident of the city, and is liable to be taxed as such. *City of Lebanon v. Biggers*, 78 S. W. 213, 214, 117 Ky. 430.

"One cannot acquire the right to vote in this state by a sojourn here for business or pleasure, however long, without abandoning his former domicile. There must not only be a personal presence here for the requisite time, but a concurrence therewith of an intention to make the place of inhabitancy the true home." Under 2 Mills' Ann. St. § 4364, requiring petitions for the incorporation of a town to be signed by 30 electors owning land and residing in the territory sought to be incorporated, persons who moved into the territory temporarily, merely for the purpose of signing the petition, and persons who were granted land solely to qualify them as signers and as a reward for signing, were not bona fide electors and landowners, and not qualified as signers. *People ex rel. Saunier v. Stratton*, 81 Pac. 245, 246, 33 Colo. 464.

The old domicile continues until the acquisition of a new one, and while in transitu the old domicile remains, for a "domicile" is a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. *Littlefield v. Inhabitants of Brooks*, 50 Me. 475, 477 (quoting and adopting definition in *Phillim. Dom.* p. 13).

The word "domicile," as used in General Order 6 of the General Orders of the United States Supreme Court, providing that, in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the testator had his domicile, while grammatically fitting the 10 days' habitation of the bankrupt in the Southern district, should while rival petitions are under consideration be held to mean the domicile which has existed during the greater portion of the preceding six months. Where two petitions in bankruptcy have been filed against the same individual, one in the district in which the alleged bankrupt has resided during the greater part of the preceding six months, and the other in a district into which he recently removed and established his residence, the former is the district of his domicile within the meaning of General Order No. 6. *In re Isaacson*, 161 Fed. 779, 781.

Every person must have a "domicile" somewhere, and can have but one, which, when established, continues until he renounces it and takes up another in its stead. *Helm's Trustee v. Commonwealth*, 122 S. W. 196, 197, 135 Ky. 392.

"To acquire a 'domicile' both the fact and the intention must concur. Actual residence and the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, are required to constitute a change of domicile. The length of the residence is immaterial provided the other elements are present and are found to exist." Where a man upon marriage went

to Massachusetts with his wife, intending to reside there permanently, with no intention of returning to his previous abode, though he was undecided as to the particular place where he would reside, and another selected an apartment for him and his wife, which he took possession of by sending his clothing to it, he acquired a domicile in the state, though he never in fact occupied the apartment, being called away by his mother's illness in another state, and so lived in the state with his wife, within a statute providing that a divorce shall not, with an immaterial exception, be decreed if the parties have never lived together as husband and wife in the state. *Winans v. Winans*, 91 N. E. 394, 396, 205 Mass. 388, 28 L. R. A. (N. S.) 992.

Where one, born an English subject in Canada, removed to New York, there engaged in business, became naturalized, afterwards closed out his business, declared his intention to return to his place of birth to live, then became non compos, and a committee was appointed for him in New York, who took him back to his place of birth, where he resided till his death, a sufficient "domicile" was re-established there to confer probate jurisdiction in the first instance on the courts of that country, which took cognizance of his will. *In re Robitaille*, 138 N. Y. Supp. 391, 392, 78 Misc. Rep. 108.

"Domicile" is the habitation fixed in any place without any present intent of removing therefrom, and ordinarily is a pure question of fact. There can be but one domicile of testacy or intestacy, and the fundamental idea of domicile is a relation between an individual and a particular locality, and does not depend on any distinction as to the source of the local law. *Mather v. Cunningham*, 74 Atl. 809, 813, 105 Me. 326, 29 L. R. A. (N. S.) 761, 18 Ann. Cas. 692.

In order to give jurisdiction to grant a divorce to one coming to the state from another state, there must be an actual residence for two years with intention of remaining, so as to acquire a domicile in the state; the "domicile" of a person being the place in which he has voluntarily fixed his habitation, with a present intention of making it his home, until he is induced to adopt another permanent residence by some uncertain or unexpected event. *Williams v. Williams*, 78 Atl. 693, 695, 78 N. J. Eq. 13.

A wife who had been deserted by her husband came from New York to New Jersey in October, 1904, and filed a petition October 9, 1907. She resided in different places to find an inexpensive place, but, not two years before filing her petition, fixed her permanent residence at Asbury Park. Her intention when she came to New Jersey was to make her future home in the state. Held, that her residence in the state from the beginning, with her intention to remain here, gave her a domicile within the state within the divorce act (P. L. 1902, p. 503), requiring

two years' residence in the state during the time for which the desertion continues; the word "residence" meaning "domicile." *King v. King*, 71 Atl. 687, 74 N. J. Eq. 824, 135 Am. St. Rep. 731.

A man's "domicile" is determined by his actual residence, coupled with his intention to remain, irrespective of the residence of his family. *McCord v. Rosene*, 80 Pac. 793, 794, 39 Wash. 1.

"Domicile" may be defined as home. A place where a person lives—his only place of residence. A box stall at a fair ground, provided with inside fastenings to its doors, which is prepared and used by a man as his office and sleeping apartment, the place where he resides, he having no other place of abode, and which contains his clothing, his money, and all his belongings, is in legal effect his home or domicile. *Young v. State*, 104 N. W. 867, 868, 74 Neb. 346, 2 L. R. A. (N. S.) 66.

Under Gen. St. c. 107, § 12, which provides that no divorce shall be decreed if the parties have never lived together as husband and wife in this state, parties must have a domicile here, and a resident of another state coming here with his wife to seek employment, and, failing that, returning to the state of his residence leaving his wife here, does not acquire a "domicile," since his intention to acquire a domicile depended upon a contingency that never happened. *Ross v. Ross*, 103 Mass. 575, 576, 577.

"The fact that the defendant never acquired a residence in another place and that he had all the time \* \* \* an intention to return and resume housekeeping with his family in this city would be sufficient to constitute a 'domicile' within this state." *Hanover Nat. Bank v. Stebbins*, 23 N. Y. Supp. 529, 530, 69 Hun, 308.

#### As affected by absence

"In law every person has a 'domicile.' In some instances it may be different from his actual abode. Until he has changed it, which is a combination of act and intention, it continues to be his 'domicile' in law. Where one has an actual domicile, and departs from it temporarily, intending to return, it will remain his legal domicile for all purposes." *Erwin v. Benton*, 87 S. W. 291, 294, 120 Ky. 536, 9 Ann. Cas. 264.

One who owned real estate and personal property and had paid personal tax in the town in which he died, and where he had lived, was "domiciled" in such town, though he was frequently away from it, owned property in other states, and had declared that he expected to make his home in another state. *In re Dalrymple's Estate*, 64 Atl. 554, 555, 215 Pa. 367.

Defendant, having been born in Missouri, in 1907 disposed of all her property and removed with her mother to France to study

music. She remained there for three years, visiting the United States in August, 1910, when she sang under complainant's management in New York and Philadelphia, and made a brief visit to her grandparents in Kansas City. She returned to Paris, where she remained until September 20th of that year, when she took up her residence in London, remaining there until September 12, 1912, when she came to the United States to give a concert in Kansas City. She testified that, when she left in 1907, she did so intending to change her domicile and take up a residence abroad, and that when she went to London it was with the intention of remaining there for an indefinite period, and that she had not then, nor at any time since her departure, any intention of returning to Missouri. Held, that defendant was not a citizen of Missouri, so as to confer jurisdiction on a federal court sitting in that state of a suit brought against her by complainant, a citizen of New York. *Hammerstein v. Lyne*, 200 Fed. 165, 170.

#### Citizenship distinguished

See Citizenship.

#### Home distinguished

The word "domicile" is nearly synonymous with home. *Ex parte Petterson*, 166 Fed. 536, 541.

"The word 'home' is undoubtedly the fundamental idea of 'domicile,' though calling a place 'home' as a matter of fact may not be and often is not entitled to much weight." The word "home" is very frequently used with reference to a place other than the legal and permanent domicile. *Pickering v. Winch*, 87 Pac. 763, 765, 769, 48 Or. 500, 9 L. R. A. (N. S.) 1159 (quoting and adopting definition in *Jacobs, Dom.* § 72).

#### Inhabitancy

See Inhabitancy—Inhabitant.

#### Residence distinguished

The words "residence" and "domicile" are not convertible terms, the latter being a word of more extensive signification, and including, beyond mere physical presence at the particular place, positive or presumptive proof of an intention to make it a permanent abiding place. *Pendleton v. Commonwealth*, 65 S. E. 536, 538, 110 Va. 229.

"Domicile" and "residence" are not synonymous; "domicile" being a legal relation existing between a person and a particular place originating in residence and intention, or created by operation of law while a person may have as many residences as he may choose, and, while a minor's legal domicile is with his parents, he may, with consent of his father, acquire a residence in another parish to earn a livelihood. *Oglesby v. Turner*, 54 South. 400, 402, 127 La. 1093.

"Residence" means living in a particular locality, but "domicile" means living in that locality with intent to make it a fixed and



permanent home; and "residence" requires only bodily presence as an inhabitant in a given place, while "domicile" requires presence in that place as well as an intention to make it a domicile. In *re Newcomb's Estate*, 84 N. E. 950, 954, 192 N. Y. 238.

The terms "residence" and "domicile" are not identical for all purposes, and their meaning is different under the rule suspending limitations by absence from the state. *McDowell v. Friedman Bros. Shoe Co.*, 115 S. W. 1028, 1031, 135 Mo. App. 276.

The word "residence" indicates the place of dwelling, whether permanent or temporary, and the word "domicile" indicates the real home of the deceased. A few general rules may also be noticed in this connection. A man must have a domicile somewhere. He cannot have two at the same time, and a domicile once gained remains until a new one is acquired. Two things must concur to effect a change of domicile. There must be actual residence and the intent. Mere intention cannot effect the change, but the intention to remain, coupled with the fact of actual residence, establishes the domicile, notwithstanding a floating intention to return at some future time. And this intention need not be to remain for a definite time. "A change of domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period as upon the fact that it is without a definite intention to return; and even an intention to return at a remote or indefinite period may be controlled by other circumstances establishing the fact of domicile in the new place." In *re Titterington's Estate*, 106 N. W. 761, 762, 130 Iowa, 356 (citing *Tuttle v. Wood*, 88 N. W. 1056, 115 Iowa, 507; *Cohen v. Daniels*, 25 Iowa, 88; *Vanderpoel v. O'Hanlon*, 5 N. W. 119, 53 Iowa, 246, 38 Am. Rep. 216; *Church v. Crossman*, 49 Iowa, 444; *State v. Groome*, 10 Iowa, 308).

"The distinction between 'residence' and 'domicile,' in the law of process and attachment, is very clearly marked by the decisions. 'Domicile' is a much broader term than that of 'residence.' A man may have his domicile in one state, and actually reside in another, or in a foreign country. If he has once had a residence in a particular place, and removed to another, but with the intention of returning after a certain time, however long that may be, his domicile is at the former residence, and his residence at the place of his habitation." *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 259, 54 W. Va. 32 (quoting *Drake*, *Attach.* § 59).

The word "domicile," in a statute which provides that no person who is an inhabitant of the state shall be sued out of the county in which he has his domicile, except in certain cases, is used in the sense of "residence." There may, however, be a difference between a man's residence and his domicile. He may

have his domicile in one place, and still may have a residence in another; for, although a man for most purposes can be said to have but one domicile, he may have several residences. *Pearson v. West*, 77 S. W. 944, 945, 97 Tex. 238 (quoting *Brown v. Boulden*, 18 Tex. 431, 434).

The word "resides," in *Laws* 1901, p. 588, c. 96, providing that any town not maintaining a high school shall pay for the tuition of any child who with parents "resides" in said town, and who attends a high school in another town, means actual habitation, and not a legal "domicile," which is acquired by residence and an intention of making it a home; and, where a father who lived off a farm in a town sold his stock and removed to another town with his family, and there kept house, without any definite intention either to make the latter town his home or of returning to the former town within which he was taxed, and wherein he voted, the former town was not liable to pay to the latter town for the tuition of his child attending high school in the latter town. *Lisbon School Dist. No. 1 v. Landaff Town School Dist.*, 74 Atl. 186, 187, 75 N. H. 324.

"Domicile" is not the same as "residence," as the first expression indicates the fixed and permanent residence to which one when absent has the intention of returning. The other merely indicates the place of dwelling, whether permanent or temporary. In *re Brannock*, 131 Fed. 819, 922 (quoting and adopting the definitions in *Fitzgerald v. Arel*, 16 N. W. 712, 63 Iowa, 104, 18 N. W. 713, 50 Am. Rep. 733; *Mann v. Taylor*, 78 Iowa, 355, 43 N. W. 220).

"Residence" and "domicile" are sometimes distinct, and in contemplation of the attachment law the domicile of the defendant may be in this state, while the actual residence is in another. *Hollander v. Central Metal & Supply Co.*, 71 Atl. 442, 448, 109 Md. 131, 23 L. R. A. (N. S.) 1135.

"Residence," it has been frequently held, is largely a matter of intention. That is the very language used in an extract from an opinion by the Attorney General appearing in *Jewett's Election Manual*, 1907, p. 378. It is a word which is ordinarily distinguishable from "domicile," and in cases in which it is distinguished from domicile it imports less fixity of tenure. It is not dependent upon the quantity of possession that a man may have about him at a given place, nor necessarily upon the length of time that he spends at a particular place. And this is particularly so in the absence of proof that a man spends the larger part of his time at some other place; but the prevailing authorities in this state seem to hold that, despite the use in a seemingly contrastive manner of the two terms "residence" and "domicile" in the election law (see *Laws* 1896, pp. 913, 914, c. 909, § 34, subds. 1, 2, as amended), those

terms are to be regarded as practically synonymous where the question of the exercise of a franchise is concerned, and that in the case of a voter there must not only be an intention to regard a certain place as his voting residence, but conduct appropriate to and indicative of that intention. *People v. Acritelli*, 110 N. Y. Supp. 430, 446, 57 Misc. Rep. 574.

"A 'residence' is one thing, and a 'domicile' another. A person may have as many residences as he may choose, but can have but one domicile. Residence does not imply permanency, or the *animus manendi*, as does the word 'domicile.'" The term "residence," as used in Const. La. art. 197, fixing the qualification of voters, does not mean "domicile." *Estopinal v. Michel*, 46 South. 907, 908, 121 La. 879, 19 L. R. A. (N. S.) 759 (quoting and adopting the definition in *State ex rel. Egan v. Steele*, 33 La. Ann. 910); *Estopinal v. Vogt*, 46 South. 908, 909, 121 La. 883.

There may be a domicile without an actual present residence, and, vice versa, there may be a present residence without a domicile, as in case of foreign ministers who reside abroad without losing their domicile in the United States, and cabinet ministers and members of Congress, who reside in Washington, but are domiciled in their respective states. A man may have two or more residences, but only one domicile. He chooses which one of the residences shall be his domicile, and his choice is final, if made in good faith, although he may spend less time at his domicile than at his residence. The marks of the domicile include the character of the place, and the acts and declarations of the party in connection therewith, provided the declarations are made in good faith, and *ante litem motam*. *Duke v. Duke*, 62 Atl. 466, 467, 70 N. J. Eq. 135.

"Domicile," strictly speaking, is the relation which the law creates between an individual and a particular place or country, and each case is dependent upon its own particular facts. "Domicile" is not in a legal sense synonymous with "residence." A person may have more than one residence and more than one home, in the ordinary acceptance of those terms, but he can have only one "domicile," and the law requires that for the succession of his property, he be domiciled somewhere. The word "home" is the fundamental idea of "domicile," and the fact that one calls a place his "home" may not be of much weight in determining whether or not it is his "domicile." To constitute a "domicile" there must be a fixed habitation or abode in a particular place, and the intention to remain there permanently. There must be "residence," actual or inchoate, and the nonexistence of any intention to make a "domicile" elsewhere, and these two elements must concur. As said by Dicey in his *Con-*

*flict of Laws*, p. 79: "The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether in fact his home or not, is determined to be his home by a rule of law." In regard to a change of domicile, the court says: "Mere change of residence is not of itself proof of a change of domicile unless accompanied by an intention, express or implied, to abandon the old domicile and acquire a new one. Within the principle of law declared in the decisions, a person may reside for pleasure or health in one place without forfeiting or surrendering his domicile or legal residence in another, if he so intends. It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile. Every person *sui juris* and capable of controlling his personal movements may change his domicile at pleasure, but a change of domicile involves intention as the dominant factor. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile; and (3) an intention of acquiring a new one; or, as some writers express it, there must be an *animus non reverendi* and an *animus manendi*, or *animus et factum*." *Pickering v. Winch*, 87 Pac. 763, 765, 766, 48 Or. 500, 9 L. R. A. (N. S.) 1159 (citing *Jacobs, Dom.* §§ 63, 72, 136; *Wharton, Conflict of Laws*, § 21; *Dicey, Conflict of Laws*, p. 79; 3 Cyc. p. 865; *Caldwell v. Pollak*, 8 South. 546, 91 Ala. 353; *Ennis v. Smith*, 14 How. 400, 423, 14 L. Ed. 472; *Isham v. Gibbons* [N. Y.] 1 Bradf. Sur. 69; *Gilman v. Gilman*, 52 Me. 165, 83 Am. Dec. 502; *Tipton v. Tipton*, 8 S. W. 440, 87 Ky. 245; *Long v. Ryan* [Va.] 30 Grat. 718; *Stout v. Leonard*, 37 N. J. Law, 492; *Berry v. Wilcox*, 62 N. W. 249, 44 Neb. 82, 48 Am. St. Rep. 706; *Hayes v. Hayes*, 74 Ill. 312, 316; *Dupuy v. Wurtz*, 53 N. Y. 556, 561; *White v. Brown*, 1 Wall. C. C. 217, 29 Fed. Cas. 982; *Cruget v. Phelps*, 47 N. Y. Supp. 61, 21 Misc. Rep. 252).

The term "residence," used by the Constitution in fixing the qualification of voters, does not mean "domicile," but the abode at which a man actually lives and works; the purposes of the requirement being to provide a term of educational probation and to prevent a colonization of voters. This abode may be a lodging house, and it makes no difference that the man may have in another parish a home where he keeps his wife and children. The words "actual bona fide resident" mean more than the word "resident." A person moving out of the state, with his wife and child and household effects, and residing and working in another state, cannot be considered as an "actually bona fide resident" of the precinct from which he removed. Article 197 of the Constitution excludes constructive residence based merely

on intentions. *State ex rel. Fleming v. Joyce*, 49 South. 219, 220, 221, 123 La. 631 (citing *Estopinal v. Michel*, 46 South. 907, 121 La. 879, 19 L. R. A. (N. S.) 759; *Estopinal v. Vogt*, 46 South. 908, 121 La. 883).

Plaintiff in *May*, 1884, was married to A., and, while she was still his wife, during the same month he married E., she being his plural wife. Thereafter he went to England as a missionary, and took with him his wife E. and her children, and resided and worked there. During his absence in England, his wife A. built a house in Salt Lake City, with money furnished by plaintiff, and during plaintiff's absence lived therein. Plaintiff never saw the house nor lived in it until after his return from England, during which time summons was attempted to be served on him in an action brought by defendant by leaving a copy at such house with his wife A., on which judgment was rendered against him by default, concerning which he had no knowledge until he returned from England. Held, that such house was not plaintiff's "usual place of abode" within Comp. Laws 1907, § 2948, subd. 8, authorizing substituted service by leaving a copy of the process at the defendant's usual place of abode with a suitable person at least fourteen years of age; the term "place of abode" as so used being the place where defendant lives or abides, his "then present residence," and is not synonymous with "domicile." *Grant v. Lawrence*, 108 Pac. 931, 933, 37 Utah, 450, Ann. Cas. 1912C, 280.

Under Code Civ. Proc. § 2150, the provision that an application for the discharge of an insolvent debtor must be addressed to the county court of the county "in which he resides" means that the debtor must have his "domicile" in such county. Counsel for petitioner urged that the "residence" required by the Code did not imply the place of domicile, but the court held that while it might be that a Chinese merchant whose domicile was in Hongkong, but his business residence in New York, could properly apply for a discharge, a petitioner domiciled in New Jersey could not apply. In *re Dimock*, 39 N. Y. Supp. 501, 502, 4 App. Div. 301.

Consolidated School Law, Laws 1894, c. 556, tit. 7, § 36, provides that the common schools shall be free to all persons of certain age, "residing in the district." Held that, where an orphan child had been placed by a society in the home of a resident of a school district under an arrangement whereby the society paid for his board and clothing, he was entitled to school privileges as a resident, though there was no arrangement as to the term of his abode in the district; the well-recognized policy of the state relating to education, as expressed in Const. art. 9, § 1; School Law, Laws 1894, c. 556, tit. 7, §§ 11, 59, 60; and Compulsory Education Law, Laws 1894, c. 671, §§ 2, 13, making it obvious

that it was not the legislative intent to employ the word "residence," as used in the school law, in the narrow sense of "domicile." *People ex rel. Brooklyn Children's Aid Soc. v. Hendrickson*, 104 N. Y. Supp. 122, 124, 125, 54 Misc. Rep. 337.

Inhabitation and residence do not mean precisely the same thing as "domicile," when the latter term is applied to personal estate; but they mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence. There must be a settled fixed abode, an intention to remain permanently at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. Defendant, after the rendition of the judgment sued on, went to Idaho, where she lived with her daughter in a rented house, and taught school there continuously thereafter, except during vacations, when she generally returned to Washington, always with the intention of returning to Idaho before the succeeding school year. Her visits to Washington were made to different localities, and not to the farm where she had previously resided; the house there having been first deserted and then wrecked by a windstorm and finally consumed by fire. Held, that defendant, after going to Idaho, became a nonresident of Washington within Ballinger's Ann. Codes & St. § 4808, providing that the time that a person shall reside out of the state shall not be taken as a part of the time limited for the commencement of the action. *Dignam v. Shaff*, 98 Pac. 1113, 1115, 51 Wash. 412, 22 L. R. A. (N. S.) 996 (quoting definition in *Wrigley's Case* [N. Y.] 4 Wend. 602; *Frost v. Brisbin* [N. Y.] 19 Wend. 11, 32 Am. Dec. 423).

"Domicile" and "citizenship" are substantially synonymous terms in most cases, but there is a marked distinction between "domicile" and "residence"; the term "residence" indicating a place of abode, whether permanent or temporary, while "domicile" denotes a fixed permanent residence, to which, when absent, one has the intention of returning, and when there has been an actual removal with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces on him the character of a citizen of the state where he has chosen his domicile, although he may have formerly declared that he nevertheless considered himself a citizen of the state he had left. *Harding v. Standard Oil Co.*, 182 Fed. 421, 423, 424.

A corporation organized to establish and maintain a school in a town for the education of young persons residing therein may receive pupils who are not domiciled inhabitants of the town, and may receive any young person temporarily or permanently re-

siding in the town, and one who takes up a temporary abode therein for the mere purpose of receiving instruction at the school is a resident therein; residence not necessarily importing domicile. *Hewitt v. Wheeler School and Library*, 72 Atl. 935, 937, 82 Conn. 188.

**Residence synonymous**

"Domicile," in its general and popular sense, denotes residence and should be treated as synonymous therewith. *St. Louis Southwestern Ry. Co. v. McKnight*, 89 S. W. 755, 758, 99 Tex. 289 (citing *Texas & Pacific Ry. Co. v. Edmiston* [Tex.] 52 S. W. 635).

At common law the words "residence" and "domicile" were used interchangeably; a domicile being a residence at a particular place, accompanied with proof of an intent to remain there for an unlimited time, and a residence being the abode of a person or incumbent or his benefice—opposed to nonresidence. *State ex rel. Kelly v. Shepperd*, 117 S. W. 1169, 1172, 218 Mo. 656, 131 Am. St. Rep. 568.

The terms "residence" and "domicile" have the same meaning as used in the attachment statutes making certain grounds for attachment depend on residence. *McDowell v. Friedman Bros. Shoe Co.*, 115 S. W. 1028, 1031, 135 Mo. App. 276.

The word "residence," in the statute fixing the venue of actions, is synonymous with the word "domicile," and the domicile of a person is the place in which he has voluntarily fixed his abode, not with a temporary purpose, but with the intention of making it his present home. *Wyrick v. Wyrick*, 145 S. W. 144, 146, 162 Mo. App. 723.

"Residence," as used in the Code of Civil Procedure, excepting those sections relating to attachment and service of process, and as used in other statutes, excepting those relating to taxation, is generally synonymous with "domicile," and means the permanent home and place to which, whenever absent for purposes of business or pleasure, one intends to return. *Hislop v. Taaffe*, 125 N. Y. Supp. 614, 615, 141 App. Div. 40.

As used in Rem. & Bal. Code, § 1284, subd. 1, providing that wills shall be proved and letters testamentary or of administration shall be granted in the county in which decedent was a resident or had his place of abode at his death, the word "resident" imports a domicile. *Buchholz v. Buchholz*, 115 Pac. 88, 89, 63 Wash. 213, Ann. Cas. 1912D, 395.

The word "residence," as used in Const. art. 2, §§ 1, 2, providing who are qualified electors, was there used as equivalent to "domicile," and was not intended to be understood in the more restricted sense of actual habitation or abode. *State ex rel. Goldsworthy v. Aldrich*, 14 R. I. 171, 176.

There is little or no distinction between "residence" of the voter or juror and his "domicile." There is no technical definition as to what constitutes a "residence," but it is chiefly a question of intent. The term "residence" implies permanency, or for an indefinite period. Hence temporary absence of a juror from the parish of his residence will not destroy his qualification for jury service therein, when, though living and working in another part of the state, he had no intention to change his permanent abode. *State v. Wimby*, 43 South. 984, 985, 119 La. 139, 12 L. R. A. (N. S.) 98, 121 Am. St. Rep. 507, 12 Ann. Cas. 643 (citing 2 Cyc. p. 200).

The "residence" referred to in Code, art. 16, § 35, providing that a bill for divorce shall be brought in the court where either the plaintiff or defendant resides, is equivalent to "domicile." *Harrison v. Harrison*, 84 Atl. 57, 58, 117 Md. 607.

"Residence," as used in a statute requiring a specified prior residence in the state as a jurisdictional prerequisite to the commencement of an action for divorce, means "domicile." *Beeman v. Kitzman*, 99 N. W. 171, 172, 124 Iowa, 86.

"Residence," within 24 Del. Laws, c. 221, § 9, authorizing an action for divorce when, at the time the cause of action arose, either party was a bona fide resident of the state and so continued, denotes a residence within the legal meaning of the word "domicile," which means a place where a person lives, or has his home, and to which, when absent, he intends to return, and from which he has no present purpose to depart; and a bona fide resident, though a subject of a foreign sovereign, may on proper grounds sue for divorce. *Cohen v. Cohen* (Del.) 84 Atl. 122, 123.

A wife who had been deserted by her husband came from New York to New Jersey in October, 1904, and filed a petition October 9, 1907. She resided in different places to find an inexpensive place, but, not two years before filing her petition, fixed her permanent residence at Asbury Park. Her intention when she came to New Jersey was to make New Jersey her future home in the state. Held, that her residence in the state from the beginning, with her intention to remain here, gave her a domicile within the state within the divorce act (P. L. 1902, p. 503), requiring two years' residence in the state during the time for which the desertion continues; the word "residence" meaning "domicile." *King v. King*, 71 Atl. 687, 74 N. J. Eq. 824, 135 Am. St. Rep. 731.

The word "residence," as employed in the election statutes, is synonymous with "home" or "domicile," and means a fixed or permanent abode or habitation to which the party, when absent, intends to return. The residence of an unmarried man, within Code,

§ 1090, declaring that no person shall vote in any precinct but that of his residence, and section 642, providing that each qualified elector may vote at a municipal election who is a resident of the city, etc., and at the time has been ten days a resident of the precinct in which he offers to vote, is the place where he rooms and sleeps, and not the place where he takes his meals. *State v. Savre*, 105 N. W. 387, 388, 129 Iowa, 122, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452 (citing *Vanderpoel v. O'Hanlon*, 5 N. W. 119, 53 Iowa, 246, 36 Am. Rep. 216; *Sharp v. McIntire*, 46 Pac. 115, 23 Colo. 99; *State ex rel. Goldsworthy v. Aldrich*, 14 R. I. 171; *Chase v. Miller*, 41 Pa. 403; *Hannon v. Grizard*, 89 N. C. 115).

The words "residence" and "domicile" are synonymous terms under the Wisconsin Statutes, and the domicile, when it is once acquired, is not lost until the party actually acquires another in another locality. For purposes of taxation, a person must have a residence or domicile somewhere, and cannot abandon a domicile once acquired until he has actually acquired another. *Kellogg v. Winnebago County Sup'rs*, 42 Wis. 97, 107 (citing *Hall v. Hall*, 25 Wis. 600).

The terms "residence," "abode," "domicile," and kindred terms, though differing somewhat in meaning, when used in inheritance tax laws have been held to be synonymous. In *re Moir's Estate*, 69 N. E. 905, 907, 207 Ill. 180, 99 Am. St. Rep. 205 (citing *Cool. Tax*, [2d Ed.] p. 369; *Thorndike v. City of Boston*, 1 Metc. [42 Mass.] 242; *Hayes v. Hayes*, 74 Ill. 312, 316; *Du Puy v. Wurtz*, 53 N. Y. 556, 561).

For purposes of taxation, the word "residence," as used in the statutes, means "domicile." *Barhydt v. Cross* (Iowa) 136 N. W. 525, 528, 40 L. R. A. (N. S.) 986.

At common law the words "residence" and "domicile" were used interchangeably and had practically the same meaning. The word "domicile" is defined by Mr. Burrill as being a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time; and residence, as defined by Blackstone, is "the abode of a person or incumbent or his benefice opposed to non-residence." Where a person works a farm keeping a furnished room in a house thereon which he occupied when there and claimed his residence there, but generally and continuously lodged with his parents in another school district because they were old and helpless and he considered it his duty to stay with them at night, returning to his farm every morning, the district where his farm was situated was the district of his residence within Rev. St. 1899, c. 149, providing that all personal property shall be assessed in the county and district where the owners reside. *State ex rel. Kelly v. Shep-*

*herd*, 117 S. W. 1169, 1172, 218 Mo. 656, 131 Am. St. Rep. 568.

Generally speaking, "domicile" and "residence" mean the same thing. And an inhabitant is defined to be one who has his domicile in a place or his fixed residence there. A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom. *State v. Snyder*, 82 S. W. 12, 23, 182 Mo. 462 (citing *Crawford v. Wilson* [N. Y.] 4 Barb. 504; *Cooley*, Const. Lim. pp. 903, 904).

Under Code Civ. Proc. § 984, providing that actions not specified in the two preceding sections must be tried in the county in which one of the parties resided at the time the action was commenced, the word "resided" means a permanent residence. One's home, as distinguished from a mere stopping place for the transaction of either business or pleasure. It is nearly or quite synonymous with the word "domiciled," the permanent home and the place to which, whenever absent, one intends to return. Hence under the statute where defendant lived with his family at a certain place where he kept his horses, carriages, and servants, had business interest, and paid taxes, and maintained an office for the transaction of business at another place where he kept an apartment which he used while at the latter place transacting business, the former place was his residence. *Washington v. Thomas*, 92 N. Y. Supp. 994, 996, 103 App. Div. 423.

#### DOMICILE BY OPERATION OF LAW

"Domicile by operation of law" is the domicile which a woman acquired by marriage. *Flynn v. Fidelity & Casualty Co.*, 145 Fed. 265, 266.

Where a husband and wife were married and resided in Utah where the husband abandoned the wife, the "domicile of matrimony" continued in the state of Utah. *State ex rel. Aldrich v. Morse*, 87 Pac. 705, 706, 31 Utah, 213, 7 L. R. A. (N. S.) 1127.

The "domicile of an infant" follows that of the father, notwithstanding the fact that the parents had separated and the father had promised to return the child to the mother at her request. *Lanning v. Gregory* (Tex.) 101 S. W. 484, 485.

"The 'domicile' of an infant is that of his father. \* \* \* This domicile remains until the infant legally acquires another, and, since the law conclusively disables infants from acting for themselves during minority, their domicile cannot be altered by their own acts before reaching majority. Hence the legal domicile of infant orphans is at the place where the father was domiciled at the time of his death." In the absence of proof to the contrary, it will be presumed that the minor children and heirs of a deceased person were residents of the

place of decedent's residence at the time of his death. In *re Bunting's Estate*, 84 Pac. 109, 112, 30 Utah, 251 (quoting and adopting definition in *Woerner, Law of Guardianship*, pp. 80, 81).

### DOMICILE OF CHOICE

To acquire a "domicile of choice," there must concur two things, an intention to change and a taking up of an actual abode at the place selected as a new domicile; and a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence, but also the carrying out of the intention by actual residence. *Boyd's Ex'r v. Commonwealth*, 149 S. W. 1022, 1023, 149 Ky. 764, 42 L. R. A. (N. S.) 580.

### DOMICILE OF CORPORATION

The "domicile of a corporation" is within the jurisdiction that creates it, but it is a well-settled principle that foreign corporations seeking to do business within another jurisdiction, with some exceptions, can only enter it for the purpose of doing business under a permit, when it is required, and the law granting the permission can impose conditions that practically submit such corporation to the jurisdiction of the state, so far as pertains to the business there carried on. *State v. Fidelity & Deposit Co. of Maryland*, 80 S. W. 544, 550, 35 Tex. Civ. App. 214.

Railroad corporations chartered by other states, but owning and operating railroads in this state, have the status of residents of this state, although they are not citizens of it, within the meaning of clause 1 of section 2 of article 3 and clause 1 of section 2 of article 4 of the Constitution of the United States, nor "domiciled" in this state in the technical sense of that term. *Baltimore & O. R. Co. v. Allen*, 52 S. E. 465, 472, 58 W. Va. 388, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975 (criticising *Railroad Co. v. Rogers*, 44 S. E. 300, 52 W. Va. 450, 62 L. R. A. 178).

The principal office or place of business of a corporation, especially in connection with the taxation of its property at such place, means its "domicile," which is the place where its governing power resides and is exercised, and, under the Tennessee statutes, where its charter is registered, and not where its ordinary business is conducted. *Southern Exp. Co. v. Patterson*, 123 S. W. 353, 359, 122 Tenn. 279 (citing 1 *Desty, Tax'n*, p. 341).

Where defendant contended that the plaintiff corporation was subject to the insolvent law because it was "domesticated" in the state, the court presumed the word "domesticated" was intended to convey, in conciliatory form, the information that plaintiff was "domiciled" in the state and therefore barred by the language and legal operation of the act. *Bergner & Engel Brewing Co. v. Dreyfus*, 51 N. E. 531, 532, 172 Mass. 154, 157, 70 Am. St. Rep. 251.

### DOMICILE OF ORIGIN

The "domicile of origin" is defined as the primary domicile of every person subject to the common law. In *re McElwaine's Will*, 137 N. Y. Supp. 681, 682, 77 Misc. Rep. 317.

The place of one's birth is his "domicile of origin," and during minority he is without power to change the domicile, though it may be changed for him by his parent, guardian, or person having legal custody of him; but after majority he may change the domicile and obtain a domicile of choice. *Boyd's Ex'r v. Commonwealth*, 149 S. W. 1022, 1023, 149 Ky. 764, 42 L. R. A. (N. S.) 580.

### DOMICILIARY LETTERS

Letters testamentary are of two kinds, "domiciliary letters" and ancillary letters"; the first being issued at the place of the testator's domicile, and the latter at some place, other than domicile, where personality of the testator is found. Such letters depend upon the situs of such personality, and do not authorize the administrator or representative to perform any act or to reduce to possession personality not within territorial authority of the court where issued. *Lockwood v. United States Steel Corp.* 138 N. Y. Supp. 725, 727, 153 App. Div. 655.

### DOMICILIATED

"Domiciliated," in a foreign state, means that residence in such state is intended to be permanent, with no intention of returning to a former residence. A temporary removal, accompanied at all times by an intention to reoccupy the former home, will not forfeit a homestead right once enjoyed in the state. *Gaar, Scott & Co. v. Burge*, 110 S. W. 181, 184, 49 Tex. Civ. App. 599 (citing *Cent. Dict.*; *Holliman's Heirs v. Peebles*, 1 Tex. 689; *Hardy v. De Leon*, 5 Tex. 235; *Lumpkin v. Nicholson*, 30 S. W. 568, 10 Tex. Civ. App. 108).

### DOMINANT CAUSE

As proximate cause, see *Proximate Cause*.

### DOMINANT ESTATE OR TENEMENT

A "dominant estate" consists in property situated above or higher than that of a lower or subservient estate. *Walther v. City of Cape Girardeau*, 149 S. W. 38, 38, 166 Mo. App. 467.

"When one part of an estate is dependent for enjoyment on some use in the nature of an easement in the other part, and the owner conveys either part without express provision on the subject, the part so dependent, thence called the "dominant estate," carries or reserves with it an easement of such use in the other, thence called the "servient estate." Where plaintiff, owning a city lot on which two stores were erected separated by a divi-

sion wall, conveyed the south half of the lot to defendant, which included the whole division wall, and did not reserve any easement in the wall or the property conveyed, no implied easement existed that entitled plaintiff to use the wall to sustain his remaining property, where there was no reason why plaintiff could not construct a new wall on his own property to sustain his building. *Cherry v. Brizzolara*, 116 S. W. 668, 671, 89 Ark. 309, 21 L. R. A. (N. S.) 508.

## DOMINIO

As defined in the Encyclopedia of Law and Procedure, "dominio" is the right or power to dispose freely of a thing, if the law, the will of the testator, or some agreement does not prevent. *Reade v. Lea*, 95 Pac. 131, 140, 14 N. M. 442; *Castillero v. United States*, 2 Black, 1, 17 L. Ed. 360.

## DOMINION

See Complete Dominion.

The word "dominion," in the rule that a donor, to make a valid gift *inter vivos* or *causa mortis*, must part, not only with the possession, but with the dominion, of the property, means perfect control in right of ownership; and dominion of personality under a gift from a married woman will not be full in the donee, though the donor had absolute title, if the delivery by the donor was legally imperfect, because acting alone and without her husband's consent to her exercise of the authority of disposition. *Bledsoe v. Fitts*, 105 S. W. 1142, 1144, 1145, 47 Tex. Civ. App. 578.

"Dominion," as applied to a conveyance, means "to pass the instrument of writing from one man to another, as symbolic of his transferring the land to the person to whom it is delivered." *Lancaster v. Lee*, 51 S. E. 139, 141, 71 S. C. 280.

An instruction that if, at the time of the execution of the will, testator was so clearly under the "dominion" of any person as to prevent the free exercise of his judgment, he was lacking in testamentary capacity, was not open to the objection that it did not qualify "dominion" by "wrongful," as the element of wrongfulness was imparted to the word "dominion" by the qualification that it must go to the extent of depriving the testator of the free exercise of his judgment. *Dowie v. Sutton*, 81 N. E. 395, 396, 401, 227 Ill. 183, 118 Am. St. Rep. 266.

## DONATE—DONATION

See Onerous Donation; Remunerative Donation.

A "donation" is the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person without consideration.

It is that which is transferred gratuitously, or without a valuable consideration. It is also public and serves some general purpose as distinguished from a "present." It is an act of kindness and courtesy or respect, as distinguished from a "gift," which is private and benefits the individual. *State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County*, 76 N. E. 986, 994, 166 Ind. 162 (citing *Bouv. Law Dict.*; *Webster's Dict.*; *Encyclopædic Dict.*; *Crabbe*).

"Donations" inhibited by Const. art. 1, par. 20, providing that no donation of land shall be made by the state or any municipal corporation to or for the use of any society, association, or corporation, means pure gifts. *Trustees of Rutgers College v. Morgan*, 60 Atl. 205, 207, 71 N. J. Law, 663. But payment by the city of a recognized moral obligation assumed by it for services rendered at its request is within the legislative power to authorize, and does not constitute a donation or appropriation of public funds within such prohibition. *Morris & E. R. Co. v. City of Newark*, 70 Atl. 194, 196, 76 N. J. Law, 555.

Const. art. 4, § 46, prohibiting the General Assembly from making any grant of public money to any individual, association, municipal, or other corporation whatsoever, does not prohibit the Legislature from making use of an individual or a corporation as a means through which it may apply appropriations to lawful purposes; and hence an ordinance of a city appropriating money to cover the expenses incurred by a policeman while in the performance of his duties as such officer in removing a nuisance from a public street, as expressly required by law, is not a "donation of public money to an individual" in violation of the Constitution. *State ex rel. Applegate v. Taylor*, 123 S. W. 892, 914, 224 Mo. 393 (quoting and adopting *State ex rel. Crow v. St. Louis*, 73 S. W. 623, 174 Mo. 125, 61 L. R. A. 593).

## DONATIO CAUSA MORTIS

See Gift Causa Mortis.

## DONATIO INTER VIVOS

See Gift Inter Vivos.

According to the lexicographers, a "donation" is a gift, and a gift is something which is freely given and without consideration, but that is not according to the law of Louisiana. According to the Louisiana Code, there are three kinds of donations, viz., gratuitous donations, the onerous donation, and the remunerative donation; the first being the free gift, the second being a gift burdened with charges imposed by the donor, the third being a gift the object of which is to recompense for services rendered. In either case, the donation must be made by authentic act and it must be accepted by the donee in precise terms. *Ackerman v. Larnier*, 40 South. 581, 587, 116 La. 101.

**DONATION (In Civil Law)**

See Gift; Onerous Donation; Remunerative Donation.

**DONATION DEED**

The term "donation deed," as used in *Mansf. Dig. § 4475*, providing that "no action for the recovery of any lands or the possession thereof against any person or persons, or their heirs or assigns, who may hold such lands \* \* \* under a 'donation deed' from the state shall be maintained unless it appears that the plaintiff's ancestors or predecessors or grantor was seised or possessed of the land in question within two years next before the commencement of such suit or action," means a deed executed by the auditor or commissioner of state lands whereby lands forfeited to the state on account of the non-payment of taxes are conveyed to actual settlers who have made improvements and resided thereon to the extent and in the manner prescribed by the statutes, or who have undertaken to do so. *Beasley v. Equitable Securities Co.*, 84 S. W. 224, 228, 72 Ark. 601.

**DONE**

See Business Done; Permanently Done.

Under a deed conveying land in consideration that the grantee would cultivate it and give the proceeds to the grantor during her life, and, if the grantee failed to do this and the grantor became dissatisfied, the deed to be null and void and the grantee to have pay "for what she has done," where the grantee failed to perform the agreement, and the grantor thereupon became dissatisfied and brought suit for a cancellation, the grantor was entitled to recover the land and its rental value during the grantee's occupancy, and the grantee was entitled to the enhancement in value of the land from improvements made by her and to the value of her work, labor, and services, but only so far as they were of benefit to the grantor, since the work could not be said to have been "done" for the grantor if of no benefit to her. *Jones v. Sandlin*, 75 S. E. 1075, 1076, 160 N. C. 150.

Under said implied covenants, an incumbrance upon property at the time the grantor acquired the title to it is not within the covenant against incumbrances "done, made or suffered" by the grantor, unless it appears that he was under personal obligation to pay it. *Polak v. Mattson*, 128 Pac. 89, 91, 22 Idaho, 727.

The use of the words "done in the presence of" two witnesses, in lieu of "signed and sealed in the presence of," does not render a tax deed void. The word "done" is as broad as, if not broader than, the words "signed and sealed," and may comprehend the idea of the execution as well as the signing and sealing. *Smith v. Phillips*, 41 South. 527, 529, 51 Fla. 327.

**DONEE**

As assignee, see Assignee.

While a usufructuary use may be given under a will, without devising the entire estate, an equitable estate given is sufficient to make the person to whom it is granted a "donee," within the statute against perpetuities. *Henry v. Henderson*, 58 South. 354, 357, 101 Miss. 751.

**DOOM**

Under an assessment of specific bank stock and money at interest, where defendant had returned no list and the assessors had no knowledge of any particular items of money at interest, but the assessment represented their judgment of the amount for which defendant was liable to be taxed on that account, the assessment of money at interest was a "doom" so called, and included all forms of interest-bearing securities whether represented by bonds, notes, or otherwise. *Sweetsir v. Chandler*, 56 Atl. 584, 586, 98 Me. 145.

**DOOR**

See Front Door; Permanent Door.  
Doors hung, see On and Hung.

A sheriff's return on an order providing for the surrender and reissue of county warrants, reciting that the sheriff posted notices at each "entrance" to the courthouses in two places specified, sufficiently showed that the notices were posted at the courthouse "door," as required by statute. *Yell County v. Wills*, 103 S. W. 618, 619, 83 Ark. 229.

**DOORWAY**

See Principal Doorway.

**DOP**

A "dop" is an implement for holding a diamond in position to polish the facets, the table, and the culet, in distinction from the harder or more violent processes of cutting the diamond. *American Patent Diamond Dop Co. v. Wood*, 189 Fed. 391, 392.

**DORMANCY—DORMANT**

While the statute relative to dormant judgments does not define "dormancy" or apply to a condition arising on the death of a party to the judgment, such condition is constantly spoken of as "dormancy," and a long line of decisions have assimilated this condition to that of a judgment dormant for want of the timely issuance of execution, until they must be regarded as practically identical. *Manley v. Mayer*, 75 Pac. 550, 556, 68 Kan. 377, 1 Ann. Cas. 825.

**DORMANT JUDGMENT**

A "dormant judgment" is one that has not been satisfied or barred by lapse of time,



but is temporarily inoperative, so far as the right to issue execution is concerned. *Gale Mfg. Co. v. Dupree* (Tex.) 146 S. W. 1048, 1051 (citing 3 Words and Phrases, p. 2183); *General Electric Co. v. Hurd*, 171 Fed. 984, 986; *White v. Ress*, 115 N. W. 301, 302, 80 Neb. 749 (quoting and adopting definition in *Draper v. Nixon*, 8 South. 489, 93 Ala. 436).

A "dormant judgment" is one on which execution was not issued within the time allowed by law. *Spiller v. Hollinger* (Tex.) 148 S. W. 338, 340. It is a judgment without generative vitality. In order that it may have efficiency, it must be awakened revived. It does not authorize the issuance of an execution, and all proceedings based on such judgment are void. *Denny v. Ross*, 79 Pac. 502, 503, 70 Kan. 720.

The word "dormant," as applied to judgments, is broad enough to cover judgments which have not wholly lost their vitality, but which cannot support an execution for want of necessary parties. *Manley v. Mayer*, 75 Pac. 550, 556, 68 Kan. 377, 1 Ann. Cas. 825.

Under Rev. St. Mo. 1899, § 4022, providing that executions cannot be issued by a justice of the peace after three years without revivor, a judgment not revived within three years is "dormant"; in a state of suspended animation, in which state nothing can be done toward enforcing it. *Blick v. Boyd*, 100 S. W. 1128, 1129, 124 Mo. App. 58.

A judgment obtained in a justice's court is "dormant," where the execution issued thereon is more than seven years old, and neither the execution nor any official entry thereon has been entered upon the superior court execution docket, although it has, within the period named, been entered on the general execution docket, and under such circumstances will not support garnishment proceedings. *Ingram v. Jackson Mercantile Co.*, 58 S. E. 372, 373, 2 Ga. App. 218.

A decree for alimony is not a judgment within the meaning of Rev. St. § 5380, which provides that a judgment on which execution has not issued for five years shall become "dormant" and shall cease to operate as a lien on real estate; nor within section 5357, which provides for the revivor of a "dormant judgment." *Lemert v. Lemert*, 74 N. E. 194, 195, 72 Ohio St. 364, 106 Am. St. Rep. 621, 2 Ann. Cas. 914.

A "dormant judgment" is a debt of record, and the rule requiring the defendant to plead the statute of limitations if he desires to take advantage of the bar applies to a proceeding instituted thereon, whether it be an ordinary suit on the judgment, or a scire facias to revive the same. *Helms v. Marshall*, 49 S. E. 733, 734, 121 Ga. 769 (citing *Lewis v. Allen*, 68 Ga. 400).

#### DORMANT PARTNER

A "dormant partner" is one who takes no part in the business and whose connection

with it is unknown. Both secrecy and inactivity are implied thereby. *National Bank of Salem v. Thomas*, 47 N. Y. 15, 19 (citing *Pars. Partn.* 33; *Winship v. Bank of United States*, 5 Pet. [30 U. S.] 573, 8 L. Ed. 216; *North v. Bloss*, 30 N. Y. 374); *Wm. L. Allen & Co. v. Davids*, 49 S. E. 846, 848, 70 S. C. 260 (citing *Reab v. Pool*, 8 S. E. 703, 30 S. C. 140, 144). A partner who, though inactive, was not a secret partner, and hence not a dormant partner, was not relieved of the necessity of giving notice of retirement to escape liability for goods sold to the firm under the old name. *Griggs & Co. v. Levy*, 117 N. Y. Supp. 116, 117, 63 Misc. Rep. 348.

Where a "partnership" was composed of three persons, but two of them were the sole administrative agents thereof, using their judgment for the judgment and skill of the partnership without consultation with the third partner as to any matters connected with the partnership, the third partner, who permitted the other two to hold themselves out and to act as the sole members of the firm, was a "dormant partner," within the construction given to that term that it implies the quality of secrecy and inactivity, but that it is often used as synonymous with "unknown," and that a "dormant partner" combines in himself the character of both the secret and the silent partners. *Knelsley Lumber Co. v. Edward B. Stoddard Co.*, 109 S. W. 840, 841, 845, 131 Mo. App. 15.

#### DOSER

A "doser" is a flat car equipped with wings, constructed of steel and wood, which may be raised and lowered, the purpose of which is to improve the railway roadbed close to the ends of the ties. *Winter v. Great Northern Ry. Co.*, 136 N. W. 1069, 118 Minn. 487.

#### DOTAL PROPERTY

"Dotal property" is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called "paraphernal property," is that which forms no part of the dowry. *Nalle v. Young*, 16 Sup. Ct. 420, 425, 160 U. S. 624, 40 L. Ed. 560 (citing *Fleitas v. Richardson*, 13 Sup. Ct. 495, 147 U. S. 550, 553, 37 L. Ed. 276; *Rev. Civ. Code La. arts. 2332, 2399, 2334, 2335*).

#### DOUBLE

The word "double," in Code Pub. Gen. Laws 1888, art. 23, § 85 L, as added by Laws 1892, c. 109, providing that every stockholder of a bank or trust company shall be liable to depositors and creditors for double the amount of stock at par value held by such stockholder in the corporation, means twice the par value of the stock held in addition to the amount paid by them on their stock sub-

scription. It is therefore immaterial whether the stockholder has paid his subscription in full or not. *Murphy v. Wheatley*, 63 Atl. 62, 63, 102 Md. 501.

### DOUBLE ASSESSMENT

Where city lots were assessed as acreage property at a certain valuation, and this assessment was not objected to either by the assessor or by the board of equalization, and the owner paid the taxes levied on such assessment, a subsequent assessment of the property by lots and blocks to unknown owners constituted a "double assessment." *McMickle v. Rochelle* (Tex.) 125 S. W. 74, 75.

### DOUBLE BLAST

A "double blast," when used as a signal by meeting vessels under steam, means, "I am directing my course to port." *The William Chisholm*, 153 Fed. 704, 712, 82 C. C. A. 562.

### DOUBLE BOND

See Simplex Obligatio.

### DOUBLE COSTS

By "double costs" is meant twice the amount of ordinary costs. *Hopper v. Smith*, 60 A. 63, 64, 72 N. J. Law, 168.

### DOUBLE CUT

When the engine upon the lead track moved back with sufficient force so that the momentum of uncoupled cars, when the train is slackened, is sufficient to carry such cars upon the switch track, the operation is what is known as a "double cut." *Griffin v. Minnesota Transfer Ry. Co.*, 102 N. W. 391, 392, 94 Minn. 191.

### DOUBLE DAMAGES

Damages as including, see Damage—Damages.

The word "double" in a statute giving "double" damages for killing any horse in an inclosure not fenced, cannot be construed to mean one-half a unit, or the amount found by the jury, and, where the verdict was for \$160, authorizes a judgment for \$320. *Withington v. Hilderbrand*, 1 Mo. 280, 281.

### DOUBLE ENTRY

The phrase "double entry," as used in bookkeeping, signifies two entries of the same transaction. *United States v. Morse*, 161 Fed. 429, 437.

### DOUBLE HEADER

The term "double header," as used in the operation of railroads, means a train drawn by two engines. *Vencill v. Quincy, O. & K. C. R. Co.*, 112 S. W. 1030, 1031, 132 Mo. App. 722; *Galveston, etc., R. Co. v. Jenkins*, 69 S. W. 233, 29 Tex. Civ. App. 440.

### DOUBLE INSURANCE

"Double insurance" or "co-insurance" occurs when several policies are effected for

the benefit of the same person on the same subject-matter, while "re-insurance" is effected by the insurer for his own protection. *Ocean S. S. Co. v. Aetna Ins. Co.*, 121 Fed. 882, 887.

The term "double insurance" means an insurance of the same interest, and is entirely different from "reinsurance," which is a contract of indemnity to the person or corporation reinsured for the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. *Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co.*, 166 Fed. 548, 553.

When two or more policies are taken out on the same interest, it is called "double insurance"; and, where the policies in case of double insurance contain no provision that the several insurers shall be liable in case of loss, each for such a proportion of the loss as the several amounts insured bear to each other, the insured may resort to any of the insurers to recover the whole loss; and such insurer, upon the payment of the whole loss, may resort to the other insurers for their respective contributions. Such insurers are regarded in the light of cosureties and identical in interest; but where the policies constituting double insurance provide that the insurer is to be bound to prorate in case of double insurance according to the whole amount insured, whether the same is valid or invalid, the insured cannot recover from any one of the insurers a greater proportion of the loss sustained than the sum insured by that insurer bears to the whole amount insured thereon. A condition in a policy for pro rata payment in case of other insurance, "valid or invalid," does not apply to policies issued at the instance of agents of the first company and without the knowledge, consent, or ratification of the insured. *London & L. Fire Ins. Co. v. Turnbull*, 5 S. W. 542, 544, 86 Ky. 230.

A towing company insured a cargo of corn under a policy issued to it "on account of whom it may concern." The owner of the cargo also had it insured. Held, that in the absence of adoption by the owner of the towing company's insurance, or unless it was within the contemplation of the towing company that the owner should receive the insurance, the policy issued to such company did not inure to the benefit of the owner, so as to result in "double insurance," within a clause of the policy providing that, if the insured shall have any other insurance upon the property prior in date thereto, then the company shall be answerable only for the deficiency required to fully recover the property insured. *Western Assur. Co. v. Chesapeake Lighterage & Towing Co.*, 65 Atl. 637, 639, 105 Md. 232, 11 Ann. Cas. 956.

### DOUBLE-LINE RATES

The distinction in Laws 1905, c. 353, establishing rates for transportation of oil, be-

tween "single-line rates" and "double-line rates," is between rates for shipment over a single line and for shipment over more than one line. *Tucker v. Missouri Pac. Ry. Co.*, 108 Pac. 89, 90, 82 Kan. 222.

### DOUBLE-TAPE FUSE

One essential difference between a "double-tape fuse" and a "triple-tape fuse" is that the double-tape fuse lacks one outside wrapper that belongs to the triple-tape. The additional wrapper is a greater protection against moisture and makes the triple-tape article safer where dampness is encountered. Another difference is found in the fact that with the absence of the additional wrapper on double-tape fuse it is not as firm as the triple-tape, and in the process of tamping some small pieces of rock or coal may be tamped against it and produce a dent that may break the progress of the fire when ignited. *Curran v. Seattle & S. F. Ry. & Nav. Co.*, 76 Pac. 87, 88, 34 Wash. 512.

### DOUBLE TAXATION

"Double taxation" exists only where levied upon the same property in the same jurisdiction, and hence the taxation of shares in a foreign corporation is not obnoxious, as being double, because they have been taxed in another state. *Judy v. Beckwith*, 114 N. W. 565, 568, 137 Iowa, 24, 15 L. R. A. (N. S.) 142, 15 Ann. Cas. 890.

"By 'duplicate taxation' is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once; but, where the same property represents distinct values belonging to different persons, the fact that each is taxed on the value which the property represents in his hands does not constitute 'double taxation.'" *Harvey Coal & Coke Co. v. Dillon*, 53 S. E. 928, 941, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

The taxation of a real estate mortgage in addition to the taxation of the real estate itself is not "double taxation," though the mortgagor may pay the tax both upon the real estate and the mortgage. *Stumpf v. Storz*, 120 N. W. 618, 619, 156 Mich. 228, 23 L. R. A. (N. S.) 152.

It is not "double taxation" to impose a license tax on a business and at the same time to tax the capital used by the ad valorem system. *Bradley v. City of Richmond*, 66 S. E. 872, 874, 110 Va. 521.

"The imposition of a tax twice upon one person for the same purpose because of his ownership of a particular piece of property would be a 'double tax' and invalid." *William S. Wilkens Co. v. Mayor, etc., of City of Baltimore*, 63 Atl. 562, 565, 103 Md. 293, 7 Ann. Cas. 1192 (quoting and adopting definition in *United States Electric Power & Light Co. v. State*, 28 Atl. 768, 79 Md. 63).

### DOUBLE TRACK

An ordinance granting a street railroad company the right to lay its tracks required the single tracks to be laid in the center of the streets, and authorized double tracks on a certain street, to be laid on either side of the center of the street. The company sought to construct in a certain block of such street two tracks which continued parallel for a short distance on each side of the center line, when they reunited with the single track. Held, that the word "switch" has a meaning in addition to its technical meaning, depending upon its character, the word ordinarily meaning a side track constructed to permit the passage of cars from and to the main track; and the track which the company sought to construct was a "switch," and not a "double track," within the meaning of the ordinance. *City of Denison v. Denison & S. Ry. Co.*, 127 S. W. 804, 103 Tex. 344.

### DOUBT

See Fair Doubt; Reasonable Doubt; Simple Doubt.

"Doubt" is a state of mind in which a conclusion cannot be reached upon the question before it. If it is not due to mental inability to co-ordinate facts in evidence, it must arise from the absence of some material fact, or because such a fact has not been sufficiently established by the evidence, and therefore the foundations for belief are insufficient. *People v. Bonifacio*, 82 N. E. 1098, 1099, 190 N. Y. 150.

By "doubts" arising in the construction of statutes is not meant those which are engendered by the predilection of the court or its own notions of what the law ought to be, but such doubts as are inherent in the nature of the problem to be solved. *St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931, 934, 86 C. C. A. 95, 14 Ann. Cas. 233.

### DOUBTFUL CLAIM

A "doubtful or disputed claim," sufficient to constitute a good consideration for an executory contract or compromise, is one honestly and in good faith asserted, arising from a state of facts on which a cause of action can be predicated, with a reasonable belief on the part of the party asserting it that he has a fair chance of sustaining his claim, and concerning which an honest controversy may arise, though in fact the claim may be wholly unfounded. *Sharp v. Bowle*, 76 Pac. 62, 65, 142 Cal. 462 (quoting *Beach, Contracts*, § 175).

### DOUBTFUL LANGUAGE

The term "doubtful or ambiguous language," as applied by a court to a contract made with reference to a law, means language whose true meaning can find no exposition by reference alone to the language of the law itself. *Hale Bros. v. Millikin*, 90 Pac. 365, 371, 5 Cal. App. 344.

**DOUBTFUL TITLE**

A title is "doubtful" if it exposes the party holding it to the hazard of litigation. A title was so doubtful that the purchaser should not be compelled to accept the same, where it rested on a deed executed by a foreign assignee by order of a court of Iowa, though the vendor obtained judgment quieting title on service by publication against the foreign assignor, the assignee, and the party to whom the assignee had conveyed. *McNutt v. Nellans*, 108 Pac. 834, 835, 82 Kan. 424.

The term "doubt or supposed flaw," as used in cases relating to salability of land titles, refers to the character of the doubt or flaw as the court views it, and not as it may be viewed by the indeterminate judgment of the real estate market. A title dependent on a fact is not doubtful or unmarketable where the fact is so conclusively proved in a suit by the vendor for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and where there is no reasonable ground for apprehending that the same fact cannot be in like manner proved, if necessary, at any time thereafter, for the protection of the purchaser. *Barger v. Gery*, 53 Atl. 483, 485, 64 N. J. Eq. 263.

**DOUBTING**

See Not Doubting.

**DOWER**

See As Dower; Election Dower; Husband's Dower; Inchoate Right of Dower.

In lieu of dower, see In Lieu of.

Subject to dower, see Subject To.

The word "dower" has a well-defined and generally understood legal meaning. It is that portion of lands or tenements which the wife hath for the term of her life of the lands or tenements of her husband after his decease for the sustenance of herself and the nurture and education of her children. In re *Martens*, 94 N. Y. Supp. 297, 300, 106 App. Div. 50 (citing 14 Cyc. p. 880).

"Dower" is a right which, inchoate during the coverture, becomes absolutely vested in the wife, as an estate, on the death of her husband; and it is as much beyond his control or power of disposition as her own inheritance. It not being his to give, every devise which he makes of the land upon which the right of dower attaches is presumed to be given subject to the legal estate, unless the contrary appears on the face of the will, in express words or by the strongest kind of implication. *Nagle v. Tieperman*, 88 Pac. 969, 970, 74 Kan. 32, 9 L. R. A. (N. S.) 674, 10 Ann. Cas. 977; (quoting and adopting definition in *Cunningham v. Shannon* [S. C.] 4 Rich. Eq. 135, 140; *Chrisman v. Linderman*, 100 S. W. 1090, 1094, 202 Mo.

605, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822.

"Dower" accrues to the widow, and not to the wife, and until she becomes a widow her right is inchoate and contingent. Her claim can only become effective on the death of her husband and her survival. *Sherman v. Hayward*, 90 N. Y. Supp. 481, 482, 98 App. Div. 254.

Statutory allowances to a widow are not part of "dower" proper, although partaking of its nature. *Ellis v. Ellis*, 96 S. W. 260, 261, 119 Mo. App. 63 (citing *Bryant v. McCune*, 49 Mo. 546). Dower in land is taken free from the husband's debts. *Brown v. Tucker's Estate*, 117 S. W. 96, 97, 135 Mo. App. 598.

"Dower" ordinarily means the interest which the law gives to a widow in the lands of her deceased husband, and has no application to the relation of parent and child. *Middleworth v. Ordway*, 84 N. E. 291, 293, 191 N. Y. 404.

**Assignment of dower distinguished**

See Assignment of Dower.

**Thirds distinguished**

The words "dower" and "thirds" in themselves have each a uniform, established meaning both in law and in common usage; the former meaning a widow's life estate in one-third of the inheritable real estate of which the husband was seised during coverture, and the latter meaning her absolute estate in one-third of her husband's personal property remaining after payment of his debts. *Shipley v. Mercantile Trust & Deposit Co.*, 62 Atl. 814-818, 102 Md. 649.

**As chose in action**

See Chose in Action.

**As an estate in land**

"Dower" is the right of a wife to an estate for life in one-third of the lands, according to valuation, of which the husband was seised and possessed at the time of his death. *Cole v. Cole*, 68 S. E. 784, 785, 135 Ga. 19. It is subject to be dealt with as any other life estate. The interest of the life tenant or dowress is subject to levy and sale at the instance of her creditors. *Rusk v. Hill*, 49 S. E. 261, 121 Ga. 379.

Dower is an interest in land of which the husband is seised during coverture, arising in favor of the wife upon the consummation of marriage and the seisin of the husband. *Elder v. McIntosh*, 70 S. E. 807, 809, 88 S. C. 286.

"Dower" is a freehold estate which can never be carved out of an estate for years. *Moss Point Lumber Co. v. Board of Sup'rs*, 42 South. 290, 298, 89 Miss. 448.

"Dower" is not an estate in land, vested or otherwise. *McKelvey v. McKelvey*, 89 Pac. 663, 666, 75 Kan. 325, 121 Am. St. Rep. 435.

"Dower of use" constitutes a life estate. *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 68 S. E. 929, 930, 153 N. C. 49.

**As incumbrance**

See Incumbrance.

**As interest in property**

See Interest (In Property).

**As a lien**

"Dower" is not a mortgage or lien of any kind, but an estate. It is an incumbrance in the sense that it incumbers a title. *Wilson v. Wilson*, 105 N. Y. Supp. 151, 153, 120 App. Div. 581.

**As applying to personalty**

The fact that Rev. St. 1909, § 349, giving to a widow a child's part of her husband's personal property, is in the chapter entitled "Dower," does not make such widow's provision dower, nor require its admeasurement in the manner prescribed for the admeasurement of dower in real property. *Howard v. Strode*, 146 S. W. 792, 794, 242 Mo. 210, Ann. Cas. 1913C, 1057.

Where a testator made a devise to his wife, intending that she should receive no other property from his estate, and used the term "dower" to express that, that term will not be given its technical meaning. *Zook v. Welty*, 137 S. W. 989, 991, 156 Mo. App. 703.

**DOWER INTEREST**

As estate, see Estate.

During the life of the husband, "dower interest," the statutory interest which a wife has in the real estate of her husband prior to his death, is in no sense a vested one growing out of the marriage contract, but a mere expectancy or possibility incident to the marriage relation, contingent on her surviving the husband. *Stitt v. Smith*, 113 N. W. 632, 633, 102 Minn. 253, 13 L. R. A. (N. S.) 723 (citing *Randall v. Krieger*, 23 Wall. [90 U. S.] 137, 148, 23 L. Ed. 124; *Griswold v. McGee*, 112 N. W. 1020, 102 Minn. 114, 12 Ann. Cas. 186; *Morrison v. Rice*, 29 N. W. 168, 35 Minn. 436).

**DOWN**

See Handed Down.

**DOWNRIGHT EVIDENCE**

An instruction requiring the jury to determine all disputed facts by a preponderance of testimony covers a requested instruction requiring plaintiff to establish certain facts by "downright evidence." *Roe v. Bachelder*, 41 Wis. 360, 363.

**DOZEN**

See Per Dozen.

**DR.**

"The abbreviations 'Cr.' and 'Dr.' when used in bookkeeping, mean to enter upon the

credit and debit sides of the account respectively. They are generally used as adjectives, descriptive of the side of the account. They may also be used as nouns, the first as designating a person to whom an obligation accrues, and the latter the person on whom the obligation rests, as creditor and debtor, and they may be used as words to designate the act of crediting or debiting an item on an account, but in none of these senses are they used to denote a present matured indebtedness. When a statement of account is made out using the term 'Dr.,' without more, it simply indicates that the person owes the various items. It does not indicate a matured indebtedness." *Jaqua v. Shewalter*, 37 N. E. 1072, 1073, 10 Ind. App. 234.

**DRAFT**

**DRAFT (In Commercial Law)**

See Overdraft; Sight Draft against Papers.

"Draft" and "Bill of Exchange" are synonymous. *United States v. Green*, 136 Fed. 618, 648.

**As assignment**

See Assignment.

**As money**

See Money.

**As payment**

See Payment.

**As property**

See Property.

**DRAIN**

See Natural Drain.

Extension of drain, see Extend—Extension.

The term "drain" has no technical or exact meaning, but, as generally understood, means any artificial channel or drainage for the removal of water. *Benzoni Drainage Commission v. Winn*, 53 South. 778, 779, 98 Miss. 359.

The word "drain" is synonymous with "water course," as used in the County Ditch Law, and the county commissioners are without authority to convert a living stream of water into a ditch by proceedings for the locating and constructing of a ditch. *Greene County Com'rs v. Harbine*, 78 N. E. 521, 522, 74 Ohio St. 318.

Under Comp. Laws 1897, § 4309, defining the word "drain" to include any water course or ditch, opened or proposed to be opened and improved for the purpose of drainage and any artificial ditch proposed or constructed for such purpose, and section 4312 declaring that the drain commissioner shall have jurisdiction over all drains within his county, where a railroad originally maintained an open culvert over a water course

and afterwards filled up the culvert and inserted an iron pipe for drainage, after which the drainage commissioner established a new drain, crossing the railroad's right of way at the point of the culvert, the commissioner could invoke the aid of the court to assist him in opening a culvert through the railroad fill. *Pere Marquette R. Co. v. Well-nau*, 122 N. W. 303, 305, 157 Mich. 699.

Where the owner of lower lands connects a drain to a drain constructed by the owner of upper lands, the drain so connected is under the direct provisions of Laws 1889, p. 116, §§ 1, 3, a "drain for the mutual benefit of all the lands interested" therein, and none of the parties have the right, without the consent of all the parties interested therein, to fill it up or in any manner interfere therewith so as to obstruct the flow of water therein. *Dorman v. Droll*, 74 N. E. 152, 154, 215 Ill. 262.

#### **Ditch synonymous**

The words "drain" and "ditch" have no exact or technical meaning; they both may mean a hollow or open place in the ground, natural or artificial, where water is collected or conducted off, and if sufficiently defined they may bound land as other natural objects. *Sherrod v. Battle*, 70 S. E. 834, 836, 154 N. C. 345.

#### **Sewers**

The only difference between "drains" and "sewers" is that they are called sewers in cities and closely populated communities, while they are called drains in rural and agricultural communities, and the further difference that sewers are generally covered over to prevent the escape and dissemination of foul odors and noxious gases and conceal the passage of their contents through the streets, while drains are open. There is, however, no difference in the legal principles applicable to the two. *Mound City Land & Stock Co. v. Miller*, 70 S. W. 721, 724, 170 Mo. 240, 60 L. R. A. 190, 94 Am. St. Rep. 727.

#### **DRAIN VALVE**

See Bleed or Drain Valve

#### **DRAINAGE**

See Combined Drainage.

#### **As improvement**

See Improvement.

#### **As public use**

See Public Use.

#### **DRAINAGE BASIN**

Under the Oregon act (Laws 1909, p. 78) which provides for incorporation of ports, and that where the limits of a port do not include an entire county they shall not extend beyond the natural watershed of any drainage basin whose waters flow into another bay, estuary, or navigable river, the drainage basin of a bay comprises all its

arms and inlets, and land situated on the watershed of a slough constituting an arm of the bay was properly included in the territory of a port established on the bay. *Hale v. Sengstacken*, 192 Fed. 641, 642.

#### **DRAINAGE DISTRICT**

See Interest of Drainage District.

As county purpose, see County Purpose.

As municipal corporation, see Municipal Corporation.

As political subdivision, see Political Subdivision.

As public corporation, see Public Corporation.

A drainage district is a "voluntary quasi corporation" organized for a special and limited purpose. *Barton v. Minnie Creek Drainage Dist.*, 112 Ill. App. 640, 644. It is a local subdivision of the state, created for the purpose of administering therein certain functions of local government. *People ex rel. Wetz v. Hepler*, 88 N. E. 491, 492, 240 Ill. 196.

#### **DRAINAGE PROCEEDING**

As civil case, see Civil Action—Case—Suit—etc.

As suit, see Suit.

Expenses of drainage proceedings, see Expenses.

#### **DRAINAGE OF LAND**

The term "drainage of land" has practically the same application as "reclamation." The one is the means employed, the other the result. *Laguna Drainage Dist. v. Charles Martin Co.*, 77 Pac. 933, 935, 144 Cal. 209.

#### **DRAMA**

See, also, Play.

#### **DRAMATIC COMPOSITION**

A stage performance consisting of the singing of well-known songs by a woman dressed to personate other singers, prefaced by a short and commonplace dialogue having no reference to such performance, and with a kinetoscope exhibition during the intervals when the performer is changing costume, in which she is shown while making such changes by means of moving pictures previously taken photographically on a film, is not a "dramatic composition." *Barnes v. Miner*, 122 Fed. 480, 490.

A sketch, consisting of a series of recitations and songs, with a very little dialogue and action, and with scenery, and lights thrown upon the singer, is a "dramatico-musical composition," within the provisions of the copyright law. Under Copyright Law, § 5, providing that an error in classification shall not invalidate a copyright, the classification of a dramatico-musical composition as a dramatic composition does not affect the

validity of the copyright. *Green v. Luby*, 177 Fed. 287, 288.

### DRAMATIZE

The public exhibition of moving pictures of the incidents of a copyrighted book is an infringement of the exclusive right given to the author by U. S. Rev. St. § 4952, as amended, to dramatize his work. *Kalem Co. v. Harper Bros.*, 32 Sup. Ct. 20, 21, 222 U. S. 55, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

### DRAMSHOP

Webster defines a "dramshop" as "a shop or barroom where spirits are sold by the dram." *Malkan v. City of Chicago*, 75 N. E. 548, 551, 217 Ill. 471, 2 L. R. A. (N. S.) 488, 3 Ann. Cas. 1104. It is a place where one is engaged in the sale of intoxicating liquors as a business. *State ex rel. Young v. Minnesota Club*, 119 N. W. 494, 496, 106 Minn. 515, 20 L. R. A. (N. S.) 1101.

In some jurisdictions there is a distinction made between a "dramshop" and a "tippling house"; in others no distinction is recognized. Both are places where intoxicating liquors may be purchased at retail. In a legislative sense there is a recognized distinction made between them in Missouri. The Legislature has designated a licensed place for the sale of intoxicating liquors as a dramshop, and to be a dramshop, as known to the law, it must be licensed. The charter of cities of the third class does not authorize the suppression of the dramshop known as such by the general law. Such cities have no power either under the authority to suppress tippling houses, or under the general law regulating dramshops, to adopt an ordinance making it unlawful for a keeper of a dramshop to allow women to enter it and obtain liquor. *City of Joplin v. Jacobs*, 96 S. W. 219, 220, 119 Mo. App. 184.

A "dramshop," as defined by statute, is a place where spirituous or vinous or malt liquors are retailed in quantities of less than one gallon. The term has in popular acceptance a more restricted meaning, and is commonly used to designate a place where intoxicating liquor is sold at a public bar. The dispensing by a bona fide social club to its members without profit, and as incidental merely to its organization, of intoxicating liquors is a violation of the statute declaring a punishment for whoever, not having a license to keep a dramshop, sells intoxicating liquors to be drunk on the premises. *South Shore Country Club v. People*, 81 N. E. 805, 806, 228 Ill. 75, 12 L. R. A. (N. S.) 519, 119 Am. St. Rep. 417, 10 Ann. Cas. 383.

Whether or not a restaurant is a "dramshop" depends upon the character of the business that is carried on therein. *Denver City Ordinance 1892, No. 102, § 1*, providing

that no person or corporation within the city shall directly or indirectly sell or give away any intoxicating or malt liquors, to be drunk on the premises where sold or given away, without a license first obtained from the city, was applicable to a person who was a bona fide restaurant keeper, and who sold liquor only to customers to be drunk only in connection with a meal. *Scanlon v. City of Denver*, 88 Pac. 156, 157, 38 Colo. 401.

### DRAMSHOP KEEPER

A "dramshop keeper" is defined by Rev. St. 1899, § 2990, as a person licensed to sell intoxicating liquors in any quantity not exceeding 10 gallons, and section 2991 provides that no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop keeper. *St. Louis City Ordinances, § 2030*, defines a dramshop keeper as a person permitted by law or ordinance to sell intoxicating liquors in any quantity less than one gallon, and forbids any one selling intoxicating liquors in less quantities than a gallon without a license under the ordinance. Held, that the words "dramshop keeper," in the ordinance, have a wider significance than that given them by the statute, and that the words should be construed as defined in the statute and the ordinance, respectively, for the particular provisions of each; and hence, there being nothing in the ordinance which impinges on any right of a dramshop keeper under the statute, the ordinance is not in conflict with the statute. *City of St. Louis v. Tielkemeyer*, 125 S. W. 1123, 1126, 226 Mo. 130; *Same v. Glum*, 125 S. W. 1128, 226 Mo. 147.

The term "dramshop keeper" implies a license to sell intoxicating liquors. *State v. Barnett*, 85 S. W. 613, 614, 110 Mo. App. 592 (citing *State v. Shafer*, 82 Mo. App. 58).

### DRAUGHT OR DRIVING VEHICLE

A tramway upon which small cars were operated by gravity, except for a short distance, when sometimes used to haul dirt from the pits to plaintiff's brickmaking machinery would not be included with the provision of an insurance policy exempting the company from losses caused by any "draught or driving animal or vehicle." *South Knoxville Brick Co. v. Empire State Surety Co.*, 150 S. W. 92, 93, 126 Tenn. 402.

### DRAW

#### As depression in land

"In the state of Nebraska, whose surface consists of more or less rolling plains, the action of the elements has caused by erosion a system of natural drainage channels, locally termed 'draws' or 'ravines,' usually beginning with a slight depression in

the surface and gradually deepening as they reach well-defined streams and water courses, which are, as compared with those of more humid states, comparatively few in number. These draws form natural drainage channels for surface water and are largely instrumental in promoting the interests of agriculture and the healthfulness and salubrity of the climate by furnishing an unsurpassed natural drainage system, and thus quickly removing from the soil any excess rains or melting snows. These channels are usually dry, but are often deep enough with running water after storms to swim a horse. They afford almost the only means of surface drainage available to the husbandman, and his right to the use of the same, reasonably exercised, should not lightly be impaired. *Aldritt v. Fleischauer*, 103 N. W. 1084, 1085, 74 Neb. 66, 70 L. R. A. 301.

#### As applied to warrants

While, under the statute providing that the county supervisor shall "draw" his warrant, he need not personally write the whole warrant, or fill up the blank spaces, the word "draw" being used in the sense of "issue," yet it is his duty before signing them to examine the claims for payment of which they issued, and see that they are proper, and have been itemized, verified, and approved as required by statute, which duty he cannot delegate, except at the peril of himself and bondsman. *Richland County v. Owens*, 75 S. E. 549, 551, 552, 92 S. C. 329.

#### DRAWING

See Shop Drawing.

The punishment known as "drawing" consists in tying a culprit's feet to a horse's tail and dragging him along the ground to the place of his execution. *State v. Woodward*, 69 S. E. 385, 388, 68 W. Va. 66, 30 L. R. A. (N. S.) 1004.

The word "drawings" means a representation of objects made with a point, such as a pen, pencil, or crayon, and may be applied to an incomplete sketch as well as to finished plans. In an action by an architect to recover for his services, an instruction was not improper for referring to incomplete plans as drawings. *Atchison v. McKinnie*, 84 N. E. 208, 209, 233 Ill. 106.

Where the coal in any division or section of a mine has been exhausted, all the miners are withdrawn from that particular place, and the stumps or pillars of coal supporting the roof over the room in which the miners work are taken out for the coal they contain. In removing them, props of timber are used to support the roof. The removing of these pillars or stumps is called "drawing the stumps." *East Jellico Coal Co. v. Golden* (Ky.) 79 S. W. 291, 292.

#### DRAWN IN QUESTION

Where real estate is held by virtue of some right in the property, so that the right

of possession cannot be determined without adjusting the right in the property itself, then the "title to real estate" is "drawn in question," within the meaning of the statute, stating that "justice courts cannot try actions which involve title to real estate, or in which such title is drawn in question." *Stone v. Blanchard*, 126 N. W. 766, 768, 87 Neb. 1.

The validity of a statute or treaty of the United States is not "drawn in question," within Rev. St. U. S. § 709, every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed. *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893, 899.

#### DRAWN JURY

A jury impaneled by the process provided for by Ind. T. Ann. St. 1899, §§ 2221, 2222, was denominated a "drawn jury." *Burroughs v. United States*, 90 S. W. 8, 9, 6 Ind. T. 164.

Under V. S. 1127, providing that certain jurors shall be disqualified from serving again for two years, a plea in abatement alleging that a particular person was summoned as juror, and attended, qualified, and acted as such through the term, "without this, that said [juror] was during said last-mentioned session of said court summoned as a petit juror to serve at said session of court," was demurrable, because not showing that the juror was not "drawn" as a special or struck juror; the allegation that he was summoned not being sufficient for this purpose, in view of sections 1134, 1137, speaking of a struck jury as "drawn" and calling it a "special jury." *State v. Waterman*, 62 Atl. 1016, 1017, 78 Vt. 379.

#### DRAWNWORK

The provision for articles "embroidered," in Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181, held to include so-called "drawnwork" goods, consisting of fabrics in which an openwork effect has been produced by drawing out certain of the threads and interjecting different and independent threads, and which have ornamental work and figures in various portions of the goods. *Beach v. Sharpe*, 154 Fed. 543, 544 (citing *J. R. Simon & Co. v. United States*, 131 Fed. 649; *United States v. B. Ulmann & Co.*, 139 Fed. 3, 71 C. C. A. 415; *Neuss, Hesslein & Co. v. United States*, 142 Fed. 281; *In re Protests of Homer and Stevens*, G. A. 4,643 [T. D. 21, 944]).

#### DRAW-PLATES

"Draw-plates," so called, consisting, respectively, of bars and blocks with holes for wire drawing, are not dutiable as steel plates. The appellation of "draw-plates" cannot bring articles within the enumeration of "plates," which are not plates in form, nor commercially known as plates, and to



which such name has clung inappropriately because plates were formerly used for the same purpose. *Newman v. United States*, 159 Fed. 123, 86 C. C. A. 511.

## DREDGE

As public work, see Public Work.  
As vessel, see Vessel.

## DREDGING

As public work, see Public Work.

## DRESS

### DRESS GOODS

Wool dress robes or dress patterns, consisting of women's dress goods of wool, embroidered with silk, imported in single patterns in separate lengths and pieces, each pattern comprising the material for the body and trimming of a dress, are "dress goods." *Thomas v. Wanamaker*, 129 Fed. 92, 93, 63 C. C. A. 594.

Embroidered woolen dress goods are dutiable as "dress goods \* \* \* of wool, and not specially provided for," under paragraph 369, Schedule K, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 184. *Hall & Bishop v. United States*, 131 Fed. 648; *Hall v. United States*, 136 Fed. 774, 69 C. C. A. 494.

Certain woolen goods known as "cravenette cloths," which have been subjected to a process intended to make them rain-repellent, which are chiefly used for outer garments to be worn in rainy weather, and which, for all ordinary purposes, are waterproof, are dutiable as "waterproof cloth," under paragraph 369, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule J, 26 Stat. 593, and not under paragraphs 392 and 395, Schedule K, of said act, 26 Stat. 596-97, relating, respectively, to "woolen or worsted cloths" and "dress goods \* \* \* of wool, worsted," etc. *Brown & Eadie v. United States*, 126 Fed. 446, 447; *United States v. Brown & Eadie*, 136 Fed. 550, 69 C. C. A. 260.

Silk goods, sold only in the piece, of the class generally known as "taffetas," but having a special soft finish so as to be appropriate for use as a lining, if appropriate for use in making dresses, would seem to be "dress goods," even though generally so used as a lining, and a person having acquired the right to use the word "radium" as a trademark on such goods has a right to protection against its use by another in connection with silk dress goods in the piece of a better grade. *Elsman v. Schiffer*, 157 Fed. 473, 474.

### DRESSED FURS

Pieces of fur sewn together continuously for convenience or safety, but not intended to be used as articles in that shape, are not "articles made of" fur under Tariff Act March 3, 1883, c. 121, § 2502, Schedule N, 22 Stat.

512, but are dutiable as "dressed furs on the skin," under the same schedule, 22 Stat. 513. *Fleet v. United States*, 148 Fed. 335.

### DRESSED GRANITE

Monuments in sections, consisting of pieces of dressed granite intended to be assembled and erected as monuments without further manipulation, are dutiable as "dressed granite," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 118, 30 Stat. 159, and not as articles composed of mineral substances, under paragraph 97 (30 Stat. 156). *Austin Baldwin & Co. v. United States*, 144 Fed. 702, 704; *Id.*, 149 Fed. 1022, 79 C. C. A. 531. But imports in the form of pieces of granite dressed, cut, and bored, ready to be assembled as ornamental garden lanterns, cannot be so classified. *A. A. Vantine & Co. v. United States*, 159 Fed. 289, 290.

### DRESSED LUMBER

While lumber planed on one side or both sides may be "dressed lumber," when tongued and grooved it is still dressed lumber and not a new and distinct manufacture. In other words, tonguing and grooving is an additional dressing, but it is not made a different article. Lumber treated in this way is still known, advertised, handled, shipped, and bought and sold by the thousand feet as lumber. *United States v. F. W. Myers & Co.*, 139 Fed. 344, 347 (quoting *United States v. Dudley*, 19 Sup. Ct. 801, 174 U. S. 670, 43 L. Ed. 1129).

### DRESSED POULTRY

The cooked meat of poultry and game, in tins, and goose livers prepared as *pâté de foie gras*, are not dutiable, either directly or by similitude, as "poultry \* \* \* dressed," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172. *James P. Smith & Co. v. United States*, 168 Fed. 462, 463.

### DRESSED UPPER LEATHER

Japanned skins used for uppers are within the provision in paragraph 456, Tariff Act October 1, 1890, c. 1244, § 1, Schedule N, 26 Stat. 601, for "dressed upper leather, including \* \* \* japanned leather," rather than under the provision in the same paragraph for "japanned calfskins." *United States v. Bittel, Tepel & Eilers*, 155 Fed. 554.

## DRIED LYCHEE

As edible fruit, see Edible Fruit.

## DRIFT

### DRIFT PINS

"Drift pins" are pointed pieces of steel about seven inches long, small at one end and large at the other, used in riveting pipes. These pins are driven into the holes to bring the ends of the pipe together so that the riv-

et holes in one would be over the holes in the other for the insertion of the rivets. *Campbell v. T. A. Gillespie Co.*, 55 Atl. 276, 60 N. J. Law, 279.

### DRIFT ROADS

Roads which run through rough and uninclosed lands are often called "drift roads." Mayor, etc., of Borough of South Amboy v. Pennsylvania R. Co., 73 Atl. 852, 855, 76 N. J. Eq. 57.

### DRILL

See Flying Drill.

### DRINK

See Occasional Drink; Soft Drinks.

The word "food" and "drink" in common usage and understanding are complementary and associate terms, denoting the two prime necessities of life, but they import a plain and fundamental distinction, as universal as language and as old as the human race. No tongue is so primitive that it lacks different words to indicate them and different words to express the sensations of want of them, as hunger and thirst. *Pennsylvania Act June 28, 1895* (P. L. p. 317), entitled "An act to provide against the adulterating of food and providing for the enforcement thereof," which defines in section 2 the term "food" to include "all articles used as food or drink by man, whether simple, mixed, or compound," is unconstitutional, as applied to drink, in not stating the subject of the act in the title, as required by Const. art. 3, § 3. *Commonwealth v. Kebort*, 61 Atl. 895, 896, 212 Pa. 289.

The word "drinks," in a statute regulating or forbidding the sale of intoxicants, means an alcoholic beverage. *Pennell v. State*, 123 N. W. 115, 116, 141 Wis. 35.

### DRINKING FOUNTAIN

As charity, see Charity.

### DRIVE

See Belt Drive; Sprocket Chain Drive.

"Driving," in its popular sense, means more than mere managing or directing a horse. It has at least a dual signification. When it is said a party goes out "driving," it is not usually understood that each member of the party performs the physical act of driving the horse, and a driving party may be referred to collectively. Under Acts 1905, p. 202, c. 123, § 5, providing that any person operating a motor vehicle upon meeting any person driving a horse on any public highway shall, upon signal by putting up the hand from "any such person or persons so driving any horse," etc., immediately bring his motor vehicle to a stop, the signal need not be given by the person who holds the lines but may

be given by any occupant of the vehicle; the word "driving" not being limited to the mere physical act of managing or directing the horse. *State v. Goodwin*, 82 N. E. 459, 460, 169 Ind. 265.

A park regulation that "no person shall ride or drive" at a rate of speed exceeding eight miles an hour is sufficiently definite to support a criminal prosecution for operating an automobile at an excessive speed, as a person may be said to be "driving" an automobile if he is controlling the motive power. *Commonwealth v. Crowninshield*, 72 N. E. 963, 964, 187 Mass. 221, 68 L. R. A. 245.

The word "drive," as used in a statute imposing a fine on every person who shall drive faster than a certain traveling pace in certain towns, is not confined to animals. Anything capable of being ridden comes within the purview of the act, and the word is apt in the case of bicycles, motorcycles, or automobiles. *State v. Smith*, 69 Atl. 1061, 1063, 29 R. I. 245 (citing *State v. Thurston*, 66 Atl. 580, 581, 28 R. I. 265, 268).

In Code, § 1571, requiring that, whenever any engine "driven in whole or in part by steam power" crosses a bridge in a public road, planks must be laid under the wheels, the words quoted were not descriptive of the kind of engine to the exclusion of its manner of operation. These words applied only to engines when actually so driven and not to a steam engine being pulled across a bridge by horses and cable. *Young v. Madison County*, 115 N. W. 23, 24, 137 Iowa, 515.

Under 1 Mills' Ann. St. §§ 1424, 1425, providing that, if any person shall maliciously drive cattle from their usual range, he shall be liable to the party injured, etc., willful driving to any material extent from public domain within the territory within which cattle are accustomed to range to another locality, within or without such territory, is driving from their usual range. *Richards v. Sanderson*, 89 Pac. 769, 771, 39 Colo. 270, 121 Am. St. Rep. 167.

### DRIVER

The motorman of a street car is not a "driver," within Rev. St. 1899, § 2864, giving an action for death from the negligence of any "driver of any stage coach or other public conveyance." *Drolshagen v. Union Depot R. Co.*, 85 S. W. 344, 346, 186 Mo. 258.

### DRIVEWAY

See Draught or Driving Vehicle.

The Standard Dictionary defines "driveway" to be "a road for driving," and that is the meaning that at once suggests itself. It doubtless implies that it is over private land and is not a public way, but it does not imply that it is exclusive. *Young v. Braman*, 75 Atl. 120, 121, 105 Me. 494.

**DROIT****DROIT DE VILLE**

The "droit de ville" and an "octroi tax" are internal revenue imposts of France which are not general in their application but vary with the locality and are not collected if the merchandise is exported. *United States v. R. F. Downing & Co.*, 131 Fed. 653, 654.

**DROP**

Under a city charter providing that teachers in their first or second year should be classified as probationary, and might be dropped on the adverse report of the classification committee, and that teachers who have been assigned for more than two years, other than special teachers, shall be classed as permanent teachers and shall hold their positions until removed, and that no teacher shall be removed save at the close of the year and with at least one month's notice, while there does not appear to be any great difference between "dropping" a teacher from the department and "removing" him, so far as the effect on the teacher is concerned, the section does apply the latter term only to permanent teachers, and the clause protecting teachers from removal without prior notice, except at the end of the school year, was intended to refer only to permanent teachers, but an appointee during the probationary period could be legally dropped only on the adverse report by the classification committee. *Barthel v. Board of Education of City of San Jose*, 95 Pac. 892, 894, 153 Cal. 376.

**DROP SWITCH**

A "drop switch" is a switching of cars made in operation of railroads by detaching or cutting loose cars from the engine and permitting them to run or roll of their own momentum down an incline. *Birmingham S. R. Co. v. Powell*, 33 South. 875, 876, 136 Ala. 232.

**DROVER**

See Stock Drover.

**DROWN****DROWNING**

Death by "drowning" is caused by the filling of the lungs with water so that air cannot get to them. An accident policy provided in one place that the insurance was against "personal bodily injury leaving upon the body external marks of contusion or wounds"; in another that it was against "bodily injuries, such as dislocations, fractures, \* \* \* drowning," etc.; and in another place limited the liability in case of drowning, when the facts of the accident are not established by testimony of eyewitnesses, and when the body is not recovered and identified, and "in case of injuries, whether fatal

or disabling, of which there is no visible mark on the exterior of the body." Held that, under the rule that any doubt arising upon the face of an insurance policy as to its meaning is to be resolved in favor of the insured, the provisions relating to contusions and wounds did not apply to a case of "drowning," so as to exempt liability where insured was drowned and there were no marks on his body. *Lewis v. Brotherhood Accident Co.*, 79 N. E. 802, 804, 194 Mass. 1, 17 L. R. A. (N. S.) 714.

**DRUG**

See Crude Drugs.

Use of as intoxication, see Intoxicated—Intoxication.

Public Health Law, art. 3, § 40, provides that the term "drug," when used in the act, shall include all medicines for external and internal use. Cream of tartar is a drug within the statute. *State Board of Pharmacy v. Gasau*, 107 N. Y. Supp. 409, 410, 122 App. Div. 803.

The term "drug," as used in section 6 of the Acts of 1906, 34 Stat. 768, providing that the term shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals, is merely a term of description, and, if the Pharmacopoeia says medicine is a drug, it is a drug under the meaning of the act, or if it comes under the other description of what a drug is. *United States v. Frank*, 189 Fed. 195, 199.

The term "drugs" is limited in its common acceptance to medicinal preparations, though broadly it may include besides all preparations used in the arts. Articles used in dyeing or tanning are not dutiable as "drugs." *Leber & Meyer v. United States*, 135 Fed. 243, 244. Nor are Orchil and Persian berry extracts. *G. Siegle & Co. v. United States*, 166 Fed. 1015, 1016.

Wai San, an edible root used by the Chinese as a vegetable, is, because edible, removed from the provision for "drugs," in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 151. Wing On Wo v. United States, 175 Fed. 891. But dried lizards, used by the Chinese in compounding a medicine, are dutiable as "drugs." *Wing On Wo v. United States*, 148 Fed. 334.

**Benzine**

A "drug" includes any mineral substance used in mechanical operations, and the court cannot say, as a matter of law, that benzine is not included in that term. *Wilson v. Union Mut. Fire Ins. Co.*, 55 Atl. 662, 663, 75 Vt. 320 (citing *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687).

### Intoxicating Liquors

Intoxicating liquors kept for medicinal purposes being within the general term "drugs," a druggist or pharmacist legitimately engaged in that business, has a right, without express authority of law, to have, keep, possess, and store intoxicating liquors as a part of his necessary drug stock to be sold by him, subject to the conditions, limitations, and restrictions prescribed by an ordinance regulating the sale of intoxicating liquors for medicinal purposes, and could only be subjected to the penalties prescribed therein, on proof that the liquors were dispensed in violation of the prescribed conditions, restrictions, and limitations. *Town of Selma v. Brewer*, 98 Pac. 61, 63, 9 Cal. App. 70.

### Tobacco

Cigars are not "drugs," within the meaning of St. 1895, ch. 434, § 2, prohibiting business transactions on the Lord's Day excepting the retail sale of drugs and medicine. *Commonwealth v. Goldsmith*, 57 N. E. 212, 176 Mass. 104, 105.

### DRUG ADVANCED IN VALUE

Scammony resin, prepared from gum scammony, or scammony root, and used principally in compounding medicines, and chrysarobin are dutiable as "drugs advanced in value or condition," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 152, rather than as medicinal preparations, under paragraph 67, 30 Stat. 154. *United States v. Martin*, 155 Fed. 264, 265; *Levi v. United States*, 140 Fed. 126. And powdered opium is a "drug advanced in value or condition," rather than opium crude or unmanufactured. *United States v. McKesson, Robbins & Co.*, 172 Fed. 168; *Merck v. United States*, 151 Fed. 14, 15, 80 C. C. A. 510.

Fresh leaves of aconite and belladonna, and fresh roots of bryonia, immersed in their natural condition in alcohol for preservation, are not "drugs advanced in value or condition," as used in paragraph 20. Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151. *Boericke & Runyon Co. v. United States*, 126 Fed. 1018, 1019.

### DRUGGIST

The terms "druggist," "proprietor of a drug store," and "pharmacist" are synonymous, for the business of pharmacist or apothecary, or druggist, is one. An information charging that accused was a druggist and the proprietor of a drug store and a pharmacist, and that he sold intoxicating liquors without a prescription, charges a violation of Rev. St. 1899, § 3047, making it an offense for a druggist, proprietor of a drug store, or pharmacist to sell intoxicating liquors except on a written prescription, and providing that any druggist who shall violate the act shall be punished as prescribed, and it is not duplicitous or multifarious. *State*

*v. Clinkenbeard*, 125 S. W. 827, 829, 142 Mo. App. 146.

### DRUG STORE

See Proprietor of Drug Store.  
As restaurant, see Restaurant.

In an information for burglary, a "drug store" is properly described as a storehouse, commonly called a "drug store." *McNutt v. State*, 94 N. W. 143, 68 Neb. 207.

### DRUMMER

"A traveling salesman is known in modern business parlance as a 'drummer.'" *Hibbard v. Stein*, 78 Pac. 665, 45 Or. 507.

The word "drummers," as used in Rev. St. Mo. §§ 1024-1026, requiring foreign corporations for pecuniary profit doing business in the state to file articles of incorporation and be subject to local visitation and the payment of taxes on its business, and expressly excepting from the operation of the statute "drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident," means employes of such corporations employed to go into other states and communities to drum up and solicit business for the houses they represent. *Strain v. Chicago Portrait Co.*, 126 Fed. 831, 835.

The word "drummer" denotes a traveling agent personally receiving orders to be forwarded to his nonresident principal. One engaged in distributing his principal's letters, soliciting orders for whisky, and price lists containing blank orders on his principal, a nonresident distiller, is, within the statute making it a misdemeanor for any person, acting for himself or as agent, to conduct the business of "liquor drummer," soliciting or receiving orders for liquor for interstate shipment. *State v. Davis*, 66 S. E. 875, 876, 84 S. C. 512.

### DRUMMER FLOATER

A "drummer floater" insurance policy is a policy that covers the goods mentioned therein, while a commercial salesman is on the road selling goods, and the samples and goods carried by him would not be covered by the ordinary insurance carried upon merchandise located in the stores or warehouses of the merchant. When the goods are returned to the starting point and are in the store or not traveling, the drummer floater insurance is suspended, and the same goods are then covered by the general insurance which the merchant carries upon all his goods in his store or warehouse. *Jacobson v. Liverpool & L. & G. Ins. Co.*, 135 Ill. App. 20, 22.

### DRUNK

The term "drunk" is synonymous with the word "intoxicated" and is of varying degrees. This was recognized by the learned

Chief Justice of the Court of Civil Appeals when this case was first before that court (Paris & G. N. R. Co. v. Robinson, 114 S. W. 661, 53 Tex. Civ. App. 12, 18) in the following language: "Intoxication is of varying degrees. A person so under the influence of liquor as not to be entirely himself is intoxicated; yet he may not betray it by either movement or word, and his condition may not be discernible by his intimate friends. It would hardly be contended that as to such person the carrier must resort to other than the ordinary means for his safety. Again, a person may be 'staggering drunk,' and yet be capable of transacting with intelligence important business, and with great foresight providing under given circumstances for his own safety and comfort." That the term "drunk" is not a well-defined term either in law or in the common acceptance of the meaning of the word is found in the fact that all the standard dictionaries make its meaning synonymous with the word "intoxicated." The fact that the term "drunk" or "intoxicated" is a term of varying degrees is recognized in that standard authority, Words and Phrases (volume 3, p. 2208), as follows: "There are degrees of intoxication or drunkenness. A man is said to be 'dead drunk' when he is perfectly unconscious—powerless. He is said to be 'stupidly drunk' when a kind of stupor comes over him. He is said to be 'staggering drunk' when he staggers in walking. He is said to be 'foolishly drunk' when he acts the fool. All these are cases of drunkenness, of different degrees of drunkenness. So it is a very common thing to say a man is 'badly intoxicated,' and again that he is 'slightly intoxicated.' There are degrees of drunkenness, and therefore many persons may say that a man was not intoxicated because he could walk straight; he could get in and out of a wagon. Whenever a man is under the influence of liquor so as not to be entirely himself, he is intoxicated, although he can walk straight. Although he may attend to his business and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be himself, so as to be excited, and not to possess that clearness of intellect and control of himself that he otherwise would have, he is intoxicated." In the latest Webster's International Dictionary the term "drunk" is thus defined: "Intoxicated with or as with strong drink, under the influence of an intoxicant, especially an alcoholic liquor, so that the use of the faculties is materially impaired." In Bouvier's Law Dictionary (Rawle's Revision), the term is defined as "the condition of a man whose mind is affected by the immediate use of intoxicating drinks"; and the same author proceeds in his discussion of the meaning of the term "drunk" or "drunkenness" to say: "This condition presents various degrees of intensity, ranging from a simple exhilaration to a state of utter unconsciousness and in-

sensibility. In the popular phrase the term 'drunkenness' is applied only to those degrees of it in which the mind is manifestly disturbed in its operation. In the earlier stages it frequently happens that the mind is not only not disturbed but acts with extraordinary clearness, promptitude, and vigor." Paris & G. N. R. Co. v. Robinson, 140 S. W. 434-436, 104 Tex. 482.

The term "drunk," as commonly understood, means the result of excessive drinking of intoxicants. Paris & G. N. Ry. Co. v. Robinson (Tex.) 127 S. W. 294, 298.

Though one may be said to be under the influence of liquor, he is not necessarily intoxicated, this being far short of "intoxication" which is the synonym of "inebriety" and "drunkenness"; the word "intoxicated" being synonymous with "drunk," and "drunk" being defined in the Standard Dictionary as to have lost the normal control of one's bodily and mental faculties. Freeburg v. State, 138 N. W. 143, 144, 92 Neb. 346 (citing 4 Words and Phrases, pp. 3734, 3735).

An instruction, in an action against a railroad company for wrongfully ejecting a passenger for alleged drunkenness, that for one to be in an "intoxicated condition" he must be under the influence of intoxicating liquors to such an extent as to have lost the normal control of his faculties, and show a disposition to violence, quarrelsomeness, and bestiality, was erroneous, since one may be intoxicated without being violent or quarrelsome, and a man may be said to be "drunk" whenever he is under the influence of intoxicating liquors so as to affect his acts or conduct, so that persons coming in contact with him could readily know that the intoxicants had affected him in that respect. St. Louis, I. M. & S. R. Co. v. Waters (Ark.) 152 S. W. 137, 139.

The term "drunk" is properly defined as being under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly to evince a disposition to violence, quarrelsomeness, and bestiality. Brooke v. City of Morrilton, 111 S. W. 471, 86 Ark. 364; Hughes v. State ex rel. Sutton, 98 N. E. 839, 841, 50 Ind. App. 617.

#### DRUNKARD

See Habitual Drunkard.

See, also, Inebriate.

"A 'drunkard' is one with whom drunkenness has become a habit; one who habitually drinks to intoxication; a sot." There may be a habit of intoxication in one who occasionally resists temptation. People v. Radley, 86 N. W. 1029, 1030, 127 Mich. 627.

#### DRUNKENNESS

See Habitual Drunkenness, or Intoxication; Voluntary Drunkenness.

See, also, Intoxicated—Intoxication.

Though one may be said to be under the influence of liquor, he is not necessarily intoxicated, this being far short of "intoxication" which is the synonym of "inebriety" and "drunkenness"; the word "intoxicated" being synonymous with "drunk," and "drunk" being defined in the Standard Dictionary as to have lost the normal control of one's bodily and mental faculties. *Freeburg v. State*, 138 N. W. 143, 144, 92 Neb. 346 (citing 4 Words and Phrases, pp. 3734, 3735).

The words "drunkenness" and "in a state of intoxication," as used in the statute punishing drunkenness, are words of ordinary signification, and mean the condition following the taking of liquor in excessive quantities, and the court in its instructions need not define the same. *Clark v. State*, 111 S. W. 659, 660, 53 Tex. Cr. R. 529.

It may be well doubted whether the terms "drunkenness" and "sobriety" are susceptible to any accurate definition for practical purposes, as they sufficiently define themselves. *Midland Valley R. Co. v. Hamilton*, 104 S. W. 540, 542, 84 Ark. 81.

#### As crime

See Disorderly Conduct.

#### As insanity

See Temporary Insanity.

#### Intoxication from opiates included

The word "drunkenness," as applied to the use of opium, morphine, or other drugs, is not easily defined. But the evil effects resulting from the continued and excessive use of opium or morphine are well known. They interfere as much, to say the least, with the happiness of married life, and produce other effects upon the marriage relation, as deplorable as those resulting from the excessive use of intoxicating liquors. And it was the state thus resulting from their excessive use which the Legislature intended to describe by the word "drunkenness," as applied to the use of opium, morphine, and other drugs, and from which it intended to afford relief to the innocent party. *Gowey v. Gowey*, 77 N. E. 526, 527, 191 Mass. 72 (citing and approving *Burt v. Burt*, 46 N. E. 622, 168 Mass. 204; *McCraw v. McCraw*, 50 N. E. 526, 171 Mass. 146).

### DRY

When a proposition is carried at an election in favor of prohibition of the sale of intoxicating liquors, the vote is called "dry." *Board of Trustees of Town of Newcastle v. Scott*, 101 S. W. 944, 948, 125 Ky. 545.

The Supreme Court, in construing section 428, Penal Code 1895, as preventing whisky dealers from selling or contracting to sell, taking orders for, or soliciting the sale of intoxicating liquors in a "dry county, town or district," uses the word "dry" as designating

those counties where the sale of liquor is prohibited by law. *Rose v. State*, 58 S. E. 20, 21, 1 Ga. App. 596.

### DRY DOCK

A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock. Proceedings in rem to enforce a lien for repairs furnished to a vessel which was at the time engaged in navigating the Erie Canal are no less within the exclusive admiralty jurisdiction of the federal courts because such repairs were made in dry dock. *Perry v. Haines*, 24 Sup. Ct. 8, 13, 191 U. S. 17, 48 L. Ed. 73.

### DRY DOCKAGE

The term "dry dockage," as employed in a libel, is presumed by the court to mean giving dockage in a dry dock. Under B. & O. Comp. Or. 1901, § 5708, giving a lien on vessels for all debts due by virtue of a contract for construction, repairs, etc., a lien in the nature of a maritime lien exists against a domestic vessel of the state, navigating the waters of the United States, for furnishing dockage to such vessel in a dry dock at the request of the owner, which lien is enforceable in the admiralty courts of the United States. *The George W. Elder*, 159 Fed. 1005, 1009.

### DRY GALLON

The "dry (or corn) gallon" is the old English unit of measurement which seems to have fallen into practical disuse. It does not seem to have any common employment in the commerce of this country. *J. M. Ceballos & Co. v. United States*, 139 Fed. 705 (citing Cent. Dict.).

### DRY MORTGAGE

A "dry mortgage" is one under which the mortgagor incurs no personal liability, or there was no debt in the sense of an obligation that could be enforced, and where the mortgagor has merely the right to remove the lien by payment of a certain sum of money within a certain time, but could not be compelled to do so. *San Jose Safe Deposit Bank of Savings v. Bank of Madera*, 78 Pac. 5, 6, 144 Cal. 574.

### DRY PRESUMPTIONS

The rules which impose the burden of proof upon certain parties, when designated as presumptions, are "dry presumptions," having only a technical existence, and barren of all probative character when the case goes to the jury on conflicting evidence. *Sheldon v. Wright*, 67 Atl. 807, 814, 815, 80 Vt. 298.

# **DRY RECEIVERSHIP**

A receiver takes the property subject to liens upon it and on sale of the property; what he gets is the fund out of which primarily his compensation is paid. If he does not get any fund, he might not get any compensation, it being what is known as a "dry receivership," and complainant may be compelled to give a bond to secure the fees of the receiver whom the court appoints at his expense. *Lembeck v. Jarvis Terminal Cold Storage Co.*, 59 Atl. 565, 566, 68 N. J. Eq. 352.

# **DRY REFUSE**

"Dry refuse," when applied to city garbage, includes ashes and all rubbish accumulated in private houses, stores, market houses, and like places. *California Reduction Co. v. Sanitary Reduction Works*, 26 Sup. Ct. 100, 104, 199 U. S. 306, 50 L. Ed. 204.

# **DRY TRUST**

A "dry (or simple) trust" is one as to which the trustee has no duties to perform, and the cestui que trust has the entire management of the estate. It is a simple separation of the equitable and legal estates which can be united at the option of the cestui que trust. It is not to be confounded with those trusts which are created upon a declared condition which has passed away by the cessation of the reason for the continuance of the trust, as for instance, a trust established for the benefit of a married woman who becomes discover, thus discontinuing the trust. *Carpenter v. Carpenter's Trustee*, 84 S. W. 737, 738, 119 Ky. 582, 68 L. R. A. 637, 115 Am. St. Rep. 275 (citing *Woolley v. Preston*, 82 Ky. 415; *Thomas v. Harkness*, 13 Bush [76 Ky.] 23).

Where the owner of real estate conveyed it in trust, the trustee to have power of sale and reinvestment of proceeds, but a sale only to be made with the consent of the grantor, who was to be paid all the profits and have a right of testamentary disposition, the trustee took no beneficial interest but a mere "dry (or naked) trust." *City of Louisville v. Anderson (Ky.)* 84 S. W. 573, 574.

Where a testatrix bequeathed \$500 to A., to be kept in trust for her by her daughter, the bequest amounted to a "dry trust," and the cestui que trust was entitled to payment of the legacy, free from any trust. *Guild v. Allen*, 67 Atl. 855, 858, 28 R. I. 430.

# **DRY WASH**

A natural depression in the ground, below a dam, is called a "dry wash." *Howell v. Big Horn Basin Colonization Co.*, 81 Pac. 785, 786, 14 Wyo. 14, 1 L. R. A. (N. S.) 596.

# **DRY WEIGHT**

The term "dry weight," in paragraph 415 of the Tariff Act of October 1, 1890, imposing a duty on wood pulp, means not abso-

lute dry weight, but "air dry weight," as understood in commerce. *United States v. Perkins*, 66 Fed. 50, 51, 13 C. C. A. 324.

# **DUAL CAPACITY DOCTRINE**

The "dual capacity doctrine," applied in Illinois in determining the liability of a master for injury to his servant, is: The mere fact that a master has a foreman over the injured servant does not make the master responsible for the foreman's negligence, nor does the mere fact that the foreman is sometimes, or generally, also a collaborer excuse the master from his negligence; but every case must depend on its circumstances, and if the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a collaborer with those under his control, and which might just as readily have happened with one of them, having no such authority, the common master will not be liable; but when the negligent act complained of arises out of, and is the direct result of, the authority conferred on him by the master over his collaborators, the master will be liable. *Fogarty v. St. Louis Transfer Co.*, 79 S. W. 664, 667, 180 Mo. 490, 1 Ann. Cas. 136.

# **DUE**

## **DUE (In Commercial Law)**

See Become Due; Grow Due; Legally Due; Now Due; Now Due and Payable; Remain Due; Still Due; Taxes Due.

Belonging to and due, see Belong—Belonging.

Ordinarily, the word "due" is a conclusion of law, denial of which raises no issue. *Irwin v. Insurance Co. of North America*, 116 Pac. 294, 295, 16 Cal. App. 143.

The word "due," as used in section 3880, providing that a petition in attachment in an action on contract shall state that something is "due" and, as nearly as practicable, the amount, and section 3883, authorizing attachments on debts not due, when nothing but time is wanted to fix an absolute indebtedness, refers to the maturity of the claim rather than to the balance of the indebtedness owing from one party to the other, and the landlord is not precluded from attaching for rent accrued by reason of the fact that the tenant has claims against him, arising out of other indebtedness, to an amount exceeding the rent. *Smeaton v. Cole*, 94 N. W. 909, 910, 120 Iowa, 368.

The word "due," as used in Seattle City Charter, providing that demand must be made for a rebate from an excess in assessments for local improvements within two years from the date on which the assessments become "due," means the expiration of the period in which the assessments can be paid without interest; but, where the final cost of

the improvement is not determinable until its completion, the limitation period does not begin until it is ascertained that there will be an excess. *State ex rel. McCullough v. City of Seattle*, 102 Pac. 770, 772, 53 Wash. 655.

In an action under Rev. St. c. 6, § 175, to recover taxes "due" a city, it is no defense that the assessor made only one valuation for the tax, state, county, and town, and blended together the several sums to be thus levied and made but one assessment for the whole, on the ground that the combined tax, being not alone for municipal purposes, was not "due" the city, since the municipality was the agency through which the state and county taxes were collected, and all the taxes to be assessed and collected through this agency may be said to be "due" to it as such agent or trustee. *City of Rockland v. Ulmer*, 24 Atl. 949, 950, 84 Me. 503.

The phrase "debt which is to become due," as used in a statute providing that a debt which is to become due shall be liable to the process of garnishment, means an absolute existing debt and does not include an indebtedness contingent on the happening of a future event, so that it is uncertain whether the contemplated garnishee will or will not be indebted to the principal defendant. *Smith v. Marker*, 90 S. W. 611, 613, 6 Ind. T. 213.

Under Rev. Laws, c. 137, § 8, authorizing an appointment of an administrator de bonis non after the death, resignation, etc., of the administrator, if there are debts to the amount of \$20 remaining due from the estate, chapter 141, § 9, making an administrator not liable to the action of a creditor not commenced within two years from the giving of an administration bond, section 10 authorizing the Supreme Court, where an action has not been prosecuted within the time limited, if of opinion that justice requires it, to give a creditor judgment against the estate, and section 13 providing that a creditor, whose right of action does not accrue within two years from administration, may have an order for the retention by the administrator of assets sufficient to satisfy the same, there was no debt due from the estate within the meaning of the statutes, where there were no equitable considerations, and the creditor took no steps under section 13 to preserve his rights, and they became void under section 9; a "debt remaining due from the estate" meaning a debt which is enforceable in such a way that the estate may be legally liable to pay it. *In re Hubbard*, 69 N. E. 349, 350, 185 Mass. 22.

A claim against an estate for undertaker's services is not a "debt due" from the decedent, and is therefore not referable under Code Civ. Proc. § 2718, providing for reference of disputed claims, and hence, even if the parties consented to a reference jurisdiction to refer would not be conferred as

against the subsequent objection of either. *In re Mudge*, 118 N. Y. Supp. 568, 570.

Under Code, § 321, par. 3, which gives an attorney a lien on money due his client in the hands of an adverse party to the action, there is no money "due" which will support a lien, where the proceeding was under the occupying claimants statute (Code, §§ 2964-2971), which provides that the claim may be satisfied either by the claimant's paying the value of the improvements and taking the property, or, upon a refusal of the claimant to pay such sum, by his permitting the other party to take his interest in the property, or by his becoming a tenant in common of the real estate, including the improvements, with such party, and which gives the court no authority to render a personal judgment against the owner of the land, or to order the land sold under special execution to satisfy the claim. *McCormick & McCormick v. Dumbarton Realty Co. (Iowa)* 137 N. W. 943, 944.

Rev. St. 1908, § 518, preserves the lien of a chattel mortgage for 30 days after maturity without possession taken, and section 520, subsequently enacted, provides that the lien of any recorded chattel mortgage to secure any indebtedness may "at any time within 30 days after the maturity of the last installment of the indebtedness secured thereby" be extended as to the unpaid portion thereof by filing a sworn statement of the total payments on the debt and the amount remaining unpaid, that it is "still due" the mortgagee or his assignee, and that the mortgagee consents to an extension. Held, in view of section 518, that the word "due" was used in the sense that the debt was subsisting or outstanding. *Ferris v. Chambers*, 117 Pac. 994, 995, 51 Colo. 368.

#### **As acknowledgment and promise to pay**

The word "due," in a writing signed by a party and stating that a certain amount is "due" a person mentioned therein, imports a promise to pay, for the principle is that, where a paper contains a direct acknowledgment of indebtedness in a specified sum, that of itself imports a promise to pay. *Locher v. Kuechenmeister*, 98 S. W. 92, 97, 120 Mo. App. 701.

"Due" means owed or owing to. It implies an obligation or duty imposed by law—the duty to pay what is owed—but it does not of itself imply a promise to do so." *In re McGuire & Hanlein*, 132 Fed. 394, 395.

#### **Immatured liabilities**

The word "due" does not necessarily mean owing and payable. It is often used to signify merely the present existence of a debt to be paid thereafter; and, an affidavit, annexed to a chattel mortgage, stating that a certain sum was due on the mortgage, the mortgage disclosing that this sum was payable in monthly installments is not defective mere-



ly for the reason that no part of it was due at the time the affidavit was made. *Metropolitan Store & Saloon Fixture Co. v. Albrecht*, 56 Atl. 237, 238, 70 N. J. Law, 149.

The word "due," in its larger sense, is often used to cover liabilities matured or unmatured, or as importing an existing obligation, whether the time of payment has arrived or not. The expression "all taxes due the state and county," as used in the act of August 21, 1905, is not to be construed in the narrow sense of taxes, the time for paying which had arrived or passed. *Pope v. Matthews*, 54 S. E. 152, 154, 125 Ga. 341 (citing, in support of definition, *People v. Vall*, 6 Abb. N. C. [N. Y.] 210; *United States v. State Bank of North Carolina*, 31 U. S. [6 Pet.] 29, 8 L. Ed. 308; *Sand-Blast File Sharpening Co. v. Parsons*, 7 Atl. 716, 54 Conn. 310; *Scudder v. Scudder*, 10 N. J. Law, 341).

#### As legally enforceable

A sum of money being in the obligor's hands as executrix and due to be paid to the the obligee by her in that capacity, she agreed in her personal capacity to pay to the obligee the sum "so due." Held, that the phrase "so due" means that which ought to be paid and not that which is legally actionable. *Smith v. Weaver*, 66 Atl. 941, 942, 75 N. J. Law, 31.

The word "due" is defined as owed, owing, owing and unpaid, remaining unpaid, an indebtedness. A debt may therefore be due that is justly and honestly owing, and yet the creditor be without remedy to enforce payment because of the plea of the statute of limitations. So, where a will provided that a debt due from a legatee should be deducted from the legacy, the legatee could not plead limitations to avoid the deduction. In *re Gillingham's Estate*, 69 Atl. 809, 810, 220 Pa. 353 (citing *Fulweiler v. Hughes*, 17 Pa. 440; 14 Cyc. p. 1107).

#### As matured

Sess. Laws 1895, p. 67, c. 7, art. 1, § 8, providing for the issuance of bonds by municipal organizations, using the words "due" and "matured," uses them synonymously. *Territory ex rel. Jones v. Hopkins*, 59 Pac. 976, 981, 9 Okl. 133.

#### As owing

An amount "due," in the primary sense, means simply "owing." *Sather Banking Co. v. Arthur R. Briggs Co.*, 72 Pac. 352, 355, 138 Cal. 724 (citing and adopting *Crocker-Woolworth Nat. Bank of San Francisco v. Carle*, 65 Pac. 951, 133 Cal. 409).

The word "due," in its primary sense, means "owing"; hence Code, § 490, providing that a county treasurer shall receive for his services a certain per cent. of all money collected by him as taxes "due any city or town," does not authorize him to retain any sum for collecting money to pay certificates issued by a city to a contractor who has per-

formed paving work. *Barber Asphalt Paving Co. v. Woodbury County*, 114 N. W. 1044, 1045, 137 Iowa, 287.

The word "due" in Code, §§ 1308, 1309, making credits taxable and defining "credit" as including every claim or demand due or to become due, etc., is synonymous with "owing," and does not have reference to the time of payment or the fulfillment of an obligation. *Talley v. Brown*, 125 N. W. 248, 249, 146 Iowa, 360, 140 Am. St. Rep. 282.

#### Pension money

Under Rev. St. U. S. § 4747, providing that no money due or to become due to any pensioner shall be liable to attachment or seizure under any legal or equitable process, but shall inure wholly to the pensioner's benefit, pension money is only exempt "while due, or to become due." In *re Ferguson's Estate*, 123 N. W. 123, 125, 140 Wis. 583, 17 Ann. Cas. 1189.

#### As unpaid

While the word "due" is often used synonymously with "owing" or "remaining unpaid," it is not to be so construed when used in a pleading alleging that "there is now due plaintiff from defendant" a certain sum. In this case it is nothing more than a legal conclusion and is therefore not admitted by demurrer. *Moriarty v. Cochran*, 106 N. W. 1011, 75 Neb. 835.

#### DUE ADMINISTRATION OF JUSTICE

In Rev. St. § 5399, making it a criminal offense, *inter alia*, to corruptly or by threats or force "obstruct or impede, or endeavor to obstruct or impede the due administration of justice" in any court of the United States, the words "due administration of justice" import a free and fair opportunity to every litigant in a pending cause in a federal court to learn what he may learn (if not obstructed or impeded) concerning material facts, and to exercise his option as to introducing testimony as to such facts, and an offense is committed under such statute if a person corruptly endeavors to induce other persons who have knowledge of facts which may be material to a party to a pending cause to conceal or deny their knowledge, so as to prevent such party from obtaining knowledge or procuring evidence of such facts. *Wilder v. United States*, 143 Fed. 433, 441, 74 C. C. A. 567.

#### DUE AND OWING

Within the meaning of Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563, which provides that a trustee shall pay "all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors," taxes on property of a bankrupt are "due and owing" by the bankrupt, although, as in Colorado, an action cannot be maintained for their collection, but resort must be had to the property.

Nor does the fact that the property has been struck off to the county for the taxes for want of bidders, as provided by Rev. St. Colo. 1908, § 5713, or that it was surrendered by the trustee to a mortgagee, deprive the county of the right to their preferred payment. *Hecox v. Teller County*, 198 Fed. 634, 636, 117 C. C. A. 338.

In an action for the value of work done and materials furnished under a contract terminated by plaintiff for defendant's alleged breach thereof, the complaint in direct terms alleging nonpayment of the sum sued for was not insufficient because not alleging that such sum was "due and owing," such words constituting a mere legal conclusion from the use of which, at most, and then only in the absence of a demurrer, the fact of nonpayment might be implied. *Beck v. Schmidt*, 110 Pac. 455, 457, 13 Cal. App. 448.

2 Starr. & C. Ann. St. Ill. 1896, c. 74, par. 6, provides that it shall be lawful to agree that 7 per cent. per annum shall be paid for money loaned or in any manner "due and owing," etc. Held, that it was not essential, to entitle a party to recover interest under such section on contracts of guaranty, that there should be a sum "due and owing" at the time the guaranties were executed, but that it was sufficient that the guaranty was made to apply to the principal's obligations as they were incurred; the guarantor's promise being operative whenever there was money "due and owing" by the principal. *Bond v. John V. Farwell Co.*, 172 Fed. 58, 65, 98 C. C. A. 546.

The finding that there was "due and owing" under the contract, though objectionable as in form a conclusion, is a sufficient finding of nonpayment. *Treis v. Berlin Dye Works & Laundry Co.*, 105 Pac. 275, 276, 11 Cal. App. 421.

## DUE AND PAYABLE

See Wholly Due and Payable.

The only office of the words "due and payable," as used in Const. art. 8, § 191, is to fix the time when the poll tax can be paid. It cannot affect the liability of the poll to pay the tax. *Frost v. State ex rel. Clements*, 45 South. 203, 205, 153 Ala. 654.

## DUE CARE

See In the Exercise of Due Care.

"'Due care' embraces diligence." *South-ern Indiana R. Co. v. Osborn*, 78 N. E. 248, 250, 39 Ind. App. 333.

The standard for determining whether plaintiff has exercised due care is the conduct of an ordinarily prudent person under similar circumstances; and, if plaintiff did not exercise the care which an ordinarily prudent person would have exercised for her own protection under similar circumstances, she was guilty of contributory negligence, irrespective of her actual intelligence

or prudence in general. *Dobson v. Receivers of Seaboard Air Line Ry.*, 73 S. E. 875, 877, 90 S. C. 414.

The law contemplates that in any given case a normal adult person shall take "due care" for his own safety and protection, which is such care as an ordinarily prudent person would exercise under the circumstances. *J. G. Christopher Co. v. Russell*, 58 South. 45, 47, 63 Fla. 191, Ann. Cas. 1913C, 564.

"Negligence" is a relative term, and the degree of care varies with the circumstances, and, the greater the danger or importance of the matter in hand, the greater the care required to constitute "due care." *Bolton v. Western Union Telegraph Co.*, 65 S. E. 937, 938, 84 S. C. 67.

"'Negligence' is the opposite of 'due care'; where due care is found there is no negligence. If there is a want of due care, then there is negligence." *Raymond v. Portland R. Co.*, 62 Atl. 602, 605, 100 Me. 529, 3 L. R. A. (N. S.) 94.

"Due care" is care according to time and circumstances, and the degree of care required increases as the danger increases. *Riggs v. Metropolitan St. Ry. Co.*, 115 S. W. 969, 974, 216 Mo. 304.

The term "due care," as used in the law of negligence, is a relative term and means a degree of care commensurate with the danger involved. *Tackett v. Henderson Bros. Co.*, 108 Pac. 151, 155, 12 Cal. App. 658.

"Due care," in any business involving the personal safety and lives of others, is nothing less than the most watchful care. *Stanley v. Steele*, 60 Atl. 640, 641, 77 Conn. 688, 69 L. R. A. 561, 2 Ann. Cas. 342.

General custom is not, as a matter of law, in itself "due care." *Wilta v. Interstate Iron Co.*, 115 N. W. 169, 171, 103 Minn. 303, 16 L. R. A. (N. S.) 128.

"'Due care' ordinarily implies a certain line of conduct, specific acts of watchfulness or caution." Where there is direct evidence as to the circumstances surrounding an accident resulting in the death of the person injured, the presumption that, prompted by the instinct of self-preservation, he was in the exercise of due care does not obtain. *Ames v. Waterloo & C. F. Rapid Transit Co.*, 95 N. W. 161, 165, 120 Iowa, 640.

"'Due care' is a duty lying at the root of the social compact. Right early in the history of the human race the question was asked, 'Am I my brother's keeper?' an old old question, but yet new withal. Whatever doubt may have arisen in the mind of the unhappy man who first asked it, no doubt exists in the law on the right answer, then or now." "The law hedges around the lives and persons of men with much more care than it employs when guarding their property, so

that, in this particular, it makes, in a way, every one his brother's keeper, and therefore it may well be doubted whether in any supposable case redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm." *Charlton v. St. Louis & S. F. R. Co.*, 98 S. W. 529, 537, 200 Mo. 413 (citing *Van Winkle v. American Steam-Boller Co.*, 19 Atl. 475, 52 N. J. Law, loc. cit. 247).

"Due care" is the care commensurate with the instrument or means being used and danger to be apprehended. While a passenger in a freight elevator in a building accepted and acquiesced in the usual incidents and conduct of a freight elevator, yet those in control of the building were bound to exercise, in the repair, guarding from accident, and management of the elevator, that high degree of care which prudent and competent men exercise under like circumstances, and the failure to use that high degree of care which is exercised by prudent and competent men under like circumstances would be a failure to exercise "due care." *Orcutt v. Century Bldg. Co.*, 99 S. W. 1062, 1066, 201 Mo. 424, 8 L. R. A. (N. S.) 929.

The term "due care," as those words are employed in Rev. Laws, c. 106, § 71, providing that if a personal injury is caused to an employé, who at the time of the injury is in the exercise of due care, by reason of certain specified defects, etc., he may recover damages, means that degree of care which an ordinarily prudent man would use for his own safety, in the light of all the circumstances at the time of the act under inquiry. *Curren v. Magee Furnace Co.*, 94 N. E. 399, 400, 208 Mass. 229.

The standard from which to determine the question as to whether the plaintiff exercised such "care" as a reasonably prudent person would exercise under the like circumstances is the common knowledge and experience of men and not the scientific knowledge and experience possessed by experts. *Morrison v. Lee*, 113 N. W. 1025, 1028, 16 N. D. 377, 13 L. R. A. (N. S.) 650.

"Due care," in the case of a railway company, means ordinarily the timely employment of sufficient signals or warnings giving notice of the approach of cars at crossings, etc., the employment of competent motormen or other servants, and the running of cars at a proper and reasonable rate of speed. *Boudwin v. Wilmington City R. Co.* (Del.) 60 Atl. 865, 866, 4 Pennewill, 381.

Where a railroad engineer approaching a trespasser walking on the track sees her danger, and that she is entirely oblivious thereof, due care on his part means the timely use of the bell and whistle, and, if these are not effective, the use of means at hand to stop

the train before striking her. *Dutcher v. Wabash R. Co.*, 145 S. W. 63, 65, 241 Mo. 137.

"Due care" in a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation. Due care according to age and capacity is all the law exacts of a child of tender years. Neither the average child of its own age, nor the prudent man, is a standard by which to measure its diligence with legal exactness. (a) Charges which fixed the standard of care due by a child nine years of age as "what could be expected by a party of [the] age this plaintiff is proven to have been," and which stated that if both parties were at fault, but the jury could find "that the plaintiff, considering his age, could not have avoided the accident by the exercise of ordinary care," then he would not be prevented from recovering, did not correctly state the rule as to due diligence on the part of the plaintiff, there being an allegation in his petition and some evidence tending to throw light on his capacity. *Linder v. Brown*, 73 S. E. 734, 735, 137 Ga. 352 (citing Civ. Code 1910, § 3474; *Western & A. R. Co. v. Young*, 7 S. E. 912, 81 Ga. 397, 12 Am. St. Rep. 320; *Id.*, 10 S. E. 197, 83 Ga. 512).

#### As extraordinary care

The term "due care," when applied to carriers of passengers, is equivalent to the terms "extraordinary care" and "highest diligence." The high degree of care required of carriers is not required of livery stable keepers in letting horses and carriages to customers. *Stanley v. Steele*, 60 Atl. 640, 642, 77 Conn. 688, 69 L. R. A. 561, 2 Ann. Cas. 342.

#### As ordinary and reasonable care

The expression "due care" is not the equivalent of "ordinary care." *City of San Antonio v. Talerico* (Tex.) 78 S. W. 28, 32.

"Due care," "due diligence," and "ordinary care," are convertible terms, and mean the same thing. *Western Union Tel. Co. v. Smith* (Tex.) 133 S. W. 1062, 1064 (citing 3 Words and Phrases, p. 2222; 6 Words and Phrases, p. 5035).

The rule of law now generally recognized is that the legal measure of duty, except that made absolute by law, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," used interchangeably. *Raymond v. Portland R. Co.*, 62 Atl. 602, 604, 100 Me. 529, 3 L. R. A. (N. S.) 94.

"The standard of 'due care' is the conduct of the average prudent man." *Cudahy Packing Co. v. Roy*, 99 N. W. 231, 233, 71 Neb. 600 (quoting and approving definition in *Omaha Bottling Co. v. Theller*, 80 N. W. 821, 59 Neb. 257, 80 Am. St. Rep. 673).

"'Due care' is ordinary care, and ordinary care is the care that would be exercised by a reasonably prudent person under the same or similar circumstances." *Cornovski*

v. St. Louis Transit Co., 106 S. W. 51, 56, 207 Mo. 263.

A traveler crossing a railroad track is bound only to use due care, which is not the highest degree of care possible, but is only ordinary or reasonable care under the circumstances. *Colorado & S. Ry. Co. v. Chiles*, 114 Pac. 661, 664, 50 Colo. 191.

The care to be exercised by a gas company to prevent escape of gas from its mains to the injury of trees along the street is not ordinary care as distinguished from extraordinary care, but due care or care commensurate with the danger. *Gould v. Winona Gas Co.*, 111 N. W. 254, 258, 100 Minn. 258, 10 L. R. A. (N. S.) 889.

"Due care" means reasonable care adapted to the circumstances." One who proceeds to cross a street railway track without looking for approaching cars is not in the exercise of due care. *Riska v. Union Depot R. Co.*, 79 S. W. 445, 449, 180 Mo. 168.

#### DUE CARE AND CAUTION

"Due care and caution" is a relative term, and what is required to constitute it depends upon the surrounding circumstances, so that age, defective vision, hearing, or other infirmity are only circumstances to be considered by the jury, and the existence of one or more of them does not require a higher degree of care and caution than in the case of one having no such infirmity, and, while under one set of circumstances what would meet the requirement would not do under other circumstances, no conditions require more than reasonable care for one's safety. *Rosenthal v. Chicago & A. R. Co.*, 99 N. E. 672, 675, 255 Ill. 552.

#### DUE CARE AND DILIGENCE

While the word "due" is defined to be "that which is owed" or "that which one has a right to demand or claim," an instruction in an action for assault and battery, the defense being that defendant struck plaintiff thinking he was striking another in self-defense, requiring "due care and diligence" is not sufficient; the law requiring the highest degree of care practicable under the circumstances. *Crabtree v. Dawson*, 83 S. W. 557, 561, 119 Ky. 148, 7 L. R. A. (N. S.) 565, 115 Am. St. Rep. 243.

#### DUE CAUTION

"Due caution" means caution commensurate with existing and surrounding hazards. *Van Dyke v. Grand Trunk Ry. Co. of Canada*, 78 Atl. 958, 964, 84 Vt. 212, Ann. Cas. 1913A, 640.

#### DUE COMPENSATION

"Due compensation," as used in the Constitution providing that property shall not be taken for public use without "due compensation," means what will make the owner whole pecuniarily for appropriating or in-

juring his property by any invasion of it cognizable by the senses, or by interference with some right in relation to property whereby its market value is lessened as the direct result of the public use. *King v. Vicksburg Ry. & Light Co.*, 42 South. 204, 205, 88 Miss. 456, 6 L. R. A. (N. S.) 1036, 117 Am. St. Rep. 749.

#### DUE CONSIDERATION

The phrase "due consideration," as used in an ordinance providing that an application for permission to retail intoxicating liquors shall be made by petition in writing to the board of supervisors, and that, if after "due consideration" of the same by the board of supervisors the petition be favorably acted upon, the petitioner shall file a bond, etc., means a consideration of the application on its merits and the return of a judgment based on the evidence heard, and the board has no warrant to arbitrarily refuse an application without a sufficient hearing of evidence. *Reed v. Collins*, 90 Pac. 973, 974, 5 Cal. App. 494.

#### DUE COURSE OF BUSINESS

See Holder in Due Course; Indorsee in Due Course.

"In due course of business" involves indorsement to the holder before maturity, where the instrument is payable to order. *Cochran v. Stein*, 136 N. W. 1037, 1038, 118 Minn. 323, 41 L. R. A. (N. S.) 391.

One who takes negotiable paper in payment of an antecedent debt before maturity and without notice, actual or otherwise, of any defect, receives it "in due course of business," and becomes, within the meaning of commercial law, "a holder for value." *Hammer v. Brown*, 113 S. W. 1014, 88 Ark. 97.

Commercial paper may be said to be received in the "usual course of business" when it is indorsed and delivered for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it, when offered for the purpose for which it is transferred; and it would not be in due course if he should at once suspect the integrity of the paper itself, or the credit and standing of the party offering it. *Matlock v. Scheuerman*, 93 Pac. 823, 826, 51 Or. 49, 17 L. R. A. (N. S.) 747.

A "purchase in due course" means a purchase before maturity for value, without notice, and in good faith. *Walters v. Rock*, 115 N. W. 511, 513, 18 N. D. 45.

A bank receiving negotiable paper in consideration of credit on its books, which credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals, is not a "purchaser in due course of business." *McKnight v. Parsons*, 113 N. W. 858, 860, 136 Iowa, 390, 125 Am. St. Rep. 265, 22 L. R. A. (N. S.) 718, 15 Ann. Cas. 665.

**DUE COURSE OF LAW**

The expressions "due course of law" and "law of the land" do not mean any act that the Legislature may have passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. *Hanson v. Krehbiel*, 75 Pac. 1041, 1042, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422.

"Due course of law" of the land may not always mean a trial by jury, but it does mean that the citizen's property shall not be taken from him permanently without notice and opportunity to be heard before a judicial tribunal. Pen. Code 1895, art. 402, as amended by Acts 28th Leg. (Gen. Laws, p. 55, c. 40), providing that on the complaint of any person who believes that intoxicating liquor is being sold or given away in violation of law, and on the issuance of a warrant, a sheriff or constable is authorized to search the place described and to seize all intoxicating liquors found therein, containing no provision for the disposition of property so seized, is unconstitutional as a deprivation of property without "due process of law." *Beavers v. Goodwin* (Tex.) 90 S. W. 930, 932.

"Due course of law" does not mean any act that the Legislature may have passed if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford an opportunity of showing the extent of injury and giving adequate remedy to recover therefor. It means due and orderly procedure of courts in the ascertainment of damages for injury to the end that the injured one "shall have remedy"; that is, proper and adequate remedy, thus to be ascertained. N. C. Laws 1901, p. 784, c. 557, § 1, which provides that, before any action for libel shall be brought against a periodical or newspaper, the plaintiff shall serve a written notice on the publisher specifying the articles and the statements which he alleges to be false, and that if it appears on trial that the article was published in good faith, and that its falsity was due to an honest mistake in fact, and that there were reasonable grounds for believing that it was true, and that, within ten days after the notice, a fair and full retraction is published, the plaintiff shall recover only actual damages, does not violate Const. art. 1, § 35, which declares that, for an injury to his person or reputation, every person shall have a remedy by "due course of law," since "actual damages" include all damages which are property. *Osborn v. Leach*, 47 S. E. 811, 814, 135 N. C. 628, 66 L. R. A. 648 (quoting and adopting *Hanson v. Krehbiel*, 75 Pac. 1041. 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422).

**DUE DILIGENCE**

What is "due diligence" chiefly depends on the circumstances of each case. It, however, always involves a "judicious course" or proceeding. A suit, however, is not an essential ingredient to due diligence. *Mackie's Ex'r v. Davis* (Va.) 2 Wash. 219, 226, 1 Am. Dec. 482.

"Due care," "due diligence," and "ordinary care," are convertible terms, and mean the same thing. *Western Union Tel. Co. v. Smith* (Tex.) 133 S. W. 1062, 1064 (citing 3 Words and Phrases, p. 2222; 6 Words and Phrases, p. 5035).

What is "due diligence" in a case where negligence would be wrongful must be determined from all the surrounding circumstances, for a degree of diligence which might suffice under one set of circumstances might be wholly inadequate under different conditions. *Atlantic Coast Line R. Co. v. Moore*, 68 S. E. 875, 878, 8 Ga. App. 185.

The measure of "due diligence and foresight" is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in the 23-hour law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances. An "accidental or unavoidable cause" which cannot be avoided by the exercise of due diligence and foresight in the meaning of this law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and whose effects under similar circumstances they do not and would not ordinarily avoid. *Chicago, B. & Q. R. Co. v. United States*, 194 Fed. 342, 344, 114 C. C. A. 334.

A passenger in such a stupor that he could not be waked up either by shaking or kicking could not have been found to have been a person "in the exercise of due care and diligence," had an indictment been resorted to, and therefore he could not be found to have been in the exercise of due diligence, as was alleged in an action to recover a penalty for wrongfully causing his death. The court continued: "We use the words 'due diligence' in place of the words 'due care' found in Rev. Laws, c. 111, § 267, merely because those are the words of the count in question, and of St. 1886, p. 117, c. 140, under which the action was brought, and not because there is any distinction between those words and the words of Rev. Laws, c. 111, § 267." *Hudson v. Lynn & B. R. Co.*, 71 N. E. 66, 70, 185 Mass. 510.

Defendants in February, 1905, purchased of plaintiffs 200 barrels of certain flour at \$5.35 per barrel, for delivery in fractional

lots as requested by defendants within a "reasonable time." Between March 20th and May 16th, defendants accepted 55 barrels, and in July requested further delay. In August plaintiffs notified defendants that if they did not carry out their contract plaintiffs would dispose of the flour on defendant's account, and, receiving no response, plaintiffs tendered the flour to the defendants on September 2, 1905, which defendants refused to receive, whereupon, without further notice, plaintiffs sold the flour on a produce exchange on September 20th for \$4.20 a barrel, which was the best price obtainable. Held, that plaintiffs acted with "due diligence," and that the resale fixed the measure of plaintiff's damages. *Ford v. Erde*, 99 N. Y. Supp. 487, 488, 50 Misc. Rep. 665.

Under Pen. Code, § 686, subd. 3, providing that in a criminal case the testimony of a witness made under the opportunity for cross-examination by both sides may be admitted in evidence where such witness cannot with "due diligence" be found within the state, defendant's reliance upon the sheriff's promise to produce the witness if possible on the state's subpoena for him was not such "due diligence," which means such diligence as the circumstances require, but he should have issued one himself, since the state had the right to withdraw its subpoena at any time. *People v. Johnson*, 110 Pac. 965, 966, 13 Cal. App. 776.

#### **In making ship seaworthy**

The diligence required of vessels to enable them to claim the benefit of the Harter Act (Act Feb. 13, 1893, c. 105, § 2, 27 Stat. 445), with reference to "due diligence," is diligence with respect to the vessels and not in obtaining surveyor's certificates of seaworthiness. *The Abbazia*, 127 Fed. 495, 496.

"Due diligence" to make a vessel in all respects seaworthy, within the meaning of section 3 of the Harter Act (27 Stat. 445, c. 105), does not require merely due diligence on the part of the owner himself nor in respect to construction only, but also on the part of those to whom the owner has intrusted the duty, and in respect not only to construction but also as to inspection, maintenance, and repair; and where the agents of the purchasers of a vessel tested the deck somewhat with a hammer and small knife, without making a thorough inspection, the owners did not exercise due diligence in inspection to make her seaworthy before the commencement of the voyage. *The Ninfa*, 156 Fed. 513, 521.

#### **For personal safety**

Whatever a person in the exercise of reasonable care might do is "due diligence" within an accident policy requiring insured to use "due diligence" for his self-protection. *Tinsman v. Illinois Commercial Men's Ass'n*, 85 N. E. 913, 914, 235 Ill. 635.

#### **In securing testimony**

Rev. St. 1898, § 3133, requiring for a continuance, because of absence of evidence, a showing that "'due diligence' has been used to procure it," is not satisfied where a subpoena for the absent witness was not placed in the hands of an officer for service till the morning the case was called for trial, though it had been set for several weeks, and the witness had testified on a former trial. *Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson*, 83 Pac. 731, 733, 30 Utah, 126.

#### **DUE EXECUTION**

"The 'due execution' of an instrument goes to the manner and form of its execution, according to the laws and customs of the country, by persons competent to execute it." *Puritan Mfg. Co. v. Toti & Gradi*, 94 Pac. 1022, 1023, 14 N. M. 425.

#### **DUE FORM**

For a tax deed to be in "due form," it must have followed the form laid down in the statutes. An abstract which recites that the tax deed was in "due form," but which does not set out the tax deed in full, is insufficient to bring in question the propriety of the action of the court below in admitting the tax deed in evidence. *Williams v. Jones*, 40 South. 28, 50 Fla. 485.

#### **DUE IN THE SAME RIGHT**

A debt is considered as "due in the same right" as one sued on when the plaintiff can sue, and the defendant be sued, in their own names, without specifying any representative character, and the party to the suit has a lien upon, or a legal right to the application or distribution of, the fund when collected. *McGehee v. Harrison*, 51 Ala. 522, 524.

#### **DUE INVESTIGATION**

Section 6 of chapter 67 of the Laws of 1905, entitled "An act to abolish the state board of taxation and to create in lieu thereof a board of equalization, revision, review and enforcement of tax assessments" (P. L. p. 126), authorizes the state board of equalization, "after 'due investigation,'" to increase the assessment made upon any property that has been assessed at less than its true value, and for this purpose, if necessary, to direct a reassessment of such property to be made by an assessor or other taxing officer, or by some other person appointed by the board. Held, that the new assessment, whether made by the board, or by a taxing officer, or some other person, is intended merely for the purpose of carrying into effect a determination previously reached by the board, after "due investigation"; that the property in question has been assessed at too low a valuation; and that the owner of the property is entitled to notice of the investigation. Mayor, etc., of Jersey City v.

Board of Equalization of Taxes of New Jersey, 67 Atl. 38, 41, 74 N. J. Law, 753.

### DUE MANNER

See In Due Manner.

An allegation, in an indictment for subornation of perjury, that the witness suborned was in "due manner" sworn was equivalent to an allegation that she was duly sworn, and was sufficient without setting forth the form or manner in which it was done. *State v. Jewett*, 85 Pac. 994, 996, 48 Or. 577 (citing 3 Words and Phrases, pp. 2259-2264; Anderson's Dict. of Law, 385; 3 Cent. Dict. & Enc. 1795).

### DUE NOTICE

As used in the provisions of the Code, regulating sheriff's sales, a notice by advertisement is not due notice to the party in actual possession of the land. *Downing v. Stephens*, 1 Baxt. (60 Tenn.) 454, 456.

"Due notice," within Rev. St. c. 107, § 8, requiring due notice of a deposition taken out of the state and not under a commission, is that which will reasonably enable the adverse party to be present at the taking, and depends on the circumstances of each case, and must be settled by the sound discretion of the presiding judge, which was not abused by holding good a notice served in Portland (Me.) on the 14th for the taking of a deposition in New Bedford (Mass.), 166 miles distant, on the 24th, where the court adjourned its session on the 16th. *Harris v. Brown*, 63 Me. 51, 53.

"Due notice," as used in the by-laws of a Trade Union, which provided for fining and otherwise punishing any member violating the law of the association, etc., and provided for a trial with due notice, means notice that the accused is to be put upon trial at a specified time upon specified charges, and the notice must be given in season to afford him reasonable opportunity to make preparation to meet the charges by summoning witnesses in his behalf. *Brennan v. United Hatters of North America*, Local No. 17, 65 Atl. 165, 168, 73 N. J. Law, 729, 9 L. R. A. (N. S.) 254, 118 Ann. St. Rep. 727, 9 Ann. Cas. 698.

Under a contractor's bond for city work, providing that, if an action be brought against the city for damages from the contractor's negligence, "due notice" of the action, given the contractor and his surety, should be conclusive against them as to their liability, notice of an action against the city given to the contractor 17 months after it was begun, a year after it was put at issue, and 11 days before the time for trial was *prima facie* but not conclusively "due notice" within the contractor's bond, and the court should have permitted the contractor and sureties to make their showing that the notice was not in time. *Spokane v. Costello*, 74 Pac. 58, 60, 61, 33 Wash. 98.

### DUE OR TO BECOME DUE

The "debts due or to become due," under Rev. St. 1898, § 2768, relate to such as the garnishee owes absolutely, and have been construed to cover debts which are an absolute liability, though payable at some future date. *Mundt v. Shabow*, 97 N. W. 897, 120 Wis. 303 (citing *Smith v. Davis*, 1 Wis. 447, 60 Am. Dec. 390; *Bishop v. Young*, 17 Wis. 46, 47; *Foster v. Singer*, 34 N. W. 395, 69 Wis. 392, 2 Am. St. Rep. 745; *Vollmer v. Chicago & N. W. Ry. Co.*, 56 N. W. 919, 86 Wis. 305; *Evans v. Rector*, 83 N. W. 292, 107 Wis. 286).

### DUE PRECAUTION

The duty imposed on the owners, masters, and agents of ships bringing alien immigrants to a port of the United States by Act March 3, 1891, c. 551, §§ 8, 10, 26 Stat. 1085, 1086, to adopt "due precautions" to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and to detain such immigrants as may be rejected on board until they are returned, does not make a shipowner, master, or agent an insurer of the safe-keeping of alien immigrants while detained for inspection in the custody of inspection officers at a place on land designated by such officers, and they cannot be convicted of a violation of such provisions, because of the escape of immigrants, while so held, without their fault or negligence. *H. Hackfeld & Co. v. United States*, 141 Fed. 9, 11, 72 C. C. A. 265.

### DUE PROCESS OF LAW

See, also, Due Course of Law; Taking without Due Process.

Deprive of property, see Deprive.

"It is difficult to define with precision the exact meaning of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser \* \* \* to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decision may be founded. It may, however, be stated generally that 'due process of law' requires an orderly proceeding, adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce, and protect his rights." *Jones v. Board of Com'rs, Franklin County*, 42 S. E. 144, 149, 130 N. C. 451 (quoting and adopting statements in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289).

The phrase "due process of law" has never been defined so as to draw a clear and distinct line applicable to all cases between proceedings which are by "due process of law" and those which are not. *Gaffney v. Jones*, 87 Pac. 114, 116, 44 Wash. 158.

"The words 'law of the land' were borrowed from the Magna Charta and have a recognized significance." *State v. Barrett*, 50 S. E. 506, 514, 138 N. C. 630, 1 L. R. A. (N. S.) 626.

The constitutional guaranty of "due process of law" prohibits every arbitrary interference with the property of a person, and protects every citizen in the possession, enjoyment, and disposition of his property; but it is not intended to interfere with the government in determining by what remedies or process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for this purpose gives reasonable notice and affords fair opportunity to be heard before the issues are decided. As stated in *Taylor v. Porter* (N. Y.) 4 Hill, 140, 40 Am. Dec. 274, "due process of law" is "a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property." As stated in *Backus v. Shipherd* (N. Y.) 11 Wend. 629, it is "a timely and regular proceeding to judgment and execution." As stated in *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682, it is "the application of the law as it exists in the fair and regular course of administrative procedure." As stated in *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, it is "that kind of procedure which is suitable and proper to the nature of cases, and sanctioned by the established usages and customs of the courts." As stated in *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678, it is "process due according to the law of the land." In *re Francis*, 136 Fed. 912, 913 (citing *Iowa Cent. R. Co. v. Iowa*, 16 Sup. Ct. 344, 160 U. S. 389, 40 L. Ed. 467; *Simon v. Craft*, 21 Sup. Ct. 836, 182 U. S. 427, 45 L. Ed. 1165; *Leeper v. Texas*, 11 Sup. Ct. 577, 139 U. S. 462, 35 L. Ed. 225; *Ludeling v. Chaffe*, 12 Sup. Ct. 439, 143 U. S. 301, 36 L. Ed. 313; *Wiswall v. Campbell*, 93 U. S. 348, 23 L. Ed. 923).

That the Constitution is the "law of the land," in the sense that no act of either department of the government, which violates its provisions or exceeds its powers, can be enforced to deprive the citizen of his life, liberty, or property, is a fundamental truth. To deny it is to assert that constitutional government is a failure, and liberty, regulated by law, has no abiding place in our political system. The Constitution is, of necessity, as well as the declared will of the people, the supreme law, and in no proper legal sense can any act of either department of the government which violates its provisions or exceeds the powers delegated, be by law. *State v. Williams*, 61 S. E. 61, 62, 146 N. C. 618, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562.

The phrase "due process" has had a well-defined meaning for ages. Putting it in the

fourteenth amendment to the Constitution not only granted, but directly defined, certain specific rights which inure to the benefit of every person, alien as well as citizen, and are derived from, dependent upon, or secured by the Constitution of the United States. The right thus created and defined, in a case involving life and liberty, is the right to enjoy the benefits of all proceedings which constitute a trial according to the law of the land. But it cuts deeper than this. The law of the land, applying to all persons impartially, might not afford some of the rights which this clause of the Constitution grants and secures to the citizen and compels the state to afford. If, for instance, the state should deprive a person of the benefit of counsel, it would not be due process of law. If it allowed a private person to pass judgment on him for crime, it would not be due process. Within certain limits the state may change its remedies at pleasure, but it must be "with due regard to the landmarks established for the protection of the citizen." It must not exercise "arbitrary power or depart from the principles of private right and distributive justice." As declared by the Supreme Court, the fourteenth amendment, in its requisition concerning due process, "is not too vague and indefinite to operate as a practical restraint." *Hurtado v. California*, 4 Sup. Ct. 111, 110 U. S. 516, 28 L. Ed. 232. As there declared, "due process must, in the language of Mr. Webster, be, according to his familiar definition, the general law, or law which hears before it condemns, and which proceeds upon inquiry and renders judgment." *Ex parte Riggins*, 134 Fed. 404, 418.

"Due process of the law" includes every step from summons to judgment, and, if a party is deprived of any right usually accorded to others, it is not "due process of law." *Riglander v. Star Co.*, 90 N. Y. Supp. 772, 776, 98 App. Div. 101.

What is "due process of law" must be determined by circumstances, and thus, in the military or naval service of the United States, the military law is due process, so that the decision of military tribunal, acting within its scope, is not reviewable by the courts. *Reaves v. Ainsworth*, 31 Sup. Ct. 230, 233, 219 U. S. 296, 304, 55 L. Ed. 225.

Any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves the principles of liberty and justice, is "due process of law." *State v. Jack*, 76 Pac. 911, 913, 69 Kan. 387, 1 L. R. A. (N. S.) 167, 2 Ann. Cas. 171 (citing *Brown v. New Jersey*, 20 Sup. Ct. 77, 175 U. S. 172, 44 L. Ed. 119).

If a statute does not violate the federal constitutional prohibition against the denial of due process of law, it does not violate the



state Constitution in that respect, since "due process of law" means the same in both Constitutions. *McGarvey v. Swan*, 96 Pac. 697, 714, 17 Wyo. 120.

Const. U. S. Amend. 5, prohibiting any person from being deprived of liberty or property without due process of law, is merely a restriction upon the federal power, and does not apply to the states. *Inland Steel Co. v. Yedinak*, 87 N. E. 229, 234, 172 Ind. 423, 139 Am. St. Rep. 389.

The provision of the state Constitution (article 1, § 6) declaring that no person shall be deprived of his property without "due process of law" has been universally given a large and liberal interpretation, and it has been held that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense, against unlawful invasion by the government, but also protects every essential incident to the enjoyment of those rights, including the right to dispose of property without unreasonable restrictions. *Wright v. Hart*, 93 N. Y. Supp. 60, 67, 103 App. Div. 218.

In criminal cases in a state court, "due process of law" means a trial in a court of competent jurisdiction, before an impartial judge and jury, or judge without a jury, upon an accusation, either by indictment or information, as the state may provide, charging the accused with the violation of some state law, of which accusation the accused must have notice in time to enable him to prepare for trial. This trial must proceed according to the established procedure or rules of practice in such state applicable to all such cases. In other words, the defendant must have his day in court. The admission of evidence for or against the accused must be according to the established rules in such state in all such cases, and the punishment inflicted must be authorized by law. *Anderson v. State*, 126 Pac. 840, 847, 8 Okl. Cr. 90.

#### **Equal protection of law synonymous**

See Equal Protection of Law.

#### **Law of the land synonymous**

The expressions "due process of law" and "the law of the land" are synonymous. *United States v. New York*, N. H. & H. R. Co., 165 Fed. 742, 748; *Daniels v. Homer*, 51 S. E. 992, 999, 139 N. C. 219, 3 L. R. A. (N. S.) 997 (*Simon v. Craft*, 21 Sup. Ct. 836, 182 U. S. 427, 45 L. Ed. 1165); *Rider-Wallis Co. v. Fogo*, 78 N. W. 767, 769, 102 Wis. 536 (quoting and adopting definition in *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678); *Kansas Pac. Ry. Co. v. Dunnmeyer*, 19 Kan. 539, 542; *State v. McKnight*, 75 N. W. 790, 791, 7 N. D. 444; *Womach v. City of St. Joseph*, 100 S. W. 443, 446, 201 Mo. 467, 10 L. R. A. (N. S.) 140; *State ex rel. Mackintosh v. Superior Court for King County*, 88 Pac. 207, 209, 45 Wash. 248; *State v. Missouri Tie &*

*Timber Co.*, 80 S. W. 933, 941, 181 Mo. 536, 65 L. R. A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; *State v. Barrett*, 50 S. E. 506, 514, 138 N. C. 630, 1 L. R. A. (N. S.) 626; *Ong Chang Wing v. United States*, 31 Sup. Ct. 15, 218 U. S. 272, 54 L. Ed. 1040; *People ex rel. Hillel*, No. 72, I. O. B. B., v. *Rose*, 69 N. E. 762, 767, 768, 207 Ill. 352; *McKinstler v. Sager*, 72 N. E. 854, 856, 163 Ind. 671, 68 L. R. A. 273, 108 Am. St. Rep. 268; *Charles J. Off & Co. v. Morehead*, 85 N. E. 264, 235 Ill. 40, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; *City of Belleville v. St. Clair County Turnpike Co.*, 84 N. E. 1049, 234 Ill. 428, 17 L. R. A. (N. S.) 1071; *Gunn v. Union R. Co.*, 62 Atl. 118, 119, 27 R. I. 320, 2 L. R. A. (N. S.) 362; *People v. Strassheim*, 90 N. E. 118, 242 Ill. 359 (citing 3 Words and Phrases, p. 2230); *State v. Hodgson*, 28 Atl. 1089, 66 Vt. 134, 157; *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 500, 512, 127 Wis. 468; *Wenham v. State*, 91 N. W. 421, 423, 65 Neb. 394, 58 L. R. A. 825; *United States v. Billings*, 190 Fed. 359; *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 219, 18 Idaho, 695, 32 L. R. A. (N. S.) 534; *Meffert v. State Board of Medical Registration and Examination*, 72 Pac. 247, 251, 66 Kan. 710, 1 L. R. A. (N. S.) 811; *Kennedy v. State Board of Registration in Medicine*, 108 N. W. 730, 731, 145 Mich. 241, 9 Ann. Cas. 125 (adopting definition in *State v. Board of Medical Examiners*, 26 N. W. 123, 34 Minn. 387); *Jenks v. Stump*, 93 Pac. 17, 19, 41 Colo. 281, 124 Am. St. Rep. 137, 14 Ann. Cas. 914; *Strom's Estate v. Strom*, 114 S. W. 581, 582, 134 Mo. App. 340 (citing *Hunt v. Searcy*, 67 S. W. 206, 167 Mo. 158, 179); *Anderson v. State*, 126 Pac. 840, 8 Okl. Cr. 90; *Crane v. Waldron*, 94 N. W. 593, 598, 133 Mich. 73; *Board of Water Com'rs of City of Norwich v. Johnson*, 84 Atl. 727, 86 Conn. 151, 41 L. R. A. (N. S.) 1024; *People ex rel. New York Cent. & H. R. Co. v. Priest*, 99 N. E. 547, 552, 206 N. Y. 274.

#### **As security against arbitrary action**

"Due process of law" is secured by laws operating on all alike, without discrimination." *Lamar v. Prosser*, 48 S. E. 977, 121 Ga. 153. (Citing and adopting *Caldwell v. Texas*, 11 Sup. Ct. 883, 141 U. S. 209, 35 L. Ed. 718.)

Due process of law is secured, if the laws operate upon all alike and do not subject the individual to the arbitrary exercise of the powers of government. *Miller v. City of Birmingham*, 44 South. 388, 389, 151 Ala. 469, 125 Am. St. Rep. 31.

The words "due process of law" as used in the federal Constitution have been held to mean nothing more than the application of the law of the land to a given class of cases, and such application is secured if the law in question operates on all alike and does not subject the individual to an arbitrary exercise of the powers of government. *Dela-*

ware, L. & W. R. Co. v. Board of Public Utility Com'rs, 84 Atl. 702, 703, 83 N. J. Law, 212.

The constitutional safeguard of "due process of law," or its equivalent, "law of the land," "condemns arbitrary, unequal, and partial legislation; and it is equally clear that the right to make contracts and have them enforced as others may is one of the rights so secured to every citizen." *State v. Missouri Tie & Timber Co.*, 80 S. W. 933, 940, 941, 181 Mo. 536, 65 L. R. A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119.

"Due process of law" is secured by laws operating on all alike and not subjecting the individual to arbitrary exercise of the powers of the government, unrestrained by the established principle of private right and justice. *People v. Coleman*, 79 Pac. 283, 286, 145 Cal. 609 (citing *Leeper v. Texas*, 11 Sup. Ct. 577, 139 U. S. 467, 35 L. Ed. 225).

There is a substantial distinction between the fifth amendment of the federal Constitution which is obligatory only on the United States, and secures due process of law, and the fourteenth amendment, which is obligatory on the states and prohibits the denial of the equal protection of the laws; the latter expression being broader than the former, though the mere denial of equal protection of the laws may run into the other limitation. Mere discrimination, however, does not necessarily have that effect. *United States v. New York, N. H. & H. R. Co.*, 165 Fed. 742, 745.

The terms "due process of law" and "equal protection of the laws," as used in Const. U. S. Amend. 14, mean practically one and the same thing. *State v. Barrett*, 50 S. E. 506, 514, 138 N. C. 630, 1 L. R. A. (N. S.) 626 (dissenting opinion of Brown, J., quoting and adopting definitions in *Cooley*, Const. Lim. § 335; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. 722).

There is a diversity of opinion as to the true meaning of the words "law of the land" and "due process of law," as used in the state Constitutions; but the phrases mean the same, and, if they were combined to read "due process of the law of the land," the meaning would be the same. But they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property, and to secure the individual from the arbitrary exercise of the powers of government unrestrained by established principles of private rights and distributive justice. *State v. Hodgson*, 28 Atl. 1089, 1094, 68 Vt. 134; *State v. Stimpson*, 62 Atl. 14, 17, 78 Vt. 124, 1 L. R. A. (N. S.) 1153, 6 Ann. Cas. 639.

#### **As based on fundamental and inherent principles of justice**

The words "due process of law" imply conformity with natural and inherent princi-

ples of justice. *Larabee v. Dolley*, 175 Fed. 365, 392 (quoting and adopting definition in *Holden v. Hardy*, 18 Sup. Ct. 383, 169 U. S. 366, 42 L. Ed. 780).

#### **As restriction on all branches of government**

The term "due process of law" means "the law of the land," or certain fundamental rights which have always been recognized by the common law, and extends to every proceeding which may interfere with life, liberty, or property, whether judicial, administrative, or executive in its nature. *People v. Strassheim*, 90 N. E. 118, 120, 242 Ill. 359; *Risley v. City of Utica*, 173 Fed. 502, 507.

"Due process of law" extends to every case which may deprive a citizen of life, liberty, or property whether the proceedings be judicial, administrative, or executive in their nature. *Weimer v. Bunbury*, 30 Mich. 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights." *MacMullen v. City of Middletown*, 98 N. Y. Supp. 145, 150, 112 App. Div. 81 (quoting *Stuart v. Palmer*, 74 N. Y. 183, 191, 30 Am. Rep. 289).

#### **As common law, statutes, and constitutional provisions**

"Due process of law" does not mean merely according to the will of the Legislature, or the will of some judicial or quasi judicial body upon whom it may confer authority. It means according to the law of the land, including the Constitution with its guaranties and the legislative enactments and rules duly made by its authority, so far as they are consistent with constitutional limitations. It excludes all mere arbitrary dealings with persons or property. It excludes all interference not according to the established principles of justice, one of the most familiar of them being the right and opportunity for a hearing, to meet opposing evidence and oppose with evidence, according to the established principles of fair investigation to determine the justice of the case, before judgment affecting personal or property rights shall be pronounced." *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 500, 512, 127 Wis. 468 (citing *Seifert v. Brooks*, 34 Wis. 443; *State ex rel. Flint v. Common Council of City of Fond du Lac*, 42 Wis. 287).

Under the Constitution of the United States, and amendment (article 5), providing that no person shall be deprived of life, liberty or property without "due process of law," and the Constitution of Pennsylvania, declaring that the accused cannot be deprived of his life, liberty, or property, without the judgment of his peers, or the "law of the land," the two phrases "law of the land" and "due process of law" are synonymous, and their meaning is that such principles in the administration of law as were in

force under the common law in England at the time when the Constitution of the United States or the Constitution of Pennsylvania was adopted became part of the American law by force of these constitutional enactments. *State ex rel. Mackintosh v. Superior Court for King County*, 88 Pac. 207, 209, 45 Wash. 248.

The term "law of the land" includes law of the state, Constitution of the state, and the Constitution of the United States. *Titsworth v. State*, 101 Pac. 288, 289, 2 Okl. Cr. 268.

#### **As proceeding according to course of common law**

It has been held that the phrase "due process of law" has reference to judicial proceedings according to the course and usage of the common law. *People ex rel. Hillel Lodge No. 72, I. O. B. B., v. Rose*, 69 N. E. 762, 767, 768, 207 Ill. 352.

The "law of the land" is not simply existing statute law of the state, but is the right of trial according to the process and proceedings of the common law. *State v. Learned*, 47 Me. 426, 432.

"Due process of law" means a regular trial according to the course of the common law. *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 107 N. Y. Supp. 341, 364, 122 App. Div. 203 (quoting definition in 4 Lincoln's Const. Hist. p. 37).

#### **As exercise of governmental power according to settled maxims**

Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an exercise of power "as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes to which the one in question belongs," it is due process of law. *Leigh v. Green*, 24 Sup. Ct. 390, 392, 193 U. S. 79, 48 L. Ed. 623 (quoting *Cooley*, Const. Lim. [7th Ed.] 506).

When it is declared that a person shall not be deprived of his property without "due process of law," it means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs. The constitutional guaranty which is as old as Magna Charta, as it is found in this or an equivalent form in every American Constitution, is intended to secure the citizen from the arbitrary exercise of the powers of government, unrestrained by the established principles of right and distributive justice. *Kennedy v. State Board of Registration in Medicine*, 108 N. W. 730, 731, 145 Mich. 241, 9 Ann. Cas. 125 (quoting and adopting the definition in *State v. State Board of*

*Medical Examiners*, 26 N. W. 123, 34 Minn. 387); *People v. Dickerson*, 129 N. W. 199, 200, 164 Mich. 148, 33 L. R. A. (N. S.) 917, Ann. Cas. 1912B, 688; *In re City of Pittsburg*, 66 Atl. 348, 352, 217 Pa. 227, 120 Am. St. Rep. 845.

#### **As general public laws**

The phrase "law of the land" includes the general laws of the state. *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 217, 18 Idaho, 695, 32 L. R. A. (N. S.) 534.

To give a court discretion as to mode of trial on the question of insanity does not deny "due process of law." *State v. Lyons*, 37 South. 890, 905, 113 La. 959; *In re Crosswell's Petition*, 66 Atl. 55, 57, 28 R. I. 137, 13 Ann. Cas. 874.

The constitutional phrase, "law of the land," means the general law which requires a hearing before a lawful tribunal before condemnation and judgment. *Wichita Electric Co. v. Hinckley (Tex.)* 131 S. W. 1192, 1194; *People ex rel. Hillel Lodge No. 72, I. O. B. B., v. Rose*, 69 N. E. 762, 767, 768, 207 Ill. 352; *Dorrance v. Dorrance*, 148 S. W. 94, 99, 242 Mo. 625; *Clapp v. Houg*, 98 N. W. 710, 713, 12 N. D. 600, 65 L. R. A. 757, 102 Am. St. Rep. 589 (quoting definition in *Dartmouth College Case*); *Daniels v. Homer*, 51 S. E. 992, 999, 139 N. C. 219, 3 L. R. A. (N. S.) 997 (dissenting opinion by Connor, J., quoting and adopting the definition of Mr. Webster, in his arguments in the *Dartmouth College Case*, which definition was adopted with approval in *Parish v. Cedar Co.*, 45 S. E. 768, 133 N. C. 478, 98 Am. St. Rep. 718); *Viemeister v. White*, 84 N. Y. Supp. 712, 715, 88 App. Div. 44 (citing *State Bank v. Cooper*, 2 Yerg. [10 Tenn.] 599, 24 Am. Dec. 517, 523; *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] 518, 4 L. Ed. 629).

The term "law of the land," in a constitutional provision that no person shall be deprived of his rights or privileges, unless by the law of the land or judgment of his peers, means "a general and public law equally binding upon every member of the community. \* \* \* The right to life, liberty, and property of every individual must stand or fall by the same rule of law that governs every other member of the body politic or 'land' under similar circumstances." *People ex rel. Kenny v. Folks*, 85 N. Y. Supp. 1100, 1105, 89 App. Div. 171 (concurring opinion of Woodward, J., quoting and adopting definition given in *Vanzant v. Waddel*, 2 Yerg. [10 Tenn.] 260); *Rosin v. Lidgerwood Mfg. Co.*, 86 N. Y. Supp. 49, 51, 89 App. Div. 245.

"Due process of law" means ordinary judicial proceedings, or due notice in pursuance of the general law. *Jones v. Mould*, 132 N. W. 45, 49, 151 Iowa, 599.

A general public law, equally binding upon everybody similarly situated, and administered according to the regular course of

judicial proceedings, constitutes "due process of law." *Mountain City Mill Co. v. Waller*, 1 Tenn. Ch. App. 629, 643.

"Due process of law" means a general public law, binding upon all members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Charles J. Off & Co. v. Morehead*, 85 N. E. 264, 266, 235 Ill. 40, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434.

**As course of legal proceedings according to established rules and principles**

"Due process of law" means in the due process of the legal proceedings according to those rules and forms which have been established for the protection of private rights." *Flannery v. People*, 80 N. E. 60, 64, 225 Ill. 62; *City of Belleville v. St. Clair County Turnpike Co.*, 84 N. E. 1049, 1052, 234 Ill. 428, 17 L. R. A. (N. S.) 1071; *Town of Vidalia v. Falkenheiner*, 49 South. 217, 123 La. 625; *Hendryx v. Perkins*, 114 Fed. 801, 824, 52 C. C. A. 435; *Martin v. White*, 146 Fed. 461, 467, 76 C. C. A. 671 (quoting and adopting the definition in *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 665); *Commissioners of Union Drainage Dist. No. 1 v. Smith*, 84 N. E. 376, 377, 233 Ill. 417, 16 L. R. A. (N. S.) 292; *People v. White*, 90 Pac. 471, 477, 5 Cal. App. 329 (quoting and adopting definition in *Cooley*, Const. Lim. 355); *Drady v. District Court*, 102 N. W. 115, 118, 126 Iowa, 345; *People ex rel. Hillel Lodge No. 72, I. O. B. B., v. Rose*, 69 N. E. 762, 768, 207 Ill. 352; *State v. Buddress*, 114 Pac. 879, 882, 68 Wash. 26; *State v. Barrett*, 50 S. E. 506, 514, 138 N. C. 630, 1 L. R. A. (N. S.) 626; *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.*, 99 N. E. 920, 924, 256 Ill. 196, 42 L. R. A. (N. S.) 793.

"Due process of law," guaranteed in both the fifth and fourteenth amendments to the Constitution, implies the administration of equal laws according to established rules by competent tribunals having jurisdiction and proceeding upon notice and hearing. *United States v. Billings*, 190 Fed. 359, 364.

"Due process of law" means according to established forms of law, and the requirement is satisfied by the grant of a right to proceed in equity. *Sisson v. Board of Sup'rs of Buena Vista County*, 104 N. W. 454, 461, 128 Iowa, 442, 70 L. R. A. 440 (citing *McLane v. Leicht*, 29 N. W. 327, 69 Iowa, 401).

"Due process of law," as used in Const. art. 1, § 13, and Const. U. S. Amend. 14, as applied to judicial proceedings, means that every litigant shall have the right to have his cause tried and determined under the rules of procedure, the same as are applied to other similar cases, and, where this is afforded him, he cannot complain that due process of law is not being observed. *Eagleson v. Rubin*, 100 Pac. 765, 768, 16 Idaho, 92.

"Due process of law" in a criminal case requires a law describing the offense. The offense must be described in the accusation. The accused must be given his day in court. His trial must proceed according to established procedure, consisting of rules of pleading and practice." *Jamison v. Wimbish*, 130 Fed. 351, 358.

**As observance of matter of form**

"Due process of law" refers primarily to procedure according to the law of the land, rather than to matters of substantive law. *Ong Chang Wing v. United States*, 31 Sup. Ct. 15, 16, 218 U. S. 272, 54 L. Ed. 1040.

The "due process of law" clause of the fourteenth amendment to the Constitution of the United States does not control mere forms of procedure in the state courts, or regulate practice therein. All its requirements are complied with if sufficient notice and adequate opportunity to defend has been afforded. *Hammond Packing Co. v. State*, 100 S. W. 407, 413, 81 Ark. 519, 126 Am. St. Rep. 1047 (quoting and adopting *Simon v. Craft*, 21 Sup. Ct. 836, 182 U. S. 427, 45 L. Ed. 1165).

While the forms of procedure in common use at the time the Constitutions were adopted must be taken to have been understood by the framers as embraced within the term "due process of law," it was not intended that the details of practice and procedure then existing should forever remain unchanged; and the Legislature may provide entirely novel and unprecedented methods of procedure, if they afford the parties affected the substantial securities against arbitrary and unjust spoliation which are embraced within the system of jurisprudence prevailing throughout the land. *Title & Document Restoration Co. v. Kerrigan*, 88 Pac. 356, 361, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199 (citing *Hurtado v. California*, 4 Sup. Ct. 111, 110 U. S. 516, 28 L. Ed. 232).

"Due process of law" is that constitutional right which provides that no citizen shall be deprived of life, liberty, or property, except as provided by law. "It relates primarily to the remedy or means of redress, where rights are invaded, rather than to matters of substantive law," and it ordinarily implies and includes a plaintiff, a defendant, a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 219, 18 Idaho, 695, 32 L. R. A. (N. S.) 534 (citing *Huber v. Rely*, 53 Pac. 112, *Kalloch v. Superior Court of City & County of San Francisco*, 56 Cal. 229, and *Board of Directors of Alfalfa Irrigation Dist. v. Collins*, 64 N. W. 1090, 46 Neb. 411).

**As law in regular course of administration**

"Due process of law" means law in the regular course of administration through the

courts of justice. *Womach v. City of St. Joseph*, 100 S. W. 443, 446, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (citing *Jones v. Yore*, 43 S. W. 384, 142 Mo. loc. cit. 44); *In re Francis*, 136 Fed. 912, 913; *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 107 N. Y. Supp. 341, 364, 122 App. Div. 203 (quoting definition in 2 *Miller*, Const. p. 664); *Davidson v. Hartford Life Ins. Co.*, 132 S. W. 291, 292, 151 Mo. App. 561; *People v. Coleman*, 79 Pac. 283, 286, 145 Cal. 609; *Crane v. Waldron*, 94 N. W. 593, 598, 133 Mich. 73; *Davidson v. Hartford Life Ins. Co.*, 132 S. W. 291, 292, 151 Mo. App. 561.

Though "due process of law" means "law in its regular course of administration through the courts of law," it does not mean that the Legislature cannot change the rules of evidence as they existed at common law, nor make one a competent witness who was not such at common law. Statutes making parties and the husband or wife of a party competent to testify, changing the rule regulating challenges to jurors, providing for a special commissioner of jurors and for special juries in criminal cases, authorizing the perpetuation of certain testimony respecting the title to a particular estate, authorizing the physical examination of the plaintiff in actions for personal injuries, declaring what shall be received by the courts as presumptive evidence, provided the fact proved has a fair connection with the main fact to be proved, declaring the effect of recitals in tax deeds and of ex parte affidavits in town bonding acts and statutory foreclosures, and changing in other respects the common-law rules of evidence and common-law competency of witnesses, may be referred to as instances sustained by the courts. *People v. Johnson*, 77 N. E. 1164, 1167, 185 N. Y. 219.

The general definition of "due process of law" is "law in its regular course of administration through courts of justice"; and, while not necessarily confined to judicial proceedings (as, for instance, the collection of taxes is held to be within the phrase "by due process of law"), yet these words have such a signification when used to designate the kind of an eviction, or ouster, from real estate by which a party is dispossessed, as to preclude thereunder proof of a constructive eviction resulting from the purchase of a paramount title when hostilely asserted by the party holding it. *Kansas Pac. Ry. Co. v. Dunmeyer*, 19 Kan. 539, 542.

Law in its regular course of administration through courts of justice is "due process," and, when secured by the law of the state, the constitutional requisition is satisfied. Due process of law is so secured by laws operating on all alike and not subjecting the individual to the powers of government, unrestrained by the principles of private right and distributive justice. *Kroschel v. Munkers*, 179 Fed. 961, 963.

"Process of law," in its broad sense, means law in its regular administration in courts of justice, which is but another way of saying that every man's life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when the Constitutions were adopted. *Ives v. South Buffalo Ry. Co.*, 94 N. E. 431, 439, 201 N. Y. 271, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

#### As legislative enactment

The state cannot make anything "due process of law" which by its own legislation it declares to be such. *People ex rel. Hillel Lodge No. 72, I. O. B. B., v. Rose*, 69 N. E. 762, 767, 768, 207 Ill. 352 (citing *Cooley's Const. Lim.* [6th Ed.] pp. 430, 431; *Burdick v. People*, 36 N. E. 948, 149 Ill. 600, 24 L. R. A. 152, 41 Am. St. Rep. 329; *Regents v. Williams [Md.]* 9 Gill & J. 365, 31 Am. Dec. 99; *Board of Education v. Bakewell*, 10 N. E. 378, 122 Ill. 339; *Westervelt v. Gregg*, 12 N. Y. 202, 209, 62 Am. Dec. 160; *Rhinehart v. Schuyler*, 2 Gilman [7 Ill.] 473; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Cooley's Const. Lim.* [5th Ed.] marg. p. 356, top p. 435; *Taylor v. Porter [N. Y.]* 4 Hill, 140, 40 Am. Dec. 274; *Rohn v. Harris*, 22 N. E. 587, 130 Ill. 525; *Ervine, Appeal of*, 16 Pa. 256, 55 Am. Dec. 499; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *Commissioners of Union Drainage Dist. No. 1 v. Smith*, 84 N. E. 376, 377, 233 Ill. 417, 16 L. R. A. (N. S.) 292.

"The phrase 'law of the land,' as used in the Bill of Rights, is not easy of definition. It does not mean any act that the Legislature may have passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury and give an adequate remedy to recover therefor. Whatever the term may mean, it does mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one shall have remedy—that is, proper and adequate remedy—thus to be ascertained. To refuse hearing and remedy for an injury after its infliction is a small remove from infliction of penalty before and without hearing." *Osborn v. Leach*, 47 S. E. 811, 814, 135 N. C. 628, 66 L. R. A. 648 (quoting *Hanson v. Krehbiel*, 75 Pac. 1041, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422).

The expressions "due course of law" and "law of the land" do not mean any act that the Legislature may have passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury and give an adequate remedy to recover therefor. *Hanson v. Krehbiel*, 75 Pac. 1041,

1042, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422.

To say that the "law of the land," or "due process of law," may mean the very act of the Legislature which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The Constitution would then mean that no person should be deprived of his property or rights unless the Legislature shall pass a law to effect the wrong, and this would be throwing the restraint away. It follows that a law which, by its own inherent force, extinguishes rights of property, or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution. *King v. Hatfield*, 130 Fed. 564, 579 (quoting *Wynehamer v. People*, 13 N. Y. 378).

#### As laws of each state

"Due process of law" in the states is regulated by the law of the states. *River-Walles Co. v. Fogo*, 78 N. W. 767, 769, 102 Wis. 536 (quoting and adopting definition in *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678); *Wenham v. State*, 91 N. W. 421, 423, 65 Neb. 394, 58 L. R. A. 825.

"Due process of law," as required by the fourteenth amendment to the Constitution of the United States, means only that a man is to be tried, as every other man is tried, in accordance with the law of the land in the state where he is charged with crime." *Lamar v. Prosser*, 48 S. E. 977, 121 Ga. 153.

#### Judicial proceeding implied

"Due process of law" is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. *Jones v. Franklin County Com'rs*, 42 S. E. 144, 149, 130 N. C. 451; *Board of Education of City of Stillwater v. Aldredge*, 73 Pac. 1104, 1105, 13 Okl. 205; *Kennedy v. State Board of Registration in Medicine*, 108 N. W. 730, 731, 145 Mich. 241, 9 Ann. Cas. 125; *Ross v. Board of Sup'rs of Wright County*, 104 N. W. 506, 511, 128 Iowa, 427, 1 L. R. A. (N. S.) 431 (citing *In re Bradley*, 79 N. W. 280, 108 Iowa, 476; *Public Clearing House v. Coyne*, 24 Sup. Ct. 789, 194 U. S. 497, 48 L. Ed. 1092; *Weimer v. Bunbury*, 30 Mich. 201; *Spencer v. Merchant*, 8 Sup. Ct. 921, 125 U. S. 345, 31 L. Ed. 763; *Yeomans v. Riddle*, 50 N. W. 886, 84 Iowa, 147; *Wulzen v. Board*, 35 Pac. 353, 101 Cal. 15, 40 Am. St. Rep. 17; *Munson v. Commissioners*, 8 South. 906, 43 La. Ann. 15; *McMahon v. Palmer*, 6 N. E. 400, 102 N. Y. 176, 55 Am. Rep. 796; *Cooley's Const. Lim.* pp. 354, 355; *McKeever v. Jenks*, 13 N. W. 295, 59 Iowa, 300; *In re Madera Irr. Dist.*, 28 Pac. 272, 675, 92 Cal. 296, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Hagar v. Rec. Dist. No. 108*, 4 Sup. Ct. 663, 111 U. S. 701, 28 L. Ed. 569; *Ballard v. Hunter*, 27 Sup. Ct. 261, 266, 204 U. S. 241, 51 L. Ed. 461; *Cunningham v. North-*

*western Imp. Co.*, 119 Pac. 554, 564, 44 Mont. 180; *MacMullen v. City of Middletown*, 98 N. Y. Supp. 145, 150, 112 App. Div. 81.

"Due process of law" does not necessarily imply judicial process; constitutional legislation being also comprehended. *Board of Water Com'rs of City of Norwich v. Johnson*, 84 Atl. 727, 731, 86 Conn. 151, 41 L. R. A. (N. S.) 1024.

The expression "due process of law," as used in the Constitution of the United States, does not require that the assertion of the rights of the public against the individual, or the imposition of burdens on his property for the public use, shall in all cases be done by resort to courts of justice. *McMillan v. City of Butte*, 78 Pac. 203, 205, 30 Mont. 220 (citing *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. [59 U. S.] 272, 15 L. Ed. 372).

"Due process of law" may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose, and adequate to secure the end and object sought to be attained." *Reed v. Reed*, 98 N. W. 73, 76, 70 Neb. 775.

"Due process of law," by which parties may be brought within the jurisdiction of the trial court as defendants in a suit, involves a course of legal procedure, which under our system must be summons or by *capias*. *Hubbard v. Montross Metal Shingle Co.*, 74 Atl. 254, 255, 79 N. J. Law, 208.

"Due process of law" means at least some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself. *In re Gannon*, 18 Atl. 159, 160, 16 R. I. 537.

"Due process of law" means according to the settled course of judicial proceedings." *City of St. Louis v. Galt*, 77 S. W. 876, 879, 179 Mo. 8, 63 L. R. A. 778.

"Due process of law" requires judicial hearings only in matters of purely judicial nature, and not in matters of taxation, or matters purely administrative in their nature. *Anderson v. Ritterbusch*, 98 Pac. 1002, 1014, 22 Okl. 761.

"Due process of law" with respect to the imposition of legal penalties requires that the Legislature should prescribe the amount of the penalty or some definite standard for fixing the amount, or else that the amount should be determined in a judicial proceeding instituted against the offender. *Cigar Makers' International Union of America v. Goldberg*, 61 Atl. 457, 458, 72 N. J. Law, 214, 70 L. R. A. 156, 111 Am. St. Rep. 662.

"Due process of law" or the "law of the land," which means the same thing, is not necessarily a judicial proceeding. Private rights and the enjoyment of property

may be interfered with by the legislative or executive, as well as the judicial, department of government. When it is declared that a person shall not be deprived of his property without due process of law, it means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs. That clause in section 1, art. 14, of the Constitution of the United States, "Nor shall any state deprive any person of life, liberty, or property without due process of law," is not a limitation upon the police power of the state to pass and enforce such laws as, in its judgment, will inure to the health, morals, and general welfare of its people. *Meffert v. State Board of Medical Registration & Examination*, 72 Pac. 247, 251, 86 Kan. 710, 1 L. R. A. (N. S.) 811 (quoting and adopting definition in *State v. State Board of Medical Examiners*, 26 N. W. 123, 124, 34 Minn. 387, 389, 390).

"It is not essential, in order to constitute 'due process of law,' that a taxpayer shall have the right to a direct proceeding in the courts to review the action of persons, boards, and tribunals empowered to assess property and levy taxes for the purpose of raising revenues for expenses of government. It is not required that judicial proceedings be resorted to in enforcing the levying and payment of taxes. The right to an appeal is purely statutory. These are special officers and tribunals within themselves empowered to do and perform all acts necessary and essential in the accomplishment of the collection of the public revenues. Due process of law is observed if, in the different steps taken by the officers and tribunals created by statute, an opportunity is given to an individual taxpayer who may feel aggrieved to be heard with reference thereto, and power is given to redress such grievance as may be right and just. Personal notice is not always essential. Notice given by statute or by publication may be sufficient. An owner is not deprived of his property without due process of law, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in subsequent proceedings for its collection. *Hacker v. Howd*, 101 N. W. 255, 259, 72 Neb. 385 (citing 2 *Cooley, Tax'n* [3d Ed.] 393; 1 *Cooley, Tax'n* [3d Ed.] 60).

"Due process of law" does not necessarily imply judicial proceedings, and while orderly proceedings according to established rules which do not violate fundamental right must be observed, there is no vested right in any particular remedy or form of proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental

rules of right and affecting all persons alike, is due process. *People v. Apfelbaum*, 95 N. E. 995, 998, 251 Ill. 18.

Though the phrase "due process of law" does not necessarily mean a judicial proceeding, neither does it necessarily mean a special tribunal for the express purpose of hearing the merits of a particular controversy, and where ample notice is provided, giving an owner opportunity to have a hearing in a court of competent jurisdiction before his property is affected, he is afforded due process of law. *Balch v. Glenn*, 119 Pac. 67, 73, 85 Kan. 735, 43 L. R. A. (N. S.) 1080, Ann. Cas. 1913A, 406.

#### Jury trial not implied

A jury trial is not necessary to constitute "due process of law" in every case. *Kirkland v. State*, 78 S. W. 770, 772, 72 Ark. 171, 65 L. R. A. 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 242; *Marvin v. Trout*, 26 Sup. Ct. 31, 34, 199 U. S. 212, 50 L. Ed. 157; *Hood v. Tharp*, 81 N. E. 861, 862, 228 Ill. 244; *Rider-Wallis Co. v. Fogo*, 78 N. W. 767, 769, 102 Wis. 536 (quoting and adopting definition in *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678); *Anderson v. Ritterbusch*, 98 Pac. 1002, 1014, 22 Okl. 761; *Ross v. Board of Sup'rs of Wright County*, 104 N. W. 506, 511, 128 Iowa, 427, 1 L. R. A. (N. S.) 431.

"'Due process of law' is process due according to the law of the land." The provisions of the federal Constitution prohibiting a state from depriving any person of life, liberty, or property without "due process of law" do not require a trial by jury in suits at common law in a state court. *Gunn v. Union R. Co.*, 62 Atl. 118, 119, 27 R. I. 320, 2 L. R. A. (N. S.) 362 (quoting and adopting definition in *Maxwell v. Dow*, 20 Sup. Ct. 448, 176 U. S. 581-594, 44 L. Ed. 597).

#### Same—In criminal cases and informations in insanity

By "the law of the land" is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, and property and immunities under the jurisdiction of the general rules which govern society. *Womach v. City of St. Joseph*, 100 S. W. 443, 447, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (quoting and adopting definition in *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] loc. cit. 581, 4 L. Ed. 629); *Holmes v. Murray*, 105 S. W. 1085, 1086, 207 Mo. 413, 17 L. R. A. (N. S.) 431, 123 Am. St. Rep. 386, 13 Ann. Cas. 845 (citing *Mathews v. St. Louis & S. F. Ry. Co.*, 24 S. W. 593, 121 Mo. loc. cit. 322, 25 L. R. A. 161); *Jenks v. Stump*, 93 Pac. 17, 19, 41 Colo. 281, 124 Am. St. Rep. 137, 14 Ann. Cas. 914 (quoting and adopting *In re Lowrie*, 9 Pac. 489, 8 Colo. 513, 54 Am. Rep. 558).

The expression "due process of law" does not include the institution and procedure of the grand jury in a criminal prosecution. *McKinney v. United States*, 199 Fed. 25, 28, 117 C. C. A. 408.

"Due process of law" in a criminal case is a trial according to the rules enacted by the Legislature or adopted by the courts for the prosecution of crimes, and, if there are special rules governing a trial of the particular crime with which accused is charged, then, in addition to the rules prescribed for the conduct of criminal prosecutions in general, he must be given the benefit of such additional rules. *Reed v. Commonwealth*, 128 S. W. 874, 875, 138 Ky. 568.

#### Competent tribunal required

"Due process of law," as stated in *Re Curry* (N. Y.) 1 Civ. Proc. R. 319, is lawful judicial proceedings in a court of competent jurisdiction. In *re Francis*, 136 Fed. 912, 913.

"Due process of law," as applied to criminal procedure, requires that accused shall be tried in a court of competent jurisdiction. *Ong Chang Wing v. United States*, 31 Sup. Ct. 15, 17, 218 U. S. 272, 280, 54 L. Ed. 1040; *Anderson v. State*, 126 Pac. 840, 8 Okl. Cr. 90.

#### As notice and opportunity to be heard

"Due process of law" must be based on notice. *People ex rel. Hillel Lodge*, No. 72, 1 O. B. B., v. *Rose*, 69 N. E. 762, 767, 768, 207 Ill. 352.

By "due process of law" is meant notice and an opportunity to be heard. *Beebe v. Magoun*, 97 N. W. 986, 987, 122 Iowa, 94, 101 Am. St. Rep. 259; *Daniels v. Homer*, 51 S. E. 992, 999, 139 N. C. 219, 3 L. R. A. (N. S.) 997 (citing *Simon v. Craft*, 21 Sup. Ct. 836, 182 U. S. 427, 45 L. Ed. 1165); *People ex rel. Loughran v. Flynn*, 96 N. Y. Supp. 655, 662, 110 App. Div. 279 (citing *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289); *Jenks v. Stump*, 93 Pac. 17, 18, 41 Colo. 281, 124 Am. St. Rep. 137, 14 Ann. Cas. 914.

"Due process of law" affords a hearing before it condemns, and gives judgment only after trial, being that constitutional right which provides that no citizen shall be deprived of life, liberty, or property, except as provided by law. *Ong Chang Wing v. United States*, 31 Sup. Ct. 15, 16, 218 U. S. 272, 54 L. Ed. 1040; *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 18 Idaho, 695, 32 L. R. A. (N. S.) 534; In *re Francis*, 136 Fed. 912, 913; *Darmstatter v. City Council of City of Passaic*, 79 Atl. 545, 546, 81 N. J. Law, 162; *Money Weight Scale Co. v. Friedman*, 74 Atl. 270, 79 N. J. Law, 214; *State ex rel. Deems v. Holtcamp*, 151 S. W. 153, 157, 245 Mo. 655.

"Due process of law" means an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard; and, where such opportunity is

granted by the law, the citizen cannot complain of the procedure to which he is required to conform. *State ex rel. Barber Asphalt Paving Co. v. District Court of St. Louis County*, 97 N. W. 132, 134, 90 Minn. 457.

"Due process of law" requires that the owner be given an opportunity to be heard at a trial before his private property be taken and adjudged forfeited for his misconduct or for a protection of the public health. He cannot be deprived of the right, either before or after such taking of the property, to have a judicial inquiry whether in fact he has forfeited the right to his property by coming within the condemnation of the law. *Lowe v. Conroy*, 97 N. W. 942, 944, 120 Wis. 151, 66 L. R. A. 907, 102 Am. St. Rep. 983, 1 Ann. Cas. 341.

The fundamental requirement of "due process of law" is an opportunity for hearing and defense, and no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case. *Ballard v. Hunter*, 27 Sup. Ct. 261, 266, 204 U. S. 241, 51 L. Ed. 461 (citing *Dent v. West Virginia*, 9 Sup. Ct. 231, 129 U. S. 114, 32 L. Ed. 623; *Lent v. Tillson*, 11 Sup. Ct. 825, 140 U. S. 316, 35 L. Ed. 419; *Hagar v. Reclamation Dist. No. 108*, 4 Sup. Ct. 663, 111 U. S. 701, 28 L. Ed. 569; *Iowa Cent. Ry. Co. v. Iowa*, 16 Sup. Ct. 344, 160 U. S. 389, 40 L. Ed. 467).

It is an essential requisite of "due process of law" that full opportunity be afforded for the assertion and enforcement of the right after it comes within the present or prospective operation of such a statute and before the extinguishment takes effect. A statute which does not afford this opportunity is arbitrary, and violates the constitutional prohibition; but, if the opportunity be afforded, it is no objection to the statute that it has some regard to the past acts and omissions of the parties concerned, or to conditions produced by past occurrences, and is therefore not wholly prospective. *Schauble v. Schulz*, 137 Fed. 389, 392, 69 C. C. A. 581.

"Due process of law" implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, to be heard and to have the right of controverting every material fact which bears on the question of right in the matter involved. *Wilber v. Reed*, 122 N. W. 53, 55, 84 Neb. 767.

"The phrase 'due process of law' includes notice and a hearing before judgment." *State ex rel. Riddell v. District Court of Second Judicial Dist.*, 85 Pac. 367, 33 Mont. 529.

The essential elements of "due process of law" are notice and opportunity to defend, but due process does not require that any



particular form of proceedings be observed, but only that the same shall be regular proceedings, in which notice is given of the claim asserted and an opportunity afforded to defend against it. *Smith v. State Board of Medical Examiners*, 117 N. W. 1116, 1117, 140 Iowa, 66.

"Due process of law," guaranteed by the fourteenth amendment, does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." The "due process of law" guaranteed by Const. U. S. Amend. 14, does not require that the highest state court for the review of a conviction of capital crimes be held in any particular county of that state, whatever may be the requirement of the state Constitution in that respect. *Rogers v. Peck*, 26 Sup. Ct. 87, 90, 199 U. S. 425, 50 L. Ed. 256 (citing *Louisville & N. R. Co. v. Schmidt*, 20 Sup. Ct. 620, 177 U. S. 230, 44 L. Ed. 747; *Wilson v. North Carolina ex rel. Caldwell*, 18 Sup. Ct. 435, 169 U. S. 586, 42 L. Ed. 865).

"Due process of law," within Const. art. 1, § 8, declaring that no person shall be deprived of life, liberty, or property without due process of law, not only requires that a party shall be properly brought into court, but that he shall have the opportunity in court to establish any facts which, according to the usages of the common law or the provisions of the Constitution, will be a protection to himself or property. *Persing v. Reno Stock Brokerage Co.*, 96 Pac. 1054, 1056, 80 Nev. 342.

"Due process of law," as used in the constitutional guaranty, declaring that a person shall not be deprived of his liberty without "due process of law," requires a hearing or an opportunity to be heard, in which the citizen may defend, enforce, and protect his rights. This principle is followed and enforced by all the courts, and is now so firmly established as to be beyond controversy. So carefully have the courts guarded this constitutional and sacred right of the citizen that statutes omitting it have uniformly been condemned, even where it appears that the party proceeded against was permitted through the courtesy of the court to have and did have notice of the proceeding and an opportunity to be heard. It is not enough that a person may by chance have notice, or that he may as a matter of favor or courtesy have a hearing. The law, to be constitutional, must require notice and give a right to a hearing; nor does it matter on the question of constitutionality that the questions involved have been fairly decided. The essential validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done.

In re Grout, 93 N. Y. Supp. 711, 719, 105 App. Div. 98.

Notice to authorize judgment is indispensable to constitute "due process of law." *Cella Commission Co. v. Bohliger*, 147 Fed. 419, 422, 78 C. C. A. 467, 8 L. R. A. (N. S.) 537 (citing *Pennoyer v. Neff*, 95 U. S. 714, 722, 724-727, 730, 733, 24 L. Ed. 565; *Webster v. Reid*, 11 How. 437, 459, 13 L. Ed. 761; *Boswell v. Otis*, 9 How. 336, 348, 13 L. Ed. 164; *Picquet v. Swan*, 5 Mason, 35, 19 Fed. Cas. 609, 612; *D'Arcy v. Ketchum*, 11 How. 165, 175, 176, 13 L. Ed. 648; *Bissell v. Briggs*, 9 Mass. 462, 469, 6 Am. Dec. 88; *Kilburn v. Woodworth* [N. Y.] 5 Johns. 37, 40, 4 Am. Dec. 321; *Goldey v. Morning News*, 15 Sup. Ct. 559, 156 U. S. 518, 521, 39 L. Ed. 517; *Dull v. Blackman*, 18 Sup. Ct. 333, 169 U. S. 243, 247, 42 L. Ed. 733; *St. Clair v. Cox*, 1 Sup. Ct. 354, 106 U. S. 350, 27 L. Ed. 222; *Hart v. Sansom*, 3 Sup. Ct. 596, 110 U. S. 151, 155, 28 L. Ed. 101; *Noble v. Union River Logging R. Co.*, 13 Sup. Ct. 271, 147 U. S. 165, 173, 37 L. Ed. 123; *Millan v. Mutual Reserve Fund Life Ass'n*, 103 Fed. 764, 769; *Ralya Market Co. v. Armour & Co.*, 102 Fed. 530, 532).

It is not "due process of law" to condemn a party without an opportunity to be heard on a charge of contempt not committed in the presence of the court, but he must be allowed to answer and offer evidence in his own behalf. *Hohenadel v. Steele*, 86 N. E. 717, 719, 237 Ill. 229.

The guaranty of the Constitution, that an owner shall not be deprived of his property without "due process of law," gives him the right to be heard in its defense against any claim that may be made against him for its possession. *Meacham v. Bear Valley Irr. Co.*, 79 Pac. 281, 145 Cal. 606, 68 L. R. A. 600.

"Due process of law" requires that the court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties." *American Land Co. v. Zeiss*, 31 Sup. Ct. 200, 208, 219 U. S. 47, 71, 55 L. Ed. 82 (quoting *Twining v. New Jersey*, 29 Sup. Ct. 14, 211 U. S. 78, 53 L. Ed. 97).

#### Same—In assessments for local improvements

What constitutes "due process of law" must be determined by the facts of each case presented for decision, as no statutory definition of the term has as yet been given. The fourteenth amendment does not require that a citizen, before a local assessment can be made by the city council on his property, shall be first served with notice of the proposed assessment, that he may have the privilege of being heard by a tribunal which could entertain hearings according to judicial methods, and which would proceed upon

inquiry and render judgment only after final trial, so that a statute conferring the power to make local assessments on a city council, without providing for another tribunal to hear and determine the validity of the council's proceedings at the suit of any owner of abutting property, is not a taking of property without "due process of law." *Hutcherson v. Storrie* (Tex.) 48 S. W. 785, 789.

#### **Same—In condemnation proceedings**

"Due process of law" requires that the owner of any right or interest in property taken upon condemnation should have a reasonable opportunity to be heard upon the question of compensation, before he can be deprived thereof, for public use. *Brigham City v. Chase*, 85 Pac. 436, 439, 30 Utah, 410. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights. When the Legislature prescribes a mode by which private property may be taken for public use, notice of the proceedings for condemnation must be provided for, to be given to the party whose property is taken or injuriously affected, in order that he may have an opportunity to be present and protect his rights at some stage of the proceedings, and in order to ascertain the proper measure of compensation to which he is entitled. If such notice is not provided for, the law is void. *Board of Education of City of Stillwater v. Aldredge*, 73 Pac. 1104, 1105, 13 Okl. 205.

#### **Same—In criminal proceedings**

"Due process of law," as applied to criminal procedure, requires that accused shall be proceeded against under orderly process of law, and only punished after inquiry and investigation, on notice to him, with an opportunity to be heard, and a judgment granted within the authority of a constitutional law. *Ong Chang Wing v. United States*, 31 Sup. Ct. 15, 17, 218 U. S. 272, 280, 54 L. Ed. 1040.

"Due process of law," within the constitutional command of due process of law, means that a state must afford an accused the due administration of its established course of judicial procedure, and the phrase requires the doing of all things which are essential to the administration of a state's established course of judicial procedure, when a citizen or person is taken into custody and held for trial for crime, and the state is under affirmative duty of affording him the enjoyment of all the rights and privileges which go to make up the due administration of a state's established course of judicial procedure, and it must confront accused with his accusers in open court and give him the opportunity to examine them there. *United States v. Powell*, 151 Fed. 648, 654.

In criminal cases in a state court, "due process of law" means a trial in a court of

competent jurisdiction, before an impartial judge and jury, or judge without a jury, upon an accusation, either by indictment or information, as the state may provide, charging the accused with the violation of some state law, of which accusation the accused must have notice in time to enable him to prepare for trial. This trial must proceed according to the established procedure or rules of practice in such state applicable to all such cases. In other words, the defendant must have his day in court. The admission of evidence for or against the accused must be according to the established rules in such state in all such cases, and the punishment inflicted must be authorized by law. *Anderson v. State*, 126 Pac. 840, 847, 8 Okl. Cr. 90.

#### **Same—In tax proceedings**

"Due process of law," as to tax sale proceedings, means only that due notice of sale shall be given to the delinquent owners. *Merchants' Trust Co. v. Wright*, 118 Pac. 517, 518, 161 Cal. 149.

Irregularity in the process of taxation can be said not to amount to "due process of law" only when the proceedings are arbitrary, oppressive, or unjust. To constitute "due process of law," it is not necessary that notice be given of each step in the process of taxation. It is sufficient if the taxpayer has an opportunity to appear at some time before a tribunal having jurisdiction, and there procure an adjustment of his liabilities. *State v. Several Parcels of Land*, 119 N. W. 21, 22, 83 Neb. 13.

As stated in *Winona & St. Peter Land Co. v. Minnesota*, 16 Sup. Ct. 83, 87, 159 U. S. 526, 40 L. Ed. 247, "a law authorizing the imposition of a tax or assessments upon property according to its value does not infringe that provision of the fourteenth amendment to the Constitution which declares that no state shall deprive any person of property without 'due process of law,' if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in the subsequent proceedings for its collection." *Central R. Co. of New Jersey v. State Board of Assessors*, 67 Atl. 672, 675, 75 N. J. Law, 120 (citing *Kentucky Railroad Tax Cases*, 6 Sup. Ct. 57, 115 U. S. 321, 331, 29 L. Ed. 414; *Pittsburg, C. O. & St. L. Ry. Co. v. Backus*, 14 Sup. Ct. 1114, 154 U. S. 421, 458, 38 L. Ed. 1031).

#### **Same—Nature and sufficiency of notice in general**

"Due process of law" must give to defendant notice of the charge or claim against him and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained. Notice of a hearing before a probate court of a petition for the settlement of an account of

an executor, for his removal and the appointment of an administrator de bonis non, is not due process of law to sustain a decree against the person and the property of the individual served, to the effect that he pay out of his own property \$915,355.08 to the successory administrator on account of his conversion and maladministration of the assets of the estate. *Michigan Trust Co. v. Ferry*, 175 Fed. 667, 669, 99 C. C. A. 221.

"Due process of law" requires that a person shall have reasonable notice and opportunity to be heard before an impartial tribunal before any binding decree or order can be made affecting his rights to liberty or property. In the case of *Reetz v. Michigan*, 23 Sup. Ct. 390, 188 U. S. 505, 47 L. Ed. 563, in point here, the following is quoted from the opinion of Mr. Justice Matthews in *Hurtado v. California*, 4 Sup. Ct. 111, 113, 292, 110 U. S. 516, 28 L. Ed. 232, reviewing at length the authorities and discussing the elements of due process of law: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom, or merely devised in the discretion of the legislative power in the furtherance of the general public good, which regards and preserves these privileges of liberty and justice, must be held to be due process of law." *Commission of Fisheries v. Hampton Roads Oyster Packers' & Planters' Ass'n*, 64 S. E. 1041, 1048, 1049, 109 Va. 565 (citing *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. [59 U. S.] 272, 15 L. Ed. 372; *Ex parte Wall*, 2 Sup. Ct. 569, 107 U. S. 265, 27 L. Ed. 552).

"Due process of law" requires only that provision shall be made for notice in some form and an opportunity to be heard before some tribunal, not necessarily an organized court or before a jury. *Campbell v. State*, 87 N. E. 212, 214, 171 Ind. 702.

Code Civ. Proc. § 110, provides for the service of summons against a private corporation by delivering a copy to the president or other officers thereof, except where service is on a foreign corporation, when it may be had only when it has property in the state, or the cause of action arose therein, or when such service shall be made within the state personally upon the president, treasurer, secretary, or duly authorized agent thereof. Personal service had on a treasurer of a domestic corporation residing in another state was objected to as insufficient to confer jurisdiction. Held, that the purpose of the statute is not to bring the nonresident officer within the jurisdiction, but to bring the domestic corporation within the jurisdiction; and, as such service would give sufficient notice of the pendency of the action or proceeding, which is the fundamental principle involved in "due process of law," it was sufficient. *Straub v. Lyman Land & Investment*

*Co. (S. D.)* 138 N. W. 957, 958 (citing 3 Words and Phrases, 2251).

Attachment of a nonresident's property within the jurisdiction, without personal service on the defendant, constitutes "due process of law," within the federal Constitution, in so far as it reaches and affects the defendant's property lawfully attached. *Lutz v. Roberts Cotton Oil Co. (Del.)* 82 Atl. 601, 603.

Notice served on a defendant in the manner and by the officer provided by law, constitutes "due process of law." *Smoot v. Judd*, 83 S. W. 481, 506, 184 Mo. 508.

Notice of the time and place of making a motion for leave to issue execution is not necessary to constitute that "due process of law" which is guaranteed by the Constitution. The due process of law there guaranteed is obtained by the service of summons on the defendants, or their subsequent appearance in the action before judgment. *Harrier v. Bassford*, 78 Pac. 1038, 1039, 145 Cal. 529.

A proceeding to secure a distribution of the estate of a decedent is essentially one in rem, in which the parties interested may be bound by constructive notice, the reasonableness of which must be determined with reference to the requirements of ordinary cases; and notice given by posting notices 10 days before the hearing is not unreasonably short, and constitutes "due process of law" as against all parties, without regard to their place of residence. *Goodrich v. Ferris*, 145 Fed. 844, 859.

#### Same—Notice by publication

A notice of publication in a newspaper published in a county once a week for three consecutive weeks, required by *Sayles' Ann. Civ. St.* 1897, art. 5232o as notice to foreclose tax liens, where an owner is a nonresident, or his name is unknown, is sufficient to meet the requirement of "due process of law." *Young v. Jackson*, 110 S. W. 74, 78, 50 Tex. Civ. App. 351.

Publication of notice of the assessment of property of a nonresident for taxes is "due process of law." *Johnson v. Hunter*, 127 Fed. 219, 223, 224 (quoting and adopting the definition in *Huling v. Kaw Valley Ry. & Improv. Co.*, 9 Sup. Ct. 603, 605, 130 U. S. 559, 563, 32 L. Ed. 1045).

Service by publication on a domestic corporation, which has failed to provide officers or agents upon whom other service may be had, constitutes "due process of law." *Clearwater Mercantile Co. v. Roberts-Johnson-Rand Shoe Co.*, 40 South. 436, 437, 51 Fla. 176, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153.

The fact that notice of a special assessment for draining and reclaiming swamp land is given by advertisements and by posters as provided by statute, instead of actual service, does not render the tax invalid, as

a taking of private property without "due process of law." *Hoertz v. Jefferson Southern Pond Draining Co.*, 84 S. W. 1141, 1143, 119 Ky. 824; *Leahy v. Same* (Ky.) 84 S. W. 1181.

The constitutional guaranties of "due process of law" are not violated by the provisions for notice in Acts 1895, p. 88, c. 71, providing that notice of the pendency of an action for the enforcement for the collection of levee taxes, etc., shall be given to non-resident owners by publication in some newspaper published in the county where the suit is pending for four weeks prior to the date when final judgment may be entered for the sale of their lands. *Ballard v. Hunter*, 85 S. W. 252, 253, 74 Ark. 174.

Notice by publication of the special proceeding provided by Laws Pa. 1885, p. 155, for the administration of the estates of absentees satisfies the requirement of the "due process of law" clause of Const. U. S. Amend. art. 14. *Cunnius v. Reading School Dist.*, 25 Sup. Ct. 721, 722, 198 U. S. 458, 49 L. Ed. 1125, 3 Ann. Cas. 1121.

#### **Same—Notice by substituted service**

Constructive service of process, provided for in Practice Act (Hurd's Rev. St. 1905, c. 110), par. 5, when taken in connection with sections 12 and 13 of the Chancery Act, constitutes "due process of law," when it appears, as it must before such service can be had, by the return of the officer, that the defendant railroad has no officer or agent in the county in which the suit is brought with whom a copy of the summons can be left to effect service, and it further appears that defendant's principal office is in the state. *Nelson v. Chicago, B. & Q. R. Co.*, 80 N. E. 109, 113, 225 Ill. 197, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133.

A notice of appeal in a water permit contest, given as provided by the statute, authorizing such appeal and requiring appellant to deliver personally or by registered mail a copy of the notice in the manner prescribed for the personal service or service of publication of a summons, is "due process of law." *Speer v. Stephenson*, 102 Pac. 365, 373, 16 Idaho, 707.

#### **Indictment or information necessary**

A prosecution for a felony by an information constitutes "due process of law," within the fourteenth amendment to the federal Constitution. *State v. Guglielmo*, 80 Pac. 103, 46 Or. 250, 69 L. R. A. 466, 7 Ann. Cas. 976.

The phrase "the law of the land," within *Magna Charta*, c. 39, which provides that no man shall be imprisoned, etc., unless by lawful judgment of his peers, or by the law of the land, means indictment under procedure at common law. *Anderson v. Ritterbusch*, 98 Pac. 1002, 1014, 22 Okl. 761.

An indictment in a prosecution for murder committed after statehood is not neces-

sarily required by Const. U. S. Amends. 5, 14, and Const. Okl. Bill of Rights, § 7 (Bunn's Ed. § 16), providing that no person shall be deprived of life, liberty, or property without "due process of law." In re *McNaught*, 99 Pac. 241, 243, 1 Okl. Cr. 528.

#### **As applicable to police regulations**

"Due process of law" is the general right to acquire and possess property, and by necessary implication the general right to contract concerning it, that the Constitution protects. But that protection does not make those rights absolute in every particular. If it does, what becomes of the police power, which inheres in every free government, and is based on the maxim, "Sic utere tuo ut alienum non lædas," which, as the federal Supreme Court says, is of universal and pervading obligation, and a condition on which all property is held, that its application to particular conditions must necessarily be within the reasonable discretion of the legislative power, and that when such discretion is exercised in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection. Act Dec. 10, 1906, No. 117, requiring a mining, quarrying, manufacturing, etc., or railroad corporation to pay its employes each week, and that payment shall be in lawful money, is not, as to a railroad corporation whose charter provides that it shall be subject to amendment, alteration, or repeal, and subject also to the general law to the same effect, a deprivation of liberty or property, as to either requirement, without "due process of law," in violation of Const. U. S. Amend. 14, nor is it as to the stockholders of such corporation. *Lawrence v. Rutland R. Co.*, 67 Atl. 1091, 1095, 80 Vt. 370, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475.

Reasonable municipal health regulations under the authority of the state are not void, as taking private property without "due process of law." *State v. Robb*, 60 Atl. 874-876, 100 Me. 180, 4 Ann. Cas. 275.

The Legislature may form classes for the purpose of police regulations, where it does not arbitrarily discriminate between persons in substantially the same situation, notwithstanding the federal and state Constitutions prohibiting the deprivation of property without "due process of law." *People v. Commercial Life Ins. Co.*, 93 N. E. 90, 94, 247 Ill. 92.

"It is settled law that all property is held subject to the exercise of police power. \* \* \* Declaring that property shall not be taken without 'due process of law' has no application in such cases." In re *Newell*, 84 Pac. 226, 2 Cal. App. 767 (quoting and adopting *Odd Fellows' Cemetery Ass'n v. City & County of San Francisco*, 73 Pac. 987, 140 Cal. 226).

The exercise of a police regulation or a power under the general welfare clause of the Constitution is not a denial of "due pro-

cess of law," and regulation in reason is valid. *Knight & Jillson Co. v. Miller*, 87 N. E. 823, 830, 172 Ind. 27, 18 Ann. Cas. 1146.

The conferring of discretionary power on administrative boards to grant or withhold permission to carry on a trade or business, which is the proper subject of regulation within the police power of the state, is not violative of the rights of "due process of law" secured by the fourteenth amendment to the federal Constitution for there is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual under sanction of state authority, the federal Supreme Court will interfere for its protection, when the case comes before it in such manner as to authorize the interference of a federal court. *New York ex rel. Lieberman v. Van De Carr*, 26 Sup. Ct. 144, 146, 199 U. S. 552, 50 L. Ed. 305.

Const. U. S. art. 14, § 1, providing that no state shall deprive any person of life, liberty, or property without "due process of law," is not a limitation on the police power of the state, so as to render an act providing for the cancellation of a physician's certificate for gross immorality unconstitutional. *Meffert v. Packer*, 25 Sup. Ct. 790, 195 U. S. 625, 49 L. Ed. 350.

A law prohibiting the sale of game, whether taken lawfully or unlawfully, within or without the state, does not violate the constitutional provision that no person shall be deprived of property without "due process of law," or that private property shall not be taken for public use without just compensation. *State v. Heger*, 93 S. W. 252, 254, 194 Mo. 707.

A statute prohibiting certain trades and business on Sunday, and closing saloons and certain places of amusement on that day, does not take property without "due process of law." *State v. Dolan*, 92 Pac. 995, 998, 13 Idaho, 693, 14 L. R. A. (N. S.) 1259.

An ordinance, regulating speed of automobiles, providing punishment for violation, and requiring each automobile to carry a registration number, held not to deny "due process of law." *People v. Schneider*, 103 N. W. 172, 173, 139 Mich. 673, 69 L. R. A. 345, 5 Ann. Cas. 790.

Statutes regulating and restricting the capture of creatures *feræ naturæ* not reduced to actual possession are not violative of Const. § 14, or Const. U. S. art. 14, declaring that no person shall be deprived of life, liberty, or property without "due process of law." *Ex parte Fritz*, 38 South. 722, 723, 86 Miss. 210, 109 Am. St. Rep. 700.

Laws 1903, pp. 301, 302, declaring that it shall be unlawful for any person to drive or propel any automobile at a rate of speed exceeding 15 miles per hour on any road or highway in the state, etc., constituted a valid

exercise of the state's police power, and was not, therefore, unconstitutional, as a deprivation of liberty or property without "due process of law." *Christy v. Elliott*, 74 N. E. 1035, 1037, 216 Ill. 31.

Though an ordinance prohibiting the storage of explosive oils in large quantities within the corporate limits has the effect of putting an end to a business and rendering valueless certain structures used in connection with the business, its enforcement will not constitute a depriving of property without "due process of law" where the circumstances justified its adoption as a police regulation. *City of Crowley v. Ellsworth*, 38 South. 199, 200, 114 La. 308, 69 L. R. A. 276, 108 Am. St. Rep. 353.

The "due process of law," in the fourteenth amendment of the federal Constitution, refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, but does not forbid the enactment by the General Assembly of a general liquor license law; the liquor business being a subject of prohibition or regulation. *Appeal of Allyn*, 71 Atl. 794, 795, 81 Conn. 534, 23 L. R. A. (N. S.) 630, 129 Am. St. Rep. 225.

Act March 31, 1899, to regulate and limit the hours of employment of the employés in manufacturing, mechanical, and mercantile establishments, hotels, and restaurants, and providing that no female shall be employed in such establishments or hotels more than 60 hours during any one week, and that 10 hours shall constitute a day's labor, is in effect only a fair and reasonable exercise of the police power, and does not deprive any citizen of "due process of law." *Wenham v. State*, 91 N. W. 421, 423, 65 Neb. 394, 58 L. R. A. 825 (quoting and adopting the definition in *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678).

An ordinance, pursuant to a city charter, requiring the tracks of railroads to be constructed at grade on crossings, is in the exercise of the police power, and hence is not an ordinance taking property without "due process of law." *Houston & T. C. R. Co. v. Dallas*, 84 S. W. 648, 652, 98 Tex. 396, 70 L. R. A. 850.

A statute requiring railroad companies to maintain cattle guards where tracks pass through inclosed land, being a legitimate exercise of the police power of the state, is not violative of Const. U. S. Amend. 14, as depriving such companies of their property without "due process of law." *Yazoo & M. V. R. Co. v. Harrington*, 37 South. 1016, 1017, 85 Miss. 366, 3 Ann. Cas. 181.

Labor Law (Consol. Laws 1909, c. 31) § 80, providing that all doors leading in and

to any factory shall be so constructed as to open outwardly where practicable, and shall not be locked, bolted, or fastened during working hours, is within the police power of the state, and is not a deprivation of property without "due process of law," within the federal or state Constitutions. *People v. Harris*, 134 N. Y. Supp. 409, 411, 74 Misc. Rep. 353.

#### **Payment of compensation for property taken implied**

The words "due process of law" forbid that one man's property or right to property shall be taken for the benefit of another, or for the benefit of the public without compensation. *Larabee v. Dolley*, 175 Fed. 365, 392 (quoting and adopting definition in *Holden v. Hardy*, 18 Sup. Ct. 383, 169 U. S. 366, 42 L. Ed. 780).

"Due process of law," as applied to judicial proceedings instituted for the taking of private property for public use, means such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into "due process of law," if the necessary result be to deprive him of his property without compensation. An award of only nominal damages for the taking of the fee of lands under water, the owner having parted with most of the shore land, was held not a taking without due process. *Appleby v. City of Buffalo*, 31 Sup. Ct. 699, 702, 221 U. S. 524, 55 L. Ed. 838.

"Due process of law" requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and, second, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection of the interest of the property owner, except as he may see fit to waive therein." *Jones v. Nashville, C. & S. L. R. Co.*, 37 South. 677, 679, 141 Ala. 388.

The constitutional requirement of "due process of law," which embraces compensation for private property taken for public use, applies in every case to the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *Chicago, B. & Q. Ry. Co. v. Illinois ex rel. Grinstead*, 26 Sup. Ct. 341, 350, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175 (citing *Cherokee Nation v. Southern Kansas R. Co.*, 10 Sup. Ct. 965, 135 U. S. 641, 659, 34 L. Ed. 295, 303; *Sweet v. Rechel*, 16 Sup. Ct. 43, 159 U. S. 380, 399, 402, 40 L. Ed. 188, 196, 197; *Monon-*

*gahela Nav. Co. v. United States*, 13 Sup. Ct. 622, 148 U. S. 312, 336, 37 L. Ed. 463, 471; *United States v. Lynah*, 23 Sup. Ct. 349, 188 U. S. 445, 47 L. Ed. 539).

#### **Right of appeal implied**

A review by an appellate tribunal, whether upon appeal or writ of error, is no part of "due process of law." *McCue v. Commonwealth*, 49 S. E. 623, 631, 103 Va. 870.

To make effectual the constitutional guaranty of "due process of law," one must have the right to appeal to the court whenever it is claimed that his constitutional rights are invaded. *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 107 N. Y. Supp. 341, 351, 122 App. Div. 203.

It is not necessary to "due process of law" that an owner of property assessed should be given an opportunity to have the assessment reviewed by the courts or have the right of appeal on being afforded a right to be heard before some tribunal or board. *State v. Bley*, 50 South. 263, 264, 162 Ala. 239.

#### **Property or rights protected**

A vested cause of action for damages is "property," which cannot be taken or destroyed without "due process of law," being a chose in action. *Williams v. Atlantic Coast Line R. Co.*, 69 S. E. 402, 403, 153 N. C. 360.

#### **DUE PROSECUTION OF APPEAL**

By "due prosecution of appeal" is meant its effectual prosecution. *Swofford Bros. Dry Goods Co. v. Livingston*, 65 Pac. 413, 415, 16 Colo. App. 257.

#### **DUE REGARD**

"Due regard," under the law of negligence, means that regard that a prudent man would have for the protection of human life under the circumstances of the case. *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33, 43.

The words "due regard" in Act May 13, 1887, authorizing the granting of liquor licenses and authorizing their refusal having "due regard" to the number and character of the persons petitioning for and against the issuing of such license, means such regard as the circumstances of the case demand, and these circumstances include the knowledge possessed by the court, facts whereof judicial notice should be taken, the testimony of witnesses, and the opportunities of petitioners and remonstrance for knowing the things about which they volunteer information. In *re Reznor Hotel Co.'s License*, 34 Pa. Super. Ct. 525, 529.

#### **DUE THE PUBLIC**

Where a county treasurer deposited county funds in an unincorporated bank, the debts are, upon the death of the banker and the insolvency of his estate, debts "due the public," within the meaning of a statute pro-

viding that such debts shall be paid in full before other debts. *Lockwood v. Lockwood*, 47 S. E. 441, 68 S. C. 328.

### DUEBILL

"When the court, in *Fleming v. Burge*, 6 Ala. 373, said that a 'duebill' was, in legal effect, a promissory note, it only announced a well-recognized principle that from a duebill the law implies an obligation to pay the amount acknowledged by it to be owing, as the law implies from a promissory note an obligation on the part of the promisor to pay the amount promised to be paid; yet a duebill and a promissory note are in many respects unlike. A 'duebill' is not assignable by indorsement; a promissory note is. A duebill is not entitled to days of grace; a promissory note is. A 'duebill' is a brief acknowledgment of a debt; a promissory note is a promise in writing to pay a specified sum at a time therein fixed. They are, however, in legal effect, the same, for the law implies a like obligation from each—the obligation to pay the debt acknowledged to be due by the one, and the debt promised to be paid by the other." In *re McGuire & Hanlein*, 132 Fed. 394, 395.

### DUEL

St. 1909, § 1269, imposes a punishment upon one challenging another to fight in single combat or otherwise, with a deadly weapon, and Const. § 239, prohibits one from holding office who shall directly or indirectly give a challenge to another to fight in single combat with a deadly weapon. Accused, while partially intoxicated, went up to another, and, drawing or partly drawing a gun, said: "God damn you, you started to draw a gun this morning; now, God damn you, shoot." Held that, since a "duel" was a combat with a deadly weapon fought under prescribed rules according to a precedent formal agreement without sudden heat or passion, accused's conduct did not amount to a challenge. *Ward v. Commonwealth*, 116 S. W. 786, 787, 132 Ky. 636, 19 Ann. Cas. 71.

### DUES

The term "dues" refers to obligations into which members of a club enter to pay a sum, to be fixed usually by by-laws, at recurring intervals for the maintenance of the organization. *Thompson v. Wyandanch Club*, 127 N. Y. Supp. 195, 200, 70 Misc. Rep. 299 (citing 3 Words and Phrases, pp. 2258, 2259).

The word "dues," as used in Rev. St. 1899, § 1408, declaring that a fraternal beneficiary association might make provision for the payment of benefits in the case of death, sickness, or disability from a fund to be derived from assessments of "dues" collected from its members, was not used in a technical sense, but to represent sums paid by members of the

association toward its support, and did not indicate an intent on the part of the Legislature to permit such society to issue old line life insurance policies not otherwise authorized. *State ex rel. Supreme Lodge K. P. v. Vandiver*, 111 S. W. 911, 912, 213 Mo. 187, 15 Ann. Cas. 283.

#### Damages for tort

The provision of Const. art. 12, § 2, repealed in 1906, providing that dues of a corporation shall be secured by the individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder uses the words "dues" in a sense broad enough to cover a judgment against a corporation in an action founded on tort. *Henley v. Myers*, 93 Pac. 168, 173, 76 Kan. 723, 17 L. R. A. (N. S.) 779.

### DUES AND DEMANDS

The words "dues and demands," as applied in Acts 1875, p. 37, c. 24 (section 7936, Burns' Rev. St. 1901; section 5850, Horner's Rev. St. 1901), authorizing clerks of court to officially receive money in payment of all judgments, "dues, and demands" whatever, of record in their respective offices, together with all funds ordered to be paid into court, and making such clerks liable on their official bonds for the money so received, are sufficiently broad and comprehensive to include money received by the clerks in payment of all fees and costs of record in his office. *State ex rel. Board of Com'rs of Tippecanoe County v. Flynn*, 69 N. E. 159, 164, 161 Ind. 554.

### DUGAS TEST

The "Dugas test" to discover a dislocation of a shoulder consists in placing the patient's elbow against his chest, and then having him place his fingers, if possible, on the opposite shoulder. If the patient is able to raise the fingers of his injured arm to the opposite shoulder while his arm is in this position, there can be no dislocation at the shoulder. *Burton v. Neill*, 118 N. W. 302, 305, 140 Iowa, 141, 17 Ann. Cas. 532.

### DUGOUT

As building, see *Building* (In Criminal Law).

### DULL SEASON

The terms "busy season" and "dull season," unexplained, in a contract for the employment of a fur cutter, in which the employer agrees to give a certain weekly salary for the "busy season" and a certain other sum per week for the "dull season," are ambiguous to those unacquainted with the fur trade, and oral testimony is admissible to show their meaning. *Schultz v. Simmons Fur Co.*, 90 Pac. 917, 919, 46 Wash. 555.

**DULY**

The word "duly" means "according to law," that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure. *Reynolds v. Harlem Const. Co.*, 128 N. Y. Supp. 642, 643, 71 Misc. Rep. 446.

The word "duly," in a record stating that the accused was duly arraigned in open court, means according to law. *Clements v. State*, 40 South. 432, 436, 51 Fla. 6 (citing 3 Words and Phrases, p. 2259).

The word "duly," when used in a complaint, is generally a conclusion of law. Denying that an act was duly done raises no issue. *Stott v. City of Chicago*, 68 N. E. 738, 737, 740, 205 Ill. 281.

"Duly" means in a due, fit, or becoming manner; properly or regularly; in due time or proper manner; in accordance with what is right, required, or suitable; fittingly, becomingly, regularly. *Rogers v. Trumble*, 125 N. W. 600, 602, 86 Neb. 316 (quoting 3 Words and Phrases, p. 2259).

The word "duly" has acquired a fixed legal meaning, and when used before any word implying action it means that the act was done properly, regularly, and according to law. It is often used in this sense before such words as "convened," "arrested," "qualified," "served," "presented," "discharged," and the like. A motion to quash the indictment on the ground that the record did not show that the grand jury were sworn by the statutory form of oath was properly overruled, where the record recited that the grand jurors were "duly" sworn. *O'Donnell v. People*, 79 N. E. 639, 640, 224 Ill. 218, 8 Ann. Cas. 123.

"Duly," in legal parlance, means according to law. It does not relate to form merely, but includes both form and substance. *Levy v. Cohen*, 92 N. Y. Supp. 1074-1076, 103 App. Div. 195 (citing *Brownell v. Town of Greenwich*, 22 N. E. 24, 114 N. Y. 527, 4 L. R. A. 685); *Sherman v. Ecker*, 110 N. Y. Supp. 265, 59 Misc. Rep. 216. And the expression "duly adjudged" means adjudged according to law, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction of the subject-matter and all parties affected by the judgment. *Benedict v. Clarke*, 123 N. Y. Supp. 964, 965, 139 App. Div. 242.

A complaint in an action on a note, which states that the note was "duly" presented for payment at the time and place designated thereon and payment thereof demanded and refused, that said note was duly protested, and that due notice of the protest of said note was duly given to the defendants and each of them, is sufficient as against a demurrer by an indorser on the ground that it did not show the giving of notice of presentment, demand, nonpayment, and protest.

*Sherman v. Ecker*, 110 N. Y. Supp. 265, 266, 59 Misc. Rep. 216.

In the provision of Rev. St. § 5428, making it a criminal offense for any person to falsely represent himself to be a citizen of the United States for any fraudulent purpose "without having been duly admitted to citizenship," the word "duly" applies to regularity and compliance with requirements, rather than to the truth of the facts involved in the admission, and where the person charged was granted a certificate of citizenship by an order of court, both of which are regular in form and have not been vacated, it is impossible to charge "unlawful use" based solely upon a further allegation of knowledge that the certificate had not been "duly" made. *United States v. Hamilton*, 157 Fed. 569, 570.

**DULY ADJUDGED**

The expression "duly adjudged" means adjudged according to law, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction of the subject-matter and all parties affected by the judgment. *Benedict v. Clarke*, 123 N. Y. Supp. 964, 965, 139 App. Div. 242.

**DULY ADMITTED TO RECORD**

If a contract of sale or option to purchase coal in place, which has not been acknowledged or proved by two witnesses, as required by statute, be admitted to record by the clerk of the court, it is not "duly admitted to record." *South Penn Coal Co. v. Smith*, 60 S. E. 593, 596, 63 W. Va. 587.

**DULY AND OFFICIALLY**

A protest by a notary, stating that the indorser was "duly and officially" notified of the dissent by written notice sent by mail to him at P., without stating that the indorser's residence was at such place, is prima facie evidence of due notice to the indorser. *Legg v. Vinal*, 43 N. E. 518, 519, 165 Mass. 555, 557.

**DULY APPOINTED**

An allegation in a declaration that "W. G. B. was 'duly appointed' as administrator of the estate of said R. B. deceased," is equivalent to an allegation that such administrator was appointed according to law. *Bowden v. Jacksonville Electric Co.*, 41 South. 400, 401, 51 Fla. 152, 7 Ann. Cas. 859 (citing *Clements v. State*, 40 South. 432, 51 Fla. 6; 3 Words and Phrases, p. 2260; *Rockwell v. Merwin*, 45 N. Y. 166).

**DULY ARRAIGNED**

"Duly arraigned" in open court means arraigned according to law. *Clements v. State*, 40 South. 432, 436, 51 Fla. 6 (citing 3 Words and Phrases, p. 2259).



**DULY ASSESSED**

Under Pol. Code, § 2213, making a tax deed prima facie evidence of the truth of facts recited and the regularity of the proceedings, the prima facie evidence, consisting of the recital that the property was "duly assessed," as effectually establishes the fact, in the absence of contrary evidence, that the assessor made proper oath to his return as would the verbal testimony of the assessor or county auditor. *Peters v. Lohr*, 124 N. W. 853, 855, 24 S. D. 605.

**DULY ASSIGNED**

The allegation of the complaint, in an action against guarantors by the assignee of a guaranty, that with the knowledge and consent of defendants the guaranty was "duly" assigned, is a sufficient statement that whatever was necessary to a valid assignment was done. *Levy v. Cohen*, 92 N. Y. Supp. 1074-1076, 103 App. Div. 195 (citing *Brownell v. Town of Greenwich*, 22 N. E. 24, 114 N. Y. 527, 4 L. R. A. 685).

**DULY AUTHORIZED AGENT**

A receiver for collection and enforcement of the liability of stockholders, appointed by the court, pursuant to the statutes of Minnesota, in a suit by creditors of the insolvent corporation against it and its stockholders to charge the stockholders with their liability for its debts, is a "duly authorized agent" of the corporation's creditors to prove their debt against the estate of a bankrupt stockholder. *Dight v. Chapman*, 75 Pac. 585, 588, 44 Or. 265, 65 L. R. A. 793.

Since corporations act by agents, an allegation that a defendant corporation by a named agent, "who was thereto 'duly authorized,'" entered into an agreement, sufficiently alleges the agency. *Duval Investment Co. v. Stockton*, 45 South. 497, 498, 54 Fla. 296.

The phrase "duly authorized agent or agents of such owner or owners," used in Liquor Tax Law (Laws 1896, p. 60, c. 112) § 17, subd. 8, as amended by Laws 1897, p. 220, c. 312, § 10, requiring the applicant for a liquor license to file a consent executed by the owner or owners or by the "duly authorized agent or agents of such owner or owners" of at least two-thirds of the total number of dwellings within 200 feet of the premises where the liquor is to be sold, means only such an agent as is authorized by the owner of the property to sign the consent in his behalf. *In re McCoy*, 93 N. Y. Supp. 401, 404, 104 App. Div. 215.

**DULY CALLED AND HELD**

An election to select a schoolhouse site, of which notice was not given, is not an election "duly called and held," within *Hurd's Rev. St.* 1905, c. 122, § 166, as amended by act effective July 1, 1908, legalizing the selection of schoolhouse sites by boards of education. *Southworth v. Board of Education*

of School Dist. No. 131, in Ogle County, 87 N. E. 403, 406, 238 Ill. 190.

**DULY CERTIFIED**

The words "duly certified," used with reference to the certification of a copy of a foreign death record, should be construed to mean "certified according to law." *State v. McDonald*, 104 Pac. 967, 976, 55 Or. 419.

**DULY COMMENCED**

Under How. Ann. St. 1882, § 8723, providing that, in case of an action "duly commenced" within the time limited by the statutes of limitation, a new action may be commenced within one year after reversal of judgment therein, and section 7291, providing for commencement of actions by filing a declaration and entering a rule to plead within 20 days after service of a copy thereof personally on the defendant, an action is not "duly commenced" without personal service. *Detroit Free Press v. Bagg*, 44 N. W. 149, 150, 78 Mich. 650.

**DULY ESTABLISHED**

Where, in a prosecution for operating an automobile at a speed in excess of that prescribed by the by-laws of a town, it was agreed that such by-laws were "duly established," such stipulation admitted that the by-laws were advertised and posted as provided by St. 1905, p. 289, c. 366, § 1, and that they were made as authorized by such act, and that the place covered by them was within the thickly settled part of the town. *Commonwealth v. Sherman*, 78 N. E. 98, 99, 191 Mass. 439.

**DULY FILLED**

A vacancy in the common council of a city of the third class, occurring after the primary election, so that it was too late to make nominations for the office except by petition, occurs at so short a period before the next annual election that the office cannot be "duly filled" at such election, within Act March 1, 1905 (P. L. p. 26), providing in such case for the filling of the vacancy by the common council. *Stewart v. Jones*, 71 Atl. 151, 152, 77 N. J. Law. 7.

**DULY GIVEN OR MADE**

There is no substantial difference between "duly given" and "given after the requirements of law had been duly complied with." *Gurnsey v. Northern California Power Co.*, 94 Pac. 858, 863, 7 Cal. App. 534.

While, in pleading the judgment of an inferior court, the facts showing the jurisdiction must be alleged or the pleader may, under Code Civ. Proc. § 532, state that the judgment was "duly given or made," an allegation in an affidavit for an examination in supplemental proceedings in the New York City Court on a Municipal Court judgment that the judgment was "duly recovered" was equivalent to an allegation that it was "duly

given." *Hottenroth v. Flaherty*, 112 N. Y. Supp. 1111, 1114, 61 Misc. Rep. 108.

Under a statute providing that in pleading a judgment it is not necessary to state the facts conferring jurisdiction, but the judgment may be stated to have been "duly given or made," a complaint alleging that on a certain date certain parties were adjudged bankrupts by the District Court of the United States at a term of the court held in a certain city, in proceedings then pending in the court, under the provisions of the federal bankrupt act, was an insufficient allegation of the rendition of the adjudication, in that it failed to allege that it was "duly given or made." *Mears v. Shaw*, 81 Pac. 338, 339, 32 Mont. 575.

Under Const. art. 8, § 20, giving a justice court jurisdiction as an examining court in cases of felony, and Code Civ. Proc. § 745, declaring that in pleading a judgment it is not necessary to state the facts conferring jurisdiction, but the judgment may be stated to have been "duly given or made," a complaint in an action on a bail bond which alleges that a certain person was ordered by a certain justice of the peace to be held to answer on a charge of burglary on which he was admitted to bail, the justice then and there having full authority and power to accept and approve the bond, and that he duly approved it and ordered the release of defendant, is insufficient for failing to allege the jurisdictional facts that the accused was charged by a complaint filed with the justice and examined on the charge, or to state the judicial capacity of the justice, and that the order holding accused to answer was "duly given" or "duly made," or "duly given and made." *State v. Lagoni*, 76 Pac. 1044, 1045, 30 Mont. 472.

#### DULY HAD

A recital in a commitment of an insane person that a hearing was "duly had" implies that due and lawful notice was given to the insane person and proved to the satisfaction of the court. *Ex parte Clary*, 87 Pac. 580, 581, 149 Cal. 732.

#### DULY ISSUED

An allegation of the complaint, in an action against a sheriff for wrongfully levying upon goods under a writ of attachment, that the writ of attachment was "duly issued" means that it was based upon a debt, and upon the affidavit required by statute. *Citizens' Securities Co. v. Hammel*, 112 Pac. 731, 733, 14 Cal. App. 564.

#### DULY LAID OUT OR ERECTED

The words "duly laid out or erected," as used in Rev. St. 1887, § 960, providing for the removal of an encroachment on any highway "duly laid out or erected," refers to a road which had been laid out or erected by

the proper officers in the manner prescribed by law. They have reference to formal or official action which the law enjoins upon those charged with the duty of establishing public highways. *Meservey v. Gulliford*, 93 Pac. 780, 788, 14 Idaho, 133 (citing *Freshour v. Hihn*, 34 Pac. 87, 99 Cal. 443).

#### DULY LICENSED

Even if a physician, whose license to practice was not recorded with the county clerk as required by Laws 1903, c. 426, § 5, cannot testify as an expert in a criminal case, testimony by such a physician that he was "duly licensed to practice" and was a practicing physician will be construed to mean, in absence of a contrary showing, that he had complied with section 1435e; that section making it unlawful for a physician to practice who has not first recorded his license as required thereby. *Smits v. State*, 130 N. W. 525, 526, 145 Wis. 601.

#### DULY MADE

The phrase "duly made," without a statement of the special facts on which it is predicated, has in general no effect, for it is not only indefinite, but affirms matter of law instead of facts, and consequently is not traversable. An allegation in a petition to collect a subscription to the stock of a railroad that certain requisite assessments had been duly made was insufficient. *Woonsocket Union R. Co. v. Taft*, 8 R. I. 411, 414 (quoting and adopting the rule stated in *Gould, Plead.*).

Under Code Civ. Proc. § 456, providing that in pleading a judgment or other determination of the court it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made, an averment that an order of appointment of a receiver was "duly made" is equivalent to an averment that all the jurisdictional prerequisites to the appointment existed. *Title Insurance & Trust Co. v. Grider*, 94 Pac. 601, 602, 152 Cal. 746.

#### DULY NOTIFIED

When the sufficiency of a defense pleaded depends on whether a person since deceased acted with knowledge of a certain fact, a mere statement in the affidavit of defense that he was "duly notified" of such fact is insufficient. *Stephenson v. Supreme Council A. L. H.*, 127 Fed. 379, 380.

#### DULY ORGANIZED AND EXISTING

A complaint, alleging that defendant is a domestic corporation "duly organized and existing," and engaged in operating street railroads, means that defendant has been legally organized and existing for the purpose alleged. *Hollis v. Brooklyn Heights R. Co.*, 113 N. Y. Supp. 4, 6, 128 App. Div. 821.

**DULY PAID**

A complaint held not demurrable as alleging that the check was properly or lawfully paid, the allegation that it was "duly paid" through the clearing house meaning that it was regularly paid in the manner to make it a proper charge against the bank. *Davenport v. Walker*, 116 N. Y. Supp. 411, 414, 132 App. Div. 96.

**DULY PASSED**

In an action on a street assessment, the issue of fact on which plaintiff's right to recover depended was whether the board of supervisors had jurisdiction to pass the resolution ordering the performance of the work. Defendant's answer alleged that this resolution was not "duly passed," which was deemed controverted by plaintiff, as provided by Code Civ. Proc. § 462. Held, that a finding that the resolution was "duly passed" was a determination that the board had jurisdiction to pass it. "While the averment that an act has been 'duly' performed is ordinarily but a legal conclusion, yet, in the absence of a special demurrer or objection on that ground, it will be held sufficient to authorize the court to receive evidence upon the issue." *Pacific Pav. Co. v. Diggins*, 87 Pac. 415, 416, 4 Cal. App. 240 (citing *Minor v. Baldrige*, 55 Pac. 783, 123 Cal. 187).

**DULY PROSECUTE**

Though plaintiff in replevin is unsuccessful in maintaining his title or right to the property, the condition of his bond to "duly prosecute" the action is satisfied by his prompt trial of the action in the circuit court and in the Court of Appeals. *Vallandingham v. Ray*, 108 S. W. 896, 897, 128 Ky. 506.

**DULY PROTESTED**

"Duly protested" is equivalent to an averment that a bill was presented at maturity at the place of payment named in it. *Battle v. Weems*, 44 Ala. 105, 107.

**DULY PROVED**

In North Carolina it has been held that, when the clerk of a court of record certifies that an instrument has been "duly proved" in that court, it is implied that everything required by law has been proved, upon the maxim "res judicata pro veritate accipitur." *Horton v. Hagler's Ex'r*, 8 N. C. 48, 49.

**DULY RECORDED**

The term "duly recorded," used in Acts 1908, c. 105, providing that all deeds, mortgages, releases, etc., which have not been properly executed and acknowledged shall be valid, if duly recorded, merely requires that the instrument defectively acknowledged must be recorded, and not that the record must be made within the statutory six months after execution, for a deed lawfully registered is valid without any aid from statute. *Eden Street Permanent Bldg. Ass'n*

*No. 1 of Baltimore City v. Lusby*, 81 Atl. 284, 286, 116 Md. 173.

Where the record of a married woman's deed conveying her separate property showed that an essential part of the certificate of acknowledgment was omitted, the deed was not "duly recorded" so as to support title by limitations. *Merriman v. Blalack*, 122 S. W. 403, 408, 57 Tex. Civ. App. 270.

Code 1873, § 1967, as amended by Acts 24th Gen. Assem. p. 68, c. 42, provides that the acknowledgments of all deeds, mortgages, or other instruments in writing, taken and certified previous to the 1st day of February, 1892, and which have been duly recorded in the proper counties in this state, be and the same are hereby declared to be legal and valid in all courts of law and equity in this state or elsewhere, held that the words "duly recorded," as here used mean actually recorded. *Parriott v. Incorporated City of Hampton*, 111 N. W. 440, 442, 184 Iowa, 157.

**DULY RECOVERED**

While, in pleading the judgment of an inferior court, the facts showing the jurisdiction must be alleged or the pleader may, under Code Civ. Proc. § 532, state that the judgment was "duly given or made," an allegation in an affidavit for an examination in supplemental proceedings in the New York City Court on a Municipal Court judgment that the judgment was "duly recovered" was equivalent to an allegation that it was "duly given." *Hottenroth v. Flaherty*, 112 N. Y. Supp. 1111, 1114, 61 Misc. Rep. 108.

**DULY RENDERED**

In an action based on a foreign judgment, an allegation that the judgment was "duly rendered" was, as against a general demurrer, sufficient as showing the court's jurisdiction. *Benedict v. Clarke*, 123 N. Y. Supp. 964, 965, 139 App. Div. 242.

In *Young v. Wright*, 52 Cal. 410, it was held that the expression "duly rendered" is not equivalent to "duly given or made," but the later decisions do not indulge in such subtle refinement. *Gurnsey v. Northern California Power Co.*, 94 Pac. 858, 862, 7 Cal. App. 534.

**DULY SCHEDULED**

Under Bankr. Act July 1, 1898, c. 541, § 7, subd. 8, requiring the bankrupt to file a schedule of his property and a list of his creditors, "showing their residence if known, if unknown that fact to be stated," and section 17a, providing that a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as have not been "duly scheduled," a debt is not duly scheduled when the creditor's office address, instead of his residence, is set forth in the schedule under the designation "residence." *Weldenfeld v. Tillinghast*, 104 N. Y. Supp. 902, 903.

**DULY SERVED**

The words "duly served," used by a constable in returning a summons in a case in justice court, do not imply a legal service. So, where a constable returns a summons "duly served," the return is illegal, and does not give the justice authority to try the cause in the absence of defendant, as the time and manner of service ought to appear. *Zane v. Pissant*, 2 N. J. Law, 319, 320; *Budd v. Marvin*, 4 N. J. Law, 248.

**DULY SIGNED**

Under a strict interpretation of an admission in a stipulated agreement of facts that a bill was "duly signed" by the Speaker of the House of Representatives, it might be held that this covered compliance with the constitutional provision as to the manner and time of signing. *State ex rel. Hynds v. Cahill*, 75 Pac. 433, 439, 12 Wyo. 225.

**DULY SUBMITTED**

An indictment for violation of the local option law, alleging that the four questions provided by Liquor Tax Law (Laws 1896, c. 112) § 13, were "duly submitted," was sufficient without expressly alleging various preliminary steps requisite to the legal submission of such questions; the terms "duly submitted" implying the existence of every fact essential to the proceedings. *People v. Yarter*, 137 N. Y. Supp. 462, 464, 152 App. Div. 568.

**DULY SUMMONED**

The term "duly summoned," applied to a garnishee, signifies that he was properly and regularly served with notice of garnishment. *Dodge v. Knapp*, 87 S. W. 47, 50, 112 Mo. App. 513 (citing *Robertson v. Perkins*, 9 Sup. Ct. 279, 129 U. S. 233, 32 L. Ed. 686; *Bank of British Columbia of Victoria v. City of Port Townsend*, 47 Pac. 896, 16 Wash. 450).

Revisal 1905, § 1645 (9), provides that a deposition may be read if the deposing witness has been "duly summoned," and is absent from the state at the time of the trial, or more than 75 miles from the place of trial, without the procurement of the party offering the deposition. Held, that the words "duly summoned," used in the statute, are equivalent to and mean "subpoena duly issued," implying that due effort has been made to secure the presence of the witness. *Tomlinson Chair Mfg. Co. v. Townsend*, 69 S. E. 145, 146, 153 N. C. 244.

**DULY SWORN**

"The words 'in due manner sworn' have the same meaning as the word 'duly.' An indictment alleging that the witness was 'in due manner sworn' sufficiently alleged that she was 'duly sworn.'" *State v. Jewett*, 85 Pac. 994, 996, 48 Or. 577 (citing the definitions in 3 Words and Phrases, pp. 2259-2264).

**DULY WITNESSED**

"Duly witnessed" means witnessed according to law. *Baughman v. Harvey*, 93 Pac. 146, 147, 76 Kan. 767.

**DUM FERVET OPUS**

Where, in an action for injuries received by an employé in consequence of a fall of a trestle while running a train over it, a right of recovery was based on the employer's negligence in permitting the trestle to become defective, it was shown that it was the duty of the section foreman to require a man to repair it, and the foreman a short time before the accident requested a third person to tell the trestle man to make such repair, as a declaration that the trestle was going down and that it was in bad shape, being illustrative of the notice to the trestle man to repair the trestle, it was admissible as a declaration made "dum fervet opus." *Bundy v. Sierra Lumber Co.*, 87 Pac. 622, 624, 149 Cal. 772.

**DUMMY**

In land office practice "dummies" are either fictitious persons, or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud, and sign papers and make affidavits perfunctorily. *United States v. Munday*, 186 Fed. 375, 385.

**DUMMY DIRECTOR**

Where a share of stock in a corporation was transferred to a person for the purpose of qualifying him as a director in the corporation, he constituted what is commonly called a "dummy director." *Hoopes v. Basic Co.*, 61 Atl. 979, 980, 69 N. J. Eq. 679.

**DUMP**

Where, in an action for injuries to a servant by the derailment of a car, it appeared that the car was "emptied" of its contents by "dumping," which was accomplished by pulling a lever, an instruction that, if plaintiff "emptied" the slate from the car at the place of derailment, he was guilty of contributory negligence, was sufficiently covered by the plea, which alleged that plaintiff "dumped the car." The words "dumped" and "emptied" are synonymous. *Redus v. Milner Coal & R. Co.*, 41 South. 634, 635, 148 Ala. 665.

**DUMP CARS**

As materials, see Materials.

**DUNNAGE**

"Dunnage" consists, generally, of loose wood or other material usually placed on the flooring of a vessel for the cargo to rest on, or pieces of wood, mats, etc., jammed between barrels and other cargo to prevent

motion. *Capuccio v. Barber & Co.*, 148 Fed. 473, 476.

## DUPLICATE

A "duplicate" is an original instrument reproduced, not a new agreement, but merely written evidence of the lost instrument to take its place. *Grand Lodge A. O. U. W. v. McFadden*, 111 S. W. 1172, 1176, 213 Mo. 269.

"The meaning of the word 'duplicate,' in legal phraseology, is the same as that in its use among business men. It is tersely and correctly stated in 10 Am. & Eng. Encycl. of Law, 318, as follows: "'Duplicate' is defined as a document which is the same in all respects as some other instrument from which it is indistinguishable in its essence and operation.' A substantially like definition is given of the word in all the law dictionaries in common use. In Burrill's Dictionary, verbum 'Duplicate,' is given the following ample definition: 'A duplicate is sometimes defined to be a copy of a thing, but, though generally a copy, a duplicate differs from a mere copy in having all the validity of an original. Nor, it seems, need it be an exact copy. Defined also to be the counterpart of an instrument; but in indentures there is a distinction between counterparts executed by the several parties, respectively, each party affixing his or her seal to only one counterpart, and duplicate originals, each executed by all the parties.' " In paragraph 6 of Schedule A of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 458 (U. S. Comp. St. 1901, p. 2304), which requires a stamp to be affixed to each bill of lading, manifest, etc., "and to each duplicate thereof," the word "duplicate" is to be defined, in accordance with the meaning given it generally in business, as one of two instruments, each of which is original, and intended to have the force of an obligation irrespective of the other, and not as meaning merely a copy. *Wright v. Michigan Cent. R. Co.*, 130 Fed. 843, 846, 65 C. C. A. 327.

The use of the word "duplicate" across a check signifies that it was made as a substitute for the original and that no new liability was created thereby. *Lewis v. Commercial Nat. Bank*, 83 S. W. 423, 37 Tex. Civ. App. 241 (citing *Benton v. Martin*, 40 N. Y. 345).

### Copy distinguished

A "duplicate" is sometimes defined to be a copy of a thing; but, though generally a copy, a duplicate differs from a mere copy in having all the validity of an original. *Wright v. Michigan Cent. R. Co.*, 130 Fed. 843, 846, 65 C. C. A. 327.

While in grammatical construction of sentences the words "copy" and "duplicate" are never synonymous unless employed as verbs, the practice of indiscriminately using them as such is quite prevalent, and the ex-

trinsic facts presented by the record in this case fully justify the inference that the term "copy" was used only with reference to and to designate the instrument executed by the mortgagor and duly filed for record. Differing from a "copy," a "duplicate" instrument in writing is the exact repetition thereof, and according to judicial lexicographers has all the validity of an original. "A duplicate writing has but one effect. Each duplicate is complete evidence of the intention of the parties." *Bouv. Law Dict.* "A document the same in all respects as some other document, from which it is indistinguishable in its essence and operation." *Anderson's Law Dict.* "An original instrument repeated; a document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original." *Bur. Law Dict.* *Cable Co. v. Rathgeber*, 113 N. W. 88, 90, 21 S. D. 418.

Within four months subsequent to the commission of an act of bankruptcy, an involuntary petition was filed. On the same day the clerk of the district court made and certified a copy of such petition, which was delivered to the marshal with the summons, and was by him given to the defendant contemporaneously with the service of the summons. Held, that such copy made under such circumstances was a "duplicate" within the requirement that such petition must be filed in duplicate. *Millan v. Exchange Bank of Mannington*, 183 Fed. 753, 754, 106 C. C. A. 327.

The word "duplicate," in Act May 5, 1892, c. 60, §§ 6, 7, relating to the deportation of Chinese laborers not having certificates of residence, and authorizing the procurement of a "duplicate" on the loss or destruction of certificate of residence, etc., is not synonymous with the words "a true copy"; the law not requiring that the duplicate shall be an exact copy of the original. *Dillard v. United States*, 141 Fed. 303, 308, 72 C. C. A. 451.

### As original instrument

See Original Instrument.

## DUPLICATE TAXATION

See, also, Double Taxation.

"Duplicate taxation," as distinguished from "double taxation," contemplates a tax on property assessed to the person owning it under the laws of one state, which is levied in another state for the same year under a tax assessment accruing later in the year than that in the first state upon the owner's removal thereto. *Judy v. Beckwith*, 114 N. W. 565, 568, 137 Iowa, 24, 15 L. R. A. (N. S.) 142, 15 Ann. Cas. 890.

## DUPLICITY

"Alike in criminal and civil proceedings 'duplicity' consists in alleging for one single

purpose or object two or more distinct grounds of complaint or defense when one alone would be effectual in law." A plea in abatement alleging that the indictment was not found by a legal grand jury (1) because the grand jury did not consist of 23 lawful persons, (2) because the persons from which it was drawn were not legally selected, and (3) because the act under which it was drawn is unconstitutional, is bad for "duplicitv." *State v. McNay*, 60 Atl. 273, 274, 100 Md. 622 (quoting and adopting definition in 1 Bish. New Cr. Proc. § 432).

"Duplicitv" in a declaration consists in joining in one count different grounds of action to enforce a single right of recovery. *People's Nat. Bank v. Nickerson*, 76 Atl. 937, 938, 106 Me. 502.

"Duplicitv" in pleading means double pleading, the joining of two or more causes, or offenses, in one count, etc. It does not include a union of two or more facts which together constitute but one cause, or offense. *Sloss-Sheffield Steel & Iron Co. v. Smith*, 52 South. 38, 41, 166 Ala. 437.

"Duplicitv in pleading" consists in the tender of issue in the same plea on several points, either of which would be traversable. *Bruce v. Mathers* (Ky.) 2 Bibb 294, 298.

To constitute "duplicitv" in pleading it is not enough that it appears therefrom that the plaintiff has more than one cause of action. It must appear that he relies on more than one as the ground of a single recovery. It is not objectionable because he sets up the terms of a contract as constituting part of the means by which the fraud was consummated, so long as he does not seek to recover upon it. *Summers v. Geer*, 93 Pac. 133, 135, 50 Or. 249 (citing *Bingham v. Lipman*, 67 Pac. 98, 40 Or. 363; *Raymond v. Sturges*, 23 Conn. 134).

Though the term "duplicitv" used in Code practice has been given a somewhat enlarged meaning, it still includes all that was comprehended by the definition at common law. *Schwindt v. Lane Potter Lumber Co.*, 107 Pac. 818, 819, 40 Mont. 537, 135 Am. St. Rep. 639.

The term "duplicitv," as used in Rev. St. 1899, § 613, providing that duplicitv in pleading is a substantial objection and any petition or other pleading found subject to such objection shall on motion be stricken out, is synonymous with "multifariousness," and means improper joinder in a single bill of independent matters. It also consists of a joinder of different grounds of action to enforce a single right (quoting 3 Words and Phrases, p. 2267). *Scott v. Taylor*, 132 S. W. 1149, 1153, 231 Mo. 654.

"Duplicitv" in an indictment or information is the joinder of two or more distinct offenses in one count. *State v. Sherman*, 119 S. W. 479, 480, 137 Mo. App. 70 (citing and quoting 1 Bish. Cr. Proc. [3d Ed.] § 432).

An indictment, to be open to the objection of "duplicitv," must charge two distinct and complete crimes, for each of which a separate punishment may be inflicted, and each of which would withstand a demurrer for want of sufficient evidence to constitute a crime. *Baysinger v. Territory*, 82 Pac. 728, 729, 15 Okl. 386.

"Duplicitv" relates to averment or allegation, not to judgments which may be founded thereon; and hence it follows that there cannot be duplicitv in a rule calling on defendant attorney to answer two distinct acts which, if they be offenses, may be punished by different and distinct penalties. *State v. Hays*, 61 S. E. 355, 356, 64 W. Va. 45.

That an information for operating a disorderly house contained several specifications of different ways in which the statute was being violated, did not render it defective for "duplicitv." *Walt v. People*, 104 Pac. 89, 90, 46 Colo. 137.

## DURESS

See, also, Coercion.

"Duress" exists when one, by an unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his free will." *Knight v. Brown*, 100 N. W. 602, 603, 137 Mich. 396 (quoting *Hackley v. Headley*, 8 N. W. 511, 45 Mich. 569); *Fred Rueping Leather Co. v. Watke*, 116 N. W. 174, 175, 135 Wis. 616; *Smithwick v. Whitley*, 67 S. E. 913, 914, 152 N. C. 369; *Guinn v. Sumpter Valley Ry. Co.*, 127 Pac. 987, 989, 63 Or. 368.

"To constitute 'duress' sufficient to avoid a contract in this state, the means adopted need only be of a character necessary to overcome the will and desire of the injured party, whether that person be below or above the average person in firmness and courage, and whether the means employed come clearly within the common-law definition of 'duress' or otherwise. In other words, the law extends its protection to an individual, without reference to whether he is strong or weak, intellectually, and refuses to measure his rights by an arbitrary yardstick avowedly applicable only to men of 'ordinary intellect, firmness, and courage.'" *Nebraska Mut. Bond Ass'n v. Klee*, 97 N. W. 476, 478, 70 Neb. 383 (citing *First Nat. Bank of David City v. Sargent*, 91 N. W. 595, 65 Neb. 594, 59 L. R. A. 296; *Galusha v. Sherman*, 81 N. W. 495, 501, 105 Wis. 263, 47 L. R. A. 417).

"Duress," in its broader sense, includes every mental condition caused by fear of personal injury, or injury to one's wife, child, or husband, which is sufficient to make the person acted upon incapable of exercising his free will power; the important consideration being whether the means used were, under the circumstances, sufficient to prevent

the free exercise of the will power. *Price v. Bank of Poynette*, 128 N. W. 895, 897, 144 Wis. 190; *Wooley v. Chicago & N. W. Ry. Co.*, 136 N. W. 616, 618, 150 Wis. 183.

To constitute "duress," it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evil, as inconvenience and loss by the detention of property, loss of property altogether, or compliance with an unconscionable demand. *Harris v. Cary*, 71 S. E. 551, 553, 112 Va. 362, Ann. Cas. 1913A, 1350.

To constitute "duress" by threats and intimidation, it must appear that the party coerced was so intimidated and moved by the threats made as to cease to be a free moral agent, and to become so bereft of those qualities of mind essential to the making of a contract, as to be incapacitated to exercise his free will power in that connection. *Clement v. Buckley Mercantile Co.*, 137 N. W. 657, 661, 172 Mich. 243.

"Duress," to be available as a ground to set aside a deed, must be such as to excite an apprehension or fear of great bodily harm or illegal punishment, and the violence or threats must be of such a degree as to cause one of ordinary firmness and courage to yield, but, to avoid a deed on the ground of duress per minas, the threats must be such as to strike with fear one of common firmness and constancy of mind. *Kline v. Kline* (Ariz.) 128 Pac. 805, 808.

Bouvier defines "duress" as an actual or threatened violence or restraint of a man's person contrary to law to compel him to enter into a contract or to discharge one. It implies a restraint which overcomes the will, and, to constitute it, threats must be used. *Roloson v. De Hart*, 114 S. W. 1122, 1123, 134 Mo. App. 633.

Civ. Code 1895, § 3536, defines "duress" as any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. *Griffin v. Griffin*, 61 S. E. 16, 17, 130 Ga. 527, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866; *Bond v. Kidd*, 57 S. E. 944, 945, 1 Ga. App. 798; *Whitt v. Blount*, 53 S. E. 205, 206, 124 Ga. 671 (citing 9 Cyc. pp. 444, 451, 452).

Where plaintiff admitted that no threats were made to induce her to sign a chattel mortgage, which was given on an exchange of houses between herself and defendant, but, after holding out for several hours and refusing to sign the mortgage, she did so finally on the insistence of defendant and his brother that a valid trade had been made, and that if she refused to sign she would become liable for a larger amount than that for which the mortgage was given, the mortgage was not void for "duress." *Knight v.*

*Brown*, 100 N. W. 602, 603, 137 Mich. 396 (quoting *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511).

The common-law doctrine of "duress," divided into duress by imprisonment and duress per minas, which arises when a person is threatened with loss of life or limb, or with mayhem, or with imprisonment, is in force in Missouri as modified by the decisions of the courts, and in its extensive sense duress is the degree of constraint which is sufficient to affect the mind of a person of ordinary firmness, and includes the condition of mind produced by the wrongful conduct of another, rendering a person incompetent to contract with the exercise of his free will power. *Wood v. Kansas City Home Telephone Co.*, 123 S. W. 6, 12, 223 Mo. 537.

"To be 'duress,' the act must be physical violence, threats of violence or harm, or imprisonment or threat of imprisonment." One of three brothers, who owned all their property in a partnership, died, leaving his estate by will to his two brothers equally, and requesting them to adopt his children, which they did. They continued to hold their property in common, and the estate had been largely increased in value, when, more than 20 years later, the second brother died intestate, leaving a widow and children. The surviving brother then proposed the formation of a corporation to take the common property, and that a division be made between the persons in interest, who were then all adults, by the allotment of stock to each. Though there was some opposition, he insisted and declared that otherwise he would administer the estate as surviving partner, and the others would get only what the courts allowed them. After the matter had been under consideration for six months, an agreement for the formation of a corporation and the allotment of the stock was signed by the persons in interest, except one, whose interest was bought by the others. The agreement was carried out, and the common estate was owned, and the business managed, by the corporation with marked success. The agreement for division of the stock as a family settlement would not be set aside, after a lapse of 12 years, on the ground that the acts and threats of the surviving brother amounted to duress. *Burnes v. Burnes*, 132 Fed. 485, 493.

"Duress" is defined as "a condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party, and causes him to do an act or make a contract not of his own volition." Duress was not shown where, plaintiffs having obtained certain property from their ancestor by an alleged deed and will, four months after the ancestor's death, on the eve of the trial of an action to set aside such deed and will, a mutual friend caused the settlement to be made by which

complainants conveyed certain of the property to defendants, who in the meantime had only avowed their determination to fight for what they insisted were their legal rights; plaintiffs at the time being fully competent to contract. *Quigley v. Quigley* (Iowa) 115 N. W. 1112, 1113 (quoting 14 Cyc. p. 1123).

To deprive one of his will and understanding by reason of threats or other unlawful means, so that a note thus obtained is not his free and voluntary act, constitutes "duress." *Morrow v. Barnes*, 116 N. W. 657, 81 Neb. 688.

"Under the modern theory, 'duress' is to be tested, not by the nature of the acts or threats, but rather by the state of mind of the victim induced by such acts and threats." Where a father is coerced into executing a mortgage to secure the payment of a defalcation of his son by threats of the arrest and prosecution of the son for embezzlement if such security is not given, the mortgage may be avoided on the ground of duress. If the threats of the arrest and prosecution of the son operated to deprive the father of his free will power and to constrain the execution of the mortgage, the actual guilt or innocence of the son was not a material question in determining whether there was duress. *Williamson-Halsell-Frazier Co. v. Ackerman*, 94 Pac. 807, 808, 77 Kan. 502, 20 L. R. A. (N. S.) 484.

"Duress" and "deceit" are simply different methods by which fraud is consummated. The same remedies are available to the injured party. *Neibuhr v. Gage*, 108 N. W. 884, 887, 99 Minn. 149.

An instruction in a will contest that the words "fraud," "duress," and "undue influence," as used in the instructions, were used synonymously and generally mean the same thing, was not error. *Pickler v. Wise*, 132 N. W. 815, 817, 152 Iowa, 644.

"To constitute the 'coercion' or 'duress' which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or recovering the payment, over the person or property of another, for which the latter has no means of immediate relief than by making the payment." Where a mortgage provided that on default of interest the mortgagee could treat principal and interest as due, and on such default brought suit for foreclosure, which constituted an election to treat the mortgage as due, and where the mortgagor tendered the amount of the mortgage and interest, and the mortgagee then stated that the foreclosure suit had been discontinued, and insisted on payment of \$1,000, which the mortgage provided for in case the mortgagor elected to pay the amount of the mortgage before it was due, and the mortgagor, to procure the discharge of the mortgage, pays such bonus, the pay-

ment was under "duress" and involuntary, and could be recovered back in an action for that purpose. *Kilpatrick v. Germania Life Ins. Co.*, 75 N. E. 1124, 1126, 183 N. Y. 163, 2 L. R. A. (N. S.) 574, 111 Am. St. Rep. 722 (quoting and adopting definition in *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. Ed. 409).

"Duress" is that degree of constraint or danger either actually inflicted or threatened and impending which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. Where a husband whose obligation was about to fall due procured his surety thereon to arrange for a renewal, and the bank having refused to renew unless the wife would sign as surety, the act of such surety of the husband without knowledge of the bank in stating to the wife that, if she did not sign the obligation, it would be a great detriment to her husband and result in damage to him, did not amount to duress available as a defense in an action on the note signed by the wife brought by the bank, the wife being an intelligent woman able to transact business for herself. *United States Banking Co. v. Veale*, 114 Pac. 229, 230, 84 Kan. 385, 37 L. R. A. (N. S.) 540.

Civ. Code, § 1569, defines "duress" as (1) the unlawful confinement of a person; (2) unlawful detention of the property of any such person; (3) confinement of such person, lawful in form, but fraudulently obtained. Section 1570 defines "menace" as consisting of the duress specified in subdivisions 1 and 2, and unlawful and violent injury to the person and property of such person, or injury to his character. Defendant demanded the right to purchase boxes from plaintiff at an alleged contract price, which contract, in fact, did not exist, but plaintiff refused to sell at less than practically the market price, which was higher than the alleged contract price. It was practically impossible to then buy the boxes elsewhere, and they were essential to the continuance of defendant's business, and defendant claimed it was coerced into paying the price charged therefor. Held, that some element of compulsion or threatened exercise of power over the person or property to compel payment must be present to constitute duress, and defendant was not compelled by duress to purchase and pay the price charged for the boxes. *Standard Box Co. v. Mutual Biscuit Co.*, 103 Pac. 938, 943, 10 Cal. App. 746.

In an action on a note, a plea that one defendant was the father of another, who had been cashier of a bank, that after his resignation as cashier he and his father were called together by officers and agents of the bank, who knowingly and falsely stated to them that defendant son had violated the criminal laws of the state in using the bank's money with which to speculate, that the bonding company, which was surety upon defendant son's bond, if the son were turned



over to it, would doubtless prosecute him for the alleged felonies he had committed, and that, if he escaped on a technicality, he could never get a place in a bank again, because his business career would be ruined, and defendants believed such statements, and upon being told by the bank officers that if they would sign certain notes, including the one in suit, such officers would not prosecute defendant son and another defendant, they executed the note in suit, alleged merely a threat, without color of power to make it effective, and was insufficient as a plea of duress, under Civ. Code 1895, § 3536, defining "duress" as consisting in an illegal imprisonment, or legal imprisonment for an illegal purpose, or threats of harm, tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. *Mallory v. Royston Bank*, 70 S. E. 586, 587, 135 Ga. 702.

#### As of person or of property

"Duress" is of the person when manifested by imprisonment or threats, and of goods when one is compelled to yield to illegal exactions to obtain possession of his property. *Smithwick v. Whitley*, 67 S. E. 913, 914, 152 N. C. 369.

"Duress" is a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury. Duress is either of the person or of the goods of the party. 'Duress of the goods' consists in seizing by force, or withholding from the party entitled to it, the possession of personal property, and extorting something as a condition of release, or in demanding and taking property under color of legal authority which in fact is either void, or for some other reason does not justify the demand." In applying this principle it has been said that "artifice and force differ only as modes of obtaining the assent of a contracting party, and a contract to which one assents through imposition or overpowering intimidation will be declared void on appeal to either a court of law or of equity to enforce it. The question whether one executes a contract or deed with a mind and will sufficiently free to make the act binding is often difficult to determine, but for that purpose a court of equity, unrestrained by the more technical rules which govern courts of law in that respect, will consider all the circumstances from which rational inferences may be drawn, and will refuse its aid against one who, although apparently acting voluntarily, yet in fact appears to have executed a contract with a mind so subdued by harshness, cruelty, extreme distress, or apprehension short of legal duress, as to overpower and control the will," hence where a divorced wife, to whom had been committed the custody of a child instituted proceedings against her former husband, claiming that he was wasting his estate, and obtained the appointment of a temporary guardian for him, and

the husband, who was old and enfeebled in body and mind, and was very anxious to procure a dismissal of the proceedings, entered into an arrangement, under the approval of the court, by which a sum of money was paid, and property was conveyed by him for the benefit of the child, the money and property so paid and conveyed comprising the larger part of the husband's estate, and it was obviously paid to procure a dismissal of the proceedings and release of the guardianship, the proceedings being groundless in point of law, and the husband being coerced to make a contract which he would not have made voluntarily, the transaction constituted a form of duress, and could be avoided at the instance of the husband's heirs at law after his death. *Foot v. De Poy*, 102 N. W. 112, 114, 126 Iowa, 366, 68 L. R. A. 302, 106 Am. St. Rep. 365 (quoting definition by Cooley, *Torts*, p. 506; *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597).

"At common law 'duress' meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid; but courts of equity would unhesitatingly set aside contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence. And the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation or apprehension of physical force." "The true doctrine of duress, at the present, both in this country and in England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion, remediable by an appeal to a court of equity. The law no longer allows a person to enjoy without disturbance the fruits of his iniquity, because his victim was not a person of ordinary courage, and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard,

but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him. *Callendar Sav. Bank v. Loos*, 120 N. W. 317, 320, 142 Iowa, 1; *Joannin v. Ogilvie*, 52 N. W. 217, 49 Minn. 564, 16 L. R. A. 376, 32 Am. St. Rep. 581; *Galusha v. Sherman*, 81 N. W. 501, 105 Wis. 280, 47 L. R. A. 424; *Kennedy v. Roberts*, 75 N. W. 363, 365, 105 Iowa, 528.

"Duress" consists not merely in the act of imprisonment or other hardship to which the party is subjected, but the state of mind produced by those circumstances and in which the act sought to be avoided was done. According to the weight of modern authority the unlawful detention of another's goods under oppressive circumstances or their threatened detention will avoid a contract on the ground of duress, for the reason that in such cases there is nothing but the form of the agreement without its substance. *Whitt v. Blount*, 53 S. E. 205, 206, 124 Ga. 671 (citing 9 Cyc. pp. 444, 451, 452).

"Duress" of property, which will constitute a defense to a contract induced thereby, must be such pressure or constraint upon the property as to take away the free agency of the person contracting; and where one threatens nothing that he has not a legal right to perform there is no duress. *Kansas City, M. & O. Ry. Co. v. Graham & Price* (Tex.) 145 S. W. 632, 633.

Civ. Code, § 1567, provides that an apparent consent is not real or free when obtained through "duress" and section 1569 declares that any unlawful detention of the property of any person constitutes duress. Held that, where plaintiff held possession of the property of the drawer of an order sued on under an attachment issued by a justice without jurisdiction, an order executed by the drawer to relieve his property from such writ was subject to rescission for duress under section 1566, providing that a consent which is not free is nevertheless not absolutely void, but may be rescinded, etc. *Harlan v. Gladding, McBean & Co.*, 93 Pac. 400, 402, 7 Cal. App. 49.

#### **Refusal to pay full claim or amount due**

A mere threat to withhold payment of a debt, except on the giving of a receipt that the amount paid was all that was due, is not "duress." *Earle v. Berry*, 61 Atl. 671, 675, 27 R. I. 221, 1 L. R. A. (N. S.) 867, 8 Ann. Cas. 875.

#### **Refusal to surrender property**

"The 'duress' for which a person may avoid any contract of business made or recover back any money paid under its influence exists where one by the unlawful act of the

beneficiary or his authorized agent, or by the act of some person with his knowledge, is constrained under circumstances which deprive him of the exercise of free will to agree or perform the act sought to be avoided." It involves illegality. Payment by a consignor as a condition of obtaining his goods from the possession of the general assignee of a factor, who claimed and was legally entitled to a lien thereon for the factor's advances, made under protest and claim of a right to offset against such lien the amount of accommodation notes not then due, but paid by the consignor, was not made under "duress," so as to be recoverable by the consignor. *In re Meyer*, 106 Fed. 828, 831.

Where mortgaged cattle were in the possession of an agister, who had no lien thereon, and no right to detain them, but who nevertheless imposed on the mortgagee, as a condition of peacefully surrendering them, that the mortgagee should guaranty a note of the mortgagor for pasturing or caring for the cattle, and the mortgagee complied with the condition to peacefully get possession of the cattle, the guaranty was obtained by "duress" and was unenforceable. *Tandy v. Elmore-Cooper Live Stock Commission Co.*, 87 S. W. 614, 617, 113 Mo. App. 409.

#### **Threats in general**

A threat of arrest, imprisonment, and prosecution does not constitute "duress," unless the person so threatened is charged with having committed an act constituting a crime or a misdemeanor. *Bond v. Kidd*, 57 S. E. 944, 945, 1 Ga. App. 798.

Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal "duress" to avoid a contract, unless the threats are made under such circumstances as to excite fear of imminent and immediate imprisonment. While under both the civil and common law threats did not constitute "duress" unless they were of such a character as to induce a well grounded fear in the mind of a firm and courageous man, the rule now is that any contract produced by actual intimidation is void whether arising from or resulting merely from personal infirmity or from circumstances which might produce a like effect on persons of ordinary firmness. That plaintiff assigned certain corporate stock to defendants because of their threats to procure the arrest of plaintiff's son, plaintiff having been afforded ample time in which to consult an attorney, did not constitute such duress as would avoid the transfer. *Sulzner v. Cappeau-Lemley & Miller Co.*, 83 Atl. 103, 105, 234 Pa. 162, 39 L. R. A. (N. S.) 421.

A threat by officers of a union of musicians that, unless a member paid an illegal fine imposed, he would be expelled, causing the member to fear that, unless he paid the

fine, he would be expelled and deprived of his means of earning a living, amounts to "duress," entitling him to maintain an action for the fine paid. *Fuerst v. Musical Mut. Protective Union*, 95 N. Y. Sup. 155, 160.

**Threats of arrest**

Legal imprisonment, actual or threatened, not used for an illegal purpose, is not "duress," although in the given case it may be inflicted or threatened under such circumstances as to be shocking to the instincts of humanity. *White v. City of Tifton*, 57 S. E. 1038, 1039, 1 Ga. App. 569.

Under the modern rule of law, actual or threatened use or misuse of criminal process, legal or illegal, sufficient to overpower and overcome the will of the party threatened, constitutes "duress." *Wilbur v. Blanchard*, 126 Pac. 1069, 1070, 22 Idaho, 517.

**Threats of attachment**

Under Civ. Code 1895, § 3536, defining "duress" as any illegal imprisonment or legal imprisonment for an illegal purpose, or threats of bodily or other harm, or other means tending to coerce the will of another and actually inducing him to act contrary to his free will, and section 3723, providing that the payment of a claim, where the facts are known and there is no fraud, is deemed voluntary, and cannot be recovered unless made under immediate necessity therefor, or to release personal property from detention, or to prevent an immediate seizure, the payment of a claim, unfounded in law or fact, and known by the person making it to be so, to avoid a threatened seizure of the baggage of the person paying the claim, was a payment under duress, and may be recovered. *Fenwick Shipping Co. v. Clarke Bros.*, 65 S. E. 140, 141, 133 Ga. 43.

**Threats of civil suit**

A threat of litigation by one who has a legal right to sue is not generally held to be "duress" within the meaning of the law. *Walla Walla Fire Ins. Co. v. Spencer*, 100 Pac. 741, 743, 52 Wash. 369.

**Threats of foreclosure**

To constitute "duress," avoiding a deed, there must either be imprisonment or threats thereof, or of personal violence; the mere fear of losing property by foreclosure of a lien not being sufficient. *Ward v. Baker* (Tex.) 135 S. W. 620, 624.

**Threats of prosecution**

The obtaining of a note through the payee's threat to prosecute the maker for a criminal offense not relating to or injuring the payee, though the maker be guilty, constitutes "duress." *Thompson v. Hicks* (Tex.) 100 S. W. 357, 358.

"Duress" may be said to exist when one person is, by threats of a criminal prosecution of such a character as to deprive him of his own free will and agency, induced to make a contract or perform some act that

he would not otherwise make or perform." *Lacks v. Butler County Bank*, 102 S. W. 1007, 1012, 204 Mo. 349.

**Threats of prosecution of another**

In order to constitute "duress," the threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition. "Duress which consists of threats of imprisonment of a husband or a child is a species of fraud, which renders the contract made under its influence voidable only, and not void." Proof that a note and mortgage by a wife upon her individual property were executed under threats of criminal prosecution of her husband for embezzlement, and that she was greatly excited and alarmed at these threats, and had fainting spells before and after she executed the mortgage, and only consented to execute it to prevent her husband being sent to jail, is sufficient evidence of "duress" to invalidate the note and mortgage, as between the wife and the mortgagee. *Mack v. Prang*, 79 N. W. 770, 771, 104 Wis. 1, 45 L. R. A. 407, 76 Am. St. Rep. 848.

**DURESS BY IMPRISONMENT**

"Duress by imprisonment" is when a person is actually imprisoned for an improper purpose without just cause, or for a just cause without lawful authority, or for a just cause and under proper authority, but for an improper purpose. Code Civ. Proc. § 3670, declares that "duress" either of imprisonment or by threats or other acts by which the free will of the party is restrained or his consent induced, will avoid the contract, but that legal imprisonment, if not used for illegal purposes, is not duress. *Whitt v. Blount*, 53 S. E. 205, 206, 124 Ga. 671 (citing 9 Cyc. pp. 444, 451, 452); *White v. City of Tifton*, 57 S. E. 1038, 1039, 1 Ga. App. 569; *Balley v. Devine*, 51 S. E. 603, 604, 123 Ga. 653, 107 Am. St. Rep. 153.

In order for "duress of imprisonment," either actual or threatened, to be available at common law as a defense to a contract, the imprisonment must have been unlawful. *Balley v. Devine*, 51 S. E. 603, 604, 123 Ga. 653, 107 Am. St. Rep. 153.

**DURESS PER MINAS**

"Duress per minas" arises when a person is threatened with loss of life or limb, or with mayhem, or with imprisonment. *Wood v. Kansas City Home Tel. Co.*, 123 S. W. 6, 12, 223 Mo. 537; *Whitt v. Blount*, 53 S. E. 205, 206, 124 Ga. 671 (citing 9 Cyc. pp. 444, 451, 452).

**DURING**

"During" is a proper word to be used in creating a limitation upon the term grant-

ed by a lease. *Vanatta v. Brewer*, 32 N. J. Eq. 268, 270.

The word "during," used to designate time for the performance of an act as during a certain term of court, would be an apt expression of an intention to include the whole term. *Bloch Queensware Co. v. Smith, Saxton & Co.*, 80 S. W. 592, 593, 107 Mo. App. 13.

Defendant purchased certain oil from plaintiff, to be taken at defendant's option "during" the months of October, November, and December, 1901. Later another contract was made for delivery at defendant's option "between" October 1, 1901, and January 30, 1902, and still later another contract was made for delivery at defendant's option "during" the period from October 1, 1901, to June 30, 1902. In construing these contracts, it was held that defendant was entitled to call for deliveries at his option within the time specified in amounts to suit his convenience, and was therefore entitled to demand a delivery of all the oil at any time within the dates named. *American Linseed Co. v. Ebersson*, 104 S. W. 121, 124, 126 Mo. App. 426.

In an indictment for perjury alleging that on the trial of a criminal case it was a material inquiry whether the defendants were in a certain town "during the day and night of December 28th, and early in the morning of December 29th," the word "during" means at any time during the day or night of the 28th and the morning of the 29th. *United States v. Ammerman*, 176 Fed. 635, 636.

#### As on

See On—Upon.

#### As throughout the course of

While one meaning ascribed to the word "during" is "throughout the course of," it also means "in time of," "in course of," and hence where defendants, who had a contract to construct locks in a river for the United States, wrote plaintiff, stating that they would put on their work any number of teams plaintiff cared to furnish during the construction of the locks, the word "during" did not necessarily mean that the employment would extend over the whole period of construction. *Christie, Lowe & Heyworth v. Patton*, 42 South. 614, 616, 148 Ala. 324.

#### DURING APPOINTMENT

Under Rev. St. U. S. § 5136 et seq., the directors of a national bank are to be chosen annually, and one of the directors is to be chosen as president of the board. A bond given to a national bank by its president, for the faithful performance of his duties "during his appointment," covers only the year for which he was elected, and his sureties will not be liable for his misconduct after the expiration of that time. *First Nat.*

*Bank v. Samuelson*, 118 N. W. 81, 82, 82 Neb. 532.

#### DURING COVERTURE

See also, During Marriage.

"During coverture" means while the marriage lasts. *United States v. Ammerman*, 176 Fed. 635, 636 (quoting and adopting definition in *State, to Use of Gentry, v. Fry*, 4 Mo. 159).

#### DURING DISABILITY

Where, in consideration of wages "during disability," necessary nurse hire and doctor's bills resulting from present disability, and employment when recovered, plaintiff released defendant from liability for an injury sustained, which consisted of a broken leg, making plaintiff a cripple, the term "during disability" was not limited to the time that a nurse and doctor were required. *American Quarries Co. v. Lay*, 73 N. E. 608, 609, 37 Ind. App. 386.

#### DURING EXAMINATION

The surety on an undertaking that the principal should personally appear "during the said examination" for an alleged criminal offense "on each and every day to which the examination may be adjourned, until the same is fully completed," is not excused for failure to produce the principal at an adjourned hearing after the magistrate had ordered the principal to furnish surety in a larger sum for a further examination, but which he failed to do, and was permitted to leave the court without having furnished it. *People v. Newman*, 91 N. Y. Supp. 811, 813, 100 App. Div. 436.

#### DURING EXISTENCE

Where defendant, the general agent of a life insurance company, employed a special agent, and obligated himself to pay the agent an agreed percentage of such renewal premiums as might be paid on policies procured by the agent, provided such renewals should be paid "during the existence of this contract," and the contract provided it was to terminate on the termination of defendant's contract with the company, and the latter contract terminated before any renewal premiums were paid, by giving effect to every part of the contract as required by Civ. Code, § 1641, the agent's right to renewal premiums ceased on the termination of the contract. In no other way than as thus interpreted can effect be given to the words quoted. *Nelles v. MacFarland*, 99 Pac. 980, 981, 9 Cal. App. 534.

St. 1898, § 1789, relating to the voluntary dissolution of corporations, requires the adoption of a resolution of dissolution, and that a certified copy thereof be recorded in the office of the register of deeds of the corporation's home county, and also in the office of the secretary of state, and provides that

thereupon it shall cease to exist, except for winding up its affairs. Section 1791e, as amended by Laws 1905, c. 504, makes it the absolute duty of the state treasurer to receive and retain in custody "during the existence" of the company securities thereby required to be deposited by trust companies for the benefit of depositors and creditors. The state treasurer on the day previous to the recording of such resolution, with the register of deeds of the proper county, on presentation of a certificate of dissolution of the trust company, which had been filed with the secretary of state, released such securities to the amount of \$45,000. Held, that the corporation had not ceased to exist, and the release of the securities was a breach of the treasurer's duty for which he was liable on his official bond. *State ex rel. Sheldon v. Dahl*, 135 N. W. 474, 477, 150 Wis. 73.

#### **DURING FURTHER TIME**

See Further Time.

#### **DURING GOOD BEHAVIOR**

The phrase "during good behavior" means "while conducting oneself conformably to law." *United States v. Hasky*, 88 N. E. 1031, 1034, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279.

#### **DURING LAST SICKNESS**

The dictation of instructions for a will, which was not executed, many months before decedent's death, is not "during the last sickness," within Revisal 1908, § 3127, subd. 3, relating to nuncupative wills, though there was no recovery from the sickness. *Kennedy v. Douglas*, 66 S. E. 216, 217, 151 N. C. 336.

#### **DURING LIFE OF AGREEMENT**

Defendants executed a note, binding themselves to pay plaintiff \$300, with interest, on or before November 14, 1903. Defendants also executed a deed to plaintiff to secure the note, and plaintiff executed a defeasance agreement reciting that, one of the defendants desiring to sell from time to time "during the life of this agreement" certain portions of the property conveyed, plaintiff would convey to any purchaser so obtained on receipt of \$50 per lot, to be applied on the note. Held, that the phrase "during the life of this agreement" was limited to the time prior to the mortgagors' default in paying the note secured by the deed at maturity, and that plaintiff was not bound after such default either to accept less than the full amount due on the note or to convey a portion of the mortgaged property. *Bartels v. Davis*, 85 Pac. 1027, 1028, 34 Mont. 285.

#### **DURING LIFE OF CONSPIRACY**

"During the life of the conspiracy," as used in determining whether acts and declarations are admissible to prove a conspiracy,

is meant after the conspiracy has been formed and before its accomplishment or abandonment. *State v. Allen*, 87 Pac. 177, 179, 34 Mont. 403.

#### **DURING MARRIAGE**

See, also, During Coverture.

The phrase "during marriage," in a statute providing that "during marriage" the husband shall have the sole management of all the separate property of his wife, means as long as the marriage relation exists, and at no time during the marriage relation can the wife deprive the husband of his right of control and possession; he being present in the marriage relation. *Bledsoe v. Fitts*, 105 S. W. 1142, 1144, 47 Tex. Civ. App. 578.

Property acquired by the husband after his abandonment of the wife and her marriage to another, believing him divorced from her, is property acquired "during the marriage," and hence the wife was entitled to share in the community. *Merrell v. Moore*, 104 S. W. 514, 516, 47 Tex. Civ. App. 200.

#### **DURING NATURAL LIFE**

See Quarterly During His Natural Life.

Under the rule in *Shelley's Case*, a deed to the grantee "during his natural life and then to his heirs" conveys to the grantee title to the land in fee simple. *Doyle v. Andis*, 102 N. W. 177, 180, 127 Iowa, 36, 69 L. R. A. 953, 4 Ann. Cas. 18.

Testator gave his widow the income from his property for life, and provided that after her death, his daughter should become the owner of all that might remain after his widow's funeral expenses and just debts were paid during her natural life, then the property to go to his daughter's heirs. Held, that the clause "during her natural life" referred to the duration of the estate in testator's daughter, thus limiting it to a life estate, and did not refer to the period within which such debts should be paid. *Deaton v. Dorsey*, 73 Atl. 239, 240, 78 N. J. Law, 229.

In a will giving to testator's wife all his personal and real estate, "to have and to hold for her use and benefit during her natural life, with the right to dispose of the same by gift or will at her decease," the limitation of the wife's estate during her natural life describes the estate, which terminates at her death and creates in the wife a life estate with power of disposition, and not an estate in fee. *Collins v. Wickwire*, 38 N. E. 365, 366, 162 Mass. 143, 145.

A bequest of real and personal property to a wife "during her natural life and at her decease to be left to my son A." vests immediately in the son as an executory devise. *Farley v. Gilmer*, 12 Ala. 141, 142, 46 Am. Dec. 249.

**DURING OCCUPANCY OF BUILDING**

Under a lease for a term of two years, containing a covenant by the lessee to pay a specified rent "during occupancy of the building," the expression "during occupancy of the building" meant during the term, and did not give the lessee an option to surrender possession and relieve himself from liability for rent. *Bickford v. Kirwin*, 75 Pac. 518, 520, 30 Mont. 1.

**DURING PENDENCY OF ACTION OR PROCEEDINGS**

A petition to set aside a divorce decree for fraud may be properly considered as filed "during pendency of the action" for divorce, so far as relates to the court's power to make allowance for maintenance and expenses of the litigation, under Kirby's Dig. § 2679, providing that during the pendency of action for divorce the court may allow the wife maintenance and a reasonable fee for her attorneys. *Stewart v. Stewart*, 141 S. W. 193, 194, 101 Ark. 86.

In Comp. St. 1911, c. 25, § 12, providing that, in every suit brought, either for a divorce or a separation, the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency, the term "during its pendency" means any time from the commencement of the suit until and including the final order of dismissal thereof. *Kiddle v. Kiddle*, 133 N. W. 181, 182, 90 Neb. 248, 36 L. R. A. (N. S.) 1001, Ann. Cas. 1913A, 796.

**DURING PROGRESS OF SETTLEMENT**

The expression "during the progress of the settlement of the estate," as used in Code Civ. Proc. § 2582, providing for the allowance to the widow of a decedent, means during the time reasonably necessary for that purpose, and does not warrant a continuance of the allowance for an indefinite time until the whole estate is consumed and nothing left to be distributed. In *re Dougherty's Estate*, 86 Pac. 38, 41, 84 Mont. 836.

**DURING SEASON**

The phrase "during the season of the year 1905," as used in a contract to perform "certain services" of labor to work and pull a crop of turpentine boxes during the season of 1905, means through the course, existence, or continuance of the turpentine season of that year, and does not mean "at some period in the turpentine season of the year 1905." *Taylor v. State*, 53 S. E. 320, 124 Ga. 798.

**DURING TERM**

See Day During the Term.

A covenant of a landlord to make certain repairs "during the term" of a lease requires only that the landlord shall act on

notice on the part of the tenant. *Gerzebek v. Lord*, 33 N. J. Law, 240, 245.

**DURING TERM OF CHARTER**

Privileges granted by a city ordinance to a street railroad company "during the term of its charter" are meant to be granted during the period named in the charter, so that, where that period is 50 years, the privileges cannot be held to have expired because the company must have organized under an act limiting the corporate life to 30 years. *City of Minneapolis v. Minneapolis St. R. Co.*, 30 Sup. Ct. 118, 122, 215 U. S. 417, 427, 54 L. Ed. 259.

**DURING TRIAL**

"During such trial" includes all of the proceedings from the impaneling of the jury to the receiving and recording of the verdict. *United States v. Ammerman*, 176 Fed. 635, 636 (quoting and adopting definition in *State, to Use of Gentry, v. Fry*, 4 Mo. 159).

The phrase "during the trial" means every substantive step taken by the court in the cause after the indictment is presented, up to and including the final judgment. An order authorizing the sheriff to summon a jury to be present at a subsequent date fixed for the trial is a mere administrative function of the court and is not a part of the trial of the cause at which the presence of the accused is required. *State v. Barrington*, 95 S. W. 235, 257, 198 Mo. 23.

**DURING WIDOWHOOD**

A devise to a widow "during her widowhood" gives her a life estate only. *Sink v. Sink*, 64 S. E. 193, 194, 150 N. C. 444.

Where a testator, after devising a homestead to his wife for her life, directed that at her death the executor should sell it, it could not be said that his sole object was to provide a house for his widow, so that, where she parted with her interest therein during her lifetime in consideration of an annuity, the homestead could not be sold before her death for the benefit of the purchaser, but the testator's intent as expressed in the will should be enforced. *Stewart v. Jones*, 118 S. W. 1, 3, 219 Mo. 614, 131 Am. St. Rep. 595.

**DURING YEAR**

The expression "during a year" in Rev. St. 1898, § 1550, punishing illegal sales of liquor and declaring that in case of a second conviction during any year the punishment shall be increased, means within 365 days after the first conviction, and not within the same calendar year. *Paetz v. State*, 107 N. W. 1090, 1092, 129 Wis. 174, 9 Ann. Cas. 767.

Where a letter of a guaranty was dated August 1, 1903, and recited that the writer would guaranty purchases made by a third party "during this year," the guaranty should be construed as limited to the remainder of the year 1903. *Whitehead v.*

American Lamp & Brass Co., 62 Atl. 554, 555, 70 N. J. Eq. 581.

## DUST

The word "dust," as used in the factory act, requiring exhaust fans of sufficient power to be provided for the purpose of carrying off dust from emery wheels and grindstones and dust-creating machinery, may include particles of iron and crystals created by and thrown off by an emery wheel in operation. *Indianapolis Foundry Co. v. Lackey* (Ind.) 97 N. E. 349, 350.

The factory act, requiring exhaust fans to be provided to carry off dust from emery wheels, includes particles of emery and iron thrown and blown off the wheels while in operation, as well as any dust likely to be present in rooms in which dust-creating machines are operated; the word "dust" meaning fine, dry particles of matter that may be raised and carried by the wind, there being no rule to determine the size of the particles, nor the matter of which they are composed. *Indianapolis Foundry Co. v. Bradley*, 89 N. E. 505, 506, 45 Ind. App. 530.

## DUTCHMAN

A spliced rail is called a "dutchman," in the vernacular, of railroad employes. *Galveston, H. & N. Ry. Co. v. Wallis*, 104 S. W. 418, 419, 47 Tex. Civ. App. 120.

## DUTIABLE MERCHANDISE

The rule that fruit imported in a rotten and wholly worthless condition does not constitute "dutable merchandise" applies as well to fruit in packages as to fruit in bulk; and in the assessment of duty on fruit imported in packages allowance should be made for the decayed portions, even though not separated from the sound, but all being sold together at auction. *United States v. Villari, Mitchell & Co.*, 160 Fed. 77, 78, 87 C. C. A. 233.

## DUTIES

See Domestic Duties; Tonnage Duties. Excise duty, see Excise.

"Duties" are terms commonly applied to levies made by governments on the importation and exportation of commodities. *Flint v. Stone Tracy Co.*, 31 Sup. Ct. 342, 349, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1812B, 1312.

"Duties" or imposts are taxes levied on articles brought into the country. The power to collect such duty necessarily implies that there must be some article imported into the country on which the duty is imposed. *Alexander D. Shaw & Co. v. United States*, 141 Fed. 469, 471.

## DUTY

See Absolute Duty; Additional Duty; Breach of Duty; Death Duty; Die in Performance of Duty; Executive Duties; Governmental Duty; Gross Violation of Professional Duties; Imposed Duties; Judicial Duty; Lawful Duty; Line of Duty; Ministerial Duty; Moral Duty; Official Duty; On Duty; Positive Duty; Private Duty; Probate Duties; Public Duty; Right, Debt, or Duty; Special Duty; Statutory Duty; Unfit for Duty; While on Discharge of Official Duty. Discharge of official duty, see Discharge. Other Duties, see Other.

"Duty" is defined to be a human action which is exactly conformable to the laws which require us to obey them. *Chicago, R. I. & P. Ry. Co. v. Filson*, 128 Pac. 298, 299, 35 Okl. 89.

There are instances where the word "duty" may be used in a pleading, although perhaps not with the utmost propriety, in characterizing the nature of the plaintiff's employment, as where the word is used as descriptive of an ultimate fact as to the character of the work which he was required to do, as that one of the duties which plaintiff was employed to perform was to inspect his locomotive. In such an instance the allegation is one of ultimate fact, and is partially descriptive of what his contract was. *Pittsburgh, C. & St. L. R. Co. v. Lightelser*, 71 N. E. 218, 220, 163 Ind. 247; *Chicago & E. I. R. Co. v. Hamilton*, 85 N. E. 1044, 1046, 42 Ind. App. 512.

"The expression 'duty' properly imports a determinate person to whom the obligation is owing, as well as the one who owes the obligation, and there must be two determinate parties before the relationship of obligor and obligee of a duty can exist." *McGehee v. Norfolk & S. Ry. Co.*, 60 S. E. 912, 914, 147 N. C. 142, 24 L. R. A. (N. S.) 119.

### As legal obligation

In an indictment against a railroad station agent who was authorized to hire and pay extra help required at his station, taking receipts therefor which were turned in as a part of his accounts as cash, for forgery of such a receipt, an allegation that it was a part of his duty to have the party to whom the money was paid sign a receipt, and when signed it was his duty to turn it in as cash, imported a legal obligation in the performance of his services for the company. *Pelton v. State*, 132 S. W. 480, 481, 60 Tex. Cr. R. 412, Ann. Cas. 1912C, 86.

### As obligation

"Duty" is that which one is bound or under obligation to do. *Bankers' Deposit Guaranty & Surety Co. v. Barnes*, 105 Pac. 697, 698, 81 Kan. 422 (citing 3 Words and

Phrases, p. 2284); *Taylor v. White* (Tex.) 113 S. W. 554, 556.

"The 'duty' of a husband to love and support his wife is a practical duty and is not performed by a manifestation of sentiment without corresponding conduct." *Footte v. Footte*, 65 Atl. 205, 207, 71 N. J. Eq. 273 (quoting and adopting definition in *Coe v. Coe*, 59 Atl. 1059, 68 N. J. Eq. 157).

"In reference to the payment of taxes," the terms "duty" and "obligation" are used in two senses; the first being with reference to the sovereign imposing the tax, the second being in reference to individuals. The matter of duty to the sovereign is fixed by the legislative enactments imposing the tax. The matter of obligation to individuals arises from the legal or equitable relation of the parties. In neither case is the measure of obligation fixed by the mere fact of an interest or an estate in the land. It is settled by the authorities that the party under obligation to pay taxes cannot acquire a title at a tax sale. *Shrigley v. Black*, 71 Pac. 301, 303, 66 Kan. 213 (dissenting opinion, quoting *Spratt v. Price*, 18 Fla. 289).

#### DUTY AND BUSINESS

The words "duty and business" refer to the work of the operator and engineer, under a complaint in an action for the death of a railroad engineer in a collision with a standing train at a station, which shows a fully equipped telegraph office and signal station at the station with an employé in charge, whose business it was to give signals, and which avers that decedent approached the station under orders to meet a train there, that he checked the speed of his engine and sent his brakeman to throw the switch preparatory to taking a siding, when he received from the operator at the station a signal calling him to come down the main track, that it was the duty and business of the operator to give proper signals, and of the engineer to obey signals, and that on decedent proceeding down the track his train collided with a train standing at the station, causing his death, and hence the complaint states a cause of action under Employer's Liability Act, § 1, cl. 4. *Chicago & E. R. Co. v. Hamerick*, 96 N. E. 649, 651, 50 Ind. App. 425.

#### DUTY AS FIREMAN

In mandamus to compel the employment of an injured fireman in some position in the city of New York in accordance with the provisions of Greater New York charter, an allegation in defendant's answer that the relator was disqualified for service other than "duty as fireman" was to be interpreted as meaning "active duty in the uniformed service," as distinguished from "light duties," defined in another section of such charter. *People ex rel. Young v. Sturgis*, 82 N. Y. Supp. 953, 955, 85 App. Div. 20.

#### DUTY OF WATER

"Duty of water" means the quantity essential to the irrigation of any given tract. *Hough v. Porter*, 98 Pac. 1083, 1102, 51 Or. 318; *Id.*, 95 Pac. 732, 51 Or. 318.

#### DUTY TO CONSTRUCT

Laws 1870, p. 14, appropriated funds to a corporation for the improvement of the Willamette river, section 2 providing that it should be the duty of the corporation to construct a canal and locks, and, after completion, to pass without delay all steamboats at a charge not greater than 50 cents a ton. Held, that the term "duty to construct" was more comprehensive than a grant of authority, while including it, and that the requirement that the company should not "charge a greater rate" than 50 cents a ton was equivalent to authority to charge such rate. *State v. Portland General Electric Co.*, 98 Pac. 160, 162, 52 Or. 502.

#### DWELL

As reside

See Reside.

#### DWELLER

Other dwellers, see Other.

#### DWELLING—DWELLING HOUSE

See Inhabited Dwelling House; Occupied as Dwelling House; Occupied Exclusively as a Dwelling; One Dwelling House; Private Dwelling; Single Dwelling House; Two-Story Dwelling House.

Dwelling and additions, see Addition.

Use as dwelling house, see Use—Used.

The phrase "dwelling house," in the statutes against larceny in a dwelling house, has the same significance as in burglary, and where there is no allegation in an indictment therefor of the ownership of the house, or any other or further identification thereof, it is insufficient. *State v. Lawler*, 119 S. W. 639, 641, 220 Mo. 26.

#### Additions

An owner of an adjoining lot sued a church corporation to enforce a building restriction in defendant's deed providing that no building or part of a building should be erected in the rear end of the lot conveyed to be used other than a dwelling house, and that no building should be erected within 10 feet of the line of the north side of a 34 feet wide street. The rear end of the lot was the north side of the 34 feet wide street. To the east of the church was a parish building. The church began to build an addition to such building, no portion of which was within the 10 feet back of the line of such street. The building contained living rooms, bedrooms, and studies for the clergy, and was to be used as their residence. Held, that the addition was not a "dwelling house"



within the language of the restriction. *Crofton v. St. Clement's Church*, 57 Atl. 570, 572, 208 Pa. 209.

#### Attached building

A fire was set at night in a house in which fodder was stored. The house was joined to a dwelling house by an uninclosed gallery and roof. The fire was quickly communicated to the dwelling house, which was occupied. Held, that the house in which the fodder was located was a part of the dwelling house, within Code 1906, § 1036, punishing the burning in the nighttime of any house in which there shall be a human being, etc. *Spears v. State*, 46 South. 166, 167, 92 Miss. 613, 16 L. R. A. (N. S.) 285.

#### Barn

A barn inclosed by a fence disconnected from the dwelling, and no portion of which is applied to purposes of a dwelling house, is not a "dwelling house," within the terms of the statute against burglary. *Hutchins v. State*, 59 S. E. 848, 849, 3 Ga. App. 300.

#### Boarding house

"The term 'dwelling house' does not always have the same sense in all cases. It may mean one thing under an indictment for burglary or arson, another under a home-stead law, another under a pauper law, and another in a contract or devise. A boarding house certainly is a dwelling house." *Robbins v. Bangor R. & Electric Co.*, 62 Atl. 136, 140, 100 Me. 496, 1 L. R. A. (N. S.) 963.

Where lots in a town plat were sold under a form of deed common to all sales from the plat, and containing a restriction that no building except residences, to be used exclusively as dwelling houses for private families and necessary outbuildings, should ever be erected thereon, such restriction prohibited the use of one of the buildings as a boarding house. *Sayles v. Hall*, 96 N. E. 712, 713, 210 Mass. 281, 41 L. R. A. (N. S.) 625, Ann. Cas. 1912D, 475.

The word "public," in the phrase "public boarding house," does not expand the term "boarding house" so as to make it nominative of a class of buildings not used as dwellings. In a boarding house the guest is under an express contract at a fixed rate for a certain period of time. Where a municipal water contract provided specified rates for service to dwellings, and defendant water company refused to furnish certain boarding houses at such rates, a plea alleging that such houses were "public boarding houses" did not show that they were the less boarding houses nor excluded them from the class of buildings known as dwellings, within the contract. *Mayor, etc., of Birmingham v. Birmingham Waterworks Co.*, 44 South. 581, 582, 152 Ala. 306, 11 L. R. A. (N. S.) 613.

#### Buildings in cartilage

The words "dwelling house," as used in *Ballinger's Ann. Codes & St. § 7104*, defining

burglary as the unlawful breaking and entering any dwelling house, use the words in their ordinary sense, and do not include disconnected buildings which are not occupied by a member of the family. "Under the common law the term 'dwelling house' included the building or cluster of buildings in which a man, with his family, resided." *State v. Randall*, 78 Pac. 998, 36 Wash. 438 (quoting *Bish. St. Cr. [3d Ed.] § 278*).

"A 'dwelling house' is a permanent building or cluster of buildings, in which a man with his family resides." It cannot be fairly understood as a part of a contract of insurance that "a two-story frame building and its additions," used as a dwelling house, includes a servant's house 150 feet distant. *North British & Mercantile Ins. Co. v. Tye*, 58 S. E. 110, 111, 1 Ga. App. 380.

#### Character of building as affecting

An owner of land conveyed a part by deed, retaining the rest; the deed providing that no dwelling house should be erected upon the premises. The grantee built a structure thereon, on the first floor of which was a garage and a boiler house, and on the second floor bedrooms and a bathroom, occupied by the servants of a lessee. Held, in an action to enjoin the use of the building as a dwelling house or habitation, and to compel it to be torn down and removed, that the four walls and the roof of the structure constituted a "house," and that the interior arrangement determined that a portion of it was a "dwelling house," and that complainant was entitled to enjoin the use of any part of the house as a dwelling house, although not to compel its removal. *Goater v. Ely*, 82 Atl. 611, 612, 80 N. J. Eq. 40.

An awning in front of a building extending thirteen feet from the house line to the curb, supported by five posts and covered with a roof of transparent glass, is not covered by the words "dwelling house or other building" in a deed providing that the front line of any messuages, dwelling houses, or other buildings shall recede eight feet from the street line. *Olcott v. Sheppard, Knapp & Co.*, 89 N. Y. Supp. 201, 202, 96 App. Div. 281.

Owners of land platted it, and then conveyed it to a third person as trustee, who afterwards deeded back to each original owner a number of lots representing his interest in the unplatted tract. The plat, the deed from the owners to the trustee, and the deeds from the trustee contained no restrictions. The original owners subsequently executed deeds of many lots, 16 of which contained no restrictions, while others contained restrictions to the effect that no structure but dwellings costing at least \$2,500 should be erected thereon. There was an understanding that the land should be used for residences. Double houses were built thereon without objection. Held that, if it be

conceded that there was a valid restriction limiting each lot owner to a "dwelling" to be erected on his premises, the parties had construed it to mean a double house, or a house of two stories, to be occupied for dwelling purposes by two families, as a compliance with the restriction. *James v. Irvine*, 104 N. W. 631, 632, 633, 141 Mich. 376.

A railroad car may be treated as a dwelling house, and may be the subject of burglary, when it is used exclusively for habitation. *Gibbs v. State*, 68 S. E. 742, 8 Ga. App. 107.

#### Character of use of building as affecting

Where a policy insured a building "while occupied as a dwelling house," the insurance ceased when the premises were used as a house of ill fame. *Bastian v. British American Assur. Co.*, 77 Pac. 63, 65, 143 Cal. 287, 66 L. R. A. 255.

"A 'dwelling' is a 'place or house in which a person lives.'" A restrictive building covenant, stipulating that the buildings erected on the premises shall be first-class "private houses," prohibits the use of a private dwelling on the premises for a private sanitarium, for a "private house" is a "private dwelling" intended for private living, and a private dwelling is a "dwelling house" in which a person or family lives in an individual or private state. *Barnett v. Vaughan Institute*, 119 N. Y. Supp. 45, 46, 134 App. Div. 921 (quoting and adopting definition in *Webst. Dict.*).

#### Different use of part of building as affecting

A fire policy, describing the property insured as a "dwelling house," did not cover a building in which the basement was used as a shoe store, the first floor as a dry goods store, and the upstairs for dwelling purposes. *Bowditch v. Norwich Union Fire Ins. Soc.*, 79 N. E. 788, 789, 193 Mass. 565 (citing *Dougherty v. Greenwich Ins. Co. of New York*, 42 Atl. 485, 46 Atl. 1099, 64 N. J. Law, 716).

#### As domicile or residence

One's "dwelling house" is the building in which he lives. *East Montpelier v. City of Barre*, 66 Atl. 100, 79 Vt. 542, 10 L. R. A. (N. S.) 874.

In common parlance a house intended to be occupied as a residence is a "dwelling house," and the term means more than a house that is actually occupied as such. *People v. Mix*, 112 N. W. 907, 909, 149 Mich. 260, 12 Ann. Cas. 393.

A clause in a deed restricting the location of "dwellings" applies to business buildings and other structures, where the neighborhood is a residential section and it appears that the original owners never contemplated the erection of business buildings on

the street. *Hyman v. Tash* (N. J.) 71 Atl. 742, 744.

The phrase "the dwelling," in Tax Law (Laws 1896, c. 908) § 10, which provides that, if land is divided by a line between two tax districts, it shall be assessed in the district where "the dwelling" house or other municipal buildings are located, means, it seems, the dwelling occupied by the owner of the farm, or at least one erected and intended for the owner's occupancy, as distinguished from houses erected and intended for tenants and employes. *Chamberlain v. Sherman*, 103 N. Y. Supp. 239, 242, 53 Misc. Rep. 474.

"The words 'dwelling house' involve the idea of a house, a residence, where a person lives in settled abode. A dwelling house is a 'house intended to be occupied as a residence in distinction from a store, office, or other building.'" A restrictive building covenant, stipulating that the buildings erected on the premises shall be first-class "private houses," prohibits the use of a private dwelling on the premises for a private sanitarium, for a "private house" is a "private dwelling" intended for private living, and a private dwelling is a "dwelling house" in which a person or family lives in an individual or private state. *Barnett v. Vaughan Institute*, 119 N. Y. Supp. 45, 46, 134 App. Div. 921 (quoting and adopting definition in *Webst. Dict.*).

The word "dwelling" is one of multiple meanings, but the particular meaning intended to be expressed by it when used in a given instance may be rendered obvious by the context or attendant circumstances, and usually resort must be had to those aids to interpretation to ascertain what is meant. In its broadest sense the word denotes a building used as a settled human abode, and in common parlance, when not qualified, conveys the notion of a home, though a suite of rooms occupied by one man may be his dwelling house. *Sanders v. Dixon*, 89 S. W. 577, 582, 114 Mo. App. 229.

"Dwelling house," as used in Civ. Code, § 1237, providing that the homestead consists of the dwelling house in which the claimant resides and the land on which it is situated, means the building which is occupied as a dwelling house by the family, and not such portion of the building as may be actually used by the family for residence purposes. *In re Levy's Estate*, 75 Pac. 301, 302, 141 Cal. 646, 99 Am. St. Rep. 92.

"A person has his 'dwelling' where he resides permanently or from which he has no present intention to remove." Under act July 9, 1901, authorizing a summons to be served by handing a copy to a member of defendant's family at his "dwelling" house, the service was good, though the "dwelling" house was that of the father of defendant.

*Yerkes v. Stetson*, 61 Atl. 113, 114, 211 Pa. 556 (quoting And. Law Dict.).

**Garage and storeroom**

A "dwelling house" does not include a garage and storeroom, and hence the restriction in a deed against the erection of any "flat building" or tenement house and against any residence or other dwelling house on the premises within a certain distance to the street line is not violated by the erection of a garage and storeroom beyond such line. *Jones v. Williams*, 106 Pac. 166, 168, 56 Wash. 588.

**Hotel**

A hotel is a "dwelling house." *Robbins v. Bangor R. & Electric Co.*, 62 Atl. 136, 140, 100 Me. 496, 1 L. R. A. (N. S.) 963.

A hotel is a "dwelling house" when continually used as a place of habitation, within the statute, under which a dwelling house includes all buildings attached to and used in connection with the house usually lived in, and embraces a pool room adjoining the main hotel building and connected by a large archway, when both businesses are operated together. *Simpson v. State*, 113 Pac. 549, 551, 5 Okl. Cr. R. 57.

A room in an inn occupied by a guest is not, in a legal sense, his "dwelling house," the innkeeper having a right of access thereto at all reasonable times and for all reasonable purposes, e. g., to extinguish fire, to remedy leakage of water or gas, or any other emergency calling for immediate action, and to comply with his contract to furnish the guest with such convenience and comfort as the inn affords. *De Wolf v. Ford*, 86 N. E. 527, 530, 193 N. Y. 397, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969.

A house used for years as a hotel, and which was sold at auction as such, is not a "dwelling house," within the terms of a fire policy, even though the owner, when he purchased it, put a caretaker in charge who slept in one of the rooms. *Thomas v. Commercial Union Assur. Co.*, 37 N. E. 672, 673, 162 Mass. 29, 44 Am. St. Rep. 323.

**Houseboat**

A houseboat drawn upon the beach may properly be called a water craft and need not be called a "dwelling house" or other building in describing it in an indictment. *Nagel v. People*, 82 N. E. 315, 318, 229 Ill. 598.

**Piazza, veranda, or porch**

A veranda is a part of a dwelling house, within the meaning of a covenant not to erect any dwelling house nearer than 25 feet to the front street line, and the house, including the veranda, should be set back 25 feet therefrom. *McDonald v. Spang*, 105 N. Y. Supp. 617, 620, 55 Misc. Rep. 332.

The front porch of a dwelling house, covered by a roof, is a part of the dwelling house, and the larceny of property from the

front porch is, in contemplation of law, a larceny from the dwelling house. *Downer v. State*, 74 S. E. 301, 302, 10 Ga. App. 827.

**As personal property**

See Personal Property.

**As public place**

See Public Place.

**As public resort**

See Public Resort.

**As residence**

See Residence.

**Schoolhouse**

A school building, one part of which is occupied as a habitation, with interior communication between the parts, is a "dwelling house," within the meaning of the term as used in the law of arson. *United States v. Cardish*, 145 Fed. 242, 247.

**Single room**

The different rooms of a house, with doors and entry common to all, constitute each room the "dwelling house" of the particular occupants. Therefore an illegal entry into part of the house may be made by one who has a right to be in another part. *State v. Descant*, 42 South. 486, 488, 117 La. 1016 (citing Clark Cr. Law, c. 10, pp. 236, 237).

It not being necessary for an indictment for burglary to describe the premises in the exact language of the statute, an indictment charging the burglarious entry of the "room of S. in the M. Hotel" sufficiently charges entry of her "dwelling house," as it was if she dwelt therein, as is inferable from the language. *People v. Carr*, 99 N. E. 357, 358, 255 Ill. 203, 41 L. R. A. (N. S.) 1209, Ann. Cas. 1913D, 864.

"The authorities are somewhat at variance as to what is embraced in the word 'dwelling.' Some hold that it means the dwelling house alone in some instances, some that it means the house in which one resides, the house of his present abode, the apartment, building, or cluster of buildings in which a man resides with his family, and a few hold that it includes the curtilage.

\* \* \* Our own statutes seem to separate the outhouses from the main building in cases of arson, and yet the common law prevails in burglary. But we cannot hold that 'dwelling' in its general acceptation includes the garden, lawn, or a park within the curtilage. \* \* \* As the word can be either contracted or elastic, as the occasion may arise, in ascertaining the meaning thereof we should consider the facts and circumstances." Where a contract between a city and a water company provided certain rates for domestic consumption, and a single house was divided into resident apartments by different families or persons, the company was entitled to treat each part, room, or apartment as a distinct "dwelling." *City of Birmingham v. Bir-*

mingham Waterworks Co. (Ala.) 42 South. 10, 13.

#### Temporary absence as affecting

"A house occupied as a place of residence by a man and his family is an 'occupied dwelling house,' \* \* \* though every member of the family may be temporarily absent." *Andrus v. Davis*, 89 S. W. 772, 774, 99 Tex. 303 (quoting and adopting the definition in *Meeks v. State of Georgia*, 27 S. E. 679, 102 Ga. 572).

Though a house broken into and entered was at the time unoccupied, it is a "dwelling house" within Ky. St. § 1162, which makes felonious breaking into a dwelling house a crime, and prescribes the punishment therefor. *Thomas v. Commonwealth*, 150 S. W. 376, 377, 150 Ky. 374.

#### Tenement building

The requirement, contained in Civ. Code, art. 2637, concerning the expropriation of the "dwelling house, yard, garden and other appurtenances," is not intended to be applied to a tenement bought, and held merely as an investment, and which the owner himself has never occupied as a dwelling. *Louisiana & A. Ry. Co. v. Moseley*, 41 South. 585, 586, 117 La. 313.

#### Unfinished building

Uncompleted buildings not furnished with either doors or windows, and not occupied nor reasonably capable of occupancy for dwelling purposes, are not "dwelling houses" within Gen. St. p. 2838, § 167, providing that nothing in the act (the road act) shall be construed to extend to pulling down or removing any dwelling house which may encroach on any highway. *Whittingham v. Hopkins*, 57 Atl. 402, 404, 70 N. J. Law, 322.

A structure, intended for a dwelling house when completed, consisting of one main room, with a piazza and a shed room, covered as to the piazza and about half way up the rafters on the front part of the main room, and as to the balance of the main room and shed room uncovered, and in which structure there were window and door openings, but no windows or doors therein, and which had an opening for a chimney, which had not been commenced, and which had never been occupied, is not a dwelling house, within Code 1907, § 6296. *Davis v. State*, 44 South. 1018, 153 Ala. 48, 127 Am. St. Rep. 17, 15 Ann. Cas. 547.

#### As usual place of abode

As used in R. & C. Comp. §§ 55, 396, 400, subd. 2, providing that "the summons shall be served by delivery of a copy thereof \* \* \* to the defendant personally or, if he be not found, to some person of the family above the age of fourteen years at the dwelling house or usual place of abode of defendant," the terms "dwelling house" and "usual place of abode" are synonymous and evident-

ly mean a domicile. *McFarlane v. Cornelius*, 73 Pac. 325, 328, 43 Or. 513.

#### Vacancy of building as affecting

A "dwelling house" is a building which, by the mode of its construction or reconstruction, is suitable for a habitation, and a building does not cease to be a dwelling house because the owner, a school-teacher by profession, closed the house during the school vacation and lived elsewhere. *State v. Mason*, 77 N. E. 283-285, 74 Ohio St. 65.

A building was erected for a dwelling house, and was occupied by a tenant for some time, who removed therefrom. At the time of the removal the tenant's son left in the house his wearing apparel and other articles, and continued to claim the house as his place of residence. The tenant retained the keys. Held, that the building, the day after the tenant's removal, was a dwelling house, within Ky. St. 1903, § 1162, providing that, if any person shall "feloniously break into any dwelling house" and take anything of value, he shall be punished. *Commonwealth v. Woolfolk*, 89 S. W. 110, 111, 121 Ky. 164 (quoting and adopting the definition in Cyc. 1226).

#### DWELLING IN THE UNITED STATES

An alien minor child who has been born and remained abroad does not, when coming to join an individual parent, come within the provisions of Rev. St. § 2172, providing that minor children of naturalized citizens shall, if "dwelling in the United States," be considered as citizens thereof. *Zartarian v. Billings*, 27 Sup. Ct. 182, 183, 204 U. S. 170, 51 L. Ed. 428.

#### DWELLER'S CASTLE

"It is often said that every man's house is his castle. In early days men were compelled to protect themselves in their habitations by preparing them against attacks, and thus in time the dwelling came to be known as the 'dweller's castle'; the name probably having its origin in feudal times. If attacked in his home, he did not have to retreat but could use necessary force to eject the intruder. It was not lawful to kill for a bare trespass on property. It must have been at least forcible." *Freeney v. State*, 59 S. E. 788, 791, 129 Ga. 759.

#### DYE

An article which contains all the essential elements and determining characteristics of a color or dye, needing only to have its coloring properties rendered accessible by dropping it into water containing an alkali, is a color or dye within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15. Bromofluoresc acid is dutiable as a coal tar color or dye under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 152. *United States v. Kuttroff, Pickhardt & Co.*, 147 Fed. 758, 759.

## DYERS' STICKS

"Dyers' sticks" are used by dyers for hanging on dyeing material. Bamboo dyers' sticks, rounded at the ends and smoothed off at the joints, are covered by the enumeration of bamboo in Tariff Act July 24, 1897. c. 11, § 2, Free List, par. 700. *United States v. Knipscher & Maas Silk Dyeing Co.*, 152 Fed. 590, 591.

## DYING

By his own hand or act, see *Die by His Own Hand*.

Without heirs, see *Die Without Heirs*.

Without issue, see *Die Without Issue*.

Without leaving issue, see *Die Without Leaving Issue*.

## DYING DECLARATIONS

### Consciousness of impending death

In order to render a declaration admissible as a dying declaration, it must be made under a sense of impending dissolution, and after a hope of recovery has been entirely abandoned. *State v. Kelleher*, 100 S. W. 470, 477, 201 Mo. 614; *State v. Baldwin*, 71 S. E. 212, 213, 155 N. C. 494, Ann. Cas. 1912C, 479; *Brown v. State*, 69 S. E. 45, 47, 8 Ga. App. 382.

The essential element of a "dying declaration" is that a person making it does so under a belief of impending death, and when entertaining no hope of recovery. Consequently where a person in answer to categorical questions states that she believes she is about to die, and that she hopes God would let her recover, there is no such a belief of impending death and abandonment of hope of recovery necessary to constitute her statements "dying declarations." *People v. Brecht*, 105 N. Y. Supp. 436, 438, 120 App. Div. 760.

"'Dying declarations' derive their sanction as testimony from the fact that they are made under the apprehension of approaching dissolution in the view and expectation of speedy death; the situation of the party under such solemn circumstances creating a sanction equally impressive with that of an oath administered in a court of justice. It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them, that they were made under a sense of impending death." *State v. Monich*, 64 Atl. 1016, 1017, 74 N. J. Law, 522 (quoting and adopting definition in *Green in Donnelly v. State*, 26 N. J. Law, 463, at page 497).

"It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the statement of decedent admissible as a 'dying declaration.' The mere belief of the declarant that he will not get well, but that he will ultimately die from his injuries, is not

sufficient to admit his declaration. The fact of impending death and consciousness of it on the part of a wounded person may be proven by circumstances. In a prosecution for murder, in which it is sought to introduce a dying declaration, the court should, in the absence of the jury, hear evidence as to the circumstances under which the declaration was made to determine what statements, if any, were made in extremis, and should permit these only to be introduced, allowing defendant to introduce any statements made afterwards for the purpose of lessening or destroying the force of the dying declaration." *Coyle v. Commonwealth*, 93 S. W. 584, 587, 122 Ky. 781 (quoting and adopting 1 Greenl. Ev. § 158).

Dying declarations must be made when the party making them realizes his impending death and motives for falsehood may be presumed to have been lost in the despair of life. Where one who received two ugly and severe wounds, from which he died within a week, twice expressed the belief that he would never recover, declarations made by him concerning the homicide were admissible. *Patterson v. State*, 54 South. 696, 699, 171 Ala. 2.

The admissibility of dying statements is not affected by the means by which decedent became conscious that he is dying, provided that he is really conscious of the fact and impressed with the solemnity of his situation. *Smith v. State*, 71 S. E. 606, 607, 9 Ga. App. 403.

A statement, made by one making a dying declaration, that he entertained no hope of recovery; that he made the declaration in that frame of mind—was competent and sufficient to show that he was without hope of recovery, though he also stated that he did not know what the future had in store for him. The fact that one who had been fatally wounded had not been told by his physician that his wound was fatal did not render a dying declaration inadmissible, when it was made under the belief that he could not recover. Code Civ. Proc. § 1870, providing that in criminal actions the declaration of a dying person, made under a sense of impending death, may be admitted in evidence, is declaratory of the existing law that the belief that a fatal wound had been received, and that death was about to ensue, was sufficient to render a dying declaration admissible, and a person who had been fatally wounded, and who was in sore distress therefrom, and who believed that he would not recover, and who was soon about to die, was a "dying person," and a statement made in that belief relating to the cause of his injury is admissible, where it appears that he subsequently died from the direct effects of the wound, though he may have revived after making the statement, or may have lived a considerable time thereafter, and may have

again begun to hope for recovery. *People v. Cord*, 108 Pac. 511, 513, 157 Cal. 562.

Where deceased, who died nine or ten days after he was wounded, on the day before his death said to his brother in reply to a question as to how he was: "Same as a dead man. I will never get out of here"—his declarations as to what he was doing when wounded, as to how he was wounded, and that he had been shot in the knee, were properly admitted as dying declarations. *Kennedy v. Commonwealth (Ky.)* 100 S. W. 242, 243.

Where deceased stated just before a declaration as to the shooting that it was "all off with him," and that he was a "dead one," and asked for a priest, the declaration was admissible as a dying declaration. *State v. Kelleher*, 100 S. W. 470, 477, 201 Mo. 614.

On a trial for homicide, decedent died within a fraction of a day after having made declarations with respect to the manner in which her injuries were received. She had disposed of her only child in expectation of her approaching death, and had received the last rites of her church in the belief that death was imminent. Her attending physician held out some hope to her that she might ultimately recover. Held, that the court correctly received the declarations as her dying declarations. *People v. Stacy*, 104 N. Y. Supp. 615, 618, 119 App. Div. 743.

Decedent, after being shot, lived for several days, during which time he remained hopeful of his recovery, but on the day of his death, and about 10 or 15 minutes before he died, he stated to his physician that he was going to die, and asked him to send for his family. Held, to constitute a sufficient predicate for the admission of his statement as to the circumstances of the shooting as a dying declaration. *Rice v. State*, 108 S. W. 1156, 1165, 51 Tex. Cr. R. 255.

Contradictory statements as to expectation of impending death may prevent the admission of a statement as a dying declaration. It will not be presumed that a man who has been injured, though seriously, must necessarily feel that he is about to die so as to render his declaration admissible as a dying declaration. A statement by decedent that he was of the opinion that he was not going to get well is expressive of uncertainty and doubt, and produces the conviction that decedent had not lost all hope of recovery, so as to render his declaration of the circumstances of the homicide admissible as a dying declaration. *Bilton v. Territory*, 99 Pac. 163, 168, 1 Okl. Cr. R. 566.

Where decedent, having been cut by defendant, lingered nearly two weeks, suffering from peritonitis, when he had a chill, and the next day was worse and he then made an alleged dying declaration that defendant had cut him to death, three days after which

he died, the surrounding circumstances constituted a sufficient predicate for the admission of such declaration. *McEwen v. State*, 44 South. 619, 621, 152 Ala. 38.

The rule requiring proof that declarations offered as "dying declarations" were made by declarant when in extremis does not require that it be shown that they were made while he was literally breathing his last, but is satisfied when it is shown that the declarant died from the wound from which he was suffering at the time they were made, and that such wound was the direct and proximate result of the act which the declarations tend to describe. *State v. Byrd*, 111 Pac. 407, 415, 41 Mont. 585.

Where deceased was shot in the stomach at close range, and, when lying down, with all his entrails hanging outside of his body, he said, "I have been shot to death by Isidore for nothing," and died a few hours after, the statement was admissible as a dying declaration; it being one made under sense of impending death. *State v. Augustus*, 56 South. 551, 552, 129 La. 617.

In the trial of a murder case, if at the time of making declarations the condition of the wounded party making them, the nature of his wounds, the length of time after making the declarations before he expired, and all circumstances, make a prima facie case that he was in the article of death and conscious of his condition when he made the declarations, such declarations are admissible in evidence under proper instructions, though the person may not have expressed his consciousness of impending dissolution. *Jefferson v. State*, 73 S. E. 499, 501, 137 Ga. 382.

Evidence that deceased, on being asked if she knew she was fatally wounded, said she did, and that she knew she was going to die, is a sufficient predicate for admission as dying declarations of her statements then made. *Henniburg v. State*, 43 South. 959, 151 Ala. 26.

Where, on a prosecution for murder, it appeared that, on the morning before deceased died, he called his brother to his bedside and told him he could not get well and that he then called a certain woman and asked her to make him a cigarette, stating it would be the last one she would ever make him, such fact constituted a sufficient predicate for a "dying declaration." *Brown v. State*, 43 South. 194, 196, 150 Ala. 25 (citing *Gregory v. State*, 37 South. 259, 140 Ala. 16; *McQueen v. State*, 10 South. 433, 94 Ala. 50).

Where the court charged that, before dying declarations might be considered as evidence, the jury should be satisfied that the declaration of decedent was actually made by him while in the article of death and conscious of his condition, it was not error to charge, in immediate connection therewith,

that it was not necessary that the decedent should have expressed himself as believing that he was in a dying condition, but that consciousness of his condition might be inferred from the nature of the wound or from other circumstances. *Barnett v. State*, 70 S. E. 868, 869, 136 Ga. 65.

#### Subject of statement

Where, in a prosecution for homicide, a dying declaration contains unimportant expressions of opinion, which, taken in connection with the entire declaration are not prejudicial, the entire declaration is admissible. *Cleveland v. Commonwealth (Ky.)* 101 S. W. 931, 932.

"Dying declarations" are such as are made by a party, relating to the facts of the injury of which he afterwards dies, under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportunity for repentance, and in the absence of all hope of avoidance, when he has despaired of life, and looks to death as inevitable and at hand. *Brom v. People*, 74 N. E. 790, 792, 216 Ill. 148 (quoting and adopting definition in *Starkey v. People*, 17 Ill. 17, 21).

"Dying declarations" are admitted as an evident exception to the rule that hearsay evidence is inadmissible and must be confined to the circumstances immediately connected with the fatal injury." The statements admitted must be limited to the *res gestæ*, and the deceased must be permitted to speak only of the transactions causing the death with such accompanying statements and conduct as may throw light upon it. *State v. Doris*, 94 Pac. 44, 49, 51 Or. 136, 16 L. R. A. (N. S.) 660.

On a prosecution for murder, statements of deceased that a certain person had requested him to arrest defendant, who was drunk and crazy and had run his family out of the house, and that deceased had shot defendant in self-defense, such statements constituting a part of a dying declaration, were incompetent. *State v. Horn*, 103 S. W. 69, 74, 204 Mo. 528.

It is not error to admit evidence of dying declarations of decedent that "he shot me for nothing," over objection that this was a mere expression of opinion by decedent, and not a declaration of fact. *Washington v. State*, 73 S. E. 512, 515, 137 Ga. 218.

A dying declaration in these words, "Oh, Lordy! Willie shot me for nothing. without any cause," was not objectionable as a statement of a conclusion rather than a fact. *McMillan v. State*, 57 S. E. 309, 128 Ga. 25.

A dying declaration that defendant deliberately shot decedent, while general in its nature, was not objectionable as being a mere conclusion of declarant. *State v. Fielding*, 112 N. W. 539, 540, 135 Iowa, 255.

#### Time of death

On a prosecution for murder, the declarations of decedent made in view of death and within two hours of her death as to the details of the crime were admissible. *Bricker v. Commonwealth (Ky.)* 102 S. W. 1175.

#### Written or oral

A competent "dying declaration" can be made by acts instead of words, as by nodding the head and pointing, where declarant is unable to speak. *People v. Madas*, 94 N. E. 857, 859, 201 N. Y. 349, Ann. Cas. 1912B, 229.

A "dying declaration" need not be reduced to writing in order to render it competent, but may be evidenced partly by writing and partly by parol. *Kirby v. State*, 44 South. 38, 41, 151 Ala. 66.

The fundamental rule governing the admissibility of "dying declarations" is that it must appear by proof by the party offering such declarations that they were made under a sense of impending death, and it is sufficient if it satisfactorily appears, in any mode, that they were made under that sanction. No particular form in the statement of dying declarations is required, and, where a dying declaration taken down in writing shows that the declarant "states and declares that he is now sick and nigh unto death and is fully aware that his death is now certainly approaching him in his present condition from a mortal wound inflicted upon his person," the disclosure of the record furnishes a reasonably proper foundation for the introduction of the declaration, especially where death soon followed the making of the declaration. *State v. Brown*, 87 S. W. 519, 522, 188 Mo. 451.

Where a witness testified that decedent repeatedly told her that he was going to die, it was proper to permit the state to prove the declarations decedent made to the witness as to the circumstances surrounding the infliction of the fatal wounds as a dying declaration, though decedent had previously made a dying declaration to another person which had been reduced to writing. *Pate v. State*, 43 South. 343, 344, 150 Ala. 10.

## DYKE

Where occurrences are not intrusions of igneous rocks or matter between sedimentary beds, characteristic of dykes, but, according to the testimony, the fractures are filled with minute angular fragments of sedimentary bed rock, limestone, and clay, brecciated material, in places, recemented with calcite, it is inappropriate to term the occurrences "dykes," but the more appropriate term would be "faulting fracture." *Grand Central Min. Co. v. Mammoth Min. Co.*, 83 Pac. 648, 681, 29 Utah, 490.

**DYNAMITE**

An information for the malicious placing of an explosive near a dwelling house, describing the explosive as "nitroglycerin," commonly known as "dynamite" or "giant powder," was not objectionable for indefiniteness as to the explosion charged, the substances all being nitroglycerin explosives. *People v. Swalle*, 107 Pac. 134, 136, 12 Cal. App. 192.

**DYNAMO**

A "dynamo" or "generator" is a mechanism which generates electromotive force by moving a closed circuit in a magnetic field. In re *Charles Town Light & Power Co.*, 183 Fed. 160, 165.

A "dynamo" is a machine for generating or converting mechanical energy into electricity. *Angola Ry. & Power Co. v. Butz (Ind.)* 98 N. E. 818, 819.



## E

## E &amp; O. E.

The letters "E. & O. E." as used in a receipt, mean "errors and omissions excepted." Where one has an unliquidated demand and the debtor sends a check to his attorney with a receipt to be signed by the creditor, and the latter receives the check, though protesting that a much larger sum is due him, and signs a receipt under seal containing the stipulation that in consideration of the amount of the check he releases the creditor from all claims and demands whatsoever, the receiving and retaining of the sum offered and the signing of the receipt constitute a good accord and satisfaction binding on the creditor, though he entered on the receipt the letters "E. & O. E." *T. B. Redmond & Co. v. Atlanta & Birmingham Air Line Ry.*, 58 S. E. 874, 877, 129 Ga. 133.

## EACH

**As all or every**

The word "every" is not always synonymous with the word "each." *Griffin v. Interurban St. R. Co.*, 72 N. E. 1142, 180 N. Y. 538.

In a tax deed reciting the sale of several tracts, the use in the granting clause of the words "and each and every separate tract and parcel thereof," in addition to the statutory form designating the property conveyed as "the real property last hereinbefore described," indicates a purpose to convey all the land sold. *Gibson v. Kueffer*, 77 Pac. 282, 283, 69 Kan. 534.

Where the record shows that a party excepted to the giving of "each" of several instructions, and likewise excepted to the refusal to give "each" of several requested instructions, his exceptions were properly reserved; the word "each," though not appropriate to designate several collectively without considering them severally, being sufficient to raise objections to instructions severally when designated by it as objected to. *Delaney v. Johnson*, 128 S. W. 859, 860, 95 Ark. 131.

**As apiece**

The word "each," in a bequest to testatrix's two children of 20 shares of stock and 12 shares of other stock or the value of \$5,000 "each," should a change be made in the investments, applies not only to the cash bequest but to the stock bequest, and under the bequest the legatees are each entitled to the designated number of shares of stock. *Palmer v. Palmers' Estate*, 75 Atl. 130, 132, 106 Me. 25, 19 Ann. Cas. 1184.

**Both distinguished**

A majority of "both" boards, as used in a statute providing that a majority of mem-

bers elect of both the board of aldermen and the general council shall constitute a quorum for the transaction of business in joint session, means a majority of the members taken as a whole, and not a majority of each board considered separately. The word "both" is not synonymous with the word "each." *Davis v. Claus*, 100 S. W. 263, 264, 125 Ky. 4.

**As each one individually**

"Each," as used in an instruction that a reasonable doubt is not a mere possible doubt, but a fair doubt, growing out of the evidence or lack of evidence, and exists when "each" juror is unable to say that he has an abiding conviction to a moral certainty of the truth of the charge, etc., is a distributive adjective, and means "when the same thing is to be predicated of all the individuals considered distributively, or one by one." It denotes or refers to either one of the persons mentioned, or every one of any number separately considered. *State v. Thompson*, 87 Pac. 709, 712, 31 Utah, 228 (citing *Standard Dict.*; 3 Words and Phrases, p. 2299).

**Joint or several obligation created**

The word "each," in a contract by which four guarantors guaranteed to plaintiff, "each" to the amount of \$5,000, the payment of a note, imports severalty in the ordinary acceptance of the term, and the liability of the guarantors under contract is several, and an action against one guarantor alone for \$5,000 is maintainable as against the objection of defect of parties in not joining the remaining guarantors. *Delaware County Nat. Bank v. King*, 95 N. Y. Supp. 954, 955, 47 Misc. Rep. 447.

**EACH AND EVERY PART**

Though an insurance policy, providing that the entire policy shall be void for breach of warranty or condition, may be a divisible contract, the addition of the words "each and every part" renders it susceptible to but one construction, and that is that it is indivisible. *Sullivan v. Mercantile Town Mut. Ins. Co.*, 94 Pac. 676, 680, 20 Okl. 460, 129 Am. St. Rep. 761.

**EACH CAR**

Where a municipal ordinance provides for a specified tax per year on street cars "for each car running within the said borough," the borough may collect the tax on each car running having a separate number, and such car need not be scheduled and run every day, nor for the whole of any particular day. *Borough of Braddock v. Monongahela St. Ry. Co.*, 28 Pa. Super. Ct. 262, 264.

**EACH DAY ACTUALLY ENGAGED**

See Actually Engaged.

**EACH LINE OF TAX ROLL**

The phrase "each line of the tax roll actually extended," as used in Laws 1892, p. 1750, c. 686, § 23, authorizing each supervisor to charge one cent for each line of the tax roll actually extended by him, refers to the extension of the tax into each of the columns of the roll set apart for the various taxes levied, so that, if there are three special taxes levied by the same assessment roll as the general taxes, there are as many extensions of a line as additional columns provided for for each special and general tax. *Pearsall v. Brower*, 105 N. Y. Supp. 207, 208, 120 App. Div. 584.

**EACH LOCATION**

Where goods are insured in store No. 2, a rider on the policy allowing removal to a store in B., and stipulating that during removal the policy shall attach in "each location" in proportion to the value in each, and after removal in new location only, does not insure the goods while in transit. The rider by the words "each location" meant the store No. 2 and the designated storehouse, and under its operation the policy covered none of the goods except such as should be in one or the other of those storehouses. *Goodhue v. Hartford Fire Ins. Co.*, 67 N. E. 645, 184 Mass. 41.

**EACH OFFENSE**

The phrase "each offense," in an act making it unlawful for any corporation operating an electric street railway to permit the operation of cars without providing screens for the protection of motormen, and making any corporation violating the act liable to the state for a certain penalty for each offense, is uncertain as to what constitutes a violation, whether each trip of each car or each day's operation, and the statute cannot be enforced. *Beaumont Traction Co. v. State*, 122 S. W. 615, 618, 57 Tex. Civ. App. 605.

**EACH PARTY**

In Code Civ. Proc. § 1176, allowing each party six peremptory challenges, the words "each party" do not mean each individual litigant, but mean each side to the controversy to be decided by the jury, so that, if there are only two sides in the case, viz., the prosecution and defense, there should be only six challenges allowed to defendants collectively; but, where there are many defendants conflicting claims or interests which may be determined one way or the other by the jury, duplicate peremptory challenges should be allowed. *Lane v. Fenn*, 120 N. Y. Supp. 237, 243, 65 Misc. Rep. 336.

2 Wds. & P. 2d Ser.—14

**EACH VIOLATION**

For marking as "pure cider vinegar" barrels containing artificial coloring matter, in violation of Agricultural Law, cumulative penalties are recoverable under section 53, imposing a penalty for "each" violation, though the barrels are sold or kept for sale as a single lot. *People v. Albion Cider & Vinegar Co.*, 118 N. Y. Supp. 15, 16, 133 App. Div. 865.

**EARLIEST POSSIBLE**

In a contract of sale, defendant's requirement that the shipment of goods should be the "earliest possible" must be construed as meaning that the goods should be sent as soon as plaintiff could possibly send them, and signified rather more than that the goods should be sent within a reasonable time. *Robinson Clay Product Co. v. American Locomotive Co.*, 107 N. Y. Supp. 69, 71, 56 Misc. Rep. 589.

**EARLY AS CONVENIENT**

A release which expresses a promise to cancel and return the note itself as "early as convenient" is not rendered executory by the quoted words. *Lowrey v. Danforth*, 69 S. W. 89, 41, 95 Mo. App. 441.

**EARLY SPRING**

Where a preliminary statement alleged conception of an invention "in the early spring" of 1900, such phrase necessarily means not earlier at the utmost than March 1st, and probably not that early. *Richards v. Meissner*, 24 App. D. C. 305, 308.

**EARN****EARNED AND COLLECTED**

The phrase "earned and collected," as used in a partnership agreement or dissolution that the second party shall transfer all gains of said business other than moneys "earned and collected," does not include outstanding uncollected accounts. *Scudder v. Perce*, 114 Pac. 571, 572, 159 Cal. 429.

**EARNED LAND**

Land conveyed to a railroad company after its fulfillment of the conditions of a grant, is spoken of as "earned land." *United States v. Northern Pac. R. Co.*, 170 Fed. 854, 855.

**EARNEST**

The term "earnest money" is used to distinguish a payment made to bind the bargain on the sale of property. *Hillyard v. Banchor*, 118 Pac. 67, 70, 85 Kan. 516 (citing 3 Words and Phrases, p. 2302).

"Earnest," in the civil law, is the money which one of the contracting parties delivered to the other at the time of the contract,

and is presumed to be a forfeit, in the absence of evidence that the parties intended to bind themselves by an irrevocable contract. *Legier v. Braughn*, 49 South. 22, 23, 123 La. 463.

The original idea of "earnest," in the Roman law, signified the conclusion of the contract, and it is that idea which obtains in the common-law jurisdictions, and under the statutes of fraud of England, and of some of the states of this Union. But now the giving and receiving of earnest money though evidence of a completed bargain, is considered of no importance, or of the smallest importance, in ascertaining whether property has passed by virtue of such bargain; that question being determined by the nature of the bargain, concluded by the giving of the earnest. Under Justinian, the effect of the giving and receiving of "arrha" was to enable the contractants to retain the privilege of withdrawing from the contract on certain conditions, and the same effect is attributed to the giving and receiving of the equivalents "arrhes" and "earnest," by the Codes of France and of Louisiana, respectively. An agreement for the sale of real estate, therefore, which contemplates the passing of property, not immediately and by virtue thereof, but by an act to be executed at a later date and which in other respects contains the elements essential to a sale, is a "promise of sale," and when made with the giving of earnest may be receded from by either of the parties; "he who has given the earnest, by forfeiting it, and he who has received it, by returning the double," as expressly provided by article 2463, relating to when a "promise to sell amounts to a sale." (Civ. Code. arts. 2462, 2463). *Smith v. Hussey*, 43 South. 902, 904, 119 La. 32 (citing Statutes of Fraud of Eng. [29] Car. 11, c. 3, § 17; *Elgee Cotton Cases*, 22 Wall. [90 U. S.] 195, 22 L. Ed. 863; *Benj. Sales* [2d Ed.] pp. 260, 262; *Howe v. Hayward*, 108 Mass. 55, 11 Am. Rep. 306; *Gut. Brac.* [Am. Transl.] 145; *Just. Institutes*, III. 24; *Marcade*, art. 1590, *Code Napoléon* [our Code, art. 2463]; 6 *Marcade*, p. 172; 24 *Laurent*, p. 37).

"Earnest" means a part payment of the purchase price of property. It is a term taken from the civil law and was more generally used in connection with sales of personalty "to bind the bargain." A contract to convey certain described land for a certain sum per acre, provided that the money was paid within three years of the date thereof and reciting the payment in cash of \$25 "by way of earnest," was not a mere option but a contract of sale which could be specifically enforced. *Davis v. Martin*, 59 S. E. 700, 146 N. C. 281.

The statutory meaning of the word "earnest" is part payment, and it must be a real payment. *Groomer v. McMillan*, 128 S. W. 285, 287, 143 Mo. App. 612.

The term "earnest money," as used in a contract by the owner of land with a broker for its sale providing that commissions should be due and payable "on the settlement of all sales (for instance, after a purchaser signs a proposition and puts up earnest money with the contract to settle the balance, cash required on the first payment March 1st, 1910, then the commissions will be due and payable on that settlement, but where a purchaser settles at once and pays the cash required which otherwise would be due March 1st, 1910, and the contract is \* \* \* signed up, in that event, commissions are due on that settlement)," was used synonymously with "first payment," and not technically. *Kurtz v. Payne Inv. Co.* (Iowa) 135 N. W. 1075, 1078.

A broker having authority to sell certain land, his agent made a contract of sale, and received a \$50 check from the purchaser as a part of the price. The check was laid on the broker's desk with a memorandum showing what it was for, and the broker thereafter transferred the check to his principal in settlement of his monthly account, and the principal collected the check. Held, that the check became earnest money sufficient to bind the contract under the statute of frauds. *Chouteau Land & Lumber Co. v. Chrisman*, 102 S. W. 973, 975, 204 Mo. 371.

## EARNING CAPACITY

See Capacity to Earn Money.

As property, see Property.

In determining one's "earning capacity," in assessing damages for his death the amount of his income is an important element of consideration, but the final inquiry is as to what he is capable of earning. *Memphis Consolidated Gas & Electric Co. v. Letson*, 135 Fed. 969, 976, 68 C. C. A. 453.

## EARNINGS

See Based on Actual Earnings; Future Earnings; Future Loss of Earnings; Gross Earnings; Loss of Earnings; Net Earnings; Traffic Earnings.

The word "earnings" means the fruit or reward of labor, the price of services performed. *Mitchell v. Chicago, R. I. & P. Ry. Co.*, 114 N. W. 622, 625, 138 Iowa, 283; *Jones v. Nicoll*, 131 N. Y. Supp. 341, 343, 72 Misc. Rep. 483.

The word "earnings," as used in Gen. St. 1902, § 836, declaring that no assignment of future earnings shall be valid as against an attaching creditor of the assignee, unless made to secure a bona fide debt or unless recorded, is used in the same sense as the word "wages." *Berlin Iron Bridge Co. v. Connecticut River Banking Co.*, 57 Atl. 275, 276, 76 Conn. 477.

The term "wages," as distinguished from salary, is commonly understood to apply to

compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, season, or piece, but not by the job. It is not so broad as "earnings," which comprehends returns from skill and labor in whatever way acquired. *First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. 245, 247.

The word "earnings" embraces a larger class of credits than the term "wages." It covers all compensation for services and may even include expenditures, as well as labor; and where an employé receives fixed wages and board, the board is a portion of his earnings. *Burns v. Maurer*, 131 N. Y. Supp. 344, 345, 72 Misc. Rep. 481.

The words "interest or earnings" in a will whereby testator gave property to trustees to control and pay the interest or earnings to his children for life, with gift over to their heirs, and whereby he provided that on the death of a child leaving no living heirs the spouse of the child might, if living, receive annually a specified sum of the interest money due the deceased, and in case of the death of a child leaving no living heirs his estate, principal and interest, should be divided equally with the grandchildren, are synonymous with each other, and with the word "income" in its ordinary sense. *Ex parte Humbird*, 80 Atl. 209, 211, 114 Md. 627.

Where a salesman is employed on a commission basis, with a provision that he shall be allowed a drawing account of \$60 per week for living expenses, to be deducted from any earnings on the commission basis, such installments, in the absence of a breach of contract by the employé, are "earnings," within Code Civ. Proc. § 1391, making earnings, to the extent of 10 per cent. thereof, subject to execution. *Hollender v. Friedenberg*, 112 N. Y. Supp. 467, 468, 60 Misc. Rep. 566.

A salary is "earnings," for it is the direct fruit, or is supposed to be, of labor; and evidence that one earned a salary of a certain amount, though years before he was injured, if it be shown that he possessed the same qualities just before he was injured as he did when he made such earnings, is, we think, admissible as tending to show what his earning capacity was when he was injured; its weight and probative force to be determined by the jury. *El Paso Electric Ry. Co. v. Murphy*, 109 S. W. 489, 491, 49 Tex. Civ. App. 586.

#### **Dividends or net earnings**

The "earnings" of a corporation organized for the sale of property mean the net proceeds of the property converted into money. *Baldwin v. Miller & Lux*, 92 Pac. 1030, 1034, 152 Cal. 454.

"The word 'earnings' may mean either gross or net receipts of a business, or of the income of a laborer, according to the con-

nection in which it may be used, and which of these two meanings is to be given the word" as used in a contract "is a question of construction. If the meaning to be given it is not ascertainable from the context, and if it is doubtful what was meant and intended by the parties, resort may be had to parol testimony to ascertain the surrounding circumstances and from such facts ascertain the intention of the parties which must prevail. \* \* \* A contract providing that whereas guarantor had sold all the tools used in operating a log boom, together with the management thereof, and guaranteed that vendee should be secure in continuing the management thereof, until the sum specified should be earned to vendee, and therefore guarantor and his surety agreed to pay vendee such sum, less the amount earned, and signed by guarantor and his surety alone, meant that the net earnings of the management of the log boom and not the gross earnings were guaranteed to amount to the sum specified. *Loomis v. MacFarlane*, 91 Pac. 466, 467, 50 Or. 129.

A statute requiring railroads to make statements giving the amount of the capital stock, annual gross and net earnings, etc., when considered in the light of the history of legislation on the subject of railroad taxation and the construction placed on such legislation, requires the ascertainment of the value of railroad property for taxation, which valuation includes all the property of the railroad, except that specifically exempt, and the state board of tax commissioners in assessing the property of a railroad must take into consideration its money on hand or on deposit, and the money on hand cannot be retaxed as money; the word "earnings" signifying money, and "net earnings" the sum received in excess of operating expenses. *Clark v. Vandalia R. Co.*, 86 N. E. 851, 854, 172 Ind. 409.

#### **Earnings by mental effort**

"Earnings" mean the gains of a person derived from services or labor without the aid of capital. Earnings imply more than labor. One has relation to mental effort, and the other to physical endeavor. *Jones v. Nicoll*, 131 N. Y. Supp. 341, 343, 72 Misc. Rep. 483.

#### **Profits**

As profit, see Profit.

Where a bank contracted to sell its entire capital stock and bills of discount at a stipulated time, but to retain its earnings up to that date, the word "earnings" meant the profits of the bank in the ordinary course of its business, and did not include a recovery under a judgment. *Livingston County Bank v. First State Bank*, 121 S. W. 451, 453, 136 Ky. 546.

It has been said that the "profits" derived from capital invested in business can-

not be considered as earnings, but in many cases profits derived from the management of a business may properly be considered as measuring earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner. *Mitchel v. Chicago, R. I. & P. Ry. Co.*, 114 N. W. 622, 625, 138 Iowa, 283.

**As separate estate**

See Separate Estate.

**EARNINGS OF VOYAGE**

The "earnings of the voyage," which a shipowner is required by the statute to surrender in order to obtain a limitation of liability for losses occurring on such voyage, are those only of the particular voyage which exposed the passengers or property to risk; and where a steamship was engaged in making regular trips across the Atlantic from Havre to New York and return, discharging her passengers and cargo at each terminal port, each of the trips between such ports constitutes a voyage, within the meaning of the statute, and, in proceedings for limitation of liability for claims arising out of the sinking of the ship in collision while on her way from New York to Havre, the owner is not required to surrender the earnings of the preceding trip from Havre to New York. *La Bourgogne*, 139 Fed. 433, 436, 71 C. C. A. 489.

**EARNINGS TAX**

See Tax—Taxation.

**EARTH**

**EARTHENWARE**

See Decorated Earthenware; Common Earthenware; Stained Earthenware.

**EASEMENT**

See Affirmative Easement; Apparent Easement; Continuous Easement; Discontinuous Easement; Implied Easement; Necessary Easement; Negative Easement; Noncontinuous Easement; Private Easement; Quasi Easement; Secondary Easement; Unlimited Conveyance of an Easement; Urban Easement.

Subject to easement, see Subject to.

"An 'easement' is a right, without profit, created by grant or prescription which the owner of one state may exercise in or over the estate of another for the benefit of the former." *Rodefer v. Pittsburg, O. V. & C. R. Co.*, 74 N. E. 183, 186, 72 Ohio St. 272, 70 L. R. A. 844 (quoting and adopting definition in *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.*, 31 N. E. 874, 875, 134 N. Y. 435, 439); *Reeve v. Duryee*, 129 N. Y. Supp. 748, 750, 144 App. Div. 647; *Yeager v. Tuning*, 86 N. E. 657, 658, 79 Ohio St. 121, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679; *Manheimer v. Gudat*, 106 N. Y. Supp. 461, 55

*Misc. Rep.* 330 (quoting and adopting definition in *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.*, 31 N. E. 875, 134 N. Y. 439).

An easement is defined as a right which one proprietor has to some profit, benefit, or lawful use out of or over the estate of another proprietor. *Henslee v. Boyd*, 107 S. W. 128, 129, 48 Tex. Civ. App. 494; *Consolidated Gas Co. of Baltimore v. City of Baltimore*, 61 Atl. 532, 533, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584.

An "easement" is a charge or burden upon the land of one for the benefit of another. *Blake v. Boye*, 88 Pac. 470, 472, 38 Colo. 55, 8 L. R. A. (N. S.) 418.

An "easement," though only an incorporeal right, is an interest in land created by grant or agreement, expressed or implied, conferring a right on the owner thereof to some profit, benefit, dominion, or lawful use out of or from the estate of another. *Oates v. Town of Headland*, 45 South. 910, 911, 154 Ala. 503.

An easement implies necessarily a fee in another, and it follows that it is a right by reason of such ownership to use the land for a special purpose, and one not inconsistent with the general property in the land of the owner of the fee; his property rights, however, to be exercised in such way as not to unreasonably interfere with the special use for which the easement was acquired. *Cincinnati, H. & D. R. Co. v. Wachter*, 70 N. E. 974, 975, 70 Ohio St. 118.

An easement "in a public street or highway is the public and common right to use the same for the passage of persons and property, and purposes incidental thereto." *L. Realty Co. v. Johnson*, 100 N. W. 94, 95, 92 Minn. 363, 66 L. R. A. 439, 104 Am. St. Rep. 677 (citing *Newell v. Minneapolis, L. & M. Ry. Co.*, 27 N. W. 839, 35 Minn. 112, 59 Am. Rep. 303; *Ellsworth v. Lord*, 42 N. W. 389, 40 Minn. 837).

"Strictly speaking, a right to cut and take ice is perhaps more in the nature of a profit à prendre than an easement, though it comes within the definition of an 'easement' which was given by Chief Justice Shaw in *Ritger v. Parker*, 8 Cush. (62 Mass.) 145, 54 Am. Dec. 744, and which was quoted with approval by the court in *Owen v. Field*, 102 Mass. 90." A lease, for a round sum, of premises on the shores of a pond, to be used for a dwelling house, and other buildings for the ice business, and providing that the lessor leases to the lessee the right to cut and take ice from the pond, and that the lessee, in addition to the rent, shall deliver to the lessor as much ice as shall be required for two families during the lease, annexes the right to take ice to the leased premises as an easement or a profit à prendre. *Walker Ice Co. v. American Steel & Wire Co.*, 70 N. E. 937, 939, 185 Mass. 463.

An easement is a privilege without profit which the owner of one neighboring tenement has of another, existing in respect to their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner; and it may be affirmative in its nature, permitting an active use of the servient tenement to the benefit of a dominant estate, or it may be negative only, as for the right of light and air, in which case an active use is not allowed. *Bernero v. McFarland Real Estate Co.*, 114 S. W. 531, 534, 134 Mo. App. 290.

An "easement" is a right in one person to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon. In strictness the term does not include the authority of a landowner to use a way from her residence over land the legal title to which she retained. *German Savings & Loan Society v. Gordon*, 102 Pac. 736, 737, 54 Or. 147, 26 L. R. A. (N. S.) 371.

A claim by the owner of cutting-stone rights of the right to have tracks kept on the land, to be used for the shipment of his freight, is the claim of "easement" in the land. *Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. 64, 69, 67 C. C. A. 190.

The actual occupation of a street by gas pipes under a franchise amounts to the acquisition of an "easement." *Consolidated Gas Co. of Baltimore v. Mayor, etc., of Baltimore*, 61 Atl. 532, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 100 Am. St. Rep. 584.

#### **Apparent, continuous, and discontinuous easements**

An "easement of way" is not an apparent and continuous easement and does not pass upon the severance of the tenement unless it is a way of necessity, or the operative words of the conveyance are sufficient to grant it de novo. *Young v. Pennsylvania R. Co.*, 62 Atl. 529, 531, 72 N. J. Law, 94.

#### **As appurtenant to land**

A right of way for an irrigation ditch, and the right to receive water from or discharge the same on land, constitute "easements," which may attach to other lands as incidents or "appurtenances." A deed providing that the grantee should not use an irrigation ditch except to convey water to the north half of a certain section for use thereon, unless by the consent of the grantor, created an easement which by use became "appurtenant" to such section, and was not a mere easement in "gross" personal to the grantee. *Jones v. Deardorff*, 87 Pac. 213, 215, 4 Cal. App. 18 (citing *Hopper v. Barnes*, 45 Pac. 574, 113 Cal. 630).

A grant to a power company and its successors and assigns forever of the right to go on land on the bank of a river and construct an abutment for a dam and keep the same in repair is the grant of an "easement

in fee" appurtenant to the grantee's plant and the realty on which it is situated, so as to pass to its successors, where at the time it was made the grantee was constructing, on the opposite side of the river, a plant to be operated by water power and a dam for that purpose, to the knowledge of the grantor. *Sweetland v. Grants Pass Power Co.*, 79 Pac. 337, 340, 46 Or. 85.

Where the parties to a conveyance of a water right treated it as a right which might be transferred from one piece of land to another and as possessing the nature of a profit à prendre, which might or might not be annexed as an appurtenant to a particular piece of land and might become an estate in fee, it was not a pure "easement," which is not subject to transfer independent of the land to which it is appurtenant. *Crane v. McMurtrie* (N. J.) 68 Atl. 892, 893.

Where the owner of a tract of land had constructed a ditch prior to the sale and conveyance of a portion of the land, and at the time of the sale the ditch was a benefit to the land retained by the vendor because it drained it, and a benefit to the land sold in that it furnished water for irrigation for which the vendor charged in fixing the price of the land, the right to the water and the ditch was a quasi "easement" which passed to the grantee as an appurtenance to land. *Fayther v. North*, 83 Pac. 742, 746, 30 Utah, 156, 6 L. R. A. (N. S.) 410.

Under Civ. Code, § 1104, providing that a transfer of real property passes all easements attached thereto, and section 602, providing that a thing is deemed appurtenant to land when it is by right used with the land for its benefit, and section 801, providing that the right to receive water from or discharge water on another's land is an "easement," a conveyance of a water ditch, with a right to convey water therein, and "all the rights, privileges, immunities, franchises, and easements" thereto belonging, conveys an extension of the ditch made by the grantor for the purpose of using the same as an easement and as an appurtenant to the ditch, and the extension was not subject to levy under an execution against the grantor. *Pogue v. Collins*, 80 Pac. 623, 624, 146 Cal. 435.

#### **Creation**

An easement can be created only by deed or by prescription. *Yeager v. Tuning*, 86 N. E. 657, 658, 79 Ohio St. 121, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679.

An easement is not capable of manual delivery, being an incorporeal right acquired by grant or prescription. *Le Blond v. Town of Peshtigo*, 123 N. W. 157, 160, 140 Wis. 604, 25 L. R. A. (N. S.) 511.

An easement is an interest in land capable of creation or transfer only by operation of law, by grant, or by prescription. *Prentice v. McKay*, 98 Pac. 1081, 1083, 38 Mont. 114.

An "easement" is a species of corporeal hereditament, and is such as interest in land as may come within the statute of frauds, and can be acquired only by grant, express or implied, or by prescription, which presupposes a grant to have existed. An alleged "easement," consisting of a passageway through certain doors from the rotunda of a hotel to a saloon, was within the statute of frauds and could be acquired only by express grant, or by prescription presupposing a grant to have existed. *Belser v. Moore*, 84 S. W. 219, 221, 73 Ark. 296.

#### **Essentials—Dominant and servient estates**

The essentials of an "easement" are the dominant and servient tenements, and the right of fishery is an "easement if it is the servitude which the servient tenement must yield to the dominant tenement, the upland," and if an easement may be gained by prescription. *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1073, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732 (quoting and adopting the definition in 2 Black. Com. 39).

"In every instance of a private 'easement' (that is, an easement not enjoyed by the public), there exists the characteristic feature of two distinct tenements—one dominant, and the other servient." *Consolidated Gas Co. of Baltimore v. Mayor, etc., of Baltimore*, 61 Atl. 532-534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584.

#### **As estate**

See Estate.

#### **Fee**

See Fee; Fee Simple.

#### **As freehold**

See Freehold.

#### **As highway**

See Highway.

#### **As incorporeal hereditament**

An "easement" of a right of way is an incorporeal hereditament. *Dahlberg v. Haeblerle*, 59 Atl. 92, 93, 71 N. J. Law, 514.

All "easements" are incorporeal: mere rights, invisible, and intangible. They are incorporeal hereditaments. *Kansas & C. P. Ry. Co. v. Burns*, 79 Pac. 238, 239, 70 Kan. 627.

An "easement" is only an incorporeal right. *Oates v. Town of Headland*, 45 South. 910, 911, 154 Ala. 503; *Le Blond v. Town of Peshtigo*, 123 N. W. 157, 160, 140 Wis. 604, 25 L. R. A. (N. S.) 511; *Consolidated Gas Co. of Baltimore v. Mayor, etc., of Baltimore*, 61 Atl. 532-534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584.

"That a valid appropriation of water from a natural stream constitutes an 'easement' in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, cannot well be

disputed." *Wiley v. Decker*, 73 Pac. 210, 225, 11 Wyo. 496, 100 Am. St. Rep. 939 (quoting and adopting definition in *Wyatt v. Larimer & Weld Irrigation Co.*, 33 Pac. 144, 18 Colo. 298, 36 Am. St. Rep. 280).

#### **As incumbrance**

See Incumbrance.

#### **As an interest in land**

An "easement" is an estate in real property, and its grant is within the statute of frauds. *Howes v. Harmon*, 81 Pac. 48, 49, 11 Idaho, 64, 69 L. R. A. 568, 114 Am. St. Rep. 255.

An "easement" is a servitude upon and differs from an interest in or lien upon the land. It is not a part of but is so much carved out of the estate in the land, and is as much a thing apart from such an estate, as a parcel of the land itself conveyed from it. *Jackson v. Smith*, 138 N. Y. Supp. 654, 656, 153 App. Div. 724.

An "easement" is essentially and inherently an interest in land, being an estate imposed upon a servient tenement. *Consolidated Gas Co. of Baltimore v. Mayor, etc., of Baltimore*, 61 Atl. 532, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584.

An "easement" is an interest in land, and the title is said to lie in grant. *Shaw v. State*, 28 South. 390, 392, 125 Ala. 80; *Belser v. Moore*, 84 S. W. 219, 221, 73 Ark. 296; *Prentice v. McKay*, 98 Pac. 1081, 38 Mont. 114; *Consolidated Gas Co. of Baltimore v. Mayor, etc., of Baltimore*, 61 Atl. 532-534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584.

A perpetual right reserved in a contract to have carried by a ditch and furnished the owner of certain lands sufficient water to irrigate them constitutes an "easement" in the ditch, which is real estate. *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 Pac. 290, 294, 40 Colo. 467.

#### **As irrevocable license**

An express oral license, becoming irrevocable by execution, by expenditures in permanent improvements in reliance thereon, inuring to the benefit of the licensor, if relating to the use or occupation of real estate, becomes an easement. *Shaw v. Proffitt*, 110 Pac. 1092, 1093, 57 Or. 192, Ann. Cas. 1913A, 63.

#### **As land**

See Land.

#### **License distinguished**

"A license is an authority given to do some act or acts on the land of another, without giving any estate in the land itself. It differs from an easement in that the latter is a permanent interest, with a right at all times to enter and enjoy it, while the continuance of the former depends on the will of the person who has created it." There is a

distinction between an easement and a license, although in some cases it is difficult to see a substantial difference between them. An easement is a privilege in land founded upon a deed or other writing, or upon a prescription. It is a permanent interest in another's land, with the right to enjoy it fully and without objection. It may attach to the land, and pass with the dominant tenement as an appurtenant thereto. *Asher v. Johnson*, 82 S. W. 300, 301, 118 Ky. 702 (quoting 5 Lawson, Rights, Rem. & Pr. § 2668).

The distinction between an "easement" and a "license" is well settled. "An 'easement' \* \* \* is a liberty, privilege, or advantage in land, without profit, and existing distinct from the ownership of the soil; and it has appeared also that a claim for an easement must be founded upon a deed or writing, or upon prescription which supposes one. It is a permanent interest in another's land, with a right to enjoy it fully, and without obstruction." *Hazelton v. Putnam* (Wis.) 3 Chand. 117, 121 (quoting and adopting *Ang. Water Courses*, 316).

The right of an "easement" must be founded upon a grant by deed, or upon prescription, for it is a permanent interest in another's land with a right of enjoyment, whereas a mere license is but an authority to do a particular act or series of acts upon another's land without possessing any estate therein. *Dawson v. Western Maryland R. Co.*, 68 Atl. 301, 305, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

The modern cases distinguish between an "easement" and a "license." A claim for an easement must be founded upon grant by deed or writing, or upon prescription, which supposes one, for it is a permanent interest in another's land, with a right at all times to enter and enjoy it. But a license is an authority to do a particular act or series of acts upon another's land, without possessing any interest therein. It is founded in personal confidence, and is not assignable. This distinction between a privilege or easement, carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be parol, is quite subtle, and it becomes quite difficult, in some of the cases, to discern a substantial difference between them. The marked and leading distinctions between easement and license are that in the former there is a permanent interest in the land for some specified period, amounting to an estate in the land, which is assignable, is irrevocable, and gives a right at all times to enter and remain in possession, during its continuance, while the latter is a mere authority to enter upon the land of another for a temporary purpose and to do a particular act or series of acts upon the land, is revocable at pleasure before acted on, is not assignable, and gives no estate or interest in the land upon which the act or

acts are to be done. Another incident of a technical license is that no consideration is necessary to its validity as such. It should therefore, on that ground, be distinguished from an agreement, the breach of which would entitle the party injured to an action or other legal remedy. A parol license to cut and carry away standing timber, when fully executed before revocation, constitutes a good defense to an action of trover, brought by the person giving the license, to recover the value of the timber. *Pierrepont v. Barnard*, 6 N. Y. 279, 288.

With reference to real estate, "license" is a permission or authority to do a particular act or series of acts on the land of another without possessing any estate therein. So, with reference to personal property, "license" implies and carries the power to do some act upon or in reference to or to do something with the property of another. Herein it differs from an easement. The word "easement" always implies an interest in the land. *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 188 (citing 5 Words and Phrases, p. 4133); *Borough Bill Posting Co. v. Levy*, 129 N. Y. Supp. 740, 742, 144 App. Div. 784.

An "easement" is distinguished from a license in that an easement confers an interest in the land and invests the owner with privileges that he cannot be deprived of at the mere will or wish of the proprietor of the servient estate, while a license confers no interest in the land, is generally granted by parol, and may be revoked by the licensor at pleasure, and, being a personal privilege, is not assignable, and usually amounts to an excuse for what would otherwise be a trespass. *Rittenhouse v. Swango* (Ky.) 97 S. W. 743, 744 (citing *Wilkins v. Irvine*, 33 Ohio St. 138).

A license in respect of real property is authority to do a particular act or series of acts on the land of another without possessing an estate or interest therein, while an easement always implies an interest in the land involving two distinct elements, a dominant tenement to which the right is appurtenant, and a servient tenement upon which the servitude is imposed; but a license is in the nature of a personal privilege which may be revoked before any rights have been asserted under it, or money expended on the faith thereof. Where an easement is granted specifically or by language from which such an interest is implied under settled rules of construction, the covenant will be enforced accordingly, but, where the language used is of doubtful meaning, it is for the court to construe the grant and determine whether it is of a permanent interest running with the land, or only a personal privilege affecting the rights of the parties. *Lehigh & N. E. R. Co. v. Bangor & P. R. Co.*, 77 Atl. 552, 554, 228 Pa. 350.

"An 'easement' is a privilege, without profit, which the owner of one neighboring



tenement has of another in respect of their several tenements by prescription or by grant by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner, while a 'license' is an authority to do a particular act or series of acts on another's land without possessing any estate therein. A 'license,' when executed, will prevent the owner of the land from maintaining the case or trespass for the acts done under it, but it is revocable at pleasure and will not be a defense to an act done after it is revoked." *Rodefer v. Pittsburg, O. V. & C. R. Co.*, 74 N. E. 183, 185, 72 Ohio St. 272, 70 L. R. A. 844 (quoting and adopting definition in *Wolfe v. Frost* [N. Y.] 4 Sanf. Ch. 72).

A reservation in a deed of the right to connect wash lines from the adjoining yard owned by the grantor with the yard of the property conveyed was a reservation of an "easement" in favor of the actual tenants and occupant of the adjoining yard and not a reservation of a mere personal privilege or license. *Steiner v. Peterman* (N. J.) 63 Atl. 1102, 1108 (citing *Gale, Easem.* [Gibbons' 4th Ed. 1868] pp. 20, 21).

A siding or switch constructed by a railroad company from its road to a manufactory at the expense and over the land of the latter, solely for its benefit, and for the sole purpose of affording it facilities for receiving and shipping freight, and under a written agreement silent as to the length of time it is to remain, may not be maintained by the railroad company against the objection of the owner of the manufactory. The agreement, so far as the right of the railroad company is concerned, is not an "easement" but merely a license revocable at the option of the licensor or his grantee. *Rodefer v. Pittsburg, O. V. & C. R. Co.*, 74 N. E. 183, 184, 72 Ohio St. 272, 70 L. R. A. 844.

A permission, given without consideration by an owner for the use by a township of his land for the discharge across his land of the surplus water of an artesian well sunk by the township on its land for irrigation purposes for the inhabitants of the township, and not given in the form of a grant or conveyance in writing, is a mere license, subject to revocation by the owner or his grantee; a "license," in real estate, being an authority to do a particular act on the land of another without possessing any estate therein, and being founded in personal confidence, revocable at will; and an "easement" being a privilege in land, without profit, existing distinct from the ownership of the land, founded on a grant in writing, within the statute of frauds (Civ. Code, § 1238). *Butz v. Richland Tp.*, 134 N. W. 895, 897, 28 S. D. 442.

#### **Profit à prendre distinguished**

See Profit à Prendre.

#### **As property**

See Private Property; Property; Real Property.

#### **Right of way**

See Right of Way.

#### **Right of way in gross distinguished**

To the creation of a right of way that amounts to an "easement," and not merely to a right of way in gross, two tenements are necessary, the dominant, to which the right of way belongs, and the servient, upon which the obligation rests. The principal distinction between a right of way in gross and an easement is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross, and personal to the grantee, because it is not appurtenant to other premises. The owner of premises may grant the right of way in either form, and, if it is the intention to grant a right of way in gross, there is no mention of dominant premises. If the grant is of an easement, it is always made for the benefit of other premises, and the premises to which the way becomes appurtenant are described in the grant. Where B. gave P. an option on land by an agreement, providing that P. should open a highway across such lands, and other land not then owned, but to be acquired, by P., and such contract was recorded, the option exercised, and a deed given, making no reference to the highway, but with a collateral undertaking continuing the agreement to open the highway, and P. acquired the other land, it was held that the agreement as to the highway was only an executory undertaking, wholly collateral to the land, and entirely personal, creating no easement. *Houston v. Zahm*, 76 Pac. 641, 644, 44 Or. 610, 65 L. R. A. 799 (citing *Wagner v. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 354).

#### **Riparian rights**

As between the grantor retaining the bed of a stream and the grantee of the ripa, with restrictions or limitations by contract as to boundaries or other express limitations of the natural riparian rights, the rights conveyed may perhaps be strictly called "easements" or "privileges," and not "riparian rights." But as between the grantee of these rights from the riparian owner, who retains title to the bed of the stream and to lands overflowed, and an upper riparian owner or occupant, as to whom the grantor and those claiming under him are only riparian owners of lower riparian lands with their incidents, the grantee, as deriving title to certain riparian rights from such lower riparian owner, may be, by reason of such grant, a riparian owner and entitled as against upper riparian owners or diverters to all the rights of a riparian owner conferred upon him by his grantor, the true riparian owner. Technically and legally, perhaps, such rights, which are described to be of the character of riparian

rights, arise by nature, by reason of the ownership of riparian lands; but they are easements which, as against upper riparian owners, are effective only to the extent that their exercise comes within the limits of the natural riparian rights of the lower owner. *City of Paterson v. East Jersey Water Co.*, 70 Atl. 472, 480, 74 N. J. Eq. 49.

#### **Servitude distinguished**

Though "servitude" and "easement" are often used indiscriminately, the latter term generally refers to a burden imposed. *Scudder v. Watt*, 90 N. Y. Supp. 605, 608, 98 App. Div. 228.

#### **As title**

The enjoyment of an "easement" requires the use of land, and to use is to possess. An easement, therefore, involves possession, though the title and broader right of possession may be in another. In a technical sense, the claim of an easement in property admits title in another, but asserts in the claimant such right of possession as may be necessary to the enjoyment of the easement. A judgment in favor of plaintiff in an action for trespass, in which defendant rested his right to the land on the claim of title, was a bar to a subsequent action by defendant to establish his right to the use of the land on the ground of an easement. *Sumrall v. Maninini*, 98 S. W. 301, 302, 124 Ky. 87.

#### **EASEMENT APPURTENANT**

See Appurtenance—Appurtenant.

#### **EASEMENT BY IMPLICATION**

See Implied Easement.

#### **EASEMENT BY PRESCRIPTION**

See Prescription.

#### **EASEMENT IN GROSS**

The right of profit à prendre, the right to take a part of the soil or produce of the land, such as sand, clay, etc., in which there is a supposable value, may exist in "gross" (that is, unattached to any dominant estate), but is usually attached to such an estate. *Hopper v. Herring*, 67 Atl. 714, 715, 75 N. J. Law, 212.

A deed whereby for value one grants the right to lay pipes to convey petroleum, together with all rights and privileges necessary to the enjoyment of the grant and to the removal of the pipes, the pipes to be laid within ten feet of the line of the grantor's property, does not convey a mere "easement in gross." *Standard Oil Co. v. Buchi*, 66 Atl. 427, 429, 72 N. J. Eq. 492.

A right of way for an irrigation ditch, and the right to receive water from or discharge the same on land, constitute easements which may attach to other lands as incidents or "appurtenances." A deed providing that the grantee should not use an irrigation ditch except to convey water to the north half of a certain section for use there-

on, unless by the consent of the grantor, created an "easement" which by use became "appurtenant" to such section, and was not a mere easement in "gross," personal to the grantee. *Jones v. Deardorff*, 87 Pac. 213, 215, 4 Cal. App. 18 (citing *Hopper v. Barnes*, 45 Pac. 874, 113 Cal. 636).

A landowner leased to a bill posting company the exclusive privilege of erecting a signboard on certain lots for bill posting purposes; such owner reserving the right, if the property was sold or required for building purposes, to cancel all privileges on returning to defendant a pro rata amount of the yearly rent, the signboards erected by the company to remain its property, and it to have the right to remove the same at the expiration of the lease with the privilege of renewal. Held, that such instrument was neither a lease nor a mere license, but was an easement in gross for the term specified, and was therefore not revocable by the landowner during such term. *Borough Bill Posting Co. v. Levy*, 129 N. Y. Supp. 740, 144 App. Div. 784.

Where the owner of land and his relatives and descendants were buried in a small portion of the land, which was inclosed and used as a family burying ground, the presence of the bodies in that spot did not establish a prescriptive right in favor of his later descendants to use the land as a burying ground, and to restrain the disturbance of the graves by third persons, who had since acquired the land; the right to bury in a given tract not being an easement appurtenant, there being no dominant estate, and if a right in gross in favor of persons or individuals it did not pass by descent. *Wooldridge v. Smith*, 147 S. W. 1019, 1020, 248 Mo. 190, 40 L. R. A. (N. S.) 752.

#### **EAST**

The term "east" in the call, "thence east to the lands of" a person named, used in defining the limits of a city (Act Feb. 3, 1882; Acts 1881-82, p. 52, c. 57), has a well-established legal meaning, and means due east, and is to be so understood; other words not being used qualifying that meaning. *City of Roanoke v. Blair*, 60 S. E. 75, 76, 107 Va. 639.

#### **EAST HALF**

Where there is nothing to suggest the contrary, the word "half," in connection with the conveyance of a part of a tract of land, is interpreted as meaning half in quantity. The words "east half" and "west half" in a deed, while naturally importing an equal division, may lose that effect when it appears that at the time some fixed line or known boundary or monument divides the premises somewhere near the center, so that the expression more properly refers to one of such parts than to a mathematical division which never has been made. *Gunn v. Brower*, 105 Pac. 702, 703, 81 Kan. 242.

**EASTERLY**

The word "easterly" is a somewhat indefinite term. In deeds and like instruments, the expression, when unqualified and where there is nothing else to show or vary the direction, has sometimes been construed to mean due east. If the termini of the line described are fixed, or there are other qualifying words, the term "easterly" will not be held to mean due east. The use of the word in describing the direction of a proposed railroad will not be held to require the construction of the road due east from the beginning point, especially where to do so would prevent the road from entering a city named as one of the termini. *Bridwell v. Gate City Terminal Co.*, 56 S. E. 624, 631, 127 Ga. 520, 10 L. R. A. (N. S.) 909.

**EASTERLY HALF**

The words "easterly half" in a tax certificate, though naturally implying an equal division of land, may lose that effect when it appears that, at the time the certificate was made, there was well-known boundary dividing the premises somewhere near the center. *People v. Hall*, 88 N. Y. Supp. 276, 278, 43 Misc. Rep. 117.

**EASTERN ONE-HALF**

The term "eastern one-half" in a deed conveying one-half of a tract of land, in the absence of admissible parol evidence disclosing a different intention, would mean the eastern half, formed by a line to be run due north and south through the tract; but if it appears that before the deed was executed a division into two parts, supposedly equal in area, had been made by a line, having a different bearing, actually marked on the ground by stakes and fences, according to which possession had been held for a number of years, and the parties have since held possession according to such line, the words must be taken to mean the eastern one-half as so laid off and held in severalty. *Bank v. Catzen*, 60 S. E. 499, 500, 63 W. Va. 535.

**EASY TERMS**

An option to purchase real property "purchase price to be five thousand five hundred dollars. Int. 5% easy terms," is insufficient under the statute of frauds for indefiniteness as to the terms and time of payment, since no inference can be drawn that the purchase price is to be paid in cash, and the expression "easy terms" has no well-defined and accepted meaning, but is absolutely indefinite. *Hilberg v. Greer*, 138 N. W. 201, 202, 172 Mich. 505.

**EATING HOUSE**

The sale of soda water and ice cream in a drug store does not bring the proprietor thereof within the statute providing that keepers of "eating houses, restaurants, and

saloons" cannot be lawfully granted permits for the sale of liquor. In *re Henery*, 100 N. W. 43, 44, 124 Iowa, 358.

Under Civil Rights Act, declaring that all persons shall be entitled to the full and equal enjoyment of all eating houses, etc., if the object and practice of persons is to serve meals to whomsoever apply, at prices charged to all, the place is an "eating house." *Brown v. J. H. Bell Co.*, 123 N. W. 231, 235, 146 Iowa, 89, 27 L. R. A. (N. S.) 407, Ann. Cas. 1912B, 852.

A place where meals are served to whomsoever applies, at prices charged to all, is an "eating house," within the civil rights statute prohibiting discriminations by eating houses; but if meals are served only in pursuance of previous arrangement as to particular individuals, rather than to any who may apply, it is a private boarding house only, not within the provisions of the statute. *Humbarb v. Crawford*, 105 N. W. 330, 331, 128 Iowa, 743.

**EAVES**

As building, see Building.

**EAVESDROPPER**

"'Eavesdroppers' are such as listen under the walls or windows or eaves of houses to hearken to discourse and thereupon proclaim slanderous and mischievous tales." (4 Blk. 168.) Mr. Wharton, in his work on Criminal Law, says of the offense that: "In order to be indictable at common law, it should be habitual, and combine the lurking about dwelling houses and other places where persons meet for private discourse, secretly listening to what is said, and then tattling it abroad." *State v. Davis*, 51 S. E. 897, 139 N. C. 547, 111 Am. St. Rep. 816.

"'Eavesdroppers,' or such as listen under walls or windows or the eaves of a house to hearken after discourse and thereupon to frame slanderous mischievous tales," were a nuisance at common law and indictable, and were required, in the discretion of the court, to find sureties for their good behavior. *Pavesich v. New England L. Ins. Co.*, 50 S. E. 68, 71, 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 1042, Ann. Cas. 561 (quoting and adopting the definitions in 4 Blackstone, 168)..

**ECCLESIASTICAL**

An "ecclesiastical matter" is one that concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all of such matters are within the province of church courts and

their decisions will be respected by civil tribunals. *Clark v. Brown* (Tex.) 108 S. W. 421, 433.

## ECCLESIASTICAL COURT

See General Assembly.

## EDGE

The words "along" and "edge," referring to a sidewalk, are relative terms and do not, with any definiteness, describe the location of the stone which caused the obstruction to the sidewalk. The words used, and the connection in which they are used, will not bear the construction that they convey the thought that the stone was in or upon the sidewalk. *City of Vincennes v. Spees* (Ind.) 72 N. E. 531, 532; *Id.*, 74 N. E. 277, 279, 35 Ind. App. 389.

## EDGER

An "edger" used in a sawmill is an apparatus which takes off the uneven edges from lumber to which logs have been reduced by being sawed in one direction or plane. *Carter v. Fred W. Dubach Lumber Co.*, 36 South. 952, 953, 113 La. 239.

An "edger" is a machine used to rip off the edges of lumber or rip the boards into desired widths. The one operated by plaintiff in defendant's sawmill had several saws fixed on a shaft nine or ten feet long, which were movable and were adjusted by the operator to any desired width. There were rollers to carry lumber to the saws and rollers beyond to carry it after it had passed through the saws to the place of deposit, and there were rollers called dead rollers to bear down on the lumber and hold it firm against the saws. These last-named rollers weighed 100 or 115 pounds and could be raised or lowered by the operator by means of a lever so as to adjust them to lumber of any thickness. *Trigg v. Ozark Land & Lumber Co.*, 86 S. W. 222, 223, 187 Mo. 227.

## EDIBLE

### EDIBLE FRUIT

Dried lychee, which is a Chinese fruit having, when dry, a thin shell inclosing an edible pulp, is dutiable under Tariff Act 1897, par. 262, as an "edible fruit," dried, and not entitled to free entry under paragraph 559, as a fruit not specially provided for. *United States v. Wing Wo Chong*, 98 Fed. 602, 603, 39 C. C. A. 172.

Cherries, which have been washed, pitted, and packed in salt water to preserve them in transit, are not dutiable as "fruits preserved \* \* \* in their own juices," under Tariff Act 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, but as "edible fruits \* \* \* prepared in any manner," under paragraph 262. *Causse Mfg. Co. v. United States*, 151 Fed. 4, 6, 80 C. C. A. 461.

Berry jams are dutiable under Tariff Act 1897, par. 263, 30 Stat. 171, as sweetmeats or preserved fruits, rather than as "jelly" under the same paragraph, or as "edible fruits prepared," under paragraph 262, 30 Stat. 171. *Bogle v. United States*, 175 Fed. 889, 891.

The article commercially known as "chutney," which consists of various fruits preserved with sugar and spices, is dutiable as "fruits preserved," under Tariff Act, 1897, par. 263, 30 Stat. 171, rather than as "edible fruits \* \* \* prepared," under paragraph 262, 30 Stat. 171. *Park & Tilford v. United States*, 184 Fed. 910, 911, 912.

In construing Tariff Act 1897, pars. 262, 263, 30 Stat. 171, which paragraphs relate respectively to "edible fruits \* \* \* prepared in any manner" and to "fruits preserved in \* \* \* spirits or in their own juices," held, that fruit in maraschino is dutiable under the former, rather than the latter, provision. *Reiss & Brady v. United States*, 163 Fed. 65.

## EDITION

Where a legal publication consisting of digest paragraphs is copyrighted, an "edition" of the book should be held to consist of any divisible part of which the copyright could consistently be entered by itself, though from the standpoint of an individual paragraph, a subsequent "edition" would consist of any such portion of the book as might be consistently held suitable for a copyright, if it included the paragraph in question; thus, while no one paragraph, when reprinted in a different volume, would in itself be considered a different "edition" of the entire original volume, nor would an entire subsequent volume be considered an "edition" of some one paragraph in an earlier copyrighted publication, yet, if any appreciable portion is republished indicating the use of the material of the earlier publication in a later work, the later work must carry a notice of the earlier copyright. *West Publishing Co. v. Edward Thompson Co.*, 169 Fed. 833, 880.

## EDUCATE—EDUCATION

See Board of Education; Complete Education; Tax for Education.

As charity, see Charity; Public Charity.

A bequest of a sum of money "to pay the tuition or education" of orphans or poor children under a certain age meant "to pay for the instruction or school training of orphans; that is, to pay the fee charged by teacher or school for instruction." *Crow ex rel. Jones v. Clay County*, 95 S. W. 369, 379, 106 Mo. 234.

### Moral and physical training

Education includes moral as well as intellectual and physical instruction. In its broadest sense, the word "education" comprehends not merely the instruction received

at school or college, but the whole course of training, moral, intellectual, and physical. *People ex rel. Board of Trustees of Mt. Pleasant Academy v. Mezger*, 90 N. Y. Supp. 488, 489, 98 App. Div. 237 (citing *Bouv. Law Dict.*; *Ruohs v. Backer*, 6 Heisk. [53 Tenn.] 395, 19 Am. Rep. 598).

"Education" of a child means much more than merely communicating to it the contents of a book. The physical and mental powers of the individual are so interdependent that no system of education would be complete which ignored bodily health. *State ex rel. Stoltenberg v. Brown*, 128 N. W. 294, 295, 112 Minn. 370.

#### **Subsistence and personal care**

*Kirby's Dig.* § 3803, requiring a guardian to give bond to faithfully conduct a sale, etc., applies only to sales for reinvestment, and a sale to discharge a mortgage on other land was not a sale for reinvestment, though the petition and order for sale designated it as such; the words "education" and "maintenance" in another statute authorizing sales being broad enough to authorize a sale to protect the ward's estate. *Harper v. Smith*, 116 S. W. 674, 675, 89 Ark. 284, 131 Am. St. Rep. 93.

### **EDUCATIONAL CORPORATION**

As private corporation, see *Private Corporation*.

The word "educational," as used in Tax Law, § 221, exempting bequests to educational corporations from transfer tax, is not used in the meaning of instruction by school, college, or university, which is a narrower or more limited meaning of the word; but in its broader signification as the act of developing and cultivating the various physical, intellectual, and moral qualities towards the improvement of the body, the mind, and the heart. In *re Moses' Estate*, 123 N. Y. Supp. 443, 446, 138 App. Div. 525.

A devise of a residuary estate to the city of Yonkers, in trust, to found a trades school under the direction of the board of education and as a part of the school system, providing that all payments and investments of the fund are to be under direction of the board of education, is a devise to an educational corporation within Tax Law, § 220, and is not subject to a transfer tax. In *re Saunders' Estate*, 137 N. Y. Supp. 438, 440, 77 Misc. Rep. 54.

A library corporation is not an "educational" corporation within the tax laws, providing that any property bequeathed to an educational corporation shall be exempt from the transfer tax. In *re Francis' Estate*, 105 N. Y. Supp. 643, 645, 121 App. Div. 129.

The Metropolitan Museum of Art, incorporated "for the purpose of establishing and maintaining a museum and library of art, of encouraging and developing the study of fine

arts, and the application of arts to manufacture and practical life, of advancing the general knowledge of kindred subjects, and to that end of furnishing popular instruction and recreation," and which has consistently used the property solely to encourage and develop the study of the fine arts and to advance the general knowledge of kindred subjects, is an "educational corporation," within Tax Law, providing that any property devised or bequeathed to any educational corporation shall be exempt; the exemption not being confined to corporations exclusively incorporated for educational purposes. In *re Mergentime's Estate*, 113 N. Y. Supp. 948, 949, 129 App. Div. 367.

A corporation organized to receive a testamentary gift to maintain an art gallery to which the public shall have free access under reasonable regulations, and to establish and maintain a free public reference library, is an educational corporation within Tax Law, § 221, exempting such corporations from transfer taxes. In *re Arnot's Estate*, 130 N. Y. Supp. 499, 501, 502, 145 App. Div. 708.

A school district is an "educational corporation" within Const. art. 11, § 2, providing that no charter of incorporation shall be granted, extended, or amended by special law, except for such educational corporations, etc., as are or may be under the state's control. *Howard v. Independent School Dist. No. 1 of Nez Perce County*, 106 Pac. 692, 694, 17 Idaho, 537.

Tax Law, § 221, provides that property devised to any religious, educational, charitable, missionary, or benevolent corporation shall be exempted from the transfer tax, and that there shall also be exempted from the provisions of the act personal property other than moneys or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women, or for the enforcement of laws relating to children or animals, and used exclusively for carrying out one or more of such purposes. The charter of the Young Men's Christian Association states that the object of the corporation shall be, primarily, the improvement of the moral and spiritual condition of young men and the improvement of their intellectual, physical, and social condition, and there was evidence to show that the association carried on this work by religious meetings and educational classes. The Young Women's Christian Association is organized under Laws 1891, c. 167, the first section of which provides for the formation of an association by any 20 or more women being desirous of associating themselves for the improvement of the spiritual, moral, or mental condition of young women. Held, that a devise to the Young Men's Christian Association and one to the Young Women's Christian Association was exempt from the payment of the transfer tax, but that a devise of \$3,000 to the Society

for the Prevention of Cruelty to Children is not exempt, as that association must be classified under the partially exempt class. In *re Moses' Estate*, 123 N. Y. Supp. 443, 446, 138 App. Div. 525.

The state board of control created by Laws Fla. 1905, c. 5384, No. 13, given supervision of matters relating to educational institutions in the state, is not an educational company or association within Const. art. 3, § 25, providing that the Legislature shall provide by general law for the incorporation of such companies, but is a mere public agency created in aid of public purpose. State ex rel. *Moodle v. Bryan*, 39 South. 929, 959, 50 Fla. 293.

### EDUCATIONAL INSTITUTION

Acts 28th Gen. Assem. 1900, p. 83, c. 110, authorizes the acquirement and use of books by school townships and the establishment of small libraries. Code, § 48, par. 2, provides that words and phrases shall be considered according to the context and the approved usage of the language, etc. A public library is an "educational institution" within the meaning of Acts 32d Gen. Assem. 1907, p. 65, c. 54, providing, however, that real estate owned by an educational institution of this state, as part of its endowment fund, shall not be taxed. *Webster City v. Wright County*, 123 N. W. 193, 194, 144 Iowa, 502, 24 L. R. A. (N. S.) 1205.

Real property of a private corporation organized for the purpose of avoiding taxation to operate a business college affording courses in bookkeeping, etc., intended solely for the profit of the founders and stockholders, was not exempt from taxation under Pub. Laws 1909, No. 309, § 7, par. 4, providing that real estate owned by an incorporated educational institution with the buildings and other property thereon while occupied solely for the purposes for which they are incorporated shall be exempt. *Parsons Business College v. City of Kalamazoo*, 131 N. W. 553, 554, 166 Mich. 305, 33 L. R. A. (N. S.) 921.

The word "educational" does not necessarily describe a public or charitable institution. In *re Sutro's Estate*, 102 Pac. 920, 922, 155 Cal. 727; In *re Shattuck's Will*, 86 N. E. 455, 456, 193 N. Y. 446.

A gymnastic association where regular gymnastic exercises are taught and a teacher in physical culture is constantly employed is an "institution of education" within Const. § 170, exempting such institutions from taxation. *German Gymnastic Ass'n of Louisville v. City of Louisville*, 80 S. W. 201, 117 Ky. 958, 65 L. R. A. 120, 111 Am. St. Rep. 287.

A pharmacy college whose charter provided that, should the corporation be dissolved, its funds and property, after payment of debts, should be paid into the state treasury for the benefit of the common school fund,

which is without stockholders, and whose entire income, which is derived from nominal membership fees, an initiation fee, small tuition fees, and the rental of a portion of its building, is applied to the purposes of the institution, is an "institution of education" within a constitutional provision exempting from taxation institutions of education not used for gain. *Louisville College of Pharmacy v. City of Louisville (Ky.)* 82 S. W. 610, 611.

### EDUCATIONAL PURPOSES

Exclusively used for educational purpose, see Exclusively Used.

Solely used for educational purpose, see Solely.

### EDUCATIONAL SOCIETIES

25 St. at Large, p. 731, amending 20 St. at Large, p. 246, creating the school district of Yorkville, by extending its boundaries, is not in violation of Const. art. 3, § 34, subd. 4, prohibiting the General Assembly from enacting local laws to incorporate educational societies; that section applying to institutions of learning, and not to school districts. State ex rel. *Spencer v. McCaw*, 58 S. E. 145, 77 S. C. 351.

### EFFECT

See Cause and Effect; Like Effect; Natural Effect; Of No Effect; Put into Effect; Take Effect; With Same Effect.

The words "to that effect" in Rev. St. Tex. 1895, § 3785, declaring that when the board of medical examiners shall be satisfied as to the qualification of an applicant to practice medicine they shall grant him a certificate "to that effect," indicated that it was intended that if a certificate was given indicating the intention of the board it should be valid and would be a sufficient compliance with the law, but when a female after having been duly examined was granted a certificate reciting that the board had examined her as required by the laws of the state of Texas, and found her qualified to practice, such certificate was "to that effect" in the sense that she was qualified to practice in any of the branches of medical science, notwithstanding it also recited that she was qualified to practice the branches of obstetrics and diseases peculiar to women and children; such words being without force if intended to designate the branch or department of medicine which the applicant was entitled to practice. *Board of Medical Examiners for State of Texas v. Taylor*, 120 S. W. 574, 576, 56 Tex. Civ. App. 291.

### EFFECT DEATH

The words "to effect death," in Wilson's Rev. & Ann. St. 1903, § 2167, defining murder as "homicide when perpetrated without authority of law and with a premeditated de-

sign 'to effect the death' of the person killed," means to take life, to kill, or to deprive of life. *Walcher v. Territory*, 90 Pac. 887, 888, 18 Okl. 528.

#### EFFECTED

The word "effected," though used ordinarily in the meaning of consummated or carried to completion, as used in Rev. St. U. S. § 5480, providing for the punishment of any person devising a scheme to defraud "to be 'effected' by either opening or intending to open correspondence or communication with any person by means of the post office department of the United States," means merely that there is an intent to use the mails as a channel of communication in carrying out the scheme or artifice; that is to say, the use of the mails is a means, though not the sole means, of carrying out such scheme. *Brown v. United States*, 143 Fed. 60, 64, 74 C. C. A. 214.

The expression "effects, or aids in effecting," an illegal entry of imports, in section 5445, Rev. St., includes aid in carrying out the fraud, rendered either after or before entry at the custom house. *United States v. Mescall*, 164 Fed. 587, 588.

#### As enforced

It has been held that the word "effected," as used in Code, § 2993, providing that a landlord's lien may be "effected" by commencement of an action for the rent alone, has the same meaning as "enforced." *Staher v. Collins*, 100 N. W. 527, 528, 124 Iowa. 543 (citing *Nickelson v. Negley*, 32 N. W. 487, 71 Iowa, 546).

#### As procured

An agent's commission for effecting a sale or trade of property is not shown to have been earned until a contract of sale or trade binding on the property owners is proven as having been entered into through procurement of his agent. *Jacobson v. Rotzlen*, 127 N. W. 419, 420, 111 Minn. 527.

#### EFFECTIVE HEIGHT

The "effective height" of a milldam is the height at which the dam in good condition will flow land, unaffected by changes in seasons or the occasional leakage of the dam. *Carr v. Piscataquis Woolen Co.*, 85 Atl. 497, 498, 110 Me. 184.

#### EFFECTIVE PATENT

See Perfect and Effective Patent.

#### EFFECTIVE POSSESSION

Defendants in error being in actual possession of part of the tract by their tenant living in a house built upon the tract holding under color of title and claiming the land as their own at the time the timber was felled and the logs taken away, their possession extended to the limits or boundaries contained in their title papers, which covered the space where the trees grew. This possession was

an "effective possession" or "virtual possession" and was an "adverse possession" in the sense in which that term is used in the law. *Lieberman, Loveman & O'Brien v. Clark*, 85 S. W. 258, 264, 114 Tenn. 117, 69 L. R. A. 732.

#### EFFECTS

See Household Effects; Household Furniture and Effects; Personal Effects.

The word "effects" is of very general significance, and is equivalent at least to personal property. *Gallager v. McKeague*, 103 N. W. 223, 234, 125 Wis. 116, 110 Am. St. Rep. 821.

Under Revisal 1905, § 3127, providing that to be probated a holographic will must be found among the valuable papers and effects of decedent, the word "effects" is broad enough to include policies of insurance, which are both valuable papers and effects. In *re Jenkin's Will*, 72 S. E. 1072, 1073, 157 N. C. 429, 37 L. R. A. (N. S.) 842.

The word "effects," as used in article 935, Civ. Code, relating to the place of opening of successions, was a translation of the word "biens," used in the French text of article 929, Civ. Code, 1825; both meaning property in its general sense. *Randolph v. Kraft*, 55 South. 340, 342, 128 La. 743.

Where a will devises certain land described and then disposes of all the testator's personal property, money and effects of every description, the word "effects" does not include the testator's homestead, which was not part of the real estate described. "The word 'effects' in its primary and ordinary meaning includes only personal estate, goods, movables, and chattel property. Webster's International Dict.; Standard Dict.; Century Dict. It denotes property in a more extensive sense than goods, and includes all kinds of personal property, such as shares of capital stock. *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842. The word is frequently found in wills, and, as a general thing, means personal property, and not real property. *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454; *Camfield v. Gilbert*, 3 East, 510; *Doe v. Dring*, 2 M. & S. 448. Unless the context of a will shows the intention of a testator to dispose of his realty by the use of the word, it will not include real estate, but in its broadest sense of property or worldly substance it may include land and should be so construed when it appears from other parts of the will that such was the testator's intention. Words used in a will are to be given the meaning which the testator intended they should have, and the word 'effects' is capable of carrying real estate if it appears to have been used with the intent, just as the word 'children' may mean 'heirs' or 'heirs' may mean 'children.'" *Andrews v. Applegate*, 79 N. E. 176, 177, 223 Ill. 535, 12 L. R. A. (N. S.) 661, 7 Ann. Cas. 126.

A contract for the sale of an interest in timber lands provided that, if the garnishees did not exercise an option to purchase defendants' interest in the land, they should loan defendants \$15,000 to be secured by defendants' interest in the land and pay when the land was sold. A writ of garnishment having been served on June 6, 1907, the garnishees elected not to exercise their option, and on August 31st procured a draft payable to one of the garnishees for \$15,000, which he retained until September 13, 1907, when he indorsed and delivered it to defendants in performance of the contract. Held, that such draft while in the hands of the garnishee did not constitute "effects" in the hands of the garnishee belonging to the defendants subject to the writ. *Maury v. McDonald*, 118 S. W. 812, 816, 55 Tex. Civ. App. 50.

Article 6 of the Treaty of Amity and Commerce of 1783, as revived by article 17 of the Treaty of Commerce & Navigation of 1827, between Norway and Sweden and the United States, provides that the subjects of the contracting parties in the respective states may freely dispose of their goods and effects by testament or otherwise in favor of such persons as they think proper and their heirs in whatever place they shall reside shall receive the succession, even ab intestato, either in person or by their attorney without having occasion to take out letters of naturalization. Held, that the words "goods and effects" in the treaty include real as well as personal property. In *re Stixrud's Estate*, 109 Pac. 343, 346, 58 Wash. 339, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912A, 850.

### EFFECTUAL DEED

See Good and Effectual Deed.

### EFFECTUAL RESISTANCE

Where, on a trial for rape on a female imbecile, punishable by Code, § 4758, punishing rape on a female of such imbecility of mind as to prevent effectual resistance, the evidence showed imbecility, requested instructions that, if prosecutrix was an imbecile, a conviction was not warranted, unless such imbecility was of such an extent that by reason thereof she was unable to offer such resistance as would ordinarily be offered by the average girl of her age, and that effectual resistance in the statute did not mean such entire resistance as would prevent accused from ravishing her, but meant simply ordinary, usual, and fair resistance, were properly refused because introducing elements not in the statutory offense; the word "effectual" being defined as adequate, effective, and efficient, and "effectual resistance" meaning more than mere resistance. *State v. McKinnon* (Iowa) 138 N. W. 523, 526.

### EFFECTUALLY

"Effectually" means in an effectual manner, with complete effect, so as to produce or effect the end desired thoroughly. In a de-

cree ordering a sheriff to "effectually" close a building against the use for the keeping or sale of intoxicating liquors, the word "effectually" means "in an effectual manner; with complete effect; so as to produce or secure the end desired; thoroughly." Such a decree requires the building to be closed for all purposes. *Lewis v. Brennan* (Iowa) 117 N. W. 279, 280; *Id.*, 120 N. W. 332, 141 Iowa, 585.

### EFFICIENT

Though a statute requires motor vehicles to be provided with "a good and efficient" brake, an instruction that "a good and sufficient" brake must be supplied was not improper, as "efficient" means that which causes an effect, and "sufficient," as used in the instruction, meant that the brake should be reasonably sufficient for the purposes for which it was intended, and it was therefore practically synonymous with "efficient." *Fox v. Barekman* (Ind.) 99 N. E. 989, 991 (citing 7 Words and Phrases, p. 6763).

The words "proper," "properly," and "efficient" are not necessarily relative terms, but may be definite and specific when used in connection with a definite subject-matter, as, for example, the "proper" county, used in connection with other statutes as to the county in which a suit is brought, where a specific statute fixes the proper county. *State v. Louisville & N. R. Co.*, 96 N. E. 340, 343, 177 Ind. 553.

### EFFICIENT CAUSE

By "efficient cause," within the rule preventing negligence being proximate of any injury if there was an intervening efficient cause, is meant that cause which produces effects or results. *Crandall v. Consolidated Telephone, Telegraph & Electric Co.* (Ariz.) 127 Pac. 904, 996.

In actions for injuries to employes, the "proximate cause" of the injury is not necessarily the immediate cause, but it must be the "efficient cause," which is that cause that sets in motion the general circumstances leading up to the injury. *Columbia Creosoting Co. v. Beard* (Ind.) 99 N. E. 823, 825.

It is only when something occurs subsequent to the defendant's act which makes it result in what would not otherwise have happened that the latter or intervening cause is said to be the "efficient cause," and for the result of which the original actor is not responsible in law. *Central Coal & Iron Co. v. Pearce* (Ky.) 80 S. W. 449, 450.

"First cause," "initial cause," "efficient cause," and "proximate cause" all mean the same thing in the law of negligence. They mean the cause acting first and immediately producing the injury, or setting other causes in motion, all constituting a natural and continuous chain of events each having a



close causal connection with its immediate predecessor; the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, and the person responsible for the first event having reasonable ground to expect at the moment of his act or default that a personal injury to some person might probably result therefrom. There may be pre-existing conditions or events without which the final injury could not have happened, such as the momentary shying of a horse on a defective highway, the inadvertent and nonnegligent misstep of a traveler into a dangerous excavation close to the sidewalk, or the nonnegligent misstep or slip upon the floor or passage; but none of these is to be deemed a cause of the final injury any more than the mere presence of the injured person on the scene of the accident. They are not links, either initial or otherwise, in the legal chain of responsible causation, and should not be referred to as such, even though in ordinary nonlegal parlance they might broadly be termed causes. They are mere circumstances or conditions either existing, or to be expected in the natural order of things to occur at any time; and they do not enter into the chain of responsible causation. *Winchel v. Goodyear*, 105 N. W. 824, 827, 126 Wis. 271.

Where a servant was informed by his master that a certain lever would stop the machine he was operating, when in fact it would not stop it when materials were passing through the rollers of the machine, and the servant, while causing materials to pass through the rollers, slipped on lubricating oil on the floor, and his hand was caught in the rollers, and he was injured before the machine could be stopped, he having made unavailing efforts to stop it by means of the lever, the presence of the oil on the floor was not the "efficient cause" of the injury. *Yess v. Chicago Brass Co.*, 102 N. W. 932, 934, 124 Wis. 406.

#### **As proximate cause**

See Proximate Cause.

#### **EFFICIENT PREPARATION OF CASE**

Under Gen. St. 1901, § 5137, authorizing the court after a petition has been filed in an action for divorce and alimony or for alimony alone to make such order relative to the expenses of the suit as will insure to the wife "efficient preparation of her case," the quoted phrase does not mean that her case must be made upon a petition and in the capacity of plaintiff, as preparation is just as important to her in establishing her case as against a plaintiff upon an answer or cross-petition. *Day v. Day*, 80 Pac. 974, 975, 71 Kan. 385, 6 Ann. Cas. 169.

#### **EFFORT**

See Reasonable Effort.

Make effort, see Make.

#### **EGG COAL**

See Domestic Egg Coal.

Where coal is run over one screen with a three-inch mesh, and another screen with a 1¼-inch mesh, that passing through the three-inch screen and over the 1¼-inch screen is known as "egg coal." *Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 84 N. E. 776, 777, 41 Ind. App. 658.

#### **EGGS**

As provisions, see Provisions.

#### **EGGS OF BIRDS**

Paragraph 549, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 197, relating to "eggs of birds," does not include eggs of the domesticated duck, which are dutiable under paragraph 244, Schedule G, § 1, 30 Stat. 170, as "eggs, not specially provided for." *Sun Kwong On v. United States*, 143 Fed. 115, 74 C. C. A. 309.

#### **EIGHT-FOOT HEAD OF WATER**

Grant of right to maintain a "dam to a height as to have at no time a head of water at said dam of more than eight feet," etc., does not permit maintenance of a dam eight feet high, if the water flows over the crest at a depth of two or more inches. *Tebbel v. Spencer Electric Light & Power Co.*, 138 N. W. 1073, 1075, 173 Mich. 136.

#### **EIS**

The Greek word "eis" means "into" and is not equivalent to the Greek word "dia," meaning "through." *State v. Williams*, 61 S. E. 61, 68, 146 N. C. 618, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562.

#### **EITHER**

##### **As any**

Any construed as either, see Any.

The "extremities of the body" are four in number, and "either" is one indifferently, any one of them; and the permanent paralysis of a hand resulting from a cut on the arm brings the plaintiff suing on the policy within the term "permanent paralysis of either extremities" as expressed in the constitution of the association. *Brotherhood of Locomotive Firemen & Enginemen v. Aday*, 134 S. W. 928, 930, 97 Ark. 425, 34 L. R. A. (N. S.) 126.

It was error to instruct that the law presumes that parties in their dealings intend to conduct them honestly, and where a transaction which is challenged will admit "either" of an honest or a dishonest construction it is the duty of the jury to accept the former, though it was probable that the word "either" was used when it was intended to

use the word "equally." Had the word "equally" been used, the charge would not have been objectionable. *Detroit Electric Light & Power Co. v. Applebaum*, 94 N. W. 12, 13, 132 Mich. 555.

#### One of any number

"Either" does not mean every, but one indifferently. *Brown v. Rushing*, 66 S. W. 442, 446, 70 Ark. 111.

In the use of the word "either" one or the other of two is meant. Common definitions of the word are "one of two"; the "one or the other." The word when used in a connection which implies a choice of action on the part of the person using it indicates that the option is in the person who is to do the act involving the choice. *Aldrich v. Bay State Const. Co.*, 72 N. E. 53, 54, 186 Mass. 489.

#### EITHER, ANY, OR ALL

The act of April 19, 1898, defining trusts and prohibiting them under penalties (93 Ohio Laws, p. 143) declares (section 1) that a "trust" is a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for "either, any, or all" of the following purposes, which are thereafter recited. Held, that by the use of the distributive terms "either, any, or all," these purposes are as completely separated as though each subdivision constituted the subject of a different statute. *State v. Gage*, 73 N. E. 1078, 1080, 72 Ohio St. 210.

#### EITHER BEFORE OR AFTER TRIAL

The words "either before or after trial," in Code Civ. Proc. § 1209, providing that a final judgment dismissing the complaint "either before or after trial" does not prevent a new action, etc., refer to the dismissal of the complaint and the rendering of a judgment thereon, in an action brought on for trial, either on issues of law or of fact, and either before evidence is taken or afterwards, and such a judgment is final and appealable under section 1346, defining what judgments are appealable. *Jones v. Sabin*, 107 N. Y. Supp. 508, 510, 122 App. Div. 666.

#### EITHER PARTY

See At the Option of.

Under *Burns' Ann. St. 1901*, § 416, providing that venue shall be changed for certain named causes upon application of "either party," a change of venue may be granted on motion of but one of several defendants. *Dill v. Frazee*, 79 N. E. 971, 974, 169 Ind. 53 (citing *Jarvis v. Hitch*, 67 N. E. 1057, 161 Ind. 217; *Board of Com'rs of Monroe County v. Conner*, 58 N. E. 828, 155 Ind. 484; *Cain v. Allen*, 79 N. E. 201, 168 Ind. 8); *Greening v. Kitch*, 83 N. E. 1135, 41 Ind. App. 711.

#### EITHER SIDE

See Run Upon Either Side.

2 Wds. & P. 2d SER.—15

## EJECT

The leaving of a train by a passenger whose ticket the conductor had refused to accept, in obedience to the conductor's command to the porter to see that she got off at the next station, is an "ejection." *Boling v. St. Louis & S. F. R. Co.*, 88 S. W. 35, 40, 189 Mo. 219.

For a passenger, whose ticket the conductor had refused to accept, to leave the train of her own accord, and against his advice that she remain, and allow him to hold her baggage check as security for passage, to be paid if the company agreed with him that the ticket was not good, is not an "ejection." *Boling v. St. Louis & S. F. R. Co.*, 88 S. W. 35, 40, 189 Mo. 219.

Where several cars were waiting at a station to be loaded with passengers, and a passenger, after voluntarily leaving one car, was told by the conductor that he could not ride on that car, but was directed to take passage on another car, there was no "ejection." *Dobbins v. Little Rock Ry. & Electric Co.*, 95 S. W. 704, 797, 79 Ark. 85, 9 Ann. Cas. 84.

## EJECTIONMENT

See Justice Ejectionment.

Under the statute, "ejectionment" is stripped of all of the fictions of the common-law actions. The persons in interest must be the real parties to the suit, and the judgment is a finality. It stands on the same footing as other actions, and whatever may be set up in a court of law as to fraudulent procurement of an instrument in writing may be set up. If therefore the statutory action of unlawful detainer is analogous to ejectionment, and is governed by the same rules, the fraudulent execution of a lease may be shown by parol in an action of unlawful detainer. *Sass & Crawford v. Thomas*, 89 S. W. 656, 660, 6 Ind. T. 60, 11 L. R. A. (N. S.) 260.

## EJECTOR

See Casual Ejector.

## EJUSDEM GENERIS

See, also, Other; Otherwise.

"The rule, 'ejusdem generis,' ordinarily limits the meaning of general words to things of the same class as those enumerated under them." *Gallagher v. McKeague*, 103 N. W. 233, 234, 125 Wis. 116, 110 Am. St. Rep. 821 (citing 3 Words and Phrases, p. 2328); *Gillette v. Peabody*, 75 Pac. 18, 20, 19 Colo. App. 356; *Pein v. Miznerr*, 83 N. E. 784, 785, 41 Ind. App. 255 (citing *Black, Interp. Laws*, p. 141; *Maxw. Interp. St.* p. 469; *Sedg. St. & Const. Law*, p. 360); *Williams v. Vincent*, 79 Pac. 121, 122, 70 Kan. 595, 68 L. R. A. 634, 109 Am. St. Rep. 469.

The maxim "ejusdem generis" is but a rule of construction to aid in ascertaining

the meaning of a statute or other written instrument. *Central of Georgia Ry. Co. v. Motz*, 61 S. E. 1, 5, 6, 130 Ga. 414.

"Ejusdem generis" means of similar character or species. *Ex parte Lingenfelter*, 142 S. W. 555, 569, 64 Tex. Cr. R. 30.

The rule that, where general words follow enumeration of particular things, the general words include only such things as are of the same kind as those specifically enumerated does not apply to a statute where there are no specific terms followed by general terms, or where the terms are unlike and antagonistic in meaning and kind; the literal meaning of "ejusdem generis" being of the same kind, class, or nature. *Jones v. State*, 149 S. W. 56, 57, 104 Ark. 261.

By the rule "ejusdem generis," where there is an enumeration of particular things, followed by general words, the latter shall be construed as having reference only to things of the same kind or class with those specifically mentioned. *Cutshaw v. City of Denver*, 75 Pac. 22, 25, 19 Colo. App. 341.

"Ejusdem generis" means of the same kind or species. The words are used to designate a rule of construction that when an author makes use first of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when used, embraces only things ejusdem generis—that is, of the same kind or species—with those comprehended by the preceding limited and confined terms. *Pulom v. Jacob Dold Packing Co.*, 182 Fed. 356, 359 (citing 3 Words and Phrases, p. 2328).

The doctrine of "ejusdem generis" is only a rule of construction to be applied as an aid in ascertaining the legislative intent, and does not control where it clearly appears from the statute as a whole that no such limitation was intended, nor does it apply where the specific words of a statute signify subjects greatly different from another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless. *State v. Eckhardt*, 133 S. W. 321, 322, 232 Mo. 49.

Where one granted a right of way to a railroad over certain land, together with the right to take and use all the timber, earth, stone, and mineral existing or to be found within the right of way granted, the right to take the minerals must, under the principle of ejusdem generis, which limits general terms by particular preceding terms, be confined to surface minerals, as the grantor in referring to timber and stone had limited his grant to surface mineral. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.*

(Tex.) 137 S. W. 171, 178 (citing 3 Words and Phrases).

"The rationale of the principal of ejusdem generis seems to be that, if the Legislature has intended the general words to apply, uninfluenced by the preceding particular words, and without restriction, it would, in the first instance, have employed a conspicuous word to express its purpose. \* \* \* One of these rules of construction is that general words may be limited to the same genus or class as the specific words which precede them. In *Sutherland on Statutory Constr.* § 268, it is said that, 'where there are general words following particular and specific words, the former must be confined to things of the same kind.' In *Broom's Legal Maxims* (side page 651) the rule is laid down as follows: 'Where a particular class (of persons or things) is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters "ejusdem generis" with such class; the effect of general words, where they follow particular words, being thus restricted.' *Sedgwick*, in his work on *Construction of Statutes* (page 361), says: 'Where general words follow particular words, the rule is to construe the former as applicable to things or persons particularly mentioned.' The decision of the courts fully sustain the text-writers that this is the true rule of construction in such cases, subject to certain limitations, not necessary to be mentioned here." *Gates & Son Co. v. City of Richmond*, 49 S. E. 965, 966, 103 Va. 702 (citing *American Manganese Co. v. Virginia Manganese Co.*, 21 S. E. 466, 91 Va. 272; *City of Lynchburg v. N. & W. R. Co.*, 80 Va. 237, 56 Am. Rep. 592; *Chesapeake & O. Ry. Co. v. American Exch. Bank*, 23 S. E. 935, 92 Va. 495, 44 L. R. A. 449).

"The 'rule of ejusdem generis' is not in and of itself a rule of interpretation but an aid to interpretation, when the intention is not otherwise apparent." "It is a rule of application of the rule of ejusdem generis that when the prior or specific words exhaust the class of genera there is nothing for the terms to qualify, and, following the rule that all parts of a statute shall if possible be given effect if that can be done, and that rule shall not be invoked to restrict the operation of the act within narrower limits than the Legislature intended." *Strange v. Board of Com'rs of Grant County*, 91 N. E. 242, 248, 173 Ind. 640.

The rule of "ejusdem generis," restricting the meaning of general words following specific words to things of the same kind as the specific words, is only one of a number of rules of construction intended to aid in finding the true meaning of a statute; and where, considering the act as a whole, the evil to be remedied, and public senti-

ment at the time of its passage, the purpose of the act clearly appears, the rule should not be arbitrarily applied to limit the meaning of general words, nor should it be applied when the specific words embrace all objects of their class, so that general words must bear a meaning different from the specific words or be meaningless, thus violating the rule that all the words of a statute must be given effect, if possible. *United States Cement Co. v. Cooper*, 88 N. E. 69, 72, 172 Ind. 509.

The rule "ejusdem generis" involves the idea that the particular governs the general, and is a mere auxiliary and subordinate formula, intended to assist in the application of the basic rule that the intent of the parties governs, as neither in law nor in ordinary logic can there be any inflexible rule by which parties are arbitrarily held to forego a general requirement merely because they also state a particular one. *Drainage Commission of New Orleans v. National Contracting Co. of New York*, 138 Fed. 780, 794 (citing *Bock v. Perkins*, 11 Sup. Ct. 677, 139 U. S. 628, 35 L. Ed. 314).

The words "other paper," as used in *Kirby's Dig. § 3490*, allowing the clerk of the circuit court 10 cents each "for filing complaint, answer, reply, petition, demurrer, affidavit, or 'other paper'" in a cause, is a general term; but according to the old and settled rule of statutory construction must be confined in its meaning to that class of papers to which the preceding words belong. *Hempstead County v. Harkness*, 84 S. W. 799, 73 Ark. 600 (citing *Eastern Arkansas Hedge Fence Co. v. Tanner*, 53 S. W. 886, 67 Ark. 156; *Matthews v. Kimball*, 66 S. W. 651, 69 S. W. 547, 70 Ark. 451; *Sedg. St. & Const. Law* [2d Ed.] pp. 360, 361; *End. on Interp. St. §§ 400-407*; *Suth. St. Const.* 268-276; *State v. Blackburn*, 33 S. W. 529, 61 Ark. 407).

Where words of specific and limited signification in a statute are followed by general words of more comprehensive import, the general words, under the rule of "ejusdem generis," should be construed as embracing only such persons, places, or things as are of like kind or class to those designated by the specific words, unless a contrary intention is clearly shown by the statute. *Wiggins v. State*, 87 N. E. 718, 172 Ind. 78 (citing *Miller v. State*, 23 N. E. 94, 121 Ind. 294; *Nichols v. State*, 26 N. E. 839, 127 Ind. 406; *State v. Sopher*, 61 N. E. 785, 157 Ind. 360-373; *State ex rel. Shanks v. Board of Com'rs of Carroll County*, 70 N. E. 138, 162 Ind. 183; *Laporte Carriage Co. v. Sullender*, 75 N. E. 277, 165 Ind. 290-302; *State ex rel. Beard v. Jackson*, 81 N. E. 62, 168 Ind. 384-389).

While, under the doctrine of "ejusdem generis," when general words in a Constitution or statute follow particular words, the

things contained within the general words must be of the same class or kind as those particularly mentioned, and general words will not be held to include anything which is of a class superior to the class mentioned in the particular words, the doctrine is only a rule of construction to aid in arriving at the intent of the lawmaker, and cannot be applied to override the fundamental principles that all words in a law must, if possible, be given their ordinary meaning, and that the intention of the lawmaker must be gathered from the language employed in the light of the context and of the subject-matter to which it is applied, and that when the intention is clear it must prevail, except that courts cannot assume that the lawmaker really intended to enact either absurd or unjust laws. *Const. art. 13, § 4*, provides that all mines and mining claims, etc., containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits shall be taxed, etc., and the net annual proceeds of all mines and mining claims shall be taxed, etc. At the time the Constitution was framed, the specified metals were the only ones mined in large quantities in the territory, and coal, with the exception of lime and common rock, was the only nonmetallic product mined in quantity sufficient to justify the method of taxation proposed. Held, that the classification was not intended as a limitation, but an enumeration of substances then produced in quantity sufficient to warrant the method of taxation imposed and, under the exception to the rule of ejusdem generis that where the particular things enumerated are complete, so that there remain no others of like kind, then the things that fall within the general words must be assumed to be of a different kind and not ejusdem generis with those enumerated, the phrase "other valuable mineral deposits" embraces all mineral deposits, including a deposit of gypsum, and the net annual profits from the sale of products manufactured therefrom are taxable under the section. *Nephi Plaster & Mfg. Co. v. Juab County*, 93 Pac. 53, 54, 56, 58, 33 Utah, 114, 14 L. R. A. (N. S.) 1043.

The maxim "ejusdem generis" is only an illustration or specific application of the broader maxim "noscitur a sociis." From its application is a deduced rule that, "when general words follow an enumeration of particular cases, such words apply only to cases of the same kind as those expressly mentioned." Under the charter of the city of Chicago, authorizing the city to regulate and prescribe the compensation of hackmen, cabmen, omnibus drivers, and "all others pursuing a like occupation," the city had power to enact *Rev. Code Chicago, §§ 1723, 1725*, limiting the rate of fare to be charged by street railway companies, inasmuch as the phrase "others pursuing a like occupation," when construed ejusdem generis, includes street railway companies. Chicago

Union Traction Co. v. City of Chicago, 65 N. E. 451, 460, 199 Ill. 484, 59 L. R. A. 631.

The doctrine of ejusdem generis yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it so far as that object can be collected from the language employed. So the restriction of general words to things ejusdem generis must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called ejusdem generis. If the particular words exhaust a whole genus, the general words must refer to some larger genus. The general words are not to be rejected, and the maxim of ejusdem generis must yield to the maxim that every part of a statute should be upheld and given its appropriate effect if possible. To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention. In Ky. St. 1903, § 2971, being a part of the laws relating to the government of cities of the first class, and providing that so much property in the city which from "alienage, defect of heirs, failure of kindred, or other causes," shall escheat to the commonwealth, shall vest in the board for the benefit of schools, and that board may in the name of the commonwealth sue for and recover the same, the particular words used exhaust the genera specifically named, so that under the provision "or other causes" the school board might recover escheats on the happening of events of a different class, as land escheated by a corporation. Commonwealth, for Use of Louisville School Board, v. Chicago, St. L. & N. O. R. Co., 99 S. W. 596, 599, 124 Ky. 497 (quoting and adopting definition in South. St. Const. § 437).

The rule that, where a general term in a statute follows specific words of a like nature, it takes its meaning from the latter, and is presumed to embrace persons or things of the kind designated by the specific words, is what is usually called the "ejusdem generis rule" of statutory construction. Central of Georgia Ry. Co. v. State, 40 South. 991, 145 Ala. 99 (citing Johnson v. State, 32 Ala. 583; Prim v. State, 3 Ala. 244).

Under the rule of ejusdem generis it is not a crime under Pen. Code, making it an offense to operate any banking game or percentage game played with any device for money, checks, credit, or other representative of value, to set up and operate a slot machine in which games are played unless played for money, checks, or other representative of value. In re Williams, 87 Pac. 565, 568, 4 Cal. App. xiii.

## ELECT—ELECTED—ELECTION

See Any Election; Certificate of Election; Free Election; General Election; Holding Election; Local Option Election; Municipal Election; Next Election; Next General Election; Next Municipal Election; Officer Elect; Overseers of Election; Place of Election; Primary Election; Public Election; Regular Election; Second Election; Separate Election; Special Election; Spring or Autumn Election; To be Elected; Town Election.

All elections, see All.

Contest of elections, see Contest.

Such election, see Such.

"The word 'election' may be said to be 'the act of choosing; choice; the act of electing one or more from others; power of choosing or selecting.' Webster's Dictionary. Yet 'an "election" to be held in such precinct,' according to the custom of this state, has a certain definite meaning which does not include a choice by petition." Hudgins v. State ex rel. A. T. Hicks & Co., 39 South. 717, 718, 145 Ala. 499.

The word "elect" as used in a statute providing for the submission of a proposed amendment to a Constitution and providing that upon the ballot there shall be written or printed the words, "for the constitutional amendment or against the constitutional amendment," as the voters shall "elect," is equivalent to the word "wish." Warfield v. Vandiver, 60 Atl. 538, 544, 101 Md. 78, 4 Ann. Cas. 692.

The means by which the will of the people is ascertained and their consent obtained to the making of a contract is merely by accommodation called an "election," and this is also true as to cases in which it is sought to ascertain the same thing in respect of a proposition to remove a county seat. Where a question is subsequently raised as to whether the people really consented to the proposed action, it is necessary that the court, having jurisdiction, should investigate the operation of the means adopted in order to learn whether the consent was truly obtained. Adcock v. Houk, 122 S. W. 979, 981, 122 Tenn. 269.

"There is a particular distinction between the words 'elected and qualified' and that of 'qualified' alone. The distinction is based upon the consideration that the word elected has a well-defined and universally recognized meaning, and that when used it may not be assumed that the Constitution framers intended it should have no significance, and might therefore be ignored." Hence it cannot be said that the word "elected" was accidentally omitted from Const. art. 3, § 12, providing that all judicial officers shall hold their offices until their

successors shall have qualified. *State v. Andrews*, 67 Pac. 870, 877, 64 Kan. 474.

The constitutional provision that persons possessing certain qualifications may vote at all "elections prescribed by law" applies to the election of all officers, whether provided for by the Constitution or by a law authorized thereby, in the absence of a contrary constitutional provision. *Livesley v. Litchfield*, 83 Pac. 142, 145, 47 Or. 248, 114 Am. St. Rep. 920.

Under Civ. Code, § 305, providing that corporate powers must be exercised by a board of directors "to be elected" from among the holders of the stock of the corporation, a mortgage executed by a corporation's president and secretary, in pursuance of a resolution of its board of directors who were named in the articles of incorporation as its board of directors for the first year, is valid. *Middletown v. Arastraville Min. Co.*, 79 Pac. 889, 890, 146 Cal. 219.

Const. art. 3, § 1, provides that the executive department shall consist of a Governor. \* \* \* Secretary of State, etc., who shall be severally chosen by the qualified electors at the same time and place of voting as for members of the Legislature. Section 3 provides that the Lieutenant Governor, Secretary of State, etc., shall hold their offices for four years, and until their successors are elected and qualified. Section 13 provides that when, during a recess of the Legislature, a vacancy happens in any office, the appointment to which is vested in the Legislature, or when at any time a vacancy shall have occurred in any other state office, for the filling of which vacancy no provision is made elsewhere in this Constitution, the Governor shall fill such vacancy by appointment, "which shall expire when a successor shall have been elected and qualified." Article 6, § 8, provides that the first election of all state officers shall be on the Tuesday next after the first Monday in November, 1892, and the election of such officers shall be held in every fourth year thereafter on the Tuesday succeeding the first Monday in November. No direct provision is made for elections to fill vacancies in state offices, except as such vacancies may occur in the offices of Supreme or superior court judges. Held, that the words "which shall expire when a successor shall have been elected and qualified," do not relate to the next general election, and an appointment to fill a vacancy in the office of Secretary of State does not expire until the expiration of the regular term, and when the regular election for the office occurs. *State ex rel. Fish v. Howell*, 110 Pac. 386, 387, 59 Wash. 492.

#### **Appointment distinguished**

See *Appoint—Appointment*.

#### **As appointed**

The word "election," in New York City Charter, § 382, providing that any vacancy

in the office of borough president, caused by removal from the borough or otherwise, shall be filled for the unexpired term by an election to such vacancy made by a majority vote of all the members of the board of aldermen of such borough, is equivalent to the word "appointment." *People v. Ahearn*, 89 N. E. 930, 196 N. Y. 221, 26 L. R. A. (N. S.) 1153.

Organic Act, § 8, declares that all county officers shall be appointed or elected in such manner as shall be provided by the Governor and legislative assembly of the territory. Act July, 1851, provided for the election of sheriffs. Held, that a contention that the words "elected" and "appointed" had the same meaning, and that when the people were authorized by the Governor and assembly to "elect" certain officers they were merely empowered to act in so doing as agents, possessing a mere revocable authority and incapable of binding their principles, who retained the right to be exercised through the Governor, as the executive, of removing at his discretion all the officers whom the people should thus choose, was without merit; but the words were used to distinguish one method of selection from another, and the Governor did not have the right to remove a sheriff elected in accordance with the statute, as an incident to appointive power. *Territory ex rel. Hubbell v. Armijo*, 89 Pac. 267, 272, 14 N. M. 205.

Under Pol. Code, § 58, providing that, except where otherwise specially provided, an elector is eligible to an office for which he is an elector, and that no person is eligible who is not such an elector, and County Government Act, § 54, providing that no person shall be eligible to a county office who, at the time of his election, is not an elector of the county in which the duties of the office are to be exercised, a person who is not an elector of a county is not eligible to any office of that county, whether filled by election or appointment, the term "at the time of his election" not being limited in meaning to an election in the popular sense, in which all electors participate, but also including an appointment to office; and hence, prior to the constitutional amendment extending the elective franchise, a woman was not eligible to the office of assistant probation officer of a county. *Reed v. Hammond*, 123 Pac. 346, 347, 18 Cal. App. 442.

The words "elected" and "appointed" ordinarily are not synonymous. In its limited sense the word "elected" is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand, "appointed" is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word "elected" means merely "selected." When used in that sense, the word "elected" is synonymous with the

word "appointed." *Odell v. Rihn*, 127 Pac. 802, 805, 19 Cal. App. 713.

#### **As authorized election**

"There can be no 'election' where there is no warrant for holding it. Hence, where the notices prerequisite to a valid election are not given, there is no election." *School Dist. No. 2 v. Pace*, 87 S. W. 580, 582, 113 Mo. App. 134.

A void local option election is not an "election" within Ky. St. § 2563, providing that a local option election shall not be held oftener than once in three years. *Taylor v. Cook*, 143 S. W. 1055, 1057, 147 Ky. 215.

#### **As choice by plurality**

"Election" means choice. Holding an "election" in this country has always been considered to be the ascertainment of the will of the majority, upon a given question. *Nall v. Tinsley*, 54 S. W. 187, 191, 107 Ky. 441.

Under State Prohibition Law, § 13, providing that the prohibition law should go into effect January 1, 1908, in all counties where an election has been held on or before the 12th day of December, 1907, under the provisions of the county local option law, at which election it has been determined that liquor shall not be sold, the word "election" means an expression of the will of the majority, and not a valid election. Hence the constitutionality of the local option law is immaterial in determining when the prohibition law would go into effect. *State ex rel. Woodward v. Skeggs*, 46 South. 268, 269, 154 Ala. 249.

#### **As choice by popular election**

Const. art. 10, § 2, provides that all officers whose "election" or appointment is not provided for, and all officers whose offices may thereafter be created by law, shall be elected by the people or appointed as the Legislature may be direct. Held, that the word "election" contemplates an election by all the legal electors of the state or locality, and does not apply to members of the State Board of Pharmacy, which board was created since the Constitution by Public Health Law (Consol. Laws, c. 45) art. 11, which for determining its individual membership divides the state into three sections, five members being selected from each, and provides for the "election" of the members from each section, not by the citizens generally, but by a restricted electorate, consisting in some sections of licensed pharmacists, members of incorporated pharmacy associations, and in other sections by licensed pharmacists generally; the word "election" amounting in legal effect to an appointment according to the direction of the Legislature. *State Board of Pharmacy v. Bellinger*, 122 N. Y. Supp. 651, 654, 138 App. Div. 12.

#### **As choice by those qualified**

In *Pierce's Code*, § 4224, fixing the term of the county treasurer's office at two years

"and until his successor is elected and qualified," the word "elected" means elected by the same electoral body that elected the incumbent whose term of office is thus fixed, and does not permit the qualification as such successor by a person appointed by the county board because of the failure to qualify of the person elected as such. *State ex rel. Vanderveer v. Gornley*, 102 Pac. 435, 436, 53 Wash. 543.

#### **As choice of eligible person**

The term "election" implies a choice by an electoral body, at the time and substantially in the manner and with the safeguards provided by law, of a qualified person to an office. *State v. Hays*, 45 South. 728, 730, 91 Miss. 755 (citing *Foster v. Scarff*, 15 Ohio, 532).

The word "elected," as used in Rev. Codes 1905, § 764, relating to the election of a county superintendent of schools, signifies an election of a qualified successor to the incumbent. *Jenness v. Clark*, 129 N. W. 357, 358, 21 N. D. 150, Ann. Cas. 1913B, 675.

The word "election," as ordinarily used and understood, means the choice or selection of one man amongst more to fill a certain office, and it does not always necessarily involve the question of eligibility. *State v. Cahill*, 105 N. W. 691, 692, 131 Iowa, 155.

#### **As time when ballots were cast**

The word "election," as used in Rev. St. 1895, arts. 1804t, 1804u, authorizing a contest of an election to remove a county seat, means the act of casting and receiving the ballots from voters, counting ballots, and making return thereof; and hence an election contest is no bar to an equitable proceeding after the contest to enjoin the issuance of bonds relating to the county seat removal, brought by parties other than plaintiff in the election contest, on the ground that the preparatory proceedings were void. *Kilgore v. Jackson*, 118 S. W. 819, 822, 55 Tex. Civ. App. 99.

Rev. St. 1895, art. 3397, provides that, after the result of an election under the liquor law has been declared, the election may be contested, and, if it appear that it was illegally or fraudulently conducted, another election shall be ordered. Held, that the term "election" means the act of casting and receiving the ballots from voters, counting such ballots, and making returns thereof, and a petition, in a proceeding to contest a local option election, in which the grounds alleged are not based on any irregularity in holding the election, falls to state a cause of action. *Lowery v. Briggs* (Tex.) 73 S. W. 1062 (quoting and adopting definition in *Norman v. Thompson*, 72 S. W. 62, 96 Tex. 250).

#### **As election on question submitted**

"The word 'election' signifies any choice, whether it be by an officer, by a vote of the people, or by a board having the power of

appointment, or otherwise; and it applies to a choice in other matters than the selection of an officer, as where other questions are submitted to the vote of the people." *Newton v. Ogden*, 102 S. W. 865, 126 Ky. 101 (citing 1 Words and Phrases; 15 Cyc. p. 279; *Webst. Dict.* Title "Elections").

Under the provisions of Const. § 147, declaring that the word "elections" shall include the decision of questions submitted to the voters as well as the choice of officers by them, and under section 148, providing that not more than one election in each year shall be held in any town or county, except as otherwise provided, and that all elections of state and other municipal officers shall be on the first Tuesday after the first Monday in November, the question of issuing municipal bonds in excess of the yearly revenue not being otherwise provided for was an "election" within the definition given, and must be submitted at the general election in November. *Belknap v. Louisville*, 36 S. W. 1118, 1119, 99 Ky. 474, 34 L. R. A. 256, 59 Am. St. Rep. 478.

Under the primary election law, providing for a general primary election for all political parties, for party candidates for public office, declaring what the ballots shall contain, and providing that a qualified elector shall be furnished with a ballot of the political party with which he is enrolled, etc., and directing that the provision of the general election law relative to the furnishing of ballots, arrangement of booths, powers and duties of inspectors, etc., shall be applicable thereto, except so far as the provisions thereof may be inconsistent with the primary law, voting machines cannot be used at primary elections, though the general election law provides that at all state, county, city, village, and township "elections" voting machines may be used; such provision referring only to elections to public office. *Line v. Board of Election Canvassers of Menominee County*, 117 N. W. 730, 731, 154 Mich. 329, 18 L. R. A. (N. S.) 412, 16 Ann. Cas. 248.

The word "elections," as used in Const. art. 2, § 1, providing that all elections by the people shall be by ballot, includes every expression of choice by voters of a body politic, whether it be for a particular individual or in favor of a stated proposition, and is not confined to elections of officers and the special elections provided for in the Constitution. In this broader sense it includes local option elections. *State ex rel. Birchmore v. State Board of Canvassers*, 59 S. E. 145, 147, 78 S. C. 461, 14 L. R. A. (N. S.) 850, 13 Ann. Cas. 1133 (citing 15 Cyc. p. 280).

An election in a city to determine whether the sale of intoxicating liquors shall be authorized or denied therein is an election, within Comp. Laws 1907, § 914, authorizing the contesting of the election on any proposition submitted to the vote of the people, the official ballot at the election being "For Sale"

and "Against Sale," with a circle after each phrase to enable the voters to indicate their preference by placing a mark in either circle. *Hardy v. Beaver City* (Utah) 125 Pac. 679, 680.

Const. art. 2, § 1, providing that every male citizen having the therein prescribed qualifications shall be entitled to vote at all elections, by "elections" has reference to the choice of officers alone, and hence Code, § 1131, authorizing women to vote on the issuance of bonds, borrowing money, or increasing the tax levy, is not inimical thereto. *Coggeshall v. City of Des Moines*, 117 N. W. 309, 310, 138 Iowa, 730, 128 Am. St. Rep. 221.

The word "election" means the act of choosing; choice; and whether it is a choice between alternative policies or a choice between persons, it is equally an "election." And so an "election," within the meaning of the statutes of this state, includes a referendum vote to decide a question of policy such as the issuance of bonds, the issuance of saloon licenses, or the amount thereof, just as well as it includes an ordinary "election" to choose between candidates for public office. *Hall v. City of Madison*, 107 N. W. 31, 33, 128 Wis. 132.

The word "election" is generally used as indicating the expression of choice by vote, regardless of whether the choice to be made is as to the selection of an officer or the adoption of a proposition. The word "election" as used in Code, § 1900 providing that each member of a building and loan association shall have one vote for each \$100 of stock, par value, owned or held by him at any election, refers to the selection of the stockholders or adopting a proposition submitted to them, and need not be limited to the selection of officers, and the proposition for voluntary liquidation and the appointment of a trustee is an election. *McKee v. Home Savings & Trust Co.*, 98 N. W. 609, 610, 122 Iowa, 731.

#### As sworn

The use of the phrase "who were 'elected' according to law to well and truly try and true deliverance make between the state of West Virginia," etc., was inadequate as a statement that a juror was sworn. *State v. Moore*, 49 S. E. 1015, 57 W. Va. 146.

#### Primary election

The word "election," as used in Pen. Code, § 41zzz, includes general and special elections, but does not apply to primary elections. *People v. Foster*, 112 N. Y. Supp. 706, 708, 60 Misc. Rep. 3.

The word "election," as used in a statute which declares that bets on any election authorized by the Constitution and laws of the state are gaming, is used in its political sense, and not in the same sense in which it is used in the Constitution, and means an election for public office, and does not include



a primary election for the purpose of nominating a candidate for public office. *Dooley v. Jackson*, 78 S. W. 330, 334, 104 Mo. App. 21.

A primary election is an election within article 7, § 1, of the Constitution, defining who shall be entitled to vote at elections. *People ex rel. Phillips v. Strassheim*, 88 N. E. 821, 822, 240 Ill. 279, 22 L. R. A. (N. S.) 1135; *People ex rel. O'Connor v. Haas*, 89 N. E. 792, 241 Ill. 575.

Compulsory Primary Election Law 1909, c. 102, did not provide for an "election," as that term is used in Const. art. 1, § 5, declaring that elections shall be free and equal, and that the right of suffrage shall never be denied to any person entitled thereto, except on conviction by a jury of an infamous crime, and article 4, § 1, prescribing the qualifications of electors; such primary election being more in the nature of a caucus than an election for a political office. *Ledgerwood v. Pitts*, 125 S. W. 1036, 1039, 122 Tenn. 570.

The word "election," in Const. art. 8, § 5, as amended in 1891, conferring on the district court jurisdiction of "contested elections," includes a primary election held under and regulated by statute, though such elections were not authorized at the time of the amendment. *Anderson v. Ashe* (Tex.) 130 S. W. 1044, 1046.

The word "election," as used in Const. § 6, declaring that all elections shall be free and equal, does not apply to primary elections, which are not in fact elections of officers, but merely a means of selecting candidates, so that the Primary Election Law is not in violation of the Constitution. *Hodge v. Bryan*, 148 S. W. 21, 22, 149 Ky. 110.

A general primary election held under Primary Election Law, providing for party nominations by direct vote, and declaring that the statutes in relation to the holding of elections shall apply to all primaries, is an "election authorized by law" within Rev. St. 1899, § 2116, punishing the making of fraudulent returns of ballots cast at any election authorized by law. *State ex rel. Von Stade v. Taylor*, 119 S. W. 373, 374, 220 Mo. 618.

The word "election," in Rev. St. 1899, § 3430, providing that bets on any election authorized by the Constitution and laws of the state are gaming, does not include a primary election; such elections not being authorized by the Constitution, but merely permitted because not forbidden thereby. *Dooley v. Jackson*, 78 S. W. 330, 333, 104 Mo. App. 21.

Rev. St. 1899, § 3027, prohibits local option elections held in counties from being held on any general election day or within 60 days of an election held under the Constitution and laws, and provides that elections held under such article shall be special elections separate from all other elections. Section 3028 provides that such election shall

not be held in any city of a certain population within 60 days of any municipal or state election. Rev. St. 1899, § 4160, provides that the term "general election" refers to the election required to be held on Tuesday succeeding the first Monday in November. Held, that sections 3027 and 3028 prohibited the holding of a local option election within 60 days of any general election for the election of officers or any other purpose; but a local option election may be held within 60 days of an election under the state primary law; the word "election," as used therein, not including primary elections. *Haas v. City of Neosho*, 123 S. W. 473, 474, 139 Mo. App. 293.

Primary Election Law 1907, c. 209, § 33, as amended by Laws 1909, c. 82, § 10, declaring that statute as to the holding of elections, the solicitation of voters, the challenging of voters, the manner of conducting elections, and all other kindred subjects, including the sale of intoxicating liquors while the polls are open, shall apply to all primaries in so far as they are consistent with the act, did not adopt as part of the primary election law Rem. & Bal. Code, § 4967, which is a general statute not a part of the primary election law, declaring that every person charged with the performance of any duty under any law relating to elections, who willfully neglects to perform such duty, or who in the performance thereof knowingly acts in contravention of any law as to such duty, shall on conviction thereof be fined, etc. Rem. & Bal. Code, § 4967, provides that every person charged with the performance of any duty under the provisions of any law of the state relating to elections, who willfully neglects or refuses to perform such duty, or who while in the performance thereof knowingly or fraudulently acts in contravention or violation of the provisions of such law relating to such duty, shall on conviction be fined, etc. Held, that such section was general in its application, and, if enacted prior to laws providing for primary elections, such primaries were nevertheless elections within the section, so that a primary election officer guilty of malfeasance in office was punishable under section 4967. *State v. Robinson*, 124 Pac. 379, 380, 69 Wash. 172.

#### **Town meeting**

A complaint alleging that accused illegally voted at a meeting of electors of a specified town, duly and legally held to choose town officers, etc., sufficiently described an "election" within a statute prohibiting illegal voting. *State v. Custer*, 66 Atl. 306, 307, 28 R. I. 222.

#### **Under general law**

Code 1899, c. 3, § 6, relating to change or consolidation of election precincts, provides that no change, division, or consolidation shall be made by the county court within 90 days preceding an election, and that none

shall be valid without notice of at least 1 month before any election by publication. Held, that the word "election" means an election held under the general law, and not an election under a special act of the Legislature, establishing an independent school district, on the question of consenting to the creation of such school district. *Rader v. Board of Education of Beaver Dist.*, 50 S. E. 240, 241, 57 W. Va. 220.

The word "election," as used in the Bill of Rights, providing that no religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, applies only to elections contemplated by the Constitution, and does not prevent the Legislature from authorizing the location of drainage districts, the powers of which are to be exercised by directors who are required to be freeholders elected by the resident taxpayers. *State v. Monahan*, 84 Pac. 130, 131, 72 Kan. 492, 115 Am. St. Rep. 224, 7 Ann. Cas. 661.

Under Kirby's Dig. § 1119, providing that the election provided for in the act relating to the removal of county seats shall be understood in the same manner as general elections are understood, etc., an election for the removal of a county seat is an "election" within the general election laws and is governed thereby. *Walsh v. Hampton*, 132 S. W. 214, 215, 96 Ark. 427.

## ELECTION

See Fail to Elect; Failure to Elect.

### In criminal law

Different felonies or misdemeanors may be stated in several counts in an indictment. In cases of felony, indeed, the judge in his discretion may require the counsel for the prosecution to select one of the felonies, and confine himself to that. That is what is technically termed "putting the prosecutor to his election." But this practice has never been extended to misdemeanors. "We have seen, however, that, where a count for larceny and a count for receiving the same goods are joined in the same indictment, the prosecutor shall not be put to his election." *State v. Rountree*, 61 S. E. 1072, 1073, 80 S. C. 387, 22 L. R. A. (N. S.) 833 (quoting and adopting definition in 1 Archb. Cr. Prac. & Pl. 295-298, and citing and adopting *State v. Nelson*, 14 Rich. 169, 94 Am. Dec. 130; *State v. Smith*, 18 S. C. 149).

A submission by the court of certain counts in an indictment and the elimination of the others is equivalent to an "election" by the state to prosecute on the mentioned counts. *Burk v. State*, 95 S. W. 1064, 1065, 50 Tex. Cr. R. 185.

### In equity

The ordinary meaning of "elect" is to choose between alternatives. *City and County of Denver v. New York Trust Co.*, 187 Fed. 890, 897, 110 C. C. A. 24.

"Election" is a choice shown by an overt act between two inconsistent rights, either of which may be asserted at the election of the chooser alone. *Brown v. Fletcher*, 182 Fed. 903, 972, 105 C. C. A. 425 (citing definition in *Bierce v. Hutchins*, 27 Sup. Ct. 524, 205 U. S. 346, 51 L. Ed. 828); *Bierce v. Hutchins*, 27 Sup. Ct. 524, 525, 205 U. S. 340, 51 L. Ed. 828.

An "election" is the choice between two or more courses of action, rights, or things by one who cannot enjoy the benefit of both. *Allis v. Hall*, 56 Atl. 637, 644, 76 Conn. 322.

"Election," says Judge Story, "is the obligation imposed on a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both." *Howard v. J. P. Paulson Co. (Utah)* 127 Pac. 284, 286 (quoting and adopting definition in 3 Words and Phrases, p. 2336); *Potomac Lodge No. 31, I. O. O. F., v. Miller*, 84 Atl. 554, 556, 118 Md. 405.

"Equitable election" is the obligation imposed on a party to choose between two inconsistent or alternative rights, where there is a clear intention that he should not enjoy both. *Walker v. Bement*, 94 N. E. 339, 344, 50 Ind. App. 645.

An "election" in equity is the choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of property already his own, which is attempted to be disposed of to a third person by the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere by title paramount to prevent another part of the same instrument from having effect according to its construction. "The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If therefore a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights." *McDonald v. Shaw*, 121 S. W. 935, 937, 92 Ark. 15, 28 L. R. A. (N. S.) 657 (quoting *Gregory v. Gates*, 30 Grat. [71 Va.] 83; *Fitzhugh v. Hubbard*, 41 Ark. 64).

A mortgage of a specified number of cattle on a certain farm is good, to the number specified, against a purchaser from the mortgagor, although there are more cattle of the

same description on the farm, which fact is not disclosed by the mortgage, since the mortgagee is permitted, by what is called the doctrine of selection or election, to select the specified number from the whole number. *Sparks v. Deposit Bank of Paris*, 78 S. W. 171, 115 Ky. 461.

"The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument or having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatever." *Stone v. Cook*, 78 S. W. 801, 803, 179 Mo. 534, 64 L. R. A. 287 (citing *Fox v. Windes*, 30 S. W. 323, 325, 127 Mo. 502, 511, 48 Am. St. Rep. 648); *Royster v. Heck* (Ky.) 94 S. W. 8, 11.

This fundamental principle is of wide application in the law of estoppel. Creditors who did not formerly become parties to a debtor's conveyance of property for the benefit of creditors, but who presented their claims and obtained their pro rata share of the debtor's property, are estopped from proceeding against land reserved by the conveyance. *Royster v. Heck* (Ky.) 94 S. W. 8, 11 (quoting and adopting definition in *Herman on Estoppel and Res Judicata*, §§ 1028, 1039-1049).

The term "quasi estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel in pais, and which have the same practical operation as an estoppel in pais, but which nevertheless differ from that form of estoppel in essential particulars. The term includes the doctrine of "election," the principle which precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him, and certain forms of waiver. *Humes Const. Co. v. Philadelphia Casualty Co.*, 79 Atl. 1, 3, 32 R. I. 246, Ann. Cas. 1912D, 906.

The obligation imposed upon a party to choose between inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who had the right to control one or both, that one should

be a substitute for the other. *Gainer v. Gates*, 34 N. W. 798, 799, 73 Iowa, 149; *Holland v. Coutts*, 98 S. W. 236, 237, 100 Tex. 232 (citing 2 Story, Eq. Jur. § 1075).

#### In law of wills

The principle of election applies only where a testator by his will disposes of some interest or estate that does not belong to him. *Smith v. Smith*, 77 Atl. 975, 979, 113 Md. 495, 31 L. R. A. (N. S.) 922, 140 Am. St. Rep. 435.

"Election" is defined as "where one legatee under a will insists upon something by which he would deprive another legatee under the same will of the benefit to which he would be entitled if the first legatee permitted the whole will to operate." Where bequests were made on condition that the legatees acquiesce in the will with bequests over of the shares of any who should dispute it, a claim set up by a legatee to the ownership of property which the testator assumed to dispose of by the will as his own was an election not to acquiesce in the will, and the gift over took effect. *Smithsonian Institution v. Meech*, 18 Sup. Ct. 396, 402, 169 U. S. 398, 42 L. Ed. 793.

No general rule can be formulated defining what acts of acceptance or acquiescence will constitute an election between a devise in a will and a right inconsistent with the will, but there must be an intention to make an election, or some decisive act that will prevent restoring the parties affected to the same situation as if such act had not been performed. An attempt to take both the property given by a will and a right inconsistent with the will does not constitute an election, but if one is taken and the other rejected there is an election, and if one is taken and the situation of the parties affected is so changed with reference to the property or rights involved that they cannot be restored to their former situation, the election is complete. *Cobb v. MacFarland*, 127 N. W. 377, 379, 87 Neb. 408.

The equitable doctrine of "election" between inconsistent benefits applies where a testator attempts to devise A's property to B. and at the same time gives his own property to A. It is not applicable where a mortgagee holding the legal title to land devised part of it to one holding the equity of redemption, especially where the devisee was a feme covert, and thus entitled, before being put to her election, to a full disclosure of the value of the land and of her right to redemption. *Rich v. Morisey*, 62 S. E. 762, 766, 149 N. C. 37.

The acceptance by children of a testatrix from her husband, to whom she devised all her property, of deeds of property, the title to one half of which he obtained through the will and the other half of which he owned in his own right, constituted an election barring their right to set aside the

will. *Holland v. Coutts*, 98 S. W. 236, 237, 100 Tex. 232 (citing 2 Story, Eq. Jur. § 1075).

#### Of remedies

Election goes not to the form, but to the essence, of the remedy. It applies only where the law supplies to a party two or more modes of procedure predicated upon inconsistent and conflicting theories. If the remedies afforded are predicated upon consistent theories, the suitor may use one or all of the remedies. There can be but one satisfaction. *Sweet v. Montpelier Sav. Bank & Trust Co.*, 77 Pac. 538, 539, 69 Kan. 641.

The word "election," as applied to remedies, is but another term for "estoppel." The bringing of an attachment suit is not an election of remedies barring another action; it having, by stipulation of the parties, been dismissed without prejudice, the position of the parties not having been changed by commencement thereof, and there being no intervening rights. *First Nat. Bank of Crockett v. George R. Barse Live Stock Commission Co.*, 64 N. E. 1097, 1098, 198 Ill. 232.

"The whole doctrine of 'election' is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies." As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and, if not satisfied with the result of that, he may commence and carry through the prosecution of another. But no suitor is allowed to invoke the aid of the courts on contradictory principles of redress upon one and the same line of facts. *Standard Sewing Mach. Co. v. Owings*, 53 S. E. 345, 346, 140 N. C. 503, 8 L. R. A. (N. S.) 582, 6 Ann. Cas. 211 (quoting and adopting 3 Words and Phrases, p. 2338).

A party is never put to an "election" except where two or more inconsistent remedies are open to him and may rightfully pursue either. If there be but one available remedy, and he mistakenly pursues another which is not available, it does not operate as an election. *Moon v. Hartsuck*, 114 N. W. 1043, 1044, 137 Iowa, 236; *Greenhall v. Carnegie Trust Co.*, 180 Fed. 812, 821.

"Election of remedies," in its generic sense, is the act of choosing between the different modes of procedure and relief allowed by the law on the same state of facts, which modes may be termed "coexisting remedies." In its technical and more restricted sense, election of remedies is the adoption by one of two or more coexisting remedies with the effect of precluding a resort to others. The remedies herein intended are known as exclusive or alternative remedies. A plaintiff

in a suit in equity for whose benefit an action at law is pending, for the recovery of the demand set up in his bill, cannot be compelled to elect as to which suit he will prosecute, if there appears to be jurisdiction of such demand in the equity court and none in the law court. *Dudley v. Barrett*, 66 S. E. 507, 511, 66 W. Va. 363 (quoting and adopting definition in *Bouv. Law Dict.*).

Where a party has two remedies inconsistent with each other, the bringing and prosecution of a suit based on one theory, with knowledge of his rights and of the facts, is an "election of remedies," and he cannot thereafter maintain a suit to enforce the alternative remedy. *A. Kilpstein & Co. v. Grant*, 141 Fed. 72, 72 C. C. A. 511.

"Election of remedies" is the adoption of one or two or more existing exclusive or alternative remedies, the effect of which is to preclude a resort to the others. To make a case for the application of the elective principle the party must have actually at command two inconsistent remedies. *Southern Ry. Co. v. City of Attalla*, 41 South. 664, 665, 147 Ala. 653 (citing *Morris v. Rexford*, 18 N. Y. 552; *McNutt v. Hilkins*, 29 N. Y. Supp. 1047, 80 Hun, 235; *Kinney v. Kiernan*, 49 N. Y. 164); *Calhoun County v. Art Metal Const. Co.*, 44 South. 876, 877, 152 Ala. 607.

Election exists where a party has alternative and inconsistent rights, and is determined by the choice, but a mistaken selection of a remedy that never existed and its fruitless prosecution until adjudged inapplicable does not prevent the exercise of another, if appropriate remedy, even if inconsistent with that first adopted. *Marsh Bros. & Co. v. Bellefeur*, 81 Atl. 79, 80, 108 Me. 354.

The doctrine of "election of remedies" applies only where there are two or more appropriate ways to vindicate the right of a controversy, but the relations between the parties necessary to the pursuit of one successfully are such that concurrent existence of those necessary to the pursuit of the other or others is impossible. Unsuccessful use of a remedy, supposed to be, but in effect not appropriate to vindicate the right of a particular matter, either because the facts turn out to be different than plaintiff supposed them to be, or the law applicable to the facts is found to be different than supposed, though the first action proceeds to judgment, does not preclude plaintiff from thereafter invoking the proper remedy. *Rowell v. Smith*, 102 N. W. 1, 4, 123 Wis. 510, 3 Ann. Cas. 773.

Under Comp. Laws 1897, c. 308, § 25, providing that if the complainant in proceedings to recover possession of land obtain restitution of the premises he may at his election sue and recover on the bond given by defendant or bring his action against defendant under section 24, in trespass or trespass on the case to recover treble damages for the unlawful detainer and all other dam-

ages to which he may be entitled, a landlord has an "election of remedies," and where he has successfully maintained a suit on the bond he has not the right to also sue under section 24, though he may be entitled to items of damages not recoverable in an action on the bond. *Schellenberg v. Frank*, 102 N. W. 644, 645, 139 Mich. 183.

"There is a difference between an 'election of remedies' and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions on which recovery could not be had." *Zimmerman v. Robinson & Co.*, 102 N. W. 814, 816, 128 Iowa, 72, 5 Ann. Cas. 960 (quoting and adopting definition in *Sullivan v. Ross' Estate*, 76 N. W. 309, 113 Mich. 311; and citing *Glover v. Radford*, 79 N. W. 803, 120 Mich. 542; *McLaughlin v. Austin*, 62 N. W. 719, 104 Mich. 491; *Morris v. Rexford*, 18 N. Y. 552; *Miller v. Hyde*, 37 N. E. 760, 161 Mass. 472, 25 L. R. A. 42, 42 Am. St. Rep. 424; *Snow v. Alley*, 30 N. E. 691, 156 Mass. 193; *Johnson-Brinkman Commission Co. v. Missouri Pac. R. Co.*, 28 S. W. 870, 126 Mo. 344, 26 L. R. A. 840, 47 Am. St. Rep. 675; *Bunch v. Grave*, 12 N. E. 514, 111 Ind. 351; *Kittredge v. Holt*, 58 N. H. 191; *Standard Oil Co. of Ky. v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739; *Gibbs v. Jones*, 46 Ill. 319; *White v. Whiting*, 8 Daly [N. Y.] 23; *Powell v. Dayton, S. & G. R. R. Co.*, 16 Pac. 863, 16 Or. 33, 8 Am. St. Rep. 251).

"An election exists only where two or more inconsistent remedies are open to a party, and he is at liberty to pursue any one of them. It cannot exist between consistent concurrent remedies, or between a rightful remedy and one which the party may mistakenly suppose to be applicable." *Zimmerman v. Robinson & Co.*, 102 N. W. 814, 815, 128 Iowa, 72, 5 Ann. Cas. 960 (quoting and adopting definition in *Redhead Bros. v. Wyoming Cattle Inv. Co.*, 102 N. W. 144, 126 Iowa, 410, and citing *Klocow v. Patten*, 61 N. W. 926, 93 Iowa, 432; *Theusen v. Bryan*, 85 N. W. 802, 113 Iowa, 496; *Elliott v. Merchants' & Bankers' Fire Ins. Co.*, 79 N. W. 452, 109 Iowa, 39).

"If plaintiff was mistaken and undertook to avail himself of a remedy that he was not entitled to, this does not prevent him from subsequently availing himself of a remedy which he is entitled to under the facts in the case. \* \* \* No case has been called to my attention, nor do I believe any can be found, which holds that a person is estopped from pursuing a remedy that he is entitled to because he has attempted to avail himself of another remedy that he was never entitled to." *Zimmerman v. Robinson & Co.*, 102 N. W. 814, 816, 128 Iowa, 72, 5 Ann. Cas. 960 (quoting and adopting definition in *Fuller-Warren Co. v. Harter*, 85 N. W. 693, 110 Wis. 80, 53 L. R. A. 603, 84 Am. St. Rep. 867,

which quoted and adopted from *Agar v. Winslow*, 56 Pac. 422, 123 Cal. 587, 69 Am. St. Rep. 84).

An unsuccessful action to recover the price paid for property on the theory of a rescission of the purchase does not prevent action for a breach of warranty; the former action being a mistake of remedy, and not an election between remedies, either of which was open. *Zimmerman v. Robinson & Co.*, 102 N. W. 814, 815, 128 Iowa, 72, 5 Ann. Cas. 960.

Defendant was induced to purchase a house and lot by fraudulent representations of the vendor as to the condition of the inside of the house, and as to other matters concerning the property, and after she had taken a deed, and paid the purchase price, and examined the house, she demanded possession of the tenant. She had not then been informed of her legal rights or of the untruth of other representations; but a few days later she demanded rescission and never took possession. *Held*, that she was not barred on the ground that she had made an "election." *Annis v. Ferguson (Ky.)* 84 S. W. 553, 555.

Any unequivocal act whereby a seller, with knowledge of the buyer's fraud in procuring the sale, elects to treat the sale valid, whether made in court or not, is a sufficient "election" to prevent him from subsequently rescinding the sale on the ground of the fraud. *Seeley v. Seeley-Howe-Le Van Co.*, 105 N. W. 380, 382, 130 Iowa, 626, 114 Am. St. Rep. 452.

#### Of widow

"Election," as applied to the election of a widow provided for by will, means a choice between two courses of action, acquiescence by the widow in her husband's disposition of his property, or disregard of it and assertion of the rights the law gives her. There is no third or mixed course. A widow provided for by her husband's will has the choice of two rights, one under the statute of descents and distributions, and one under the will; but she cannot have both, except in cases where such is the purpose of the will. She may take either, but the election of one is a relinquishment of the other. *Ashelford v. Chapman*, 105 Pac. 534, 536, 81 Kan. 312 (citing *Cunningham's Estate*, 20 Atl. 714, 715, 137 Pa. 621, 627, 21 Am. St. Rep. 901; 2 Story, *Equity Jur.* [13th Ed.] § 1075, p. 415).

The "election" provided for in Rev. St. Ohio, § 5963, declaring that a widow shall not be entitled to both dower and the provisions of the will in her favor unless it plainly appears that was the intention of the testator, means a choice between two courses of action—either acquiescence by the widow in her husband's disposition of his property, or disregard of it and assertion of the rights given her by law. *Geiger v. Bitzer*, 88 N. E.

134, 136, 80 Ohio St. 65, 22 L. R. A. (N. S.) 285, 17 Ann. Cas. 151 (citing *In re Cunningham's Estate*, 20 Atl. 714, 137 Pa. 621, 21 Am. St. Rep. 901).

### ELECTION BY BALLOT

"The expression 'election by ballot' had been expounded and construed by various courts of last resort, and, with entire unanimity, they had declared it meant a secret ballot, and that the essential principle of this manner of voting was that the elector might conceal from every person the name of the candidate for whom he voted." *City of Detroit v. Board of Inspectors of Election for Fourth Election Dist. of Second Ward of City of Detroit*, 102 N. W. 1029, 1031, 139 Mich. 548, 69 L. R. A. 184, 111 Am. St. Rep. 430 (quoting and adopting definition in *State ex rel. Smith v. Anderson*, 8 South. 1, 26 Fla. 240, and citing *Ex parte Arnold*, 30 S. W. 769, 1036, 128 Mo. 260, 33 L. R. A. 386, 49 Am. St. Rep. 557; *Williams v. Stein*, 38 Ind. 90, 10 Am. Rep. 97; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Brislin v. Cleary*, 1 N. W. 825, 26 Minn. 107).

### ELECTION COMMISSIONER

As city officer, see *City Officer*.

### ELECTION CONTEST

See *Contest*.

### ELECTION DAY

The day of a school election is within the statutory provision that saloons shall not be open on any "election day." *Hammond v. King*, 114 N. W. 1062, 1063, 137 Iowa, 548.

### ELECTION DOWER

The "election dower" provided for by a statute to the effect that, if a husband dies without any descendants capable of inheriting, the widow is entitled to one-half of the real and personal property belonging to the husband at the time of his death absolutely, subject to the payments of his debts, being a creature of statute, differs from the dower allowed under another statute entitling a widow to one-third of the land owned by the husband, free from liability for her husband's debts. The principal difference is that ordinary dower is one-third of the estate for life, freed from liability for debts, while election dower is one-half absolutely, subject to debts, which may turn out to be so great as to wipe out the election dower absolutely. *Adams v. Adams*, 82 S. W. 66, 69, 183 Mo. 396.

"Election dower" is a wife's dower taken from choice, as distinguished from a dower without choice. Rev. St. 1899, §§ 2943, 2945, authorize a widow to elect to take dower, etc., by filing an election within 12 months after the granting of letters of administration, and prescribes the manner of making such election, etc. An owner died seised of land leaving a widow and an infant grand-

daughter his sole heir. The widow and granddaughter occupied the mansion house and enjoyed the fruits of the plantation for over twenty years without applying for the administration of his estate. The widow, within a year after the issuance of letters of administration, elected to take a child's share in the real estate of the decedent. Held, that the right of the widow to elect to take a child's share was not barred by laches in view of sections 2907, 3480, 3485-3487, relating to the appointment of a guardian, and authorizing a suit by an infant, etc., by virtue of which the infant could have instituted proceedings for administration. *Keeney v. McVoy*, 103 S. W. 946, 949, 206 Mo. 42 (citing *Newton v. Newton*, 61 S. W. 881, 884, 162 Mo. 187; *Adams v. Adams*, 82 S. W. 66, 69, 183 Mo. 407; *McFadin v. Board*, 87 S. W. 948, 949, 188 Mo. 688).

Rev. St. Mo. 1899, § 3621, providing that, when the interest of intestate's widow in the homestead shall equal or exceed one-third interest for and during her life in and to all the real estate of which her husband shall have died seised, no dower shall be assigned to such widow, applies only to common-law dower, and not to the estate which the widow may elect to take in lieu of dower, which has been aptly called "election dower." *Chrisman v. Linderman*, 100 S. W. 1090, 1095, 202 Mo. 605, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822.

### ELECTION IN CITY

The city election act (*Hurd's Rev. St. 1909*, c. 46, §§ 155-287d), regulating elections in cities, includes town elections, so far as the territory of the town is within the boundaries of the city, since to that extent the joint election is an "election in a city." *Bolles v. Prince*, 95 N. E. 40, 41, 250 Ill. 36.

### ELECTION LAW

A law providing for the nominations of candidates for public office by primary is an "election law," and primaries are "elections" within the constitutional provisions fixing the qualifications of voters. *People ex rel. Phillips v. Strassheim*, 88 N. E. 821, 823, 240 Ill. 279, 22 L. R. A. (N. S.) 1135.

### ELECTION OFFICER

Ky. St. § 1442, defines the term "officer of election" as a judge, clerk, sheriff, or person acting as sheriff at an election, or a member of the board for canvassing the returns. An inspector is not an election officer. *Commonwealth v. Goulet*, 125 S. W. 1083, 1084, 137 Ky. 464 (citing Ky. St. 1442).

St. 1898, c. 548, § 173, providing that no person shall be eligible or act as an election officer at a state, city, or town election in a voting precinct in which he is a candidate, and if the person appointed an election officer becomes a candidate at a town election, and does not resign, he shall be removed, and pro-

viding that the term "election officer" shall apply to moderators, etc., when taking part in the conduct of elections, does not apply to moderators in town elections, though officers thereof, since their duties as election officers are merely incidental to their other duties. *Wheeler v. Carter*, 62 N. E. 471, 472, 180 Mass. 382.

### ELECTION PERTAINING TO SCHOOL MATTERS

An election to determine whether bonds shall be issued by a city, for the construction of a school building is an "election pertaining to school matters," at which women may vote, as authorized by statute. *Hall v. City of Madison*, 107 N. W. 31, 33, 128 Wis. 132.

### ELECTION RETURNS

See Returns.

### ELECTIVE FRANCHISE

The exercise of the elective franchise is not a natural right, but is a right conferred by the state or body politic. *Savage v. Umpries* (Tex.) 118 S. W. 893, 900.

### ELECTIVE OFFICE

"Elective," as used with reference to officers in a civil service act, meant officers who are elected by the people or those whom the people are or have been accustomed to elect. *Ayers v. Hatch*, 56 N. E. 612, 613, 175 Mass. 489.

The word "elective" has diverse meanings, when applied to public officers. Act March 17, 1904, amending sections of the Revised Statutes relative to the tenure of municipal or other officers, extends the official terms of clerks of municipal councils in office at the time of the passage of the act until the election of their successors in January, 1906. *State ex rel. Gunn v. Witt*, 74 N. E. 1075, 1076, 72 Ohio St. 584.

Within the meaning of Civil Service Law (Laws 1899, p. 802, c. 370), § 12, providing that one clerk of each elective judicial officer shall be exempt from civil service, a coroner is an "elective judicial officer." *People ex rel. Schulum v. Harburger*, 116 N. Y. Supp. 994, 997, 132 App. Div. 260.

The offices of justices of the Municipal Court of the city of New York are elective within Const. art. 10, § 5, providing, in relation to filling vacancies in office, that, in case of elective officers, no person appointed to fill a vacancy shall hold his office under such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy. *In re Markland*, 132 N. Y. S. 735, 737, 73 Misc. Rep. 363.

Rem. & Bal. Code, § 4805, provides that candidates for "elective" offices, state, county, municipal, precinct, or "congressional" shall be nominated at a direct primary election. Section 4813 gives the order of arranging

positions on the ballot, first congressional, next state, next preferences for United States senators; and gives a form of ballot directing a vote for first choice, and a vote for second choice for representative in Congress, and a vote for one choice only for United States senator. Section 4822 provides that, where there are four or more candidates of any political party for a state or congressional position, every voter at the primary election shall designate a first choice and a second choice for each such position. Held, that a United States senator who is elected by the Legislature does not hold an "elective" office or a "congressional position" within the meaning of the primary election law, so as to make the provision for second choice voting applicable to him. *State ex rel. Duryee v. Howell*, 110 Pac. 543, 544, 59 Wash. 634.

### ELECTOR

See Organization of Electors; Qualified Elector; Submitted to Electors.

"Citizen" and "elector" are not synonymous, for the qualifications of a voter are prescribed by the laws of the different states. *In re Rousos*, 119 N. Y. Supp. 34, 86.

The word "elector," in a statute in relation to the issuance of bonds by municipalities, and providing that they shall not be issued unless authorized by a majority of the electors, means voters who have registered so as to be entitled to vote at any election held under the Constitution and laws of the state. *Greene v. Village of Rienzi*, 40 South. 17, 19, 87 Miss. 463, 112 Am. St. Rep. 449.

The word "elector" is a technical term, descriptive of a citizen having constitutional and statutory qualifications to vote. *Greenough v. Board of Police Com'rs of Town of Tiverton*, 74 Atl. 785, 788, 30 R. I. 212, 126 Am. St. Rep. 953.

Const. art. 20, § 1, requiring "a majority of the electors" to ratify an amendment to the Constitution, requires a majority of the electors to adopt an amendment, and not merely a majority of those actually voting thereon; the word "electors" meaning as defined by article 6, § 2, those entitled to vote. *State ex rel. Blair v. Brooks*, 99 Pac. 874, 875, 17 Wyo. 344, 22 L. R. A. (N. S.) 478.

Rev. St. 1898, § 943, as amended by Laws 1903, p. 486, c. 312, provides that no bonds shall be issued by any city until the proposition shall be submitted to the "people" of the municipality, and adopted by a majority voting thereon, and that when any such bond issued is contemplated, a special election for the purpose of submitting such question to the "electors" shall be called and held. Held, that the term "electors" referred to all persons legally entitled to vote on the proposition submitted, and therefore did not exclude women from voting on a proposition to issue bonds for the construction of a schoolhouse;

such election being an election at which women are authorized to vote, under Rev. St. 1898, § 428a. *Hall v. City of Madison*, 107 N. W. 31, 33, 128 Wis. 132.

In Const. § 121, as amended, providing who shall be a qualified elector, the word "qualified" neither adds to nor detracts from the meaning of the word "elector." It follows that the word "electors," as used in section 168, providing that all changes in the boundaries of organized counties shall be submitted to the electors at a general election means all persons who are qualified to vote. *State v. Blaisdell*, 119 N. W. 360, 362, 18 N. D. 31.

St. 1898, § 959—52, relating to municipal elections, requiring the petition for referendum to be signed by at least 20 per cent. of the "electors of a village as appears by the poll list" of the last general election, means 20 per cent. of the identical electors whose names appear on the last poll list, rather than 20 per cent. of the number of electors appearing on the poll list. *State ex rel. Hanlon v. Russell*, 102 N. W. 1052, 124 Wis. 548.

#### **Voter distinguished**

There is a distinction between an "elector" and a "voter," the former being one who legally has the right to vote, and the latter, not only possessing the right, but exercising it; and hence a statute authorizing the issuance of municipal bonds if two-thirds of the qualified voters shall vote therefor has reference to persons actually voting at the election. *Fabro v. Town of Gallup*, 103 Pac. 271, 275, 15 N. M. 108.

The word "voter," like the word "elector," is used in various senses; but, when used in opposition to or in contrast with the word "elector," it has but one meaning. A voter in this sense is an "elector" who exercises the privilege of voting. An "elector" is not a voter unless he votes, yet he still retains his qualifications as an "elector." *State v. Blaisdell*, 119 N. W. 360, 363, 18 N. D. 31.

The word "voters," as ordinarily used, has two meanings—persons who perform the act of voting, and persons who have the qualifications entitling them to vote. Its meaning depends on the connections in which it is used, and is not always equivalent to "electors." *Mills v. Hallgren*, 124 N. W. 1077, 1079, 146 Iowa, 215.

"Voter" is not synonymous with citizen or "elector," as persons who cannot vote may be eligible to citizenship. In *re Rousos*, 119 N. Y. Supp. 34, 36.

#### **As state officer**

See *State Officer*.

## **ELECTRIC**

### **ELECTRIC BUSINESS**

See, also, *General Business*.

### **ELECTRIC CAR**

Ordinances making it unlawful to operate or run any "street car" unprovided with a car fender of the most improved design and construction, and providing that no "electric car" shall be propelled or operated without having one conductor and one motorman thereon, require a fender, conductor, and motorman only on motor cars, and not on trailers. *Von Diest v. San Antonio Traction Co.*, 77 S. W. 632, 633, 33 Tex. Civ. App. 577.

### **ELECTRIC COMPANY**

As public service corporation, see *Public Service Corporation*.

### **ELECTRIC LIGHT PLANT**

See *Waterworks and Electric Light Plant*.

An "electric light" station with the necessary incidents attending its operation is a factory, within a restrictive building covenant. At one time an electric light plant might have been regarded as a manufactory of a fuid. More recently it might be deemed to be turning out electrons or ions. *Scrymser v. Seabright Electric Light Co.*, 70 Atl. 977, 74 N. J. Eq. 587.

### **ELECTRIC RAILROAD**

As railroad, see *Railroad—Railway*.

### **ELECTRIC SHUNT**

An "electric shunt" is an additional course or side track established for the passage of part of an electric current. A metal of greater electrical resistance is introduced into the wire or vehicle carrying the electric current, and the two terminal portions of such metal are connected by wires with a measuring instrument. A portion of the current is thus shunted off and passed through the measuring instrument. *Western Electrical Instrument Co. v. Empire Electrical Instrument Co.*, 131 Fed. 82.

### **ELECTRICAL APPLIANCES**

As materials, see *Materials*.

## **ELECTRICITY**

As personal property, see *Personal Property*.

As public utility, see *Public Utility*.

As supplies, see *Supply (Noun)*.

Manufactures of, see *Manufactures—Manufactured Articles*.

Production of electricity, as mercantile pursuit, see *Mercantile*.

"'Electricity' is one of the most insidious and dangerous agencies known to man; it is the most dangerous form of peril, for it moves unseen, unheard, gives no warning, and may travel anywhere and everywhere." *Harrison v. Kansas City Electric Light Co.*, 93 S. W. 951, 958, 195 Mo. 606, 7 L. R. A. (N. S.) 293.



"Electricity is an invisible, impalpable force highly dangerous to life and property and those who make, sell, distribute, use, or handle it are bound to exercise care in proportion to the danger involved." *Elning v. Georgia Ry. & Electric Co.*, 66 S. E. 237, 238, 133 Ga. 458 (quoting and adopting definition in 2 Cooley, Torts [3d Ed.] 1492, 1493).

"The art of insulating electric wires has been known almost as long as that of conducting electricity for practical purposes by means of wires." *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 12 Sup. Ct. 601, 604, 144 U. S. 11, 36 L. Ed. 327.

"Electricity" is a powerful and subtle force, and its nature and manner of use not well understood by the public, nor its presence easily determined or ascertained. Those manufacturing and using electricity are required to use the utmost care to protect others from danger. *Mangan's Adm'r v. Louisville Electric Light Co.*, 91 S. W. 703, 705, 122 Ky. 476, 6 L. R. A. (N. S.) 459.

#### **ELECTROCUTION**

As cruel and unusual punishment, see Cruel and Unusual Punishment.

#### **ELECTRODE**

"Electrodes" are the sparking points of an open electric circuit. *Jackson v. Porter Land & Water Co.*, 90 Pac. 122, 124, 151 Cal. 32.

#### **ELECTROLYSIS—ELECTROLYTE**

"Electrolysis" is the decomposition of a metal solution in water, liquid ammonia, etc., accompanied by decomposition of the water into oxygen and hydrogen, or of a mass of molten metal, by having an electric current passed through it. The solution or melted mass is known as "electrolyte." *Peoria Waterworks Co. v. Peoria R. Co.*, 181 Fed. 990, 1001.

#### **ELECTRO-MAGNETISM**

"Electro-magnetism" is developed whenever a current of electricity passes through a coiled wire, the space within the coil becoming a magnetic field, which will magnetize an iron core placed therein, or, even if there be no core, will attract a piece of iron so as to draw it into the coil. The magnetic attraction increases with an increase of the volume of electric current. *Westinghouse Electric & Mfg. Co. v. Cutter Electric & Mfg. Co.*, 136 Fed. 217, 218.

#### **ELEEMOSYNARY**

Charitable synonymous, see Charity.

The words religious and "eleemosynary," when used to designate institutions, may necessarily imply that the institutions are engaged in public and not private charitable work. In *re Shattuck's Will*, 86 N. E. 455, 456, 193 N. Y. 446.

The word "eleemosynary," as used in Const. art. 20, § 9, forbidding perpetuities except for eleemosynary purposes, is synonymous with "charitable." In *re Sutro's Estate*, 102 Pac. 920, 922, 155 Cal. 727.

#### **ELEMENTS**

In the popular acceptance of the phrase "injuries by the elements" are such injuries as result from the operation of the most common destructive forces of nature against which buildings need to be protected. Injuries to buildings by wind, rain, frost, and heat are spoken of as injuries by the elements, and all the ordinary decay from natural causes is classed in the same category. An express covenant on the part of a landlord to repair and restore the demised premises to their former condition in case they are injured by the elements, etc., includes injuries resulting from the action of the elements causing natural and gradual decay. *Hanchett v. O'Reilly*, 68 Atl. 1066, 76 N. J. Law, 212 (quoting *Van Wormer v. Crane*, 16 N. W. 686, 51 Mich. 363, 47 Am. Rep. 582).

A provision in a lease that, in case the building on the leased premises is destroyed or rendered untenable by "the elements or act of God," the lessor shall rebuild the same, does not require the lessor to restore the building where it became so dilapidated from age, gradual decay, and frequent alterations made by the lessee and tenants who preceded him that it was condemned, and destroyed by municipal authorities as unsafe, since such destruction of the building did not result from the "elements" or the "act of God." *Kirby v. Wylie*, 70 Atl. 213, 215, 108 Md. 501, 21 L. R. A. (N. S.) 129, 129 Am. St. Rep. 451.

The expression "damage by the elements" as used in a lease exempting a tenant from repairing such damage includes all injury by wind, rain, frosts, and heat, as well as all ordinary decay from natural causes. *Sweezy v. Collins Northern Ice Co.*, 137 N. W. 84, 86, 171 Mich. 75.

#### **ELEVATED RAILROAD**

As railroad, see Railroad—Railway.  
As street railroad, see Street Railroad.

#### **ELEVATED ROAD**

As bridge, see Bridge.

#### **ELEVATED TRAIN**

Surface cars belonging to an elevated railway, which run up an incline to a junction platform, used to discharge passengers from the elevated trains to the surface cars and vice versa, are not elevated trains, within St. 1908, c. 420, which provides that an employé shall, for the negligence of a servant in charge of an "elevated train," have the same rights as if he were not an employé;

therefore a conductor of such a surface car, who was injured by the negligence of the motorman of another such car, cannot recover against the company. *Dow v. Boston Elevated Ry. Co.*, 93 N. E. 655, 207 Mass. 486.

## ELEVATING MACHINE

A gin pole to which was attached a block and fall used to haul beams to the third floor of a new building, the walls and girders of which had not yet been constructed, was not an "elevating machine," within Laws 1897, c. 415, § 20, as amended by Laws 1899, c. 192, providing that, where elevating machines or hoisting apparatus are used within buildings in process of construction, contractors or owners shall cause the shafts or openings in each floor to be inclosed by a barrier. *McNeill v. Bottsford-Dickinson Co.*, 112 N. Y. Supp. 867, 869, 128 App. Div. 544.

## ELEVATION

"Elevation" of grain consists in unloading it from cars or vessels into elevators, and the loading of the grain out again into cars or other vehicles. Elevator allowance or payment limited by carriers' schedules to grain unloaded out of cars from the west and loaded into cars for points east, north, and south, is "elevation" and "transfer in transit" within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), declaring that "all services in connection with the \* \* \* 'elevation' \* \* \* of the property transported" are transportation, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, to provide that transportation shall include "all services in connection with the receipt, delivery, 'elevation' and transfer in transit." *F. H. Peavey & Co. v. Union Pac. R. Co.*, 176 Fed. 409, 411, 421, 423.

## ELEVATOR

See Grain Elevator; Public Elevator.

As common carriers, see Common Carrier.

As storehouse, see Storehouse.

As warehouse, see Warehouse.

As workshop, see Workshop.

A warehouse, standing within 2½ feet of an elevator building and about the same size as the elevator, to which it is fastened by strips of boards nailed upon each building, used as a part of the elevator, is so connected with it that, in view especially of this use, it must be construed as having been intended by the parties to be included in the designation "elevator building and additions." A policy on a laundry in course of construction, describing the property covered as a two-story basement and brick building, with metal roof, and its additions adjoining and communicating, including foundations, included a boiler house situated about 4 feet

distant connected with the main building only by a steam pipe conveying power for the main building, a partially completed platform, and overhead archway between the two buildings. *Guthrie Laundry Co. v. Northern Assur. Co. of London*, 87 Pac. 649, 651, 17 Okl. 571, 10 Ann. Cas. 936 (citing and adopting *Cargill v. Millers' & Manufacturers' Mut. Ins. Co.*, 22 N. W. 6, 33 Minn. 90).

## ELEVATOR CAR

As vehicle, see Vehicle.

## ELIGIBLE

See Ineligible.

The word "eligible," used in Const. art. 9, § 5, and Laws 1907, c. 135, § 21, providing that the county superintendent of schools shall be elected for two years, and shall not be eligible for more than four years in succession, means that a person who had served for two terms was not legally qualified for election or appointment to another term only, and did not preclude a county superintendent who had served for two successive terms from holding over until a *de jure* superintendent was elected or appointed in his place on it being determined that the person elected to succeed him was ineligible. *Jones v. Roberts County*, 131 N. W. 861, 862, 27 S. D. 519, 34 L. R. A. (N. S.) 1170.

Under Laws 1879, p. 243, § 10, declaring the county treasurer "ineligible" to office for more than two consecutive terms, an appointment to complete the term of another is not an election to office for a term, and such appointment and holding for ten months thereunder does not make one ineligible to be elected for the office for the two consecutive terms immediately following the term during which he was so appointed. *Dodson v. Bowlby*, 110 N. W. 698, 700, 78 Neb. 190.

Though Const. art. 2, § 19, and Rev. St. 1909, § 11,446, provide that no collector or receiver of public money shall be eligible to any office of trust or profit until he shall have accounted for and paid over all public money for which he may be accountable, a collector of revenue may, before the expiration of his term of office, become a candidate for and be elected to another office of trust or profit, since the word "eligible," as so used, has reference to the actual assumption of the duties of an office, and it is sufficient if the condition is complied with before the functions of the new office are to be taken up, though in other cases the word may be used in reference, sometimes to the one date and sometimes to the other. *State ex inf. Major ex rel. Ryors v. Breuer*, 138 S. W. 515, 516, 235 Mo. 240.

The word "eligible," as used in the state Constitution, relates to the capacity of holding as well as the capacity of being elected to an office. *McComas v. Krug*, 81 Ind. 327,

334, 42 Am. Rep. 135 (citing *Carsons v. McPhetridge*, 15 Ind. 327).

#### As capable of being chosen

The word "eligible," as used in the Constitution and statutes concerning election to office, means capacity to hold office at the time of the election; and, if disqualified at that time, a subsequent removal of the disability will not qualify. *Finklea v. Farish*, 49 South. 366, 368, 160 Ala. 230.

#### As capable of holding office

Section 1597, Comp. Laws 1909, provides: "Nor shall any county attorney, while in office be eligible to or hold any judicial position whatever." Held, that the word "eligible," as used in the statute, means "legally qualified to hold office," and does not mean "eligible to be elected or appointed to a judicial office." Under this statute, a county attorney may be either elected or appointed to a judicial position, while holding the office of county attorney, and will be eligible to qualify for such judicial position, if his term as county attorney has expired by law, or been terminated by resignation, prior to the time it is necessary to qualify for the judicial office. *State ex rel. West v. Breckinridge*, 126 Pac. 806, 808, 34 Okl. 649; *State ex rel. Reynolds v. Howell*, 126 Pac. 954, 956, 70 Wash. 467, 41 L. R. A. (N. S.) 1119.

Where the words in a statute prescribing the qualifications for a public office are "eligible to office," or the equivalent, the eligibility must exist at the time of entering on the office, and need not exist at the time of election. *State v. Huegle*, 112 N. W. 234, 235, 135 Iowa, 100.

Where the constitution of an association provided that any persons eligible to vote might become members, the word "eligible" has reference to the qualification necessary to membership, and does not require prospective members to be actual voters or to be registered as such. *Parker v. Oliver*, 84 N. E. 860, 862, 198 Mass. 488.

The phrase "eligible to any office," used in a statute, providing that no officer of any corporation having any contract with the city shall be "eligible to any office," refers to the beginning of the term of office, and not to the election, and so one whose disability may be removed before the beginning of the term may be properly elected. *Hoy v. State ex rel. Buchanan*, 81 N. E. 509, 513, 168 Ind. 506, 11 Ann. Cas. 944.

The word "eligibility," as used in connection with an office, or the person to be elected to fill an office, where there are no explanatory words indicating that it is used with reference to the time of election, has reference to the qualification to hold office, rather than to be elected to the office. Rev. Codes, § 585, declaring that no person shall be eligible to the office of county superintendent of public instruction except a first-

grade teacher, with not less than two years' experience in the state, one of which must have been while holding a valid first grade certificate issued by a county superintendent, relates to the time when the person so elected is inducted into office, and, though he does not possess such qualification when elected, yet, if the disqualification is removed at the time he is inducted into office, he is eligible. *Bradfield v. Avery*, 102 Pac. 687, 688, 16 Idaho, 769, 23 L. R. A. (N. S.) 1228.

## ELIMINATED

Where an appellant's brief states that he has "eliminated" from the "argument practically all other points" except a certain point, it amounts to an abandonment of all other grounds. *Merritt v. Crane Co.*, 80 N. E. 103, 106, 225 Ill. 181.

## ELLIOTT

An "Elliott" or closed cup is a device used in determining the "flash point" or temperature of heated oil at which the vapor arising therefrom flashes momentarily into a perceptible flame upon the application to it of fire and then immediately goes out, and the "fire point" or temperature of the heated oil at which upon the application of fire combustion continues uninterruptedly until the oil is entirely consumed. It was for the jury to determine whether this cup was a proper and reliable one to be used for this purpose. *State v. Boylan*, 65 Atl. 595, 596, 79 Conn. 463.

## ELSE

See Anything Else.

## ELSEWHERE

See Or Elsewhere.

The fact that a policy of insurance provided that the property was insured while contained in the specific premises "and not elsewhere" did not cause the insurance to cease ipso facto upon the removal and did not vary the effect of the insurer's waiver. The words "and not elsewhere" did not convey any further or different meaning to the other words locating the place where the goods were located, as without their use it is plain that the goods were insured while in the place described and nowhere else. *McIntyre v. Liverpool, London & Globe Ins. Co.*, 110 S. W. 604, 605, 131 Mo. App. 88.

## EMANCIPATION

See Express Emancipation; Implied Emancipation.

Complete emancipation is an entire surrender of all the rights to the care, custody, and earnings of the child, as well as a renunciation of parental duties, and the test to be applied is that of the preservation or

destruction of the parental and filial relations. *Brosius v. Barker*, 136 S. W. 18, 19, 154 Mo. App. 657.

"Emancipation" of a child is the relinquishment by a parent of control and authority over his child, conferring on the child the right to his earnings and extinguishing the parent's legal duty to maintain and support the child. Emancipation is "express" when the parent voluntarily agrees with the child, who is able to take care of and provide for himself, that he may go from home, earn his own living, and control his earnings, or when the father voluntarily transfers the custody and keeping of the child to another. An express emancipation cannot be renounced by the parent. An "implied emancipation" results where the parent, by his acts or conduct, impliedly consents that the minor may leave home and shift for himself; the father, under these circumstances, however, being authorized to renounce the same within a reasonable time. *Rounds Bros. v. McDaniel*, 118 S. W. 956, 958, 133 Ky. 669, 134 Am. St. Rep. 482, 19 Ann. Cas. 326.

As applied to the relinquishment of the claim to the services of a minor child, to "emancipate" means to release, to set free, and to free a child for all the period of minority, from care, custody, control, and service would be a general emancipation, but to free him from only a part of the period of minority, or from only a part of the parent's rights, would be limited. *Bristor v. Chicago & N. W. Ry. Co.*, 104 N. W. 487, 488, 128 Iowa, 479.

A judgment for defendant in an action by a parent as next friend of a minor child for injuries received by the child, in which evidence of loss of services of the child during minority and of money expended on account of the injuries was introduced, is a bar to an action by the parent for loss of services of the child and expenses incurred on account of the injuries; the act of the parent in the action by him as next friend constituting an "emancipation" of the child, or at least a relinquishment of his right to damages. *Bowring v. Wilmington Malleable Iron Co.*, 67 Atl. 160, 162, 6 Pennewill, 332 (citing *Farrell v. Farrell* [Del.] 3 Houst. 633; *Armstrong v. McDonald* [N. Y.] 10 Barb. 300; *Gooden v. Rayl*, 52 N. W. 506, 85 Iowa, 592; *Abeles v. Bransfield*, 19 Kan. 16; *Baker v. Flint & P. M. R. Co.*, 51 N. W. 897, 91 Mich. 298, 16 L. R. A. 154, 30 Am. St. Rep. 471; distinguishing *Peppercorn v. City of Black River Falls*, 61 N. W. 79, 89 Wis. 38, 46 Am. St. Rep. 818; *Wilton v. Middlesex R. Co.*, 125 Mass. 130; *Horgan v. Pacific*, 33 N. E. 581, 158 Mass. 402, 35 Am. St. Rep. 504; *Texas & P. Ry. Co. v. Morin*, 18 S. W. 345, 66 Tex. 133; *Lieberman v. Third Ave. R. Co.*, 55 N. Y. Supp. 677, 25 Misc. Rep. 704).

## EMBANKMENT

An "embankment" is defined as a mound, bank, or dike of earthwork raised for any purpose, as to carry a canal, road, or railway over a valley. Cent. Dict. But so far as the danger to highway travel is concerned, it cannot matter whether the raised condition above the adjoining soil is produced by filling the roadway or digging away the soil adjoining. A road along the side of an excavation may be a dangerous embankment within the statute. *Wilder v. City of Concord*, 56 Atl. 193, 196, 72 N. H. 259.

The words "embankment" and "dike," when used to represent the means employed to prevent the inundation of land, are synonymous, and mean a structure of earth or other material usually placed upon the bank of a stream, or near the shore of a lake, bay, etc., the ends of which extend across low land to higher ground forming a continuous bulwark or obstruction to water, designed to keep it within the inclosure thus formed. *Morton v. Oregon Short Line Ry. Co.*, 87 Pac. 151, 153, 48 Or. 444, 7 L. R. A. (N. S.) 344, 120 Am. St. Rep. 827.

The word "embankment," as used in *Mills' Ann. St. § 2272*, making the owners of reservoirs liable for all damages from leakage or overflow of the waters or by floods caused by breaking of the embankments, and *Laws 1899, c. 126, § 9*, providing that none of its provisions shall relieve the owner of any such reservoir from the payment of damages caused by the breaking of the embankments thereof, but in the event of any such reservoirs overflowing, or the embankments, dams, or outlets breaking or washing out, the owners thereof shall be liable for all damages occasioned thereby, must be construed as including barriers. Hence the owners of reservoirs are liable absolutely for all damages from leakage or overflow of the water, or by floods caused by the breaking of an embankment, and they are not relieved from such liability by the fact that they have omitted nothing that human skill and foresight could suggest in the construction and maintenance of the reservoir to render it absolutely safe, and their liability is the same, even if they have used a natural hillside as a part of the retaining wall and it washes out. *Garnet Ditch & Reservoir Co. v. Sampson*, 110 Pac. 79, 80, 1136, 1137, 48 Colo. 285.

### As permanent structure

See Permanent Structure.

### As railroad track

See Railroad Track.

## EMBARGO

An "embargo" is a notice, issued by a common carrier, refusing to receive or carry certain kinds of freight on its line, or be-

tween certain points, and may be for a limited and definite period, or for an unlimited or indefinite period. It is the result of a congestion of business that makes it impossible for a road to carry all the freight that is offered it. *Chesapeake & O. Ry. Co. v. O'Gara, King & Co.*, 139 S. W. 803, 806, 144 Ky. 561.

## EMBEZZLEMENTS

Where a lessor and a lessee agreed that all "improvements" made by the lessee or "embellishments and reconstructions" were to remain in the building, articles which did not enter into and form a part of the property leased separate therefrom and not attached to the lessee's property belonged to the lessor. *Morris v. Pratt*, 38 South. 70, 71, 114 La. 98.

## EMBEZZLE—EMBEZZLEMENT

See, also, Bailee; Bailment.

Embezzlement means to appropriate fraudulently to one's own use. *State v. Dudenhefer*, 47 South. 614, 616, 122 La. 288; *United States v. McClure*, 107 Fed. 268, 271.

Embezzlement is the fraudulent and felonious appropriation of another's property by persons to whom it has been intrusted, or into whose hands it has lawfully come. *Hanna v. Minnesota Mut. Life Ins. Co.*, 145 S. W. 412, 418, 241 Mo. 383; *Vansant v. State*, 53 Atl. 711, 713, 96 Md. 110; *State v. Casey*, 105 S. W. 645, 647, 207 Mo. 1, 123 Am. St. Rep. 367, 13 Ann. Cas. 878; *State v. Seeney* (Del.) 59 Atl. 48, 49, 5 Pennewill, 142 (citing *Ketchum v. Corse*, 31 Atl. 486, 65 Conn. 89).

The crime of "embezzlement," as generally defined by the statutes, consists essentially of the fraudulent conversion or misappropriation of property received in a fiduciary capacity. *State v. Carmean*, 102 N. W. 97, 98, 126 Iowa, 291, 106 Am. St. Rep. 352.

It is "embezzlement" where one collects money for another and neglects or refuses to turn it over but uses the money himself. *State v. Conklin*, 84 Pac. 482, 484, 47 Or. 509.

"Embezzling" is the wrongful and felonious appropriation to himself by a servant, employé of a civil corporation, or other person designated in the statute of property intrusted to him by his employer. *State v. Sullivan*, 21 South. 688, 689, 49 La. Ann. 200, 62 Am. St. Rep. 644 (Bishop's Cr. Proc. § 322; *State v. Wolff*, 34 La. Ann. 1154; *State v. O'Kean*, 35 La. Ann. 903; *State v. Roubles*, 9 South. 435, 43 La. Ann. 201, 26 Am. St. Rep. 179).

"Embezzle" is defined by Webster to mean "to appropriate fraudulently to one's own use, as property intrusted to one's care; to apply to one's private use by a breach of trust, as to embezzle money held in trust." *United States Fidelity & Guaranty Co. v. Sexton*, 67 S. E. 649, 651, 134 Ga. 56.

Embezzlement contemplates the appropriation by one of the property of another with the intent wrongfully to convert it to his own use, and such appropriation of the goods of another and their unlawful conversion may be of goods or personal property which were lawfully received in the first instance. *State v. Lyons* (Del.) 80 Atl. 976, 977.

Under Code, § 834, declaring embezzlement to consist in the wrongful conversion to one's own use of property which has come into his possession by virtue of his employment, or in the fraudulent taking, making way with, or secreting with intent to convert such property, an allegation in an indictment for embezzlement, that a railroad conductor failed to punch tickets when collected, and to deliver them to his employer, and thereafter converted them to his own use in the District of Columbia, is sufficient. *Gassenheimer v. United States*, 26 App. D. C. 432, 440.

Rev. Codes, § 7068, defines the crime of "embezzlement" as follows: Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. *State v. Sage*, 126 Pac. 403, 405, 22 Idaho, 489.

Comp. Laws 1897, § 1125, provides that if any person to whom is intrusted money shall convert to his own use any part of said money or neglect or refuse to pay it over "or any part thereof" according to the provisions of law, so that he shall not be able to meet the demands of any person lawfully demanding the same, he shall be deemed guilty of "embezzlement." Held that in order to constitute the crime the money must not only have been converted, but defendant must have been unable to meet the demands of any person lawfully demanding the same. *Territory v. Abeyta*, 89 Pac. 254, 255, 14 N. M. 56.

Under Pen. Code, §§ 950-952, requiring an indictment to be direct and certain, and to contain such a statement of the facts that a person of common understanding may know what is intended, an indictment charging that an agent and servant did "willfully, unlawfully, and fraudulently," "appropriate to his own use" certain money of his employer, does not charge an "embezzlement" under section 504, which requires the appropriation to be a "use or purpose not in the due and lawful execution of his trust." As said in *People v. Shearer*, 143 Cal. 166, 76 Pac. 813: "'Embezzlement' is purely a statutory offense. Under the provisions of our statutes it is essential to the commission

thereof that there should be a fraudulent appropriation of property to some use or purpose not in the due and lawful execution of his trust by one to whose possession it has come by reason of some relation of trust or confidence mentioned in the statute, and existing between him and another and it is therefore necessary that an indictment or information for embezzlement should allege the trust relation, in order that it may be determined therefrom whether there has been any such violation of a trust or confidence reposed in the defendant." *People v. McMahill*, 87 Pac. 404, 405, 4 Cal. App. 225 (citing *People v. Terrill*, 59 Pac. 836, 127 Cal. 99).

"Embezzlement," speaking generally, is a breach of trust or duty with respect to moneys, properties, or effects in possession of a party and intrusted to him by another, and the appropriation of such moneys, properties, or effects, or a part thereof, to the use of the party so intrusted. Embezzlement is a technical expression, and applies only to cases in which the party charged occupies a trust or fiduciary relation, and takes the money or properties so intrusted and unlawfully applies the same to his own use. It is different from every other form of taking the property of another, in that it embraces the fact of having the same in possession and in trust when it is taken, and misapplied to the private use of the person charged. *United States v. Breese*, 173 Fed. 402, 405, 406.

Under Rev. St. § 6842, defining "embezzlement," the offense consists in converting to his own use "anything of value which comes into his possession by virtue of his employment, as \* \* \* agent, \* \* \* servant or employé." The statutory definition of the offense regards the actual relation of the agent, servant, or employé, and not the legality of the mode in which it was created, nor the extent of the authority conferred. *State v. Pohlmeier*, 52 N. E. 1027, 1028, 59 Ohio St. 491.

Under Pen. Code, § 461, declaring that a bailee's fraudulent conversion of property, or the proceeds thereof, to his own use, with a fraudulent intent, is "embezzlement," and section 463, providing that no person shall be adjudged guilty of embezzlement until a demand for return of the property converted shall have been made, "embezzlement" is complete when the property is fraudulently and feloniously converted. *Territory v. Monroe*, 85 Pac. 651, 652, 10 Ariz. 53.

Under Rev. Codes 1899, § 7462, defining the crime of embezzlement as the fraudulent appropriation of property or secreting it with intent to fraudulently appropriate it, an information charging defendant with fraudulently appropriating property or secreting it with fraudulent intent to appropriate it is bad on demurrer as not showing whether the embezzlement was by fraudulent appropri-

tion or fraudulent secretion. *State v. Lonne*, 107 N. W. 524, 525, 15 N. D. 275.

"Embezzlement" is a fraudulent appropriation of the property of another by a person to whom it has been intrusted. There is no settled mode by which this appropriation must take place, and it may occur in any one of the numberless methods which may suggest itself to the particular individual. *Henderson v. State*, 117 S. W. 825, 828, 55 Tex. Cr. R. 640.

#### As breach of trust—By bank officer

The crime of "embezzlement" from a national bank by an officer, clerk, or agent, within Rev. St. § 5209, involves two general elements: First, a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, the wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others. *United States v. Breese*, 131 Fed. 915, 919, 920, 921 (quoting and adopting definition in *United States v. Harper*, 33 Fed. 474-476).

#### Same—By public officer

The crime of embezzlement is committed by a public officer under Rev. St. 1887, §§ 7065, 7066, where he fraudulently appropriates to his own use any money or property which he has in his possession or under his control by virtue of his trust as such officer. *State v. Steers*, 85 Pac. 104, 106, 12 Idaho, 174.

Pen. Code, § 458, is as follows: "Every officer of this territory or of any county, city, or other municipal corporation or subdivision thereof, and every deputy, clerk or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society or corporation (public or private) who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of 'embezzlement.'" *Sias v. Territory*, 89 Pac. 539, 540, 11 Ariz. 175.

Rev. St. § 5490, declares that every officer charged with the safe-keeping of public money who fails to safely keep it without loaning, using, or converting it to his own use is guilty of "embezzlement" of the money so loaned, used, or converted. *United States v. Mason*, 31 Sup. Ct. 28, 30, 218 U. S. 517, 54 L. Ed. 1133; *State v. Hogg*, 53 South. 225, 126 La. 1053, 29 L. R. A. (N. S.) 830, 21 Ann. Cas. 124.

Under the act of the Twenty-Sixth General Assembly, amending Code, § 4840, by providing that any officer receiving money belonging to the county of which he is an officer shall be deemed to have received it by virtue of his office, and in case he fails or neglects to account therefor, on demand of a person entitled thereto, he shall be deemed guilty of embezzlement, adds an additional ground on which the charge of embezzlement may be based, and does not add an additional element to each of the acts previously named by section 4840, as constituting embezzlement. *State v. McKinney*, 106 N. W. 931, 932, 130 Iowa, 370.

Under Pen. Code 1901, §§ 398, 457, providing that every officer of any county charged with the safe-keeping of public moneys who, without authority of law, appropriates the same to his own use shall be punished, and defining embezzlement as the fraudulent appropriation of property by one to whom it has been intrusted, the appropriation by a county treasurer to his own use without authority of law of public moneys in his official possession is fraudulent and is embezzlement. *Storm v. Territory*, 94 Pac. 1099, 1102, 12 Ariz. 26.

#### As common-law offense

"Embezzlement" is a statutory and not a common-law crime. *McInnis v. State*, 52 South. 634, 636, 97 Miss. 280; *Smedley v. Commonwealth*, 127 S. W. 485, 486, 138 Ky. 1; *State v. Browning*, 82 Pac. 955, 956, 47 Or. 470; *Williams v. United States Fidelity & Guaranty Co.*, 66 Atl. 495, 496, 105 Md. 490.

The crime of "embezzlement" is purely of statutory origin, intended to cover the misappropriation of property not punishable as larceny. *State v. Finnegan*, 103 N. W. 155, 156, 127 Iowa, 286, 4 Ann. Cas. 628.

"Embezzlement" was first made a criminal offense by 21 Henry VIII, c. 7. *State v. McDonald*, 45 S. E. 582, 583, 133 N. C. 680.

"Embezzlement" is not a common-law crime, but one created by a statute of Louisiana, and in determining whether the acts charged to have been committed constitute embezzlement the terms of the statute are controlling. *State v. Sullivan*, 21 South. 688, 689, 49 La. Ann. 200, 62 Am. St. Rep. 644.

#### As descriptive of offense

Under Code § 834, declaring embezzlement to consist in the wrongful conversion to one's own use of property which has come into his possession by virtue of his employment, the words "convert to his own use" have a legal signification, and it is not necessary in indictments for embezzlement to allege the particular way or means by which the conversion was effected. *Gassenheimer v. United States*, 26 App. D. C. 432, 438.

It was not essential to the validity of an information against the treasurer of a

labor organization, under Rev. St. 1899, § 1918, making it embezzlement for an officer or member of any trade organization to convert to his own use any money that may have come into his hands by virtue of his office or any trust reposed in him, to allege that the money was converted by defendant to his own use without the consent of the owners and with the intent to deprive the owners of the use of the money permanently. *State v. Skinner*, 109 S. W. 38, 40, 210 Mo. 373.

The word "embezzles," as used in the statute relating to embezzlement, has a technical meaning which suggests the character and scope of the proof required, and involves two general elements: First, a breach of duty or trust in respect of money, property, or effects in the party's possession, belonging to another; second a wrongful or fraudulent appropriation thereof to his own use. *Wall v. State*, 56 South. 57, 60, 2 Ala. App. 157.

The fraudulent appropriation of property or the secreting of it with a fraudulent intent to appropriate it as described in Rev. Codes 1899, § 7462, defining "embezzlement," are different acts or facts that may constitute the crime of "embezzlement," and are not the means of committing the offense. *State v. Lonnie*, 107 N. W. 524, 525, 15 N. D. 275.

#### As fraudulently convert

Comp. Laws, § 11,562, provides that if any cashier, or other officer, agent, or servant of any incorporated bank, shall embezzle or fraudulently convert to his own use any money, etc., or any other effects or property belonging to and in possession of such bank, or belonging to any person and deposited therein, he shall be deemed to have committed larceny in such bank, etc. Held that, though the statute creates two species of larceny, one defined by the word "embezzle," the other by the words "fraudulently convert to his own use," an information charging that defendant, as cashier of a certain bank, did feloniously embezzle and fraudulently convert to his own use certain moneys, etc., charged embezzlement larceny, and that the use of the words "and fraudulently convert to his own use" did not make the count uncertain or double; the words, while also found in the statute as describing a different phase of the offense, being nevertheless likewise appropriate to the description of the offense of embezzlement. *People v. Messer*, 111 N. W. 854-857, 148 Mich. 168.

While "embezzlement" is a statutory offense, yet the word "embezzle" has now acquired a technical meaning, as has the synonymous or kindred phrase "fraudulently convert to his own use," and it is sufficient to charge the crime in the language of the statute which provides that if any officer, agent, etc., "embezzles or fraudulently dis-

poses of, or converts to his own use, or takes or secretes with intent so to do, anything of value which has been intrusted to him, or has come into his possession, care, custody, or control by reason of his office, employment or membership, he shall be punished as if he had been convicted of larceny." *Teston v. State*, 39 South. 787, 788, 50 Fla. 138.

#### Intent to defraud

In "embezzlement" the intent to defraud is necessary to be shown by the state before defendant can be convicted. *State v. Seeney*, 59 Atl. 48, 49, 5 Pennewill. 142.

Under a statute making the fraudulent conversion of a right of action "embezzlement," a managing agent who sold grain and instead of receiving the money due thereon caused the proceeds to be applied by the purchaser on the agent's personal account, is guilty of embezzlement. To constitute embezzlement there must be a fraudulent intent to convert the property. *Iligbee v. State*, 104 N. W. 748-750, 74 Neb. 331.

Under U. S. Comp. St. 1901, § 4046, making every postmaster guilty of embezzlement who converts to his own use any money order funds, any appropriation of such funds by a postmaster to his own use is embezzlement, regardless of the intent or purpose of the conversion. *Griffin v. Zuber*, 113 S. W. 961, 962, 52 Tex. Civ. App. 288.

Under Code, § 834, declaring embezzlement to be the unlawful conversion to his own use, by the accused, of property which has come into his possession by virtue of his employment, an indictment is sufficient which alleges such wrongful conversion; and an allegation of an intent to defraud is not necessary. *O'Brien v. United States*, 27 App. D. C. 263, 265.

To constitute embezzlement under the statute, the appropriation of another's money or choses in action must be with intent to defraud. *State v. Lanyon*, 76 Atl. 1095, 1097, 83 Conn. 449.

An instruction, defining "embezzlement" by an agent, which fails to include the element that the conversion by the agent was without the assent of his employer, is erroneous. *State v. Lentz*, 83 S. W. 970, 972, 184 Mo. 223.

The gravamen of the offense of embezzlement, as defined by Ky. St. 1903, § 1202, to be a "fraudulent conversion by an agent to his own use of money or property belonging to another which shall have come into his possession \* \* \* as such agent," is the criminal intent, which must be gathered from the acts of the agent and the circumstances surrounding the case. *National Life & Accident Ins. Co. v. Gibson (Ky.)* 101 S. W. 895, 897, 12 L. R. A. (N. S.) 717.

The gravamen of embezzlement is that one who has come rightfully into possession

of personality as agent, etc., not being capable of committing a trespass, which is a necessary element of larceny, fraudulently converts it to his own use, or fraudulently secretes it with intent to convert it to his own use, or the use of another. To constitute embezzlement, there must at least be some act indicating an intent to segregate the property from that held by the embezzler as agent and hold it for himself, or deprive the owner of the same, or convert it to his own use, and he must assume personal dominion of the property. *Knight v. State*, 44 South. 585, 586, 152 Ala. 56.

#### Lawful possession or custody

"Embezzlement" cannot be committed unless defendant is in the lawful possession of the property at the time of the conversion. *State v. Browning*, 82 Pac. 955, 956, 47 Or. 470.

"Embezzlement" is predicated on a wrongful conversion of property rightfully in possession. *Axtell v. State*, 91 N. E. 354, 355, 173 Ind. 711.

"Where the property is taken forcibly or furtively, or when the possession is gained by a trick or artifice, and the owner had no intent to yield possession and intrust the property to another, in such cases there is no embezzlement." *People v. Dougherty*, 77 Pac. 466, 143 Cal. 593 (citing *People v. Johnson*, 27 Pac. 663, 91 Cal. 265).

Defendant obtained possession of money and personal property belonging to another under an agreement to hold it as security for the performance of certain duties connected with a contract of employment entered into between the parties, and upon the termination of such employment he refused to return the property in his possession and appropriated it to his own use. Held, that the crime of "embezzlement," as defined by Pen. Code, § 503, was made out. *People v. Ward*, 111 Pac. 265, 266, 14 Cal. App. 143.

Under the statute defining "embezzlement" as the fraudulent appropriation of property by a person to whom it has been intrusted, to constitute embezzlement it must be shown that the property was received by the taker as a bailment, or the right of possession was intrusted to him by the owner, with intent to confer on the taker the present use or possession of the property, to be afterwards redelivered to the owner, and that the taker received the same, intending to comply with the terms under which he received it, and after he received it with such intent he converted it to his own use, intending to deprive the owner thereof. *Flohr v. Territory*, 78 Pac. 565, 570, 14 Okl. 477.

Section 121 of the Criminal Code defines "embezzlement," generally, and prescribes the punishment therefor, and in other cases not covered by this section, if one obtains possession of property with the consent of the



owner, so that he does not become a trespasser in so doing, and afterwards converts the property to his own use with intent to steal the same, he may be prosecuted under the act of 1875 (Laws 1875, p. 26). Under the information in this case, charging that the defendant did steal the property in question, there could be no conviction without proof that the owner did not consent that the defendant should take and remove from its hiding place such secreted valuables as he might find on the premises. If the owner consented that the defendant should take possession of the property found for the purpose of delivering it to some other person, or for any purpose whatever, such taking of the property would not be unlawful, and there can be no larceny without an unlawful taking. *Cohoe v. State*, 113 N. W. 532, 533, 79 Neb. 811.

"Embezzlement" is the fraudulent conversion of property by the person to whom it has been intrusted, and to constitute the crime there must be a conversion, either actual or constructive, so that where no time is fixed for the delivery of property, a demand is necessary to terminate a lawful possession, but where the time of delivery and the person to whom the delivery shall be made are fixed, the retention of the property after such time amounts to a conversion and no demand is necessary. *State v. Ensley*, 97 N. E. 113, 115, 177 Ind. 483.

The crime of embezzlement as defined by St. 1898, § 4418, embraces the fraudulent conversion of the property embezzled, and such conversion may be proved without a demand, which is necessary only where proof thereof is essential to establish a conversion, notwithstanding section 4419 making the refusal of a person to pay over moneys in his custody prima facie evidence of the embezzlement thereof. *Prinslow v. State*, 121 N. W. 637, 638, 140 Wis. 131.

Under Acts 1902, p. 151, c. 66, providing that any person who shall sell or dispose of or convert to his own use any money or property or other things of value, without the consent of the owner thereof, shall be punished, where a trustee fraudulently converts to his own use the personal property of his cestui que trust, the indictment need not allege a demand for payment or refusal on the part of accused to pay over, for, under the statute, the offense of "embezzlement" is complete when the trustee fraudulently and feloniously misappropriates the trust fund by wrongfully converting it to his own use. *Commonwealth v. Kelley*, 101 S. W. 315, 316, 125 Ky. 245, 15 Ann. Cas. 573.

#### Nature of possession

To constitute "embezzlement," defendant should stand in a fiduciary relation to another person named, within the terms of the statute; that he was a servant, clerk, treas-

urer, or employé. *State v. Ives*, 54 South. 790, 128 La. 273, Ann. Cas. 1912C, 901.

In "embezzlement" it is necessary to prove that defendant came into possession of the property as bailee. *State v. Seeney*, 59 Atl. 48, 49, 5 Pennewill, 142.

Where no fiduciary relation of principal and agent existed between prosecuting witness and accused, the latter was not guilty of "embezzlement." *Bryant v. State (Tex.)* 122 S. W. 543, 544.

Under Pen. Code, § 426, providing that every clerk, agent, or servant, who fraudulently appropriates any property of another which has come into his control by virtue of such employment, is guilty of "embezzlement," there are three essentials of the crime: (1) The act of fraudulent appropriation of money; (2) the relation of clerk, agent, or servant, on the part of the appropriator, at the time of such appropriation, and the owner of the property thus appropriated; and (3) the acquiescence by the appropriator of the care or control of the money or property appropriated by virtue of his employment as such clerk, agent, or servant. And hence an indictment alleging that defendant, as agent of a certain person, received a sum of money, and that, on another date, he unlawfully appropriated it to his own use, was fatally defective for failure to allege that defendant was an agent, or clerk, at the time of the appropriation. *Thomas v. Territory*, 80 Pac. 320, 321, 9 Ariz. 180.

In order to constitute "embezzlement" under Cr. Code, § 75, declaring guilty of larceny an agent who "embezzles" any property of his employer, the fraudulent conversion must be of the property of another, and where an agent or employé has possession of money from which she had a right to deduct commissions belonging to her, she was a joint owner and not guilty of "embezzlement" for its conversion. *McElroy v. People*, 66 N. E. 1058, 1059, 202 Ill. 473.

Under Pen. Code, § 460, providing that every broker, agent, or person otherwise intrusted with, or having in his control, property for the use of another party, who fraudulently appropriates it to any use or purpose not in the due or lawful execution of his trust, is guilty of "embezzlement," an indictment which charges that a person has been intrusted with the property in question for the use of another person, and that he has fraudulently appropriated it to some use or purpose not in the due and lawful execution of such trust, is sufficient description of the offense. *De Leon v. Territory*, 80 Pac. 348, 350, 9 Ariz. 161.

Pen. Code, § 458, declaring that every officer of this territory, or of any county, city, etc., and every deputy clerk, or servant of any such officer, and every officer, director, trustee, clerk, etc., of any association, socie-

ty, or corporation, who fraudulently appropriates to his own use or purposes, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement, was meant to apply to persons having fiduciary relations, such as public officers, and officers and agents of corporations, public and private, and to sustain a conviction thereunder, three facts must be shown: (1) The trust relation; (2) the possession or control of property by virtue of the trust; and (3) the fraudulent appropriation of the property, not in the due and lawful execution of the trust. *Hinds v. Territory*, 76 Pac. 469, 470, 8 Ariz. 372 (citing *Territory v. Meyer*, 24 Pac. 183, 3 Ariz. 199).

While the essential elements of "embezzlement" are the fiduciary relations arising where one intrusts property to another and the fraudulent appropriation of the property, an information for embezzlement of the proceeds of a certificate of deposit alleging, in the language of Pen. Code, § 507, prohibiting embezzlement by a bailee, that defendant received the certificate of deposit as bailee, is sufficient without allegations of a fiduciary relation. *People v. O'Brian*, 97 Pac. 679, 680, 8 Cal. App. 641 (citing *People v. Gordon*, 65 Pac. 746, 133 Cal. 328, 85 Am. St. Rep. 174; *People v. Goodrich*, 75 Pac. 796, 142 Cal. 216).

2 Rev. St. (1st Ed.) pt. 4, c. 1, tit. 3, § 59, punishes in the manner prescribed for felonious stealing any corporate officer, etc., who shall embezzle without his employer's consent any money, etc., which shall have come into his possession by virtue of such employment, which section was further amended and extended in 1874, as shown by 3 Rev. St. (6th Ed.) pt. 4, c. 1, tit. 3, § 73. Pen. Code, § 528, subd. 2, makes any person guilty of larceny, who, having in his possession, custody, or control, as officer of any corporation, etc., any money, etc., appropriates it to his own use. Defendants were president and vice president, respectively, of a bank. The president was given direct control over all employes, was required to countersign checks, which duty, with the trustees' consent, might be delegated to the vice president, who could perform the president's duties in his absence. The treasurer had custody of all moneys and a committee consisting of all three officers, together with the secretary, was given general supervision of the business between the meetings of the trustees. A company in which defendants were interested made drafts upon them which were satisfied by funds of the bank taken therefrom by the treasurer by defendants' direction, which funds were replaced by defendants' checks, which all the officers knew were worthless. Held, that physical possession was not essential to custody or

control, and, in view of the history of the provision, defendants had "possession, custody, or control" of the funds misappropriated so as to make them guilty of larceny under subdivision 2. *People v. Britton*, 118 N. Y. Supp. 989, 993, 134 App. Div. 275.

Where a laundress, on discovering in a clothes basket money belonging to her employer accidentally placed therein, knew her duty was to return it, but before returning it fraudulently converted the money, she was guilty of embezzlement under Gen. St. 1906, § 3311, condemning the act by a servant as to anything of value which has come into his possession by reason of his employment. *Neal v. State*, 46 South. 845, 846, 55 Fla. 140, 19 L. R. A. (N. S.) 371.

In considering whether or not a person accused of "embezzlement" was a "servant," an "agent," or the like, it should be borne in mind that in the law of embezzlement there cannot be a "clerk" without an employer, a "servant" without a master, or an "agent" without a principal. The gist of the offense of embezzlement is a breach of trust and the statutes defining such offense have no application to appropriation of property by a person unless he held a relation of confidence or trust towards the owner, and had possession of the property by virtue of that relation and converted it in violation of the trust reposed in him. The word "agent," as employed in such statute, is used in its popular sense, meaning one who undertakes to transact some business, or to manage some affair for another by authority, and on account of the latter, and to render an account of it. A person in the employ of another, who in the discharge of his duties is subject to the immediate direction and control of his master, is a "servant." The words "clerk" and "servant" imply in some one the power of control. *Tipton v. State*, 43 South. 684, 686, 53 Fla. 69.

Under Acts 1903, p. 89, c. 18, § 19, to constitute embezzlement it is necessary to show that the relation of the person charged with the property embezzled is such as is embraced in the statute, that it is the property of another, that it came into the possession of the accused by virtue of his employment, and his manner of dealing with it constituted a fraudulent appropriation to his own use, and that such appropriation was with intent to deprive the owner thereof. *State v. Moyer*, 52 S. E. 30, 32, 58 W. Va. 146.

An affidavit, founded on Acts 1905, p. 671, c. 169, § 392, providing that every employe, who, having access to, control, or possession of any money, to the possession of which his employer is entitled, shall, while in such employment, appropriate the same to his own use, shall be guilty of "embezzlement," which avers that accused was the employe of a designated association, and "as such employe" had possession of money of

the association, which he appropriated to his own use, is fatally bad for failing to aver that he obtained possession of the money by virtue of his employment. *Wright v. State*, 81 N. E. 660, 168 Ind. 643.

An agent, with authority to collect money and retain a part for his services, is, on converting to his own use the entire amount collected, guilty of embezzlement, within Ky. St. 1903, § 1202, punishing any agent who shall embezzle or convert to his own use the money of his principal, though he was entitled to 15 per cent. of the amount as his commission. *Commonwealth v. Jacobs*, 104 S. W. 345, 346, 126 Ky. 536, 13 L. R. A. (N. S.) 511, 15 Ann. Cas. 1226.

Under Pen. Code, defining "embezzlement," the offense consists of an agent's fraudulent misapplication or conversion to his own use, without the consent of his principal or employer, of money or property of the principal or employer, or which may have come into his possession, or is under his control, by virtue of his office, agency, or employment. *Hamer v. State*, 131 S. W. 813, 815, 60 Tex. Cr. R. 341.

16 Del. Laws, c. 153, makes it embezzlement for a servant or agent, having property in his possession as such, to wrongfully convert it to his own use, though the property has never been in the possession of the master or employer. Acts Gen. Assem. May 3, 1893 (19 Del. Laws, c. 782), makes one guilty of a misdemeanor who, being a bailee of money or property, the subject of larceny, embezzles or fraudulently converts it to his own use. Held, that the statutes made it "embezzlement" to fraudulently appropriate to his own use property of another coming into the appropriator's hands lawfully with the owner's consent, as his bailee or in any other fiduciary capacity. *State v. Brewington* (Del.) 78 Atl. 402, 404.

Crimes Act 1905, § 392, denounces as embezzlement the purloining, secreting, etc., of money deposited with or held by a person, firm, corporation, or association, by its officer, agent, or employé, who has access to or possession of the money converted. An affidavit purporting to present a charge of embezzlement alleged that a certain person was treasurer of an Odd Fellows Lodge, "and as such treasurer \* \* \* had control and possession" of a sum of money, "the property of the said \* \* \* order of Odd Fellows," and while such treasurer and so possessed of the money converted it. Held that, although the affidavit does not allege that the money was in possession of such defendant "by virtue of his employment," a "treasurer" is one who is intrusted with money, and "as such" means "in that particular character," so that the allegation that the defendant was a treasurer, and as such had control of the funds which he converted, means that the character of his possession was in his trust

relationship, and renders the affidavit sufficient to charge the offense denounced. *Frost v. State* (Ind.) 99 N. E. 419, 422.

Under Pen. Code, §§ 503, 508, defining "embezzlement" as the fraudulent appropriation of property by a person to whom it has been "intrusted," and declaring that a clerk, agent, or servant who fraudulently appropriates to his own use any property of another which has come into his control or care by virtue of his employment is guilty of embezzlement, it is of the essence of the crime that the misappropriation be of property "intrusted" to the defendant, and where defendant informed witness that he could sell goods dealt in by witness to a certain person, and would do so for a certain commission, and the witness was to collect the price and defendant to return for his commission, and witness shipped the goods, and defendant went with them, sold them as his own, and appropriated the proceeds, and witness testified that defendant was not in his employ and had no authority to collect the money, the defendant was not guilty of "embezzlement." *People v. Dougherty*, 77 Pac. 466, 467, 143 Cal. 593.

Under Pen. Code, § 508, defining "embezzlement" by an agent or servant, it is necessary to prove that the accused was an agent, that the property came into his hands as the property of his employer, that he received it in the course of his employment, and that he appropriated it to his own use with intent to steal it. *People v. Hemple*, 87 Pac. 227, 229, 4 Cal. App. 120 (citing Pen. Code, §§ 506, 508; *Ex parte Hedley*, 31 Cal. 108; *People v. Gordon*, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174; *Pullam v. State*, 78 Ala. 31, 56 Am. Rep. 21).

#### Property subject

Code, § 841, describing embezzlement by a receiver as the fraudulent conversion to his own use of property which "may come" into his possession by virtue of his employment, comprehends property in the hands of the receiver before the passage of the act, but embezzled thereafter. *Fields v. United States*, 27 App. D. C. 433, 439.

Under Rev. St. § 6842, making it embezzlement for certain persons to convert to their own use anything of value that shall come into their possession by virtue of their office or employment, the secretary of a building association, who procured the checks of the association payable to fictitious persons, which checks were indorsed to him according to the usual custom of the association, and applied the proceeds to his own use, was guilty of embezzlement, as such checks which he converted were things of value within such section. *Livingston v. Fidelity Deposit Co.*, 27 Ohio Cir. Ct. R. 662, 663.

#### Series of acts

"Embezzlement" is a crime defined by statute, and the Legislature may declare

what acts shall constitute it, and fix the measure of punishment. One element of the offense is the fiduciary or confidential relation existing which affords the amplest opportunity to misappropriate money, funds, and securities. The offense may consist of many acts done in a series of years, and the crime is the aggregate result rather than any particular act. *Willis v. State*, 33 South. 226, 234, 134 Ala. 429.

In a prosecution for embezzlement by a bank officer on a certain date, evidence tending to show "embezzlement" of different amounts at different times before that date, and the manner in which he continued the business of the bank, is admissible, since the body of the crime consists of many acts done by virtue of the confidential relation existing between the employer and the employé with funds, moneys, or securities over which the servant is given care or custody in whole or in part by virtue of his employment, the separate acts may not be susceptible of direct proof, but the aggregate result is, and that is "embezzlement." *Chamberlain v. State*, 115 N. W. 555, 557, 80 Neb. 812.

#### Larceny distinguished

At common law, possession was a necessary element of "larceny," and the distinction between "larceny" and "embezzlement" depends on the nature of the possession and the manner of obtaining it, and it would seem that a mere credit is not the subject of "larceny" at common law. *Higbee v. State*, 104 N. W. 748, 749, 74 Neb. 331.

Larceny and embezzlement are distinguishable, in that in larceny possession of the property may be obtained by fraud, while it cannot be so obtained in embezzlement. *People v. Grider*, 110 Pac. 586, 588, 13 Cal. App. 703.

The crimes of embezzlement and larceny are so different in their character that they should be treated in an indictment as distinct and separate offenses. *State v. Finnegan*, 103 N. W. 155, 157, 127 Iowa, 286, 4 Ann. Cas. 628.

The term "embezzle" as used in the statute, is a broader term than "larceny," but not exclusive of it. *State v. Sullivan*, 21 South. 688, 689, 49 La. Ann. 200, 62 Am. St. Rep. 644; *State v. Pellerin*, 43 South. 159, 161, 118 La. 547.

"Embezzlement" is defined as the fraudulent appropriation of property by a person to whom such property has been intrusted or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. *United States v. Allen*, 150 Fed. 152, 153 (citing *Moore v. United States*, 16 Sup. Ct. 294, 295, 160 U. S. 268, 269, 40 L. Ed. 422).

The crime of embezzlement differs in its essential ingredients from the crime of larceny in this: that in larceny the gravamen of the offense is the unlawful and felonious taking of personal property with the intent to convert and steal the same, while in embezzlement the taking is lawful, because of the trust reposed in the agent, servant, or trustee receiving it, and the gist of the offense consists of the conversion of the property so received with a felonious and fraudulent intent of converting the same to the use of the agent, servant, or trustee. *State v. Culver*, 97 N. W. 1015, 1016, 5 Neb. (Unof.) 238.

Where a person honestly receives the possession of goods, chattels, or the money of another on any trust, express or implied, and after receiving them fraudulently converts them to his own use, he may be guilty of "embezzlement" but not of "larceny," except as "embezzlement" is by statute made "larceny." *State v. Buck*, 84 S. W. 951, 952, 186 Mo. 15, 2 Ann. Cas. 1007 (citing *Commonwealth v. Barry*, 124 Mass. 325).

The distinction between larceny by fraud and embezzlement is determined as to the time when a fraudulent intent to convert arose, and in larceny the criminal intent must exist at the time of the taking, and if the taker received the property as a bailment with intent to conform to the owner's wishes and thereafter fraudulently appropriates the property, the crime is embezzlement under *Snyder's Comp. Laws* 1909, §§ 2591 and 2609. Where the owner of personalty voluntarily parts with its possession for a particular purpose, and the person receiving possession for that purpose has at the time a fraudulent intent to make use of such possession as a means of converting the property to his own use, the crime is larceny. *Bivens v. State*, 120 Pac. 1033, 1036, 6 Okl. Cr. 521.

"Where one honestly receives the possession of goods upon trust, and after receiving them fraudulently converts them to his own use, it is a case of 'embezzlement.' If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by 'false pretenses.' But where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts with the possession and not with the title, the offense is 'larceny.'" Where a person gave money to another as a stakeholder on a bet, such delivery having been brought about by fraud and artifice of the stakeholder, who intended to appropriate the money in any event, and who did so, the offense was larceny. *State v. Ryan*, 82 Pac. 703, 706, 47 Or. 338, 1 L. R. A. (N. S.) 862 (quoting and adopting the statement in *People v. Tomlinson*, 36 Pac. 506, 507, 102 Cal. 19, 23).

"The distinction between 'larceny' and 'embezzlement' is one fully recognized in the criminal law of this state, as well as in England. While the two offenses have much in common, for the purpose of prosecution they have uniformly been regarded as distinct. In every larceny there must be a trespass in the original taking of the property; that is, in larceny the felonious intent must have existed at the time of the taking." *State v. Casey*, 105 S. W. 645, 647, 207 Mo. 1, 123 Am. St. Rep. 367, 13 Ann. Cas. 878 (citing *State v. Shermer*, 55 Mo. 83; *State v. Ware*, 62 Mo. 602).

"One who obtains money or goods by some fraudulent trick or artifice, and carries them away, is guilty of 'larceny.'" Thus where one marries a woman in pursuance of a scheme to procure money which she has on deposit in bank, and later procures a check for the money on representations that he will use the money in making an investment for her, he is guilty of larceny and not embezzlement. *Hunt v. State*, 79 S. W. 769, 771, 72 Ark. 241, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33 (citing *Beasley v. State*, 38 N. E. 35, 138 Ind. 552, 46 Am. St. Rep. 418).

To constitute "larceny," as distinguished from "embezzlement," there must be a trespass to the possession, but it is larceny where one gains possession of another's personal property so as to constitute only a bare custody, or procures it by subterfuge; the owner's property not being divested in such case, he still having constructive possession. *Boswell v. State*, 56 South. 21, 22, 1 Ala. App. 178.

According to Pen. Code, § 528, "larceny" includes every act which was larceny at common law, and in addition such acts as formerly constituted "false pretenses" and "embezzlement." At common law, if a person honestly and in good faith received possession of personal property in trust, and thereafter converted the same to his own use, he was guilty of "embezzlement." If he obtained possession of the property by fraud, the owner intending nevertheless to part with the title as well as the possession, the offense was obtaining property under "false pretenses." If the possession was wrongfully or fraudulently obtained, without the owner's consent, and without color of title, and with a felonious intent of converting the property to the use of the taker or another, the offense was "larceny." *People ex rel. Perkins v. Moss*, 99 N. Y. Supp. 138, 144, 145, 113 App. Div. 329 (citing *People v. Miller*, 62 N. E. 418, 169 N. Y. 350, 88 Am. St. Rep. 546).

"Larceny" was a crime at common law and consisted of a trespass, committed in the taking of the personal goods and chattels of another with intent to convert them to the taker's use, without the consent of the owner. "Embezzlement" cannot be committed

unless the defendant is in the lawful possession of the property at the time of the conversion. As trespass is an injury to the possession only, it logically and legally follows that one in the lawful possession of goods cannot commit larceny of them, for it were idle and absurd to talk of one committing an injury to his own possession. Embezzlement consists in the breach of some trust relation by one in the lawful possession of the personal property of another who fraudulently converts it to his own use. In larceny, there is no breach of any confidential relation as in embezzlement, while in the latter crime there is no trespass as in larceny. *State v. Browning*, 82 Pac. 355, 956, 47 Or. 470.

"Larceny" at common law was the felonious taking of the property of another against his will with intent to convert it to the use of the taker, or, as some authorities hold, the use of the taker or third person. "Embezzlement" consists in the fraudulent appropriation to one's own use of money or goods intrusted to him by another. In larceny the felonious intent must have existed at the time of taking, whereas in embezzlement the fraudulent act consists in the appropriation of the property to the use of the taker or third party; but the felonious or fraudulent intent is of the essence of the offense in each case. Where an insurance agent was entitled under his contract with the company to a credit of three months on his monthly balances due the company, the fact that at the end of the three months he was unable to pay or simply failed to pay, with no proof of a fraudulent disposition of the money, would not have established embezzlement. The mere failure to pay a debt without compulsion even by one having the financial ability is neither larceny nor embezzlement. *Williams v. United States Fidelity & Guaranty Co.*, 66 Atl. 495, 496, 105 Md. 490.

#### Misapplication distinguished

The statute defining embezzlement does not make a failure to account for a trust fund or a fund received by an agent or officer an offense, but the essence of the offense is the wrongful conversion of the fund. *State v. Mispagel*, 106 S. W. 513, 519, 207 Mo. 557.

Under Code, § 4840, making the conversion of money coming into the hands of public officers "embezzlement," the crime consists in the conversion and not in a failure to account, and therefore an indictment need not allege a demand or failure to account. *State v. Hoffman*, 112 N. W. 103, 105, 134 Iowa, 587.

"Not every wrongful conversion, even by a bailee or trustee without legal authority to sell, is an 'embezzlement.' To constitute that crime, the conversion must be actuated by the fraudulent purpose to deprive the owner of his property. For instance, if

this guardian, having collected \$300 on a note held for his ward, and having at the same time a like sum to his own credit in the bank, should without any fraudulent purpose use the trust money in his hands for private purposes, and then go at once to the bank and have the same amount transferred from his personal to his trust account, he would perhaps be chargeable with a technical conversion, but would not be guilty of embezzlement. So, too, if, holding a note for his ward which is of doubtful value, he meets an opportunity to sell it for the full sum of principal and interest, and makes the sale in good faith and for his ward's benefit, though without any order or direction of the court, he may have exceeded the letter of his legal authority, but he has committed no crime. Now, if, in the first of the hypothetical cases, the guardian on the following day conceives and carries out a fraudulent purpose to convert the money in the bank to his own use, and is indicted therefor, he cannot successfully defend on the theory that, if there was any embezzlement, it was the use of the specific money collected, and not the use of the money which had been substituted for it in the bank. *People v. Bringard*, 39 Mich. 22, 33 Am. Rep. 344. And in the other case, if the guardian should fraudulently convert to his own use the money for which he sold the note held for his ward, we think he could be heard to say that the embezzlement, if any, was of the money, but not of the note." *State v. Disbrow*, 106 N. W. 263, 265, 130 Iowa, 19, 8 Ann. Cas. 190.

#### As steal

See Steal.

#### Theft distinguished

One assisting a person, having possession, as employé, of horses of another, in driving them away with the purpose of appropriating them, is guilty of "embezzlement" and is not guilty of "theft." *Pearce v. State*, 98 S. W. 861, 862, 50 Tex. Cr. R. 507.

"'Embezzlement' partakes largely of the qualities and nature of theft, in that it is a peculiar way of converting money obtained by virtue of a trust relation. The fraudulent idea pervades embezzlement as it does theft. The difference mainly in the two offenses consists in the manner of obtaining possession of the property, and the time the fraudulent intent was conceived," and there is no variance between an indictment charging embezzlement of specified property of a designated person and proof that the property was held by such person as guardian of others. *Leach v. State*, 81 S. W. 733, 46 Tex. Cr. R. 507.

#### EMBEZZLEMENT OF PUBLIC MON- EYS

Rev. St. § 5497, extends the crime of embezzlement of public money to "every \* \* \* person \* \* \* who uses, transfers, con-

verts, appropriates, or applies any portion of the public money for any purpose not prescribed by law." *United States v. Greene*, 146 Fed. 778-780.

The embezzlement of the funds of a savings bank, established, maintained, and owned by a city in Germany, by a cashier who is a public official appointed by the city, is an "embezzlement of public moneys," within the meaning of the treaty of 1852 between Prussia and the other states of the Germanic Confederation and the United States. In *re Reiner*, 122 Fed. 109, 110.

#### EMBLEM

See Conflict in Emblems.

Under Ky. St. 1903, § 1453, authorizing state conventions of political parties to adopt a figure or device, and providing that such device may be any appropriate symbol, but that any "emblem" common to the people at large shall not be so used, conceding that the words "device," "emblem," "symbol," and "figure" mean the same thing, which is that the device or figure used may be such symbol as will represent a particular idea, and also conceding that a figure of a book with words indicating that it represents the Holy Bible is such a type of symbol common to all the people, the use of such device on local option ballots which did not require any emblem or device was a mere irregularity and did not invalidate the election. *Erwin v. Benton*, 87 S. W. 291, 296, 120 Ky. 536, 9 Ann. Cas. 264.

#### EMBLEMENTS

"Emblements" at common law embraced not only corn sown, but roots planted, or other annual artificial crops. Under Ky. St. 1903, §§ 3862, 3863, providing that all the "emblements" of the lands of a person dying after the 1st day of March which shall be severed before the last day of December following shall be assets in the hands of his personal representatives and that all the emblements growing on the land at that time shall pass with the land to the heir or remainderman, a lessee under a lease from the owner of a third person's life estate, executed in September for a term of one year from March 1st following, who had sown wheat on the premises previous to the death of the third person in October, was not entitled to an interest on the wheat as "emblements," since it could not be severed from the land before the last day of December following. *Devers v. May*, 99 S. W. 255, 257, 124 Ky. 387 (quoting and adopting definition in 2 Blackstone, p. 121).

A tenant for life who sows land is entitled through his legal representatives to the growing crops, in case the estate determined by his death before the produce can be gathered. These profits are termed "emblements."

A deed conveying land and the "rents, issues, and profits thereof" was deposited with a third person in escrow, to be delivered to the grantee on the grantor's death. The grantor leased the land for a share of the crops. Held that, on the grantor's death while the crops were growing on the land, the grantee was entitled to the share agreed on as rent. *Wilhoit v. Salmon*, 80 Pac. 705, 706, 146 Cal. 444.

Where a tenant from year to year sows a crop, and before the end of a year and before the crop is harvested abandons the land and gives notice that he will not take it another year, and the surrender is accepted, he is not entitled to the crop as "emblements," though in abandoning the lease he reserved the crop, where such condition was not accepted by the landlord. *Hutfield v. Lawton*, 95 N. Y. Supp. 451, 452, 108 App. Div. 113.

"Emblements" are corn and other crops of the earth which are produced annually, not spontaneously, but by labor and industry, and for this reason are called "fructus industriales." In *re Andersen's Estate*, 118 N. W. 1108, 1110, 83 Neb. 8, 131 Am. St. Rep. 613.

#### Fruits and trees

"Emblements," as between landlord and tenant, consist of such annual productions of the soil as are raised by a tenant's labor, as corn, hops, flax, roots, and the like, but does not extend to things not of annual growth and which do not require the labor of the tenant to produce them, such as trees, fruit, etc. *Florala Sawmill Co. v. J. T. Parrish*, 46 So. 461, 462, 155 Ala. 462.

#### Grass

"Emblements" do not include grass which is not an annual crop. *Florala Sawmill Co. v. J. T. Parrish*, 46 South. 461, 462, 155 Ala. 462.

## EMBRACE

In a grant by the government of a section of land, "to embrace the buildings thereon," the word "embrace" means to inclose, as by surrounding or encircling. *Story v. Woolverton*, 78 Pac. 589, 590, 31 Mont. 346.

Under a statute authorizing the city council to annex by ordinance any tract adjoining any first-class city, but not within its limits, if it has been platted, or whenever any tract is included or embraced within corporate limits, but has not been made a part of the city, the boundary line must be unbroken and separate property within from that without at every point, and, when property is excluded from its limits by its boundary line, it is not "included" or "embraced" within the city within the statute, so as to authorize annexation; those words being synonymous. *City of Pueblo v. Stanton*, 102 Pac. 512, 514, 45 Colo. 523.

The word "expressed," as used in the constitutional provision requiring the object of every act to be expressed in the title, is not synonymous with the word "embraced" as used therein, providing what shall be embraced in an act. *Jersey City v. Speer*, 72 Atl. 448, 451, 78 N. J. Law, 34.

The phrase, "if embraced in the stenographer's report," in Acts 1905, p. 219, c. 112; § 5, means that the report should contain mention and such reasonable description of any documentary evidence as will identify the same, in order to guard against the incorporation in the clerk's transcript of instruments not offered in evidence, and does not require the stenographer to make full copy of such evidence in his notes. *Colorado & S. Ry. Co. v. Hamm*, 103 S. W. 1125, 1126, 47 Tex. Civ. App. 196.

## EMBRACERY

Embracery consists in all such practices as tend corruptly to influence a juror. The crime is made up of the attempt thus to influence a juror. Upon such attempt being made, whether successful or not, the crime is consummate. The corpus delicti, the essence and body of the offense, being a corrupt attempt, it is wholly immaterial whether the would-be corrupter gains his point or not, or whether the juror thus approached gives any verdict or not, or whether the verdict be true or false. *State v. Woodward*, 81 S. W. 857, 861, 182 Mo. 391, 103 Am. St. Rep. 646 (quoting *State v. Williams*, 38 S. W. 75, 136 Mo. 303).

#### Unsuccessful attempt

"Embracery" \* \* \* was an offense at common law, and is of ancient origin. It consists, in short, of an attempt to corruptly influence a jury, \* \* \* and, embracery being an attempt as well as a consummated injury, there is no such thing as an attempt to commit it, as an attempt is the offense itself." *State v. Davis*, 87 S. W. 33, 112 Mo. App. 346.

## EMBROIDERY

Webster defines to "embroider" as to ornament with needlework, and "embroidery" as "needlework used to enrich textile fabrics." So-called openwork articles, having ornamental designs stitched thereon by hand with a needle and thread, are held to be "embroideries" within the meaning of the Tariff Act. On the question of whether certain imported openwork articles were embroideries, the testimony of a clerk of the importers, who had never bought or sold embroideries, and whose only knowledge was as to the designation of the goods in the linen trade, was insufficient to establish the commercial scope of the expression "embroideries," or to prove that the goods, though embroidered in fact, were not embroidery in a commercial

sense. *Neuss, Hesslein & Co. v. United States*, 142 Fed. 281, 282.

The "embroidery" of a single letter upon the corner of a handkerchief is so limited in its extent and of such comparative narrowness as not to require that the handkerchiefs should be regarded as embroidered. To the common apprehension, the term "embroidery," as applied to a handkerchief, implies ornamentation, whereas, an initial, whether embroidered or otherwise affixed to the handkerchief, is a mark of identification. The fact that the expense of the embroidering of the initial formed a considerable proportion of the entire cost of the handkerchief is not material, and this additional expense does not make it an embroidered handkerchief. It is still an initial handkerchief, both in commercial and in popular designation. *United States v. Borgfeldt*, 123 Fed. 196, 197 (quoting *United States v. Jonas*, 83 Fed. 167, 169, 27 C. C. A. 500; *United States v. Harden*, 68 Fed. 182, 15 C. C. A. 358).

The provision in Tariff Act 1897, par. 339, 30 Stat. 181, for "embroidery" and articles "embroidered in any manner," does not include articles stitched on the edge merely to prevent raveling. The fundamental idea of embroidery is that it is needlework done upon a previously completed fabric as distinguished from tapestry or lace work in which the design is a part of the original fabric. It is also essential that it should be ornamental, rather than merely useful. *United States v. Waentig*, 168 Fed. 570, 571.

Thread or yarn used chiefly for machine embroidering are "embroidery cottons" within paragraph 303, Tariff Act 1897. *Loeb & Schoenfeld v. United States*, 143 Fed. 698, 699.

"Embroidery cottons," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 303, do not include so-called No. 60, 5-ply thread or yarn used in embroidering machines not within the class generally or commercially known as "embroidery cottons"; the meaning of the words, rather than the chief or individual use, being the test of classification. *Loeb & Schoenfeld v. United States*, 150 Fed. 327, 328, 80 C. C. A. 211.

Under the proviso in Tariff Act 1897, par. 339, 30 Stat. 170, prescribing that embroidered articles shall not pay a less rate of duty than is applicable to "any embroideries of the materials of which such embroidery is composed," *held*, that silk-embroidered screens, composed of wood and other materials, are liable to the rate provided for silk embroideries in par. 390, 30 Stat. 187. The rule of "*noscitur a sociis*" does not operate to exclude such articles by reason of the enumeration in the same paragraph of laces, trimmings, etc. *Lichtenstein Millinery Co. v. United States*, 154 Fed. 736 (citing *United States v. Altman*, 107 Fed. 15, 46 C. C. A.

116; *Carter, Webster & Co. v. United States*, 137 Fed. 978).

The provision for articles "embroidered" in Tariff Act 1897, par. 339, 30 Stat. 181, held to include so-called "drawnwork" goods, consisting of fabrics in which an openwork effect has been produced by drawing out certain of the threads and interjecting different and independent threads, and which have ornamental work and figures in various portions of the goods. *Beach v. Sharpe*, 154 Fed. 543, 544.

Fur garments, ready to wear, lined with silk and trimmed with embroidery, are "embroidered articles," though the fur itself has not been embroidered. *Hugo Jaekel & Son v. United States*, 178 Fed. 260, 261, 101 C. C. A. 620.

Embroidered fans are subject only to the provision in Tariff Act 1897, par. 427, 30 Stat. 191, for "fans of all kinds," not being within the scope of the proviso in paragraph 339, 30 Stat. 181, imposing the embroidery rate on "embroidered wearing apparel or other article or textile fabric." *United States v. Quong Lee & Co.*, 173 Fed. 819, 821.

## EMERGENCY

See Extraordinary Emergency.

See, also, Error in Extremis.

An "emergency" is an event or occasional combination of circumstances calling for immediate action, pressing necessity, a sudden or unexpected happening, exigency. *Colfax County v. Butler County*, 120 N. W. 444, 447, 83 Neb. 803; *Parker v. City of Monroe*, 55 South. 587, 589, 128 La. 951.

The word "emergency" is defined in Cent. Dict. as follows: "(2) A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. (3) A sudden or unexpected occasion for action; exigency; pressing necessity." *United States v. Sheridan-Kirk Contract Co.*, 149 Fed. 809, 814.

The word "emergency" signifies some sudden or unexpected necessity, requiring immediate or at least quick action. *Mallon v. Board of Water Com'rs*, 128 S. W. 764, 765, 144 Mo. App. 104.

The term "emergency," as used in a statute authorizing the borrowing of money to meet an emergency on the authorization of the advisory board of a town, is an event or occasional combination of circumstances which calls for immediate action or remedy; the word being synonymous with "pressing necessity" or "exigency." *Id.*

A contract to order goods from defendant provided that plaintiff would take the same currently as specified on order between certain dates, subject to plaintiff's privilege to change sizes from those specified, and to



cancel in the event of an "emergency" such portions of the order as had not been taken in work by defendant. *Held*, that the contract was not lacking in mutuality, as plaintiff was bound to order and to take the goods between the dates indicated, except in the event of an "emergency," by which was meant, not plaintiff's whim or wish, but some unforeseen event or unexpected combination of circumstances, which, in view of the business to which the contract related, would furnish a reasonably substantial ground for cancellation. *Semon Bache & Co. v. Coppes, Zook & Mutschler Co.*, 74 N. E. 41-43, 35 Ind. App. 351, 111 Am. St. Rep. 171.

"An 'emergency' is a condition of things appearing suddenly or unexpectedly; that is, it is an unforeseen occurrence. As related to the law of negligence, it may properly be defined as any event or combination of circumstances which call for immediate action without giving time for the deliberate exercise of judgment or discretion, in short, an emergency." *Mayott v. Norcross*, 52 Atl. 894, 896, 24 R. I. 187; *Morancy v. Hennessey*, 52 Atl. 1021, 1025, 24 R. I. 205 (quoting and adopting definition in *Mayott v. Norcross*, 52 Atl. 894, 24 R. I. 187).

A girl was employed in feeding a mangle in a laundry; she had been instructed as to her duties, and had been warned by the boss of the machine to be careful lest her hands be caught in the rollers. A sheet which she was feeding into the mangle stuck in passing over a roughness on the table of the machine, and in pushing it the sheet gave way, and her hand was drawn between the rollers and injured. *Held*, that it could not be said that there was an "emergency" relieving plaintiff from the rule as to assumption of risk. *Morancy v. Hennessey*, 52 Atl. 1021, 1025, 24 R. I. 205.

A servant experienced in his work and knowing that it cannot be safely performed without assistance attempted to do it alone and was injured. There was nothing to divert his attention, no defect in the machinery, nor anything to show lack of opportunity for deliberation, except that, knowing his employer was in a hurry for the work to be done, he attempted to do it alone. *Held*, that there was no such "emergency" as would prevent him from being deemed to have assumed the risks incident to doing the work alone. *Mayott v. Norcross*, 52 Atl. 894-896, 24 R. I. 187.

In the sudden and unexpected starting of a street car while a passenger is attempting to board, there is presented an emergency; an "emergency" being a sudden or unexpected happening or occasion calling for immediate action. *Burger v. Omaha & C. B. St. Ry. Co.*, 117 N. W. 35, 38, 139 Iowa, 645, 130 Am. St. Rep. 343.

Where it was shown that the use of the emergency brake on a railroad train was

unusual and unnecessary on ordinary occasions, it devolved on the railroad company, when sued for injuries caused by the sudden stop from its use, to show that an "emergency" existed justifying the engineer in applying the emergency brake. *Benedict v. Chicago Great Western Ry. Co.*, 78 S. W. 60, 61, 104 Mo. App. 218.

"The term 'reserve fund' when applied to a level rate policy, means a sufficient per centum of the annual premium to meet, when invested at a given rate of interest, all present and prospective liability on account of the particular policy. When applied to term insurance, it means the entire mortuary premiums collected for the particular year. It has no application to assessment insurance." In *Rev. St. Mo. 1899, § 1408* (Ann. St. 1906, p. 1111), declaring that any such fraternal beneficiary associations may create and maintain, disburse and apply, a reserve or emergency fund in accordance with its constitution or by-laws, the word "reserve" was not used in a technical meaning, but as a convertible term with "emergency," and the use of such word did not indicate a legislative intention to authorize such association to issue nonforfeitable policies and to do an old line life insurance business not otherwise authorized. *State ex rel. Supreme Lodge K. P. v. Vandiver*, 111 S. W. 911, 918, 213 Mo. 187 (quoting 7 Words and Phrases, p. 6147).

### EMERGENCY BRAKE

What is known as the "service brake" differs from the "emergency brake" only in degree. If the full force of air is turned upon the brake, that is an "emergency brake." In ordinary cases less than the full force is turned on, and that is the service brake. In other words, there is only one set of brakes, and the difference consists in the amount of air pressure which is applied. *Norfolk & W. Ry. Co. v. Dean's Adm'x*, 59 S. E. 389, 391, 107 Va. 505.

An "emergency brake" on a train is adapted and used in instances of emergency as its name implies, while a service stop is used in ordinary cases where a stoppage of the train can be accomplished by a gradual application of the brakes. *Benedict v. Chicago Great Western R. Co.*, 78 S. W. 60, 61, 104 Mo. App. 218.

### EMERGENCY EMPLOYÉ

Where one renders aid to the servant of another at the request of the servant and under circumstances which create a necessity for aid, the person rendering aid becomes an "emergency employé" of the servant's master, and, if he be injured through the servant's negligence in some detail of the work, he cannot recover against the master; the negligence being that of a fellow servant. Where it was part of the general duty of plaintiff, as a gate tender at a railroad station, to help get passenger trains off as quick-

ly as possible, and in the performance of such duty plaintiff assisted an express messenger, who was under the sole employment and control of defendant express company and not of the railroad company by whom plaintiff was employed, to remove a heavy package from the express car, and in so doing was injured by the express messenger's negligence, plaintiff was neither a fellow servant of the express messenger, nor an emergency employé of the express company. *Cannon v. Fargo*, 122 N. Y. Supp. 576, 579, 138 App. Div. 20.

### EMERGENCY STOP

The railroad train on which plaintiff was injured consisted of 10 cars, 6 of which were equipped with air brakes controlled and operated by the engineer. For all ordinary stops such as stopping at stations, and water tanks and all cases except cases of emergency, the service stop as it was termed was used which checked the train gradually but did not lock the wheels. The "emergency stop" was used only for a sudden stop in case of danger and was a full application of all the brake power which had the effect of locking the wheels. Its effect was almost instant and the shock and recoil unusually severe. *Benedict v. Chicago Great Western R. Co.*, 78 S. W. 60, 104 Mo. App. 218.

### EMERY

Corundum and emery being used for the same purposes, and emery being merely an impure grade of corundum, ground corundum ore is similar to emery and is dutiable by similitude under Tariff Act 1897, par. 419, 30 Stat. 191, relating to "emery, \* \* \* ground," etc. *F. W. Myers & Co. v. United States*, 163 Fed. 53, 89 C. C. A. 284.

### EMERY BELT

As machine, see Machine.

Belting as including, see Belting.

### EMERY WHEEL

As machinery, see Machinery.

### EMIGRATION AGENT

Acts 1903, p. 344, imposing a license tax on emigration agents, and defining an "emigration agent" as "any person engaged in hiring," etc., and referring to "any person doing the business of an emigration agent." does not apply to a person living near the border line of the state, who employs laborers for service in his business beyond the limits of the state. *Kendrick v. State*, 39 South. 203, 204, 142 Ala. 43.

### EMINENT DOMAIN

See, also, Appropriation of Land; Condemnation; Expropriation; Public Ne-

cessity; Public Use (In Eminent Domain); Taking (In Eminent Domain). Compensation for taking property, see Compensation.

The taking of private property for public use is the exercise of the right of "eminent domain," which is a distinct right from that of public domain. It is a superior right which the sovereign possesses in all property of the citizen or subject, whether real or personal, and whether the title were originally derived from the sovereign or not. *Blincoe v. Choctaw, O. & W. R. Co.*, 83 Pac. 903, 906, 16 Okl. 286, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689.

"Eminent domain" is defined by Code Civ. Proc. Cal. § 1237, to be the right of the people or government to take private property for public use. *Shasta Power Co. v. Walker*, 149 Fed. 568, 569.

"The right of 'eminent domain' which resides in the state is defined to be 'the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience, or welfare may demand.'" *Spencer v. Seaboard Air Line Ry. Co.*, 49 S. E. 96, 101, 137 N. C. 107, 1 L. R. A. (N. S.) 604 (citing *Cooley*, Const. Lim. 524; 1 *Lewis*, Em. Dom. 1; *Raleigh & G. R. Co. v. Davis*, 19 N. C. 451).

"Eminent domain" is the right or power of a sovereign state to appropriate private property to particular uses to promote public welfare. *Jeffress v. Town of Greenville*, 70 S. E. 919, 921, 154 N. C. 490.

The "right of eminent domain" is the right to take private property for a public use. Whether or not the use is public is a judicial question, and, the use being public, the right is absolute in the General Assembly, unless restricted by the Constitution, and it is entirely in its discretion whether it is necessary to take property for such use (that is, whether the public welfare requires or will be promoted by such taking). It may determine the public necessity of taking property for a public use, and confer the power to take for such use upon corporations or individuals, or it may confer the power to take subject to the determination by some other authority of the necessity of the particular improvement for which the property is sought, or of taking the whole or any part of the particular property sought to be taken. *Wheeling & L. E. R. Co. v. Toledo Ry. & Terminal Co.*, 74 N. E. 209-212, 72 Ohio St. 368, 108 Am. St. Rep. 622, 2 Ann. Cas. 941.

The right of eminent domain is not a right belonging to individuals or corporations, but is only conferred by special enactment, and, before a plaintiff should be allowed to absorb the property of another by con-

demnation, it is not asking too much of him that he affirmatively show that he is authorized by the law to condemn land at all. *State ex rel. Morrell v. Superior Court for Stevens County*, 74 Pac. 686, 688, 33 Wash. 542.

The power of "eminent domain" is a special right delegated to individuals or to a corporation by the state, and can be exercised only on the terms and in the manner prescribed by statute. *Westport Stone Co. v. Thomas*, 83 N. E. 617, 170 Ind. 91.

#### **As attribute of sovereignty**

Eminent domain implies a taking by the sovereign for some public benefit, and is a reserved right or an inextinguishable attribute of sovereignty that may be exercised by the state or its authorized agent, to effect a public good whenever public necessity requires it. *Cincinnati, I. & W. R. Co. v. City of Connersville*, 83 N. E. 503, 506, 170 Ind. 316.

Eminent domain is the right or power of a sovereign state to appropriate private property for the promotion of the general welfare. The power is an attribute of government and is inherent in it, and embraces all cases where the property of the individual is taken without his consent by such sovereign power. *Byrd Irr. Co. v. Smythe (Tex.)* 146 S. W. 1064, 1065.

The power to take private property for public uses belongs to every independent government exercising sovereign power as a necessary incident to its sovereignty and requires no constitutional recognition. *Jeffress v. Town of Greenville*, 70 S. E. 919, 921, 154 N. C. 490.

#### **Same—Exercise by corporation, etc.**

"Eminent domain" is the right or power of a sovereign state to appropriate private property to particular use, for the purpose of promoting the general welfare. It is an inherent, inalienable, sovereign right, and lies dormant in the state until the Legislature sees fit to exercise it, either directly, or by investing some corporation, or individual, with the power to exercise it. *Pittsburg Hydro-Electric Co. v. Liston*, 73 S. E. 86, 87, 70 W. Va. 83, 40 L. R. A. (N. S.) 602.

"Eminent domain" is a sovereign power to be used only by the sovereign or by one on whom the sovereign has conferred it for a particular purpose. Corporations hold their property under the same guaranty that individuals do, no greater and no less, and, as the individual holds his property subject to the right of "eminent domain," so does the corporation. *American Telephone & Telegraph Co. of Missouri v. St. Louis, I. M. & S. Ry. Co.*, 101 S. W. 578, 581, 202 Mo. 656.

#### **Compensation**

"Eminent domain" is the sovereign power in the state to take private property for public use, providing first a just compensation therefor. *City of Austin v. Nalle*, 120

S. W. 996, 102 Tex. 536; *Jeffress v. Town of Greenville*, 70 S. E. 919, 921, 154 N. C. 490; *Southern Ry. Co. v. City of Memphis*, 148 S. W. 662, 665, 126 Tenn. 267, 41 L. R. A. (N. S.) 828; *South Park Com'rs v. Montgomery Ward & Co.*, 93 N. E. 910, 912, 248 Ill. 299, 21 Ann. Cas. 127.

The right of eminent domain is the power of the state to apply private property to public purposes on payment of just compensation. The provision for compensation is no part of the power, but a limitation on its use imposed by the Constitution. *Commonwealth v. Plymouth Coal Co.*, 81 Atl. 148, 151, 232 Pa. 141.

#### **Extent of power**

The right of eminent domain, being the power of the state to appropriate private property to public use, though relating to every kind of private property and to every public use, does not extend to property already devoted to public use; and a city could not condemn property belonging to a county as a state agency and used for a poor farm, for street purposes. *City of Edwardsville v. Madison County*, 96 N. E. 238, 251 Ill. 265, 37 L. R. A. (N. S.) 101.

#### **Public use or necessity**

The phrase "eminent domain" means the right of the state or of a person acting for the state to use, alienate or destroy property of a citizen for the ends of public utility. *Wissler v. Yarkin River Power Co.*, 74 S. E. 460, 158 N. C. 465.

"Eminent domain rights" are attributes of sovereignty to be exercised by the state, with great caution, and only in case of public necessity. *Wise v. Yazoo City*, 51 South. 453, 455, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912B, 377.

The right of eminent domain is the right of the state as sovereign to take at any time private property of any citizen for public use by paying just compensation therefor. The right is inherent in all governments, but is now restricted by Const. art. 1, § 6, providing that private property shall not be taken for public use without just compensation, and the theory upon which it may be taken at all is that the right of the individual must give way to the greater rights of a majority of the subjects of the state, and that it is necessary for the public use. In re Board of Water Supply of City of New York, 109 N. Y. Supp. 1036, 1040, 58 Misc. Rep. 581.

Under Mills' Ann. St. § 2257, giving to a private individual the right to invoke the power of eminent domain to acquire the right of way for a ditch, to enable him to utilize a valid appropriation of water, a proceeding is not authorized by a private individual in his own right in a representative capacity and as a trustee for the public, to acquire private lands for the purpose of making an artificial channel for a natural stream

which has been wrongfully obstructed, which will enable him, in his individual capacity, to utilize an individual right. *Ortiz v. Hansen*, 53 Pac. 964, 965, 35 Colo. 100.

"Eminent domain" is the right of the people or government to take private property for public use (Code Civ. Proc. § 1237), and, under a Code provision allowing property already taken for public use to be taken for a more necessary public use than that to which it has been already appropriated, the land of a private person subject to an easement for a public highway may be taken by a water company for a dam and reservoir; this constituting a more necessary public use. *Marin County Water Co. v. Marin County*, 79 Pac. 282, 283, 145 Cal. 586.

#### As an estate

"The power of 'eminent domain,' or the right to take private property for a public use, which is the controlling principle underlying the action, does not partake of the nature of an estate or interest in property, but is essentially a governmental function existing in the sovereign, as a necessary, constant, and inextinguishable attribute." *Contra Costa Water Co. v. Van Rensselaer*, 155 Fed. 140, 141 (citing *Lewis, Em. Dom.* [2d Ed.] 9; *Mahoney v. Spring Valley Water Co.*, 52 Cal. 159; *California Cent. Ry. Co. v. Hooper*, 18 Pac. 599, 76 Cal. 404).

#### Police power distinguished

Destroying property as a dangerous nuisance is not an "appropriation to public use," but is to prevent any use of it by the owner and end its existence, because it could not be used consistently with the maxim, "Sic utere tuo ut alienum non lædas." In abating nuisances, the public does not exercise the power of eminent domain, but the police power. *Louisa County v. Yancey's Trustee*, 63 S. E. 452, 455, 109 Va. 229.

"The 'police power' is to be clearly distinguished from the right of 'eminent domain,' and the distinction lies in this: That in the exercise of the latter right private property is taken for public use and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is *damnum absque injuria*, or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power." *Chicago, B. & Q. R. Co. v. People ex rel. Grimwood*, 72 N. E. 219, 224, 212 Ill. 103 (citing *Frazer v. City of Chicago*, 57 N. E. 1053, 186 Ill. 450, 51 L. R. A. 306, 78 Am. St. Rep. 296).

It is a well-recognized principle in the decisions of the state and federal courts that the citizen holds his property subject not only to the exercise of the right of "eminent domain" by the state, but also subject to the lawful exercise of the "police power" by the Legislature. In the one case, property is taken by condemnation and due compensation; in the other, the necessary and reasonable expenses and loss of property in making reasonable changes in existing structures, or in erecting additions thereto, are *damnum absque injuria*. *Laws 1901*, p. 912, c. 334, § 100, as amended by *Laws 1902*, p. 937, c. 352, § 47, generally known as the "Tenement House Act," requiring all school sinks in the existing tenement houses in cities of the first class to be removed and replaced by water-closets, is a proper and constitutional exercise of the police power of the state for the protection of the public health. *Tenement House Department of City of New York v. Moeschel*, 72 N. E. 231, 232, 179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439.

An ordinance requiring railroad companies at their own expense to reduce their tracks at crossings to grade is the exercise of the police power over crossings, and not the power of "eminent domain." The limitation on the power of eminent domain that property shall not be taken or damaged for public use without adequate compensation does not of itself impose any restrictions on the proper employment of the police power on any subject lying within its sphere in a proper and lawful manner. *Houston & T. C. R. Co. v. Dallas*, 84 S. W. 648, 651, 98 Tex. 396, 70 L. R. A. 850.

#### Special assessment distinguished

See *Tax—Taxation*.

## EMOLUMENT

See *Separate Public Emoluments or Privileges*.

The word "emolument" is more comprehensive than "salary" and includes the meaning of "gain," "profit," "compensation," etc. *Scharrenbroich v. Lewis & Clarke County*, 83 Pac. 482, 483, 33 Mont. 250.

Under Const. art. 3, § 13, providing that no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment, the word "emoluments" is defined to be any perquisite, advantage, profit, or gain arising from the possession of an office. *Commonwealth v. Mathues*, 59 Atl. 961, 973, 210 Pa. 372 (quoting and adopting definition in *Apple v. Crawford County*, 105 Pa. 300, 51 Am. Rep. 205; *And. Law Dict.*).

"Emolument" is an incident to office merely, and not a necessary element in determining its character. In re *Members of Legislature*, 39 South. 63, 64, 49 Fla. 269.

Act June 28, 1902, c. 1301, referring to the fees and compensation of clerks of the district and circuit courts, defines "emoluments" as including all amounts received in connection with the admission of attorneys to practice in the courts, amounts received for services in naturalization proceedings, and all other amounts received for services in any way connected with the clerk's office. *United States v. Mason*, 31 Sup. Ct. 28, 33, 218 U. S. 517, 54 L. Ed. 1133.

Const. art. 15, § 4, provides that no law shall extend the term of any public officer or diminish his salary or emoluments. Held, that the word "emoluments" imports any perquisite, profit, advantage, or gain arising from the possession of an office. "21 Del. Laws, p. 412, c. 247, which became operative March 16, 1899, provided for the establishment of a workhouse in a certain county, to be completed within two years, and to which, when completed, the sheriff was to deliver all prisoners held by him on commitment. 22 Del. Laws, p. 122, c. 73, passed March 9, 1901, put the office of sheriff of the county on a salary basis, and provided that it should take effect at such time as the sheriff should deliver the prisoners in his custody to the workhouse, pursuant to the workhouse act. Plaintiff was elected sheriff in 1900, and received the fees and perquisites of his office up to November, 1901, on which date he was notified of the completion of the workhouse and was given notice to transfer the prisoners to it. The salary to which plaintiff was entitled under the act of 1901 amounted to less than the fees and perquisites of the office, including the profits from the board of prisoners in his custody, amounted to prior to the taking effect of that act. Held, that the workhouse act, having been passed prior to plaintiff's election as sheriff, constituted notice to the sheriff that as soon as the workhouse was completed the prisoners would be taken from his custody, and that he would no longer receive the profits from boarding them, and hence there was no violation, as to plaintiff, of Const. art. 15, § 4, providing that no law shall extend the term of any public officer, or diminish his salary or 'emoluments,' after his election or appointment." *McDaniel v. Armstrong*, 59 Atl. 865, 867, 5 Pennewill, 240.

#### As authorities

See Authorities.

## EMOTIONAL INCAPACITY

"Emotional incapacity," as applied to a witness, is partiality of hostility resulting from bias, interest, or corruption. *State v. Craft*, 41 South. 550, 551, 117 La. 213 (citing *Wigmore*, on Ev. §§ 940, 943).

## EMPLOY

See Cease to Employ; Further Employ.

The word "employ," in an agreement by a charterer of a vessel that he should "em-

ploy" only in lawful trade, indicates a purpose of control and management, but does not necessarily show a demise of the vessel. *Grimberg v. Columbia Packers' Ass'n*, 83 Pac. 194, 198, 47 Or. 257, 114 Am. St. Rep. 927, 8 Ann. Cas. 491.

The word "employ," as used in a contract by which the employer agrees to engage and employ the employé as servant, and in a particular capacity for a specified term, means to retain in service. *White v. Lumiere North American Co.*, 64 Atl. 1121, 1124, 79 Vt. 206, 6 L. R. A. (N. S.) 807.

Webster defines the word "employ": "to use; to have in service; to cause to be engaged in doing something; to make use of as an instrument, a means, a material, etc., for a specific purpose." And as so defined it is the sense in which the term is used in a statute prohibiting one to organize, maintain, and employ an armed body of men. It does not mean to hire, but it means to use whether under hire or not. It is unnecessary that the relation of master and servant exist. *State v. Gohl*, 90 Pac. 259, 261, 46 Wash. 408.

Under a statute providing that no child and no woman shall be employed in laboring in certain manufacturing and mechanical pursuits, except on compliance with certain regulations, etc., the word "employ" is used to mean to have work or to make use of the service of another. *Commonwealth v. Riley*, 97 N. E. 367, 368, 210 Mass. 387, Ann. Cas. 1912D, 388.

Deputy inspectors of boilers and elevators, provided for by the charter of the city of St. Louis, perform public functions. They have a fixed tenure of office of four years, and are required to give bond. Their salaries are fixed at a certain sum per year. Their qualifications are prescribed by law. Their public position is expressly denominated as an office, and their duties as official duties. The charter defines officers as those holding situations under the city government or its departments with an annual salary or for a fixed definite term of office, and the forms of official oath and bond prescribed refer to their positions as officers. Held, that they are officers, although *McQuillin's Municipal Code of St. Louis*, § 2197, authorizes the inspectors of boilers and elevators to "employ" deputies; the word "employ" conveying the idea of selecting and intrusting with a duty. *Gracey v. City of St. Louis*, 111 S. W. 1159, 1163, 213 Mo. 384 (citing 6 Words and Phrases, p. 4923).

#### Compensation implied

The word "employ" means "to make use of the time, attention or labor of; to give occupation to; use as an agent." One cannot be employed unless his time is occupied at something to which he is giving his attention, labor, or skill. "Employment," when used in respect to a servant or hired hand, is equivalent to hiring, which implies a re-

quest and contract for compensation. Rev. St. 1899, § 2187, which provides that no child under the age of 14 years shall be "employed" in specified manufacturing companies, and section 2190, which punishes any firm, corporation, or its agents who "employs" any such child, prohibit the putting of a child under 14 years of age at work in any of the described establishments, and a foreman of such a manufacturing corporation who hires a child and puts him at work in the establishment is subject to the punishment. *State v. Deck*, 83 S. W. 314, 315, 108 Mo. App. 292 (citing Cent. Dict.; Webst. Dict.; *United States v. Post*, 13 Sup. Ct. 567, 148 U. S. 124, 37 L. Ed. 392; *State v. Canton*, 43 Mo. loc. cit. 51; *State v. Foster*, 37 Iowa, 404, and *McCluskey v. Cromwell*, 11 N. Y. 593).

A theatrical manager, engaging a child, in regular services in a theatrical exhibition which he is presenting every evening, thereby giving the child an opportunity for valuable training and constant companionship of his parent, who is an actor in the company, employs the child in violation of Rev. Laws, prohibiting the employment of children at certain hours; the word "employ" meaning to use as a servant, agent, or representative, and not requiring the payment of compensation as an element. *Commonwealth v. Griffith*, 90 N. E. 394, 395, 204 Mass. 18, 25 L. R. A. (N. S.) 957, 134 Am. St. Rep. 645.

## EMPLOYÉ

See *Bona Fide Employé*; *Coemployé*; *Emergency Employé*; *Quasi Employé*.  
As such employé, see *As Such*.  
Discharge of employé, see *Discharge*.  
Other employés, see *Other*.

An "employé" is one who works for and under the control of his employer; and the mode of payment, while a circumstance to be considered in determining the question, is not decisive. *Employers' Indemnity Co. of Philadelphia v. Kelly Coal Co.*, 149 S. W. 992, 994, 149 Ky. 712, 41 L. R. A. (N. S.) 983.

Within Labor Law, § 18, requiring any person employing or directing another to perform labor of any kind in the erection, repairing, etc., of a house, building, or structure to furnish safe scaffolding, and section 2 defining an "employé" to mean a mechanic, working man or laborer who works for another for hire, it is not intended to protect only any particular class of mechanics, and carpenters engaged in repairing a railroad car in a car shop, requiring the use of scaffolds, are entitled to the protection of the statute. *Caddy v. Interborough Rapid Transit Co.*, 110 N. Y. Supp. 162, 164, 125 App. Div. 681.

One employed only in one particular instance to transport liquor to a mulct saloon for lawful sale was not an employé whose name the saloonkeeper was required to file with the county auditor by Code, § 2448,

subd. 4. *Johannsen v. Hutchinson*, 132 N. W. 20, 22, 151 Iowa, 608.

An employé of defendant railway company having charge of its pumping station and water tank, informed the superintendent that he had to leave on business, and would leave his 14 year old son in charge, and received the superintendent's permission to do so. Held, that the son was an "employé" of the company. *Yazoo & M. V. R. Co. v. Slaughter*, 45 South. 873, 874, 92 Miss. 289.

Gen. St. 1906, § 3150, limits the rule that an employé cannot recover from an injury occasioned by the negligence of a fellow servant to cases where the person injured is guilty of contributory negligence, and the word "employé," as used in that relation, means such an employé as would be a fellow servant under the rule above mentioned. *Atlantic Coast Line R. Co. v. Beazley*, 45 South. 761, 764, 54 Fla. 311.

Acts 1901, p. 63, as amended by Acts 1903, p. 91, making it unlawful to employ or rent agricultural lands to, or to furnish lands to be cropped by, any person already under contract as the employé, tenant of agricultural lands, or cropper of another, and providing that when the relation of employer and employé, or of landlord and tenant of agricultural lands, or of landlord and cropper, has been created by a written contract, it shall be unlawful during the life of such contract to disturb the relation in any way, is not limited to the wrongful employment of a laborer under contract to work on agricultural lands, but includes a laborer employed in the turpentine business. *Johnson v. Hudspeth*, 67 S. E. 423, 424, 134 Ga. 25.

The definition of "employé," as given by the Century Dictionary, is: "One who works for an employer; a person working for salary or wages; applied to any one so working but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants." In *Re Cortland Manufacturing Co. (Sup.)* 45 N. Y. Supp. 630, an "employé" is defined to be a person who is employed; one who works for wages or a salary. In *Palmer v. Van Santvoord*, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402, the court held: "An 'employé' is one who works for an employer; a person working for a salary or wage. The word is applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to officers of a government or corporation." *United States v. Schlierholz*, 137 Fed. 616, 624.

There is no distinction between the term "laborer" and the term "employé" as respects the element of personal service. *Pere Marquette R. Co. v. Baertz*, 74 N. E. 51, 54, 36 Ind. App. 408.

In 1 Laws Wis. 1883, c. 349, providing that assignments for the benefit of creditors

containing preferences, except for the wages of laborers, servants, and employes, earned six months prior thereto, shall be void, is qualified and limited by its association with the words "laborers" and "servants," according to the maxim, *noscitur a sociis*. *Campfield v. Lang*, 25 Fed. 128, 131.

#### Attorney

In an order giving a preference to claims for all amounts due to operators and employes, the term "employes" includes attorneys at law regularly employed. *Seaboard Air Line Ry. v. Continental Trust Co.*, 166 Fed. 597, 600.

An attorney serving as division counsel for a railroad, having charge of "all legal matters" within the territory constituting his division to which the company is a party or in which it may be interested, furnished with annual passes and telegraph franks as such counsel, and having authority to appoint local counsel, subject to the approval of the general counsel of the company, although paid by fees on accounts rendered and audited at stated periods, instead of by salary, is an "employé," and his accounts for services so rendered are for a current debt arising in the operation of the road, and within the terms of an order of court, appointing receivers, which authorized them to pay from the earnings of the property "all amounts due to operators and employes \* \* \* and unpaid pay rolls and supply accounts incurred in the operation of" the road within the preceding six months and entitled to priority of payment thereunder from current earnings over the claims of mortgage bondholders. *Seaboard Air Line Ry. v. Continental Trust Co.*, 166 Fed. 597, 602.

An attorney retained for a single suit is not an "employee," the engagement being rather that of a contractor than an employee. *Hand v. Cook*, 92 Pac. 3, 10, 29 Nev. 518.

Laws N. Y. 1897, c. 415, § 8, provides that, "upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employes of such partnership or corporation shall be preferred to every other debt or claim." Section 2 defines the word "employé" as used in the act as meaning "a mechanic, workingman or laborer who works for another for hire." Held that, under the construction placed upon a similar prior statute by the Court of Appeals of the state, an attorney at law employed by an electric company to procure options on certain property and water power sites which the company desired to buy, at an understood compensation of \$10 per day and expenses for the time employed in the service was not a "workingman" or "laborer," and hence not an "employé" entitled to preference under the statute. *Gay v. Hudson River Electric Power Co.*, 178 Fed. 499, 502.

#### Engineer

In an action to recover for the death of a person who, after securing appointment as locomotive engineer, was traveling on a locomotive for the purpose of informing himself more particularly as to the character of the road and was killed by the train leaving the tracks, whether deceased was a passenger or an "employé" was for the jury. The test of whether he was an employé being whether at the time of the accident he was in the actual service of the company performing the duties of an employé, and the fact that at the time he was riding on an "employé's pass" was not conclusive, an employé's pass being usually not required when the employé is in actual service. *Wilkes v. Buffalo, R. & P. R. Co.*, 65 Atl. 787, 788, 216 Pa. 355.

#### Hospital physician

Pol. Code, § 2255, provides that the directors of the state deaf, dumb, and blind asylum shall have power: "(2) To elect the principal teacher; (3) to elect a treasurer; \* \* \* (4) to elect a physician for the asylum for the term of two years, who shall not be a member of the board of directors; (5) to remove at pleasure any teacher or employé." Held, that the coupling of the term "employé" with the antecedent term "teacher" indicated that the former was used in a restricted sense, as applying only to employes of like kind with teachers, and the board had no power to remove the physician before the end of the term for which he was elected. *Wall v. Board of Directors of Deaf, Dumb & Blind Asylum*, 78 Pac. 951, 952, 145 Cal. 468.

#### Janitor

The present Greater New York Charter, relating to compensation of employes of the board of education, by excluding "day laborers and teachers, examiners and members of the supervising staff," includes janitors employed by the board, though limited to "compensation paid out of the city treasury." *Farrell v. Board of Education of City of New York*, 98 N. Y. Supp. 1046, 1048, 113 App. Div. 405.

Under Greater New York Charter, granting to the board of education certain judicial powers over officers and employes, and section 1068, giving power to enact by-laws, rules, and regulations for defining the duties of officers and subordinates, which have the force of law, and section 1093, providing for penalties for violation thereof to be imposed by the board, consisting of a fine, suspension, or dismissal, a janitor is an employé and subject to the penalty prescribed in section 1093. *Egan v. Board of Education of City of New York*, 127 N. Y. Supp. 611, 613, 70 Misc. Rep. 518; *Farrell v. Board of Education of City of New York*, 122 N. Y. Supp. 289, 290, 67 Misc. Rep. 187.

#### Manager or superintendent

A testator gave a specified sum to each of the employes of a firm of which he was a

member who should have been in the employ of the firm one or more years previous to testator's death. Held, that one who was paid by the piece, and who worked intermittently from May 12th, in one year to May 15th in the following year, was not an "employé" of the firm within the meaning of the will, nor was a person such an employé, where he at one time acted as a clerk of the firm but thereafter ceased to be regularly employed as such, and thereafter made collections for the firm, occasionally went to other parts of the state to transact business, and finally, during one of such trips, became the manager of a corporation in which testator and his partner were interested, at an annual salary. In re Klein's Estate, 88 Pac. 798, 806, 35 Mont. 185.

### Miners

Rev. St. 1899, § 2586, provides that eight hours shall constitute a day's labor for all "coal miners and laborers," etc. Section 2587 declares that the word "day," in all contracts between any owner, lessee, or operator of any mine with any such miner or laborer, shall mean eight hours, and section 2589 declares that any owner, lessee, or operator, his or its agent, employes, or servants violating any of the provisions of the chapter, shall be fined, etc. Held, that the words "employé" or "servants," used in section 2589, should be construed to mean employes or servants of the mine owner occupying positions of "agents," and not to include miners and laborers, so that a miner was not subject to punishment under the penal provision for working more than eight hours a day. State v. Thompson, 87 Pac. 433, 434, 15 Wyo. 136 (citing Lewis' Sutherland, Stat. Con. [2d Ed.] § 521).

### Officer of corporation

A director of a corporation is an "officer," within General Corporation Act (22 Del. Laws, p. 780) § 57, giving employes of an insolvent corporation priority for wages, but declaring that the word "employé" shall not include any officer, and he is not entitled to priority as an employé for wages as a foreman. In re Peninsula Cut Stone Co., 82 Atl. 689, 9 Del. Ch. 348.

While the word "employé" is not to be read with full generic force, it has been adjudicated to embrace more than the words "operative" and "laborer." It may be said generally that the term "employé" includes persons employed by the corporation in comparatively subordinate positions, which cannot correctly be described as either "operatives" or "laborers." Hopkins v. Cromwell, 85 N. Y. Supp. 839, 840, 89 App. Div. 481 (citing In re American Lace & Fancy Paper Works, 51 N. Y. Supp. 818, 820, 30 App. Div. 321, 323).

### As person

See Person.

### Public officer

Officer distinguished, see Office; Officer.

A health officer is not an "employé," as that word is used in Mun. Code, § 129, declaring that all employes now serving in the health department shall continue to hold their positions, and shall not be removed from office or reduced in rank or pay, except for cause assigned, and after hearing has been afforded them before the board. State v. Craig, 69 N. E. 228, 230, 69 Ohio St. 236.

### Salaried servant

Where a retail and wholesale liquor business was incorporated, the corporation was the employer, and owners of the stock, who were in its service and drew salaries from the corporation, were required by the statute to be listed as "employes," though they practically owned the business. Manderscheid Sons Co. v. Oliver, 124 N. W. 897, 898, 146 Iowa, 168.

### Servant synonymous

See Servant.

### As superintendent

See Superintendence; Superintendent.

### Employé of railroad

A student brakeman, who, in consideration of being permitted to ride on a railway company's freight train to observe and learn the duties of a freight brakeman, agrees to perform service on its engines, trains, and cars, while learning such duties, is an "employé" of the company. Atchison, T. & S. F. Ry. Co. v. Fronk, 87 Pac. 698, 699, 74 Kan. 519, 11 Ann. Cas. 174.

In an action to recover for the death of a person who, after securing appointment as locomotive engineer was traveling on a locomotive for the purpose of informing himself more particularly as to the character of the road, and was killed by the train leaving the tracks, whether deceased was a passenger or an "employee" was for the jury. The test of whether he was an employé being whether at the time of the accident he was in the actual service of the company performing the duties of an employé, and the fact that at the time he was riding on an "employé's pass" was not conclusive; an employé's pass being usually not required when the employé is in actual service. Wilkes v. Buffalo, R. & P. R. Co., 65 Atl. 787, 788, 216 Pa. 355.

In Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415, making it unlawful for any common carrier subject to the act to remain on duty for a period longer than a specified time, and providing that the term "employes" shall be held to mean persons actually engaged in or connected with the movement of any interstate train, the operation of the act is limited not only to employers engaged in interstate commerce, but to the conduct of employes so engaged, to the exclusion of any who might be engaged purely in the domestic



affairs of the employer. *State v. Chicago, M. & St. P. R. Co.*, 117 N. W. 686, 691, 136 Wis. 407, 19 L. R. A. (N. S.) 328.

Intrastate railroads and employes wholly engaged in local business were not affected by the provisions of Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416, making it "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act to be or remain on duty" for a longer period than that prescribed, since such carriers and employes are defined in section 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the roads in use by any carrier operating a railroad by contract, agreement, or lease, and "employes" as meaning persons actually engaged in, or connected with, the movement of any train. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 Sup. Ct. 621, 624, 221 U. S. 612, 55 L. Ed. 878.

Act Cong. March 4, 1907, c. 2939, § 2, prohibits a carrier to require or permit any employe subject to the act to remain on duty for a longer period than 16 consecutive hours, and requires that after an employe has been continuously on duty for 16 hours he shall be relieved, and not permitted to go on duty again until he has had at least 10 consecutive hours off duty, and that no such employe who has been on duty 16 hours in the aggregate in any 24-hour period shall be permitted to continue or again go on duty without having had at least 8 consecutive hours off duty, provided that no operator, train dispatcher, or other employe dispatching train orders shall be permitted to remain on duty for a longer period than 9 hours in any 24-hour period at stations continuously operated night and day, or for more than 13 hours in stations operated only in the daytime. Held, that train dispatchers, being "employes," are within the protection of the main part of the section giving to all employes "at least eight consecutive hours off duty in each day, counting from some point in the next day, so that it would be impossible for carriers to require of them short service periods spread over the entire 24 hours, giving no opportunity for real recuperation. *Atchison, T. & S. F. Ry. Co. v. United States*, 177 Fed. 114, 119, 100 C. C. A. 534.

Decedent was a porter on a pullman car owned jointly by defendant railroad company and the Pullman Company, and operated by them as an association under a contract providing that the Pullman Company should have the management thereof, but that all obligations with reference to operation of the

cars should be borne by the association, which should furnish each car one or more employes, who at all times should be subject to the rules of the railroad company governing its own employes, that the earnings should be divided in certain proportions, and, in the event of liability arising against the railroad company for personal injuries to an employe of the association, the railroad company should be liable only to the same extent it would be if the person injured were an employe in fact of the railroad company, and for all excess liability the railway company should be indemnified and paid by the owners of the car. Held, that decedent was an employe of the railway company within federal Employers' Liability Act, 35 Stat. 65, and hence thereunder his personal representatives were not precluded from recovering for his death resulting from the negligence of the railway company by a provision in his contract of employment purporting to release both the Pullman Company and the railway company from such liability. *Oliver v. Northern Pac. R. Co.*, 196 Fed. 432, 435.

Within Acts of 1891, c. 4071, § 3, providing that if any person is injured by a railroad company by the running of locomotives, cars, or other machinery, he being at the time an employe of the company, and if the damage is caused by the negligence of another employe without fault or negligence on the part of the person injured, his employment shall be no bar to a recovery, a person who, although in the employment of the principal whose servant's negligence occasioned the injury, was not when injured engaged in the performance of his duties as such employe, but had left the scene of his labors and was engaged in the pursuit of his own ends, was not an "employe." *Louisville & N. R. Co. v. Wade*, 35 South. 863, 864, 46 Fla. 197.

#### **Employes on the job**

A building contract provided that no orders for work supposed to be "extra" which should be given to subcontractor "by employes upon the job" would be recognized as extra by the contractor. The contractors were nonresidents, represented upon the construction work by agents known as superintendents. Held, that the superintendents represented the company upon the job, and were not "employes upon the job" within the contract. *McGowan v. Gate City Malt Co.*, 130 N. W. 965, 967, 89 Neb. 10.

#### **EMPLOYED**

See Capital Employed; Permanently Employed.

The word "employed" is a verb of past or present tense, and cannot be accurately used potentially to indicate future action, unless qualified by additional words. *Independent Transp. Co. v. Canton Ins. Office*, 173 Fed. 564, 565.

The use of the word "employed" in Civil Service Law, Laws 1899, p. 807, c. 370, § 19, requiring on the pay roll of each department of the city the certificate of the municipal civil service commission, that the persons named therein have been appointed or "employed" in pursuance of law, is in distinction to appointed, and the commission is not required to certify that the persons named in the pay roll performed the services entitling them to receive the amount opposite their respective names, or that such persons performed services appropriate to the title of the positions assigned to them on the pay roll; but the only duty imposed on the commission is that they certify that the persons whose names appear on the pay rolls are qualified for appointment or employment in the positions assigned them on the pay rolls and that they have been duly appointed thereto. *People ex rel. Bedford v. McWilliams*, 106 N. Y. Supp. 459, 460, 56 Misc. Rep. 296.

The use of the word "employed" in section 1, c. 114, Laws 1891, providing that eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons employed on behalf of any city of the state, excludes officers; an office being distinguished from an employment, in that it implies tenure, duration, emolument, and duty. *State v. City of Ottawa*, 113 Pac. 391, 393, 84 Kan. 100.

As used in section 18, Act Cong. June 26, 1884, providing that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending, but providing that such limitations shall not apply to wages of those persons "employed" by said shipowner, the word "employed" is not restricted to those only who are hired by the master of the ship personally. *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11, 20, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769.

#### **As engaged in**

"To be 'employed' in any thing means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." *United States v. Morris*, 14 Pet. (39 U. S.) 463, 475, 10 L. Ed. 543.

An employé under 16 years of age "permitted to operate" dangerous machinery prohibited by Labor Law, § 81, as amended by Laws 1899, c. 192, § 1, is "employed in violation of law" within an employer's liability policy, excepting liability for injury to one so employed; "employ," when so used, having a broader meaning than "hiring," and meaning "to have in service, to cause to be engaged in doing something." *Buffalo Steel Co. v. Etna Life Ins. Co.*, 136 N. Y. Supp. 977, 982.

A child is not "employed," within the meaning of the statute prohibiting the employment of children in certain manufacturing establishments, until he is put to work. Merely to employ a child to work does not complete the offense. *State v. Deck*, 83 S. W. 314, 315, 108 Mo. App. 292.

A statute authorizing payment of a specified sum to a court reporter for every day he is "employed," does not restrict a reporter's compensation to the time during which he is actually taking testimony. *Ferguson v. Pottawattamie County*, 101 N. W. 733, 734, 126 Iowa, 108.

An attorney is "employed"—that is, he is engaged in his professional capacity as a lawyer or counselor—when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings or advocating his client's cause in open court. *Sheehan v. Allen*, 74 Pac. 245, 247, 67 Kan. 712 (quoting *Denver Tramway Co. v. Owens*, 36 Pac. 848, 855, 20 Colo. 107, 128).

Where it appeared that plaintiff was directed by his employer to run a gin stand, and was paid a daily wage for doing such work, it was not error to hypothesize a charge on the jury's belief from the evidence that "plaintiff was employed by defendants to run the gin stand in their gin"; the word "employed" not always being synonymous with "hired," and sometimes meaning to be occupied or engaged in performance of a duty or undertaking. *Davis, Pruner & Howell v. Woods (Tex.)* 143 S. W. 950, 951.

#### **Employed in buying and selling chattels**

Where a bank carried a person for the money he used in buying and shipping stock to market, and returns for the sales were made to the bank, and the statement for money received, placed to his credit, and certain stock belonging to him was shipped in the name of the bank for its protection against loss for money furnished to buy stock, the bank, at the most, was merely acting as agent for the other, and the transaction was not within Rev. St. 1899, § 1291, prohibiting a bank to "employ its money in trade or commerce by buying and selling chattels." *Griffin v. Wabash R. Co.*, 91 S. W. 1015, 1016, 115 Mo. App. 549.

#### **Employed in commerce**

See *Commerce*; *Interstate Commerce*.

#### **Employed in mechanic arts**

A finished manufactured product entirely completed in the fall of one year, and as to which nothing further remained to be done except to be sold when the opportunity offered, and which is stored because not sold until the following April, is not "employed in the mechanic arts" on the 1st day of that April, within the meaning of Rev.

St. 1883, c. 6, § 14, providing that all personal property employed in the mechanic arts shall be taxed in the town where so employed. *Inhabitants of New Limerick v. Watson*, 57 Atl. 79, 80, 98 Me. 379.

Rev. St. 1903, c. 9, § 13, par. 1, provides that personal property employed in the mechanic arts shall be taxed in the town where employed, provided the owner occupies any store, shop, mill, or wharf therein for the purpose of such employment. A corporation owned and operated in the town of O., which was located on the opposite side of the river from the town of B., a mill for the manufacture, by mechanical and chemical processes, of soda pulp from pulp wood. On the same side of the river it also had a cutting up sawmill and piling ground. On the opposite side of the river, in B., it had another cutting up sawmill and piling ground. Pulp wood out of which the soda pulp was manufactured was driven down the river in log lengths to a boom above the mill from which some of the logs were let down into a boom on the O. side of the river, taken out and cut up and used in the mill or piled in the piling ground, while other logs were let down into a boom on the B. side of the river, taken out and cut up and piled on the B. piling ground, from where they were taken across the river in the winter on the ice to the mill or piling ground on that side. The town of B. taxed pulp wood which had been cut up and piled on the B. piling ground but which had not been removed to the O. side during the previous winter because the piling ground on that side was full. Held, that the pulp wood was not taxable by the town of B. as being employed in the mechanic arts in that town. *Inhabitants of Bradley v. Penobscot Chemical Fibre Co.*, 71 Atl. 887, 888, 104 Me. 276.

Toothpicks stored by a manufacturer thereof in a storehouse preparatory to shipment in the general course of business are not taxable under Rev. St. c. 9, § 13, par. 1, as amended by Pub. Laws 1909, c. 4, as personality "employed in mechanic arts." *Inhabitants of Peru v. Forster's Estate*, 83 Atl. 670, 671, 109 Me. 226.

Logs and lumber used at a mill for manufacture of boxes for the manufacturer's use in shipping explosives are taxable as personality "employed in the mechanic arts," within Rev. St. c. 9, § 13, par. 1, in the town where the mill is located. *Inhabitants of Boothbay v. E. I. Du Pont De Nemours Powder Co.*, 83 Atl. 663, 664, 109 Me. 236.

#### **Employed in trade**

Toothpicks stored by a manufacturer thereof in a storehouse preparatory to shipment in the general course of business are not taxable under Rev. St. c. 9, § 13, par. 1, as amended by Pub. Laws 1909, c. 4, as personality "employed in trade." *Inhabitants of Peru v. Forster's Estate*, 83 Atl. 670, 671, 109 Me. 226.

Where an inhabitant of another town owned a wood lot in the town of B. from which he cut wood and hauled it to a wharf in B. and piled it up to await shipment to a particular place when the river opened for navigation, where it remained on April 1st, the day when taxes were assessed, it was not assessable by B. within Rev. St. Me. c. 6, § 14, cl. 1, providing that all personal property "employed in trade," etc., shall be taxed in the town where so employed on the 1st day of each April, provided that the owner so employing it occupies any wharf, etc., for the purpose of such employment. *Creamer v. Inhabitants of Bremen*, 40 Atl. 555, 557, 91 Me. 508 (citing and distinguishing *Gower v. Inhabitants of Jonesboro*, 21 Atl. 846, 83 Me. 142).

Where a corporation doing business in Portland owned, occupied, and used a sawmill in F., and also owned a large quantity of logs in another county destined for that mill and which were in fact sawed there during the season of 1897 but did not arrive there until after June 1st of that year, they were "employed in trade" on April 1, 1897, within the meaning of Rev. St. c. 6, § 14, providing that all personal property employed in trade shall be taxed in the town where so employed on the 1st day of April, if the owner or agent so employing it occupies a mill, etc., therein for the purpose of such employment. *Inhabitants of Farmingdale v. Berlin Mills Co.*, 45 Atl. 39, 40, 93 Me. 333 (citing and adopting *Inhabitants of Ellsworth v. Brown*, 53 Me. 519).

#### **Employed on railroad**

Where an employé in railroad shops on going from his work passed along a track 150 feet from a crossing used by employés for many years with the consent of the company, and then attempted to go around a train on the track, and fell and was killed by the train, he was not "connected with or employed on" the railroad within Railroad Law, § 83, prohibiting any person not connected with or employed on a railroad from walking on tracks except at crossings, and the company owed him only the duty to refrain from wantonly injuring him. *McIntyre v. Long Island R. Co.*, 135 N. Y. Supp. 309, 310, 150 App. Div. 783.

#### **Employed in any of the works**

A contract for government work provided that if the contractor should fail to prosecute the work or begin the delivery of material in such manner as to insure a full compliance within the time limit, or if any question should arise as to whether the contractor was properly carrying on the contract in its true intent and meaning, and on his neglect or refusal after notice to provide means for a more energetic compliance with the contract, the Secretary of the Interior might suspend the work and take possession of all machinery, tools, appliances, and animals "employed on any of the works," and

all "materials belonging to the contractor delivered on the ground," and use the same to complete the work. Held, that on the termination of the contract the Secretary of the Interior's right to take possession of machinery, tools, appliances, and animals was not limited to those employed by the contractor, but included all that were "employed on any of the works," by any one, whether contractor or subcontractor. *Tinker & Scott v. United States Fidelity & Guaranty Co.*, 169 Fed. 211, 215.

#### Employed within the state

To render a corporation liable to a franchise tax under section 182 of the tax law as amended, imposing such a tax on the capital of a corporation "employed within the state," it must be doing business in the state, and must have capital stock employed within the state during the year for which the tax is assessed. Where the capital stock of a corporation was used for the precise purpose specified in the certificate of incorporation, it was "employed" rather than "invested" within the state so as to render it liable to a franchise tax under said section. *People ex rel. Vandervoort Realty Co. v. Glynn*, 87 N. E. 434, 435, 194 N. Y. 387.

A tract of 200 acres of land belonging to a corporation, upon part of which 34 dwelling houses are built and earning an annual rental of \$7,200, and the balance of which is held for sale as soon as a satisfactory price can be obtained, is "employed," within the meaning of Tax Law, Laws 1896, p. 856, c. 908, § 182, imposing a franchise tax on corporations, to be computed upon the basis of the amount of their capital stock employed within the state. *People ex rel. Steinway & Sons v. Kelsey*, 96 N. Y. Supp. 42, 44, 108 App. Div. 138.

Within Laws 1896, c. 908, § 182, providing that every corporation incorporated in this state shall pay annual tax, to be computed on the basis of the amount of its capital stock "employed" within this state, the capital stock of a corporation, represented by the several pieces of real estate owned by it, is "employed"; and the corporation is liable for the tax though it is really merely a holding corporation for an individual, and it is merely employing the property as he would have employed it had the title remained. *People ex rel. Waclark Realty Co. v. Williams*, 91 N. E. 266, 267, 198 N. Y. 54, 28 L. R. A. (N. S.) 371.

A corporation organized to buy and sell real estate and erect buildings thereon "employed" its capital in this state from the time it purchased realty for the purpose of erecting a building thereon within the meaning of Tax Law requiring every corporation to pay to the State Treasurer an annual tax, to be computed upon the basis of the amount of its capital stock employed during the preceding year within the state; it not being

essential that it should have completed the buildings and received rents therefrom in order to employ its capital in the state within the statute. *People ex rel. Fifth Ave. Bldg. Co. v. Williams*, 91 N. E. 638, 640, 198 N. Y. 238, 139 Am. St. Rep. 809.

The value of the rolling stock of a domestic railroad corporation is capital "employed within the state," unless such stock is used exclusively outside of the state. *People ex rel. New York Cent. & H. R. R. Co. v. Knight*, 65 N. E. 1102, 1104, 173 N. Y. 255.

A corporation whose only business is owning and managing an apartment house within the state is employing its capital stock within the state, and is taxable under Tax Law, providing for the assessment of a franchise tax against corporations, to be computed upon the basis of the amount of their capital stock "employed within the state." *People ex rel. Hubert Apartment Ass'n v. Kelsey*, 96 N. Y. Supp. 745, 746, 110 App. Div. 617.

Where the entire capital of a foreign corporation was invested in a building within the state and employed in the care and management of the same and the collection of the rents, the net income being devoted to dividends, this fund was subject to taxation as being "employed within the state" under the purview of Laws 1896, p. 856, c. 908, §§ 181, 182, imposing license taxes on foreign corporations. *People ex rel. Wall & H. St. Realty Co. v. Miller*, 73 N. E. 1102, 1103, 181 N. Y. 328.

A corporation organized for the purpose of taking title to unimproved city real estate owned by tenants in common so as to execute a mortgage thereon to pay past due mortgages and taxes and hold the same for sale is not liable to the franchise tax imposed under Tax Law, § 182, on capital of a corporation "employed within this state." *People ex rel. Ft. George Realty Co. v. Miller*, 71 N. E. 463, 464, 179 N. Y. 49.

Where a foreign banking corporation, maintaining its principal office in the state and branches and agencies in other states, carries on the business of selling its own drafts on its own branches and agencies, which in turn draw upon the principal office for reimbursement and also to pay for such drafts as have been sold, thereby becoming indebted to the main office, which uses such indebtedness for the payment of any further drafts that may be drawn and sold by it, such credits and evidences of indebtedness were taxable as capital "employed" and invested within the state. *People ex rel. International Banking Corp. v. Raymond*, 102 N. Y. Supp. 85, 86, 117 App. Div. 62.

#### EMPLOYER

In section 161, Crimes Act, the terms "employé or agent of any individual," on the one hand, and "employer," on the other, are

correlative; so that, when the employé or agents of an individual embezzle his money, they embezzle the money of their "employer," within the intendment of the law. *State v. Barr*, 38 Atl. 817, 818, 61 N. J. Law, 131.

A stockholder in a corporation which employs tinnners is not an "employer of labor" within the meaning of a by-law of a labor union which admits to its membership master tinnners, described by such by-law as employers of labor. *J. F. Parkinson Co. v. Building Trades Council of Santa Clara County*, 98 Pac. 1027, 1030, 154 Cal. 581, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165.

The Secretary of State without notice to a corporation dissolved it and caused its name to be stricken from his records. Thereafter an employé who had no knowledge of its dissolution was injured and served timely notice in writing addressed to the corporation of the time, place, and cause of the injury on its president and manager, who was also one of its two trustees and stockholders. Held, that conceding that the entry by the Secretary of State on his records of a notation that the corporation was dissolved terminated its corporate existence, and that under Rem. & Bal. Code, § 3715d, providing that the trustees of such a dissolved corporation shall hold title to the property for the benefit of its stockholders and creditors, the trustees became the employer within Laws 1905, c. 84, requiring notice of injury to be given to the employer, the notice given was sufficient. *Jones v. Francis*, 127 Pac. 307, 309, 70 Wash. 678.

#### EMPLOYING PLUMBER

"Master plumbers" and "employing plumbers" are one and the same, those who do not hold themselves out as personally doing the work, but as contracting to furnish the materials and to do the work through others, while "journeyman plumbers" are those skilled in the calling and holding themselves out as able and willing to do the work themselves. *Felton v. Atlanta*, 61 S. E. 27, 28, 4 Ga. App. 183.

#### EMPLOYMENT

See By Nature of his Employment; Common Employment; Course of Employment; Deprive of Employment; Permanent Employment; Professional Employment; Quasi Public Employment; Scope of Employment; Under the Orders or Employment of; Worldly Business or Employment.

Other employment, see Other.

Where the general manager of a corporation, on one of its employés being injured, directed an employé to call a physician, and placed the injured employé under such physician's care, and did not countermand the first employment, though he knew the physician was continuing to attend the employé, there

was an employment of the physician as to his entire services. *Freeman v. Junge Baking Co.*, 103 S. W. 565, 126 Mo. App. 124.

Under Laws 1904, p. 8, c. 9, § 1, providing that in every public department and upon all public works, etc., honorably discharged veterans of the Civil War who are citizens and residents of the state shall be entitled to preference in appointment and "employment," etc., a position as janitor of a courthouse is one by appointment or employment. *Kitterman v. Board of Sup'rs of Wapello County*, 115 N. W. 13, 15, 137 Iowa, 275.

The phrase "while in the employment" is not synonymous with "in the scope of employment." The line is not always easy to draw, but if not drawn the employer is made responsible for every tort committed by the employé during the time of employment. *Stewart v. Cary Lumber Co.*, 59 S. E. 545, 567, 146 N. C. 47 (dissenting opinion).

#### As appointment

In the common acceptation, the meaning of the words "appointment" and "employment" is quite different. An officer is usually appointed, while a person employed is spoken of as an "employé," and but rarely, if ever, as an "officer." The Century Dictionary defines "appointment" as "the act of appointing, designating, or placing in office. An office held by a person appointed." Among the definitions given to those words by the courts are the following: "'Appointment' is the designation of a person by the person having authority therefor to discharge the duties of some office or trust." *State v. New Orleans*, 41 La. Ann. 156, 6 South. 592. "Where the selection of an officer is referred to some functionary, it is called an 'appointment.'" *Speed v. Crawford*, 60 Ky. 207. The definition of "employé," as given by the Century Dictionary, is: "One who works for an employer; a person working for salary or wages; applied to any one so working but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants." In re *Cortland Manufacturing Co.* (Sup.) 45 N. Y. Supp. 630, an "employé" is defined to be a person who is employed; one who works for wages or a salary. In *Palmer v. Van Santvoord*, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402, the court held: "An employé is one who works for an employer; a person working for a salary or wage. The word is applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to officers of a government or corporation." *United States v. Schlierholz*, 137 Fed. 616, 624.

#### Hiring distinguished

"The word 'employment,' when used in respect to a servant or hired hand, is equivalent to 'hiring,' which implies a request and

a contract for compensation." *State v. Deck*, 83 S. W. 314, 315, 108 Mo. App. 292 (quoting and adopting definition in *State v. Foster*, 37 Iowa, 404; *McCluskey v. Cromwell*, 11 N. Y. 593).

Laws 1905, p. 145, c. 18, § 2, provides that the railroad commission may appoint a secretary at a salary of not more than \$2,000 per annum, appoint such clerks as may be necessary at a salary not exceeding a maximum amount, "and such other persons as experts as may be necessary to perform the duties that may be required of them by the act." Section 12 requires the commission as early as practicable to ascertain the amount of money expended per mile in the construction and equipment of every railroad in Washington, the amounts paid the officers of railroad and express companies for salaries, and wages of employes, and for this purpose authorizes employment of sworn experts to make the inspection and to assist the commission. Held, that the commission had authority to employ an expert in ascertaining the cost of the construction of railroads and to fix a salary which in the absence of fraud could not be reviewed by the State Auditor, under Ballinger's Ann. Codes & St. § 134, subd. 1, authorizing the Auditor to audit, adjust, and settle all claims against the state except such as may be expressly required by law to be audited and settled by other officers or persons. As stated in *McCluskey v. Cromwell*, 11 N. Y. 593, to "employ is to 'engage' in one's service; to use as an agent or substitute in transacting business: to commission or intrust with the management of one's affairs; and when used in respect to a servant or hired laborer is equivalent to hiring which implies a request, and a contract for a compensation, and has but this one meaning in the ordinary affairs and business of life." *State ex rel. Gillette v. Clausen*, 87 Pac. 498, 499, 44 Wash. 437.

#### Office distinguished

See Office; Officer.

## EMPOWER

"Empowered" means authorized. *Bacon v. Davis*, 98 Pac. 71, 77, 9 Cal. App. 83.

The word "empowered," as used in Act May 23, 1899 (P. L. 277), art. 12, § 2, providing that "any city which now has the title to any water, gas, or electric light works \* \* \* is hereby 'empowered' to create a department to be called the water and light department," is a grant of authority rather than a command to exercise it. *Commonwealth v. Heller*, 67 Atl. 925, 926, 219 Pa. 65.

## EMPTOR

See Caveat Emptor.

## EMPTY

A manufacturer's stamped package is not "emptied," within section 13 of the Oleomargarine Act, making it the duty, subject to a fine for violation thereof, of the person in whose hands the package is when emptied, to destroy the stamps thereof, where it still contains a pound package put up by the retailer out of its original contents. *United States v. Knott*, 151 Fed. 925, 926.

Where, in an action for injuries to a servant by the derailment of a car, it appeared that the car was "emptied" of its contents by "dumping," which was accomplished by pulling a lever, an instruction that, if plaintiff "emptied" the slate from the car at the place of derailment, he was guilty of contributory negligence, was sufficiently covered by the plea, which alleged that plaintiff "dumped the car." The words "dumped" and "emptied" are synonymous. *Redus v. Milner Coal & R. Co.*, 41 South. 634, 635, 148 Ala. 665.

## ENACT

"The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'" A joint resolution enacted by the words, "Be it resolved," etc. is a sufficient compliance with the mandatory provision of Const. art. 3, § 16, requiring all laws to be enacted by the words, "Be it enacted," etc. *Smith v. Jennings*, 45 S. E. 821, 823, 825, 67 S. C. 324 (quoting *Swann v. Buck*, 40 Miss. 268); *Swann v. Buck*, 40 Miss. 268, 269, 293.

The words "revived, saved, and enacted," as used in a law declaring that "all acts of assembly of this province, made and enacted at any time before the session of the assembly, begun and held at the port of Annapolis on the 26th of April, 1704, to be repealed and made void, except Acts 1702, c. 1, and Acts 1696, c. 24, and except the act for keeping good rules and order in the port of Annapolis, and which are not revived, saved, and enacted, this present session of assembly," mean such acts as had been expressly revived and enacted, otherwise the language would have been, "which are not hereby revived"; to revive a law by repealing a repealing law, not being to "enact" it. *State v. Bank of Maryland (Md.)* 6 Gill & J. 205, 224, 26 Am. Dec. 561.

## ENACTING CLAUSE

The "enacting clause" of a statute is that part which enacts any rule or regulation, no matter what place it occupies in the statute. *Mackmull v. Brandlein*, 137 N. Y. Supp. 607, 611, 152 App. Div. 733.

The "enacting clause" of a statute, within the rule that if exceptions are stated in the enacting clause it will be necessary to negative them in order that the description

of the crime may in all respects correspond with the statute, is not necessarily alone that which purports to be such, but comprehends every part of the statute which should be stated in order to define the offense with clearness. *U. S. v. Oregon Short Line R. Co.*, 160 Fed. 526, 528.

### ENACTMENT

The word "enactment" as used in the saving clause of article 5, § 58, of the Constitution of Oklahoma, relating to the passage of laws and the time when they are to take effect, is synonymous with the word "act." *Norris v. Cross*, 105 Pac. 1000, 1007, 25 Okl. 287; *In re Initiative State Question No. 10*, 110 Pac. 647, 648, 26 Okl. 554.

### ENAMEL

The art of "enameling" metal is old. Many different formulas and substances are used to form the enamel, but the usual process is substantially as follows: Certain ingredients, usually a mixture of silica or sand, and of other substances having a fluxing property to produce glass when mixed with sand, and subjected to heat, are mixed together mechanically. This mixture is called by enamelers the "mix." The mix is then subjected to a high degree of heat and fused, resulting in a vitrified or glassy mass. This is called the "frit." The frit is then put in a mill and ground fine, with a mixture of clay and water, resulting in a liquid paste. This is called the "dip." The metal article to be enameled is then dipped in the paste, dried, and subjected to a very high temperature in an oven or ruffle. In some cases more than one dipping and burning takes place. The result is, if the operation is successful, a metal article with its surface covered with an adherent coat of metal. *National Enameling & Stamping Co. v. New England Enameling Co.*, 151 Fed. 19, 29, 80 C. A. 485.

### ENCEPHALO MENINGITIS

"Encephalo meningitis" is a disease and consists in a change in the meninges covering the brain. It is a change which takes place in the brain's surface, and is therefore an affection of the brain covering. The term signifies degeneration. *Thomas v. Fidelity & Casualty Co. of New York*, 67 Atl. 259, 260, 106 Md. 299.

### ENCOURAGE

To "encourage, aid, or abet" the commission of a crime means or implies that the will of the person has contributed to the act actually committed by another, and fully and accurately describes an accessory before the fact if he is too far away to aid in the felonious act, or a principal if near enough to aid. One who tacitly approves of or silently consents to the killing of another per-

son cannot be held to have aided or abetted in such killing. *Harper v. State*, 35 South. 572, 574, 83 Miss. 402 (quoting and adopting definition given in *True v. Commonwealth*, 14 S. W. 684, 90 Ky. 653).

In an instruction that all persons concerned in the commission of a crime, whether they directly committed the act constituting the offense, or aided or abetted in its commission, or even if not present at its commission, have advised or encouraged its commission, are principals in the crime so committed. The word "advise" means "to give counsel; to offer an opinion to; as worthy or expedient to be followed; to recommend as wise and prudent; or to suggest as the proper course of action." And the term "encourage" means "to give courage to; to excite to action or perseverance." While the terms are not synonymous in a technical sense, they are in popular usage, and one who suggests to another that the commission of a crime is wise or that it is a proper course of action, and the advice so given is followed, may be said, in a popular sense, to have encouraged the commission of the offense. To incite one to action involves the idea of giving advice to the same end. By avoiding a strictly technical construction and giving the terms employed a more liberal and popular meaning, which is the correct canon of construction to be applied in such cases, there is no difference in principle between giving advice and giving encouragement, and criminal responsibility should be regarded as attaching to the giver in each case. *State v. Allen*, 87 Pac. 177, 182, 34 Mont. 403.

### ENCROACHMENT

See Substantial Encroachment.

As public nuisance, see Public Nuisance.

As purpresture, see Purpresture.

An "encroachment" is a gradual entering on and taking possession by one of what is not his own; an unlawful gaining upon the rights of possession of another. *Meservey v. Gulliford*, 93 Pac. 780, 786, 14 Idaho, 133 (citing *Chase v. City of Oshkosh*, 51 N. W. 560, 81 Wis. 313, 51 L. R. A. 553, 29 Am. St. Rep. 898; 3 Words and Phrases, p. 2385).

To "encroach" is to intrude upon, make gain upon, occupy, or use the land, right, or authority of another as by a gradual or partial assumption of right; to gain unlawfully upon the lands, property, or authority of another. *Johnston v. Long Island Inv. & Imp. Co.*, 82 N. Y. Supp. 961, 964, 85 App. Div. 60 (citing *And. Law Dict.*; *Bouv. Law Dict.*).

Though a post is set three feet outside the wheel tracks of a highway, it may be an obstruction within St. 1898, § 1326, providing a penalty therefor, rather than a mere encroachment within section 1330, providing

for its removal. *Neale v. State*, 120 N. W. 345, 346, 138 Wis. 484.

Under Kirby's Dig. § 5648, providing for the prevention and removal of encroachments or obstructions upon any city street or sidewalk, an unauthorized private awning extending in whole or in part over the sidewalk, which is in a good and safe condition but which might interfere with the fire department, is an "encroachment" on the street, and an ordinance requiring its removal is authorized. *City of Helena v. Wooten*, 135 S. W. 828, 829, 98 Ark. 156.

## ENCUMBRANCE

See Incumber—Incumbrance.

## END

See At the End.

The word "end," as used in a restriction in a deed providing that no building should be erected in the rear end of the lot conveyed within 10 feet from the line of the north side of a street, means the extremity, termination, limit. *Crofton v. St. Clement's Church*, 57 Atl. 570, 572, 208 Pa. 209.

A deed to certain lots reserved a right of way 10 feet wide abutting on the southwesterly "end of the strip" for an alley. Thereafter the grantor conveyed to S. the parcel of land subsequently acquired by defendant, reserving "the right of a driveway 12 feet wide along and across the southwesterly end of the same," which S. was entitled to inclose and use on maintaining gates at each end thereof. Held, that the 12-foot driveway was not only to be across the southwesterly end of the parcel conveyed, but was also to be along the southwesterly boundary; the word "end" being used first to describe the southwesterly boundary of the parcel, and as describing the southwesterly portion thereof. *Reed v. Gasser*, 106 N. W. 383, 384, 130 Iowa, 87.

### Of term

The words "end of the term," within the meaning of the acts providing for remedying defects in court records, were construed as being the last day on which argument was to be heard during that term, notwithstanding the court continued in session several days longer consulting and deciding cases. *Temple Baptist Church v. Georgia Terminal Co.*, 58 S. E. 157, 160, 128 Ga. 669.

A lease for a year contained a proviso that the "agreement, with all its provisions and covenants," should continue in force from time to time after the expiration of the year, provided that the parties could terminate the same at the end of the year or any term thereafter, and stipulated that the tenant should have the right to purchase the premises "at the end of said term" for a fixed sum. Held, that the tenant's option to purchase could be exercised at the end of

the year, or every succeeding year until the lease was terminated. *Thomas v. Gottlieb, Bauernschmidt Straus Brewing Co.*, 62 Atl. 633, 635, 102 Md. 417.

### Of will

The words "end of the will" in the statute of wills requiring signature at the end of a will refer to the logical and not the physical end and apply to the time of signature as well as the place. In *re Foley's Will*, 136 N. Y. Supp. 933, 937, 76 Misc. Rep. 168.

The statutory requirement that a will be signed "at the end thereof" means the logical end of the language used, which shows that the testamentary purpose has been fully expressed, and the position of the signature with regard to the bottom or end of the page is only evidence whether testator has completed the expression of his intention. In *re Swire's Estate*, 73 Atl. 1110, 1111, 225 Pa. 188.

The "end" of a will, under the statute, is the logical end of testator's disposition of his property, wherever it appears on the paper, and not the point spatially farthest removed from the beginning; and where testatrix, after having written the first page of a will, skipped the second page, filled the third page, and then returned to the second, having completed the disposition of her property at about the middle of the second page, and signed her name there, the statute was complied with. In *re Stinson's Estate*, 77 Atl. 807, 808, 228 Pa. 475, 30 L. R. A. (N. S.) 1173, 139 Am. St. Rep. 1014.

The provision of the statute that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The will at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the end thereof is not the foot or physical end of the sheet of paper upon which the will is written, but is the physical termination of the testamentary provisions which constitute the will. The requirement that the name shall be subscribed at the end of the will is not satisfied by having that name written in any place after the termination of the written matter irrespective of the relation which such place bears to the concluding portion of the will. This portion does not, however, of necessity require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to



place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space such as a single line or even more might be left blank between the written matter and the name without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention which would prevent its admission to probate. An alleged will was written on a printed form consisting of four pages folded in the middle as ordinary legal cap, and dispositive parts of the will were written on the blank portion of the first page and on about one-fourth of the blank portion of the second page. The printed form was prepared to be twice folded from the top to the bottom, and across the face of the paper as so folded and at the top thereof was testator's signature. Held, that the will was invalid as not fulfilling the requirements of Civ. Code, § 1276, requiring every will other than nuncupative or olographic to be subscribed at the end thereof by the testator. In re Seaman's Estate, 80 Pac. 700, 702, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726 (citing McGuire v. Kerr, 2 Bradf. Sur. [N. Y.] 244; Sisters of Charity of St. Vincent de Paul v. Kelly, 67 N. Y. 409; In re O'Neill's Will, 91 N. Y. 522; In re Andrews' Will, 56 N. E. 529, 162 N. Y. 1, 48 L. R. A. 662, 76 Am. St. Rep. 294; Soward v. Soward, 1 Duv. [62 Ky.] 126).

A will is not signed at the end thereof, within Rev. St. 1892, § 5916, when it is written by the party making it on a printed blank form containing a testimonium clause, with blanks for the name of the place and the date of execution, which he fills, and immediately following a blank line for the signature, which he leaves blank, though he has written his name in the attestation clause, immediately following the testimonium clause, in a blank left for the name of testator, and may have intended such act as a signing. *Sears v. Sears*, 82 N. E. 1067, 1068, 77 Ohio St. 104, 17 L. R. A. (N. S.) 353, 11 Ann. Cas. 1008.

A will was written on a blank form, folded in the middle, and containing three ruled pages marked with a printed heading. There were numerous testamentary clauses, and one naming the executor, occupying the first and a portion of the second page. Then a blank space was left between such clauses and the testimonium clause at the bottom of page 3. At the end of the testimonium clause testatrix signed her name, immediately following which was the attestation clause signed by two witnesses. There was no testamentary provision after her signature. Held, that the will was signed at the end thereof, as required by Rev. St. § 5916. *Mader v.*

*Apple*, 89 N. E. 37, 39, 80 Ohio St. 691, 23 L. R. A. (N. S.) 515, 131 Am. St. Rep. 719.

## ENDANGER

"Endanger" means exposure to injury coming from without, as well as within a given place or object; such being its meaning in 87 Ohio Laws, p. 161, prohibiting the employment of any child under the age of 16 years at an occupation whereby its life or limb is endangered. *Frank Unnewehr Co. v. Standard Life & Accident Ins. Co.*, 176 Fed. 16, 20, 99 C. C. A. 490.

## ENDARTERITIS

"Endarteritis" is an inflammation of the inner cores of an artery. *Heyzer v. Morris*, 97 N. Y. Supp. 131, 132, 110 App. Div. 313.

## ENDEAVOR

See *Would Endeavor*.

## ENDOCARDITIS

According to expert testimony "endocarditis" is an inflammation of the heart lining, and interferes with the action of that organ so as to enlarge or cause leakage of the valves, and make it beat faster. "The doctors agreed that this disease results from general infection, attended by a rise of temperature; and one of those called by defendant was of opinion that a person will die in a few days from acute endocarditis, but may survive months or years with the disease when chronic." *Schroeder v. Chicago & N. W. R. Co.*, 103 N. W. 985, 988, 128 Iowa, 365.

## ENDORSE—ENDORSEMENT

See *Indorse—Indorsement*.

## ENDOW

### ENDOWMENT

An exemption from taxation of the "endowment or fund of any religious society, college, etc.," has been held not to include an endowment of a religious society, college, etc., consisting of land. *Rosedale Cemetery Ass'n v. Linden Tp.*, 63 Atl. 904, 905, 73 N. J. Law, 421 (citing *State [Nevin, Prosecutor] v. Krollman*, 38 N. J. Law, 574).

### ENDOWMENT INSURANCE

A fraternal beneficiary association, which agrees to pay dividends or "maturity benefits" to its living members not under disability, and which agrees to pay small disability benefits as a loan and an insignificant death benefit for a flat premium, is selling "endowments," a business which beneficiary associations are forbidden by statute to engage in. *National Protective Legion v. O'Brien*, 112 N. W. 1050, 1052, 102 Minn. 15.

**ENEMY**

See Public Enemy.

Face of the enemy, see Face.

"In war, all residents of enemy country are 'enemies.'" *Juragua Iron Co. v. United States*, 29 Sup. Ct. 385, 388, 212 U. S. 297, 53 L. Ed. 520 (quoting definition in *Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650, 653).

Where the officers and crew of a vessel seizing another vessel acted under commissions issued by a de facto government, engaged in levying war against the United States, they are liable to be regarded as "enemies." But every forcible contest between two governments, de facto, or de jure, is war. War is an existing fact, and not a legislative decree. Congress alone may have power to declare it beforehand, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it exists, whether there is any declaration of it or not. It may be prosecuted without any declaration; or Congress may, as in the Mexican War, declare its previous existence. In either case it is the fact that makes "enemies," and not any legislative act. In a civil war, those who prosecute hostilities against the established government are also traitors. And their acts are robbery or murder on the land, or piracy on the sea; and hence, though such officers and crew be regarded as "enemies," they may also be pirates. *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 465, 470.

**ENEMY'S PROPERTY**

"For the purposes of capture, property found in enemy territory is 'enemy property,' without regard to the status of the owner." An American corporation doing business in Cuba was during the war with Spain an enemy to the United States with respect of its property found and then used in Cuba, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war. *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99; *Id.*, 29 Sup. Ct. 385, 388, 212 U. S. 297, 53 L. Ed. 520 (quoting definition in *Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650, 653).

**ENERGY**

See Best Energies.

**ENFLEURAGE GREASE**

So-called muguet pomade, produced by the combination of several kinds of enfleurage grease, to which is added about one-half of 1 per cent. of various essential oils to fortify and combine the article, thus producing an odor like that of the lily of the valley, held free of duty, under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, as en-

fleurage grease. *Lueders v. United States*, 143 Fed. 918.

**ENFORCE**

See Proceed to Enforce.

In the provision of the mulct tax statute, (Acts 25th Gen. Assem. p. 63, c. 62), requiring the county attorney to see that the provisions of the act are enforced, "to 'enforce' is to 'execute with vigor,' to put in force, compel obedience to, cause to be executed or performed. It has the same meaning in this respect as 'execute.'" *Tennant v. Kuhlemeler*, 120 N. W. 689, 693, 142 Iowa, 241, 19 Ann. Cas. 1026.

**ENFORCEABLE CONTRACT**

"The term 'enforceable contract' \* \* \* means something more than a contract of legal validity, the violation of which will afford a cause of action. It is a contract which can be so enforced as to give to the principal the property, or the money, or the profit, or other advantage for which he bargained." *Snyder v. Fidler*, 101 N. W. 130, 132, 125 Iowa, 378.

**ENGAGE**

See Principally Engaged.

The word "engage" means "to take a part; to devote attention and effort; to employ one's self; to enlist; to carry on; to conduct; be busied; to occupy one's self." *Graves v. Knights of the Maccabees of the World*, 112 N. Y. Supp. 948, 950, 128 App. Div. 660.

The term "engage" means "to take part," as to engage in a conversation. *People v. Corbatta*, 83 N. Y. Supp. 782, 784, 86 App. Div. 531 (quoting and adopting definition in *Cent. Dict.*).

**As carry on or transact**

The word "engaged," as used in a by-law of a fraternal benefit order which bars from admission to the order persons "engaged" in blasting, coal mining, manufacturing explosives, etc., or who are engaged in any other occupation deemed extrahazardous, or who are engaged either as principal, agent, or servant in the sale of liquor as a beverage, and which provides that any member who shall engage in any of the prohibited occupations shall thereby render his certificate void, is equivalent to the words "carry on," and the by-law is violated by a member who with his son opened a saloon as copartners, the license therefore being issued in their joint names, and the member being peculiarly interested therein, though he performed no labor in or about the saloon and took no active part in the business. *Graves v. Knights of the Maccabees of the World*, 92 N. E. 792, 794, 199 N. Y. 397, 139 Am. St. Rep. 912.

**Interest distinguished**

See Interest.

**As occasional or single act**

To say that one is "engaged" in an occupation signifies much more than the doing of one act in the line of such occupation. *State v. Roberson*, 48 S. E. 595, 596, 136 N. C. 587.

A mere single transaction by an infant does not constitute him as one "engaged" in a business, within the meaning of Civ. Code 1895, § 3648, providing that, if an infant by permission of his parents or guardian or of the law engages in any business as an adult, he is bound for all the contracts connected with the business. *White v. Sikes*, 59 S. E. 228, 229, 129 Ga. 508, 121 Am. St. Rep. 228.

Pen. Law, § 970, provides that a person who "engages" as player, gamekeeper, or dealer in any gambling or banking game, where money or property is dependent on the result, is a "common gambler." Code Cr. Proc. § 390, provides that a conviction cannot be had on the testimony of an accomplice, unless corroborated by such other evidence as tends to connect the defendant with the commission of the crime. The only witness in a prosecution under section 970 was a person who had participated in a game of draw poker at which defendant, before the hand was opened, took one or two chips from the pile in the center of the table, and put them in a separate pile from the chips he was playing with, and had himself acted as dealer when it came to his turn to deal. Held, that the phrase "who engages" means something more than occasional participation, and imports some continuity of practice, just as the word "common" implies that a common gambler is a person who customarily, or habitually, or frequently carries on the gambling practices in violation of the statute, as a money-making pursuit; and hence that the witness was not an accomplice whose testimony required corroboration. *People v. Bright*, 96 N. E. 362, 364, 203 N. Y. 73, Ann. Cas. 1913A, 771.

**As to pursue for profit or livelihood**

To "engage in" business is uniformly construed as signifying to follow that employment or occupation which occupies the time, attention, and labor for the purpose of a livelihood or profit. *Semple v. Schwarz*, 109 S. W. 633, 636, 130 Mo. App. 65 (citing *Beickler v. Guenther*, 96 N. W. 895, 896, 121 Iowa, 419).

**Engaged chiefly in farming**

See Farming.

See, also, Person.

**Engaged in alighting**

Where a complaint alleged that plaintiff, a passenger, was thrown down and injured while engaged in alighting, the term "engaged in alighting," includes all the acts transpiring

from the moment the passenger rises for that purpose until he gets clear of the car, provided there is no interruption of his passage. *Birmingham Ry., Light & Power Co. v. Glenn* (Ala.) 60 South. 111, 113.

**Engaged in becoming a passenger**

An allegation of the complaint, in an action against a street railway company for an assault, that it was committed while plaintiff was "engaged in or about becoming a passenger" on said car does not show that plaintiff was a passenger. *Birmingham Railway & Electric Co. v. Mason*, 34 South. 207, 137 Ala. 342.

**Engaged in business**

See Continue to Carry on Business.

As doing business, see Doing Business.

A nonresident owner of real estate in a city, who employs a resident as agent in charge of the property to rent the same and collect rents, is engaged in the business in the state of renting real estate within Civ. Code Prac. § 51, subsec. 6, providing that, in actions against a nonresident engaged in business in the state, the summons may be served on the agent, and in an action against her for damages to a tenant by defects in the premises process is properly served on the agent. *Andonlue v. Carmen*, 151 S. W. 921, 923, 151 Ky. 249.

A person who contracts debts while "engaged in a business," which makes him liable to bankruptcy, is not to be heard to say that he is not so engaged, even though he has in fact ceased to be so, so long as his debts remain unpaid. Hence, where a corporation conducted a milk-condensing business up to October 6, 1904, when its plant was burned, and thereafter did nothing except to gather in its assets and settle up its affairs, retaining a central office within its district for the purpose, upon a petition in bankruptcy being filed against it February 2, 1905, the court had jurisdiction under section 2 of the Bankruptcy Act, notwithstanding the fact that, for the greater part of the six months next preceding the filing of the petition, it was not conducting the business for which it was incorporated, but only engaged in liquidation. *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. 444, 448.

Where complainant railroad company, after operating its railroad for a number of years, in 1896 leased its property and franchises for 999 years at a specified rent, and since that time merely maintained a corporate existence, received the rents, and distributed them among its stockholders, and only had an office and such employes as were necessary to maintain such corporate existence as required by the lease, and to receive and distribute the rent, it was not "engaged in business," within the corporation tax law of 1909, and was therefore not liable for

corporation taxes thereunder, notwithstanding the lease provided for termination and recovery of the property in case of the lessee's default, etc. *Mine Hill & S. H. R. Co. v. McCoach*, 192 Fed. 670, 671.

"Engaging in or carrying on business," as used in Acts 1900-01, p. 2630, subd. 63, requiring a license for engaging in or carrying on the business of a dealer in pistols, is to pursue the occupation or employment, as a livelihood or source of profit, and must be a series of acts rather than the doing of a single act pertaining to the particular business. *Morningstar v. State*, 33 South. 485, 486, 135 Ala. 66.

A person who agreed to act as private detective to watch the movements of a husband and report to the wife, for which he was promised a certain fee, undertook "to engage in the business of a private detective for hire or reward," within Laws 1898, p. 1120, c. 422, § 1, as amended by Laws 1901, p. 1002, c. 362, requiring private detectives to be licensed, though he was not regularly engaged in the business. *Fox v. Smith*, 108 N. Y. Supp. 181, 182, 123 App. Div. 369.

Where, on sale of a business, the vendor agreed that he would not "engage in a business similar" in three named states for five years, but thereafter became president of a corporation engaged in a similar business, he would be enjoined. The parties intended that the vendor should only not employ his capital in a like enterprise but should not employ his skill and experience in any capacity whatever in a business similar to that sold. *Pittsburg Stove & Range Co. v. Pennsylvania Stove Co.*, 57 Atl. 77, 79, 214 Pa. 37.

"One cannot properly be said to be engaged in a business unless there is to some extent a continuous occupation of his faculties and powers directed toward the carrying on of the business as an object or purpose. The extent of continuity implied when the word 'engaged' is employed depends upon the thing which engages. A man may be engaged in prayer, although the engagement may occupy but a few minutes. A man may be engaged in building a house, which cannot occupy, in the natural course of things, more than a few months. A man also may be engaged in any occupation or pursuit for a limited time." One who has sold his business and good will, and has covenanted not to engage as agent or servant in that business, may not, though he is not engaged in any way in the prohibited business, hold himself out to the world as the manager or superintendent of a similar business carried on under his wife's name, as one giving to that business the benefit of his special skill and personal attention, and thereby attract to it the good will which he has sold. *Fleckenstein Bros. Co. v. Fleckenstein*, 57 Atl. 1025, 1027, 66 N. J. Eq. 252.

"To say that one is 'engaged' in an occupation signifies much more than the doing of one act in the line of such occupation. It is an expression in common use, and well understood—that one is engaged in merchandising or in practicing law. Webster, Int. Dict., defines 'engage': 'To embark in a business; to employ or involve oneself; to enlist.' Cent. Dict.: 'To occupy oneself; be busied.' " An indictment that defendant, "at," etc., "did engage in procuring laborers for employment out of the state, without having first paid the license tax" prescribed, etc., sufficiently charged that defendant "engaged in the business of procuring laborers," within Pub. Laws 1903, p. 347, c. 247, § 74, prohibiting persons from engaging in the business of procuring laborers, etc., without first having paid the tax imposed. *State v. Robertson*, 48 S. E. 595, 596, 136 N. C. 587.

A person whose principal business is that of insurance agent is also engaged in carrying on the business of selling real estate, if he enters into a contract for the sale of such property on commission, and renders such service under the contract as would entitle him to his commission if he had complied with the law in reference to registering and paying the tax. *Ford & Pruett v. Thomason*, 75 S. E. 269, 11 Ga. App. 359.

An officer of a foreign corporation, who comes into the state to procure laborers to work under himself in another state on work which he superintends and manages for the corporation, and who receives no consideration or compensation for carrying the laborers out of the state, and the laborers procured by whom are not employed in any other business or under the management of any other person than himself, is not "engaged in the business" of an emigrant agent, within the statute exacting a license tax from persons engaged in such business. *Lane v. Rowan County Com'rs*, 52 S. E. 140, 139 N. C. 443 (citing *Moore's Case*, 18 S. E. 342, 113 N. C. 697, 22 L. R. A. 472; *Hunt's Case*, 40 S. E. 216, 129 N. C. 686, 85 Am. St. Rep. 758).

Defendants manufactured fluid extract of ginger by pouring distilled spirits on ginger root. After drawing off the fluid, the distilled spirits remaining in the dregs was separated therefrom by distillation, and this product, less in quantity and lower in grade than that previously placed in the receptacle with the ginger root, was reused in repeating the process and in the manufacture of medicinal preparations. Held, that defendant was a person engaged in the business or occupation of rectifying, purifying, and refining distilled spirits and subject to internal revenue taxation imposed on those so engaged. *United States v. Smith, Kline & French Co.*, 184 Fed. 532, 533.

To constitute "engaging in the business of selling liquor" in prohibition territory, it must appear that accused pursued the busi-

ness for profit, and it must be shown that at least two sales of liquor had been made between the earliest date fixed by a witness who testified to the purchase of liquor and the finding of the indictment. *Hernandez v. State*, 141 S. W. 268, 273, 64 Tex. Cr. R. 73.

Under Rev. Pol. Code, § 2838, making it unlawful for any person to engage in any business requiring the payment of a license under section 2834 without paying the license, which section requires a license for the business of selling intoxicating liquors, the offense of "engaging in the business without a license" is the same as that of "selling without a license." *State v. Ely*, 118 N. W. 687, 688, 22 S. D. 487, 18 Ann. Cas. 92.

A bona fide club, situated in a precinct, city, or town where liquor may be lawfully sold, organized for purposes sanctioned by law, and which, as a mere incident and without profit, furnishes liquors to its members, and not to the public generally, is not a person, under the laws, "engaged in the occupation or business of selling intoxicating liquors," though each individual act of such club in territory where the sale of liquor is prohibited by law is a sale. *State v. Duke*, 137 S. W. 654, 666, 104 Tex. 355.

Laws 1897, p. 253, c. 167, provides for the issuance of licenses to sell liquor, and "that none of the provisions of this act shall apply to any person 'engaged in business as a wholesale dealer,' who does not sell in less quantities than five (5) gallons at a time." Held, that a sale of five gallons or more at a time is selling as a wholesale dealer, though the sale is made to a consumer and not to a retail dealer. *State v. Bock*, 79 N. E. 493, 495, 167 Ind. 559 (citing *Daniels v. State*, 50 N. E. 74, 150 Ind. 348; *Bishop v. State* ex rel. *Griner*, 48 N. E. 1038, 149 Ind. 223, 39 L. R. A. 278, 63 Am. St. Rep. 270; *Cahill v. State*, 76 N. E. 182, 36 Ind. App. 507; *State v. Kiley*, 76 N. E. 184, 36 Ind. App. 513).

A by-law of defendant fraternal benefit association barred from admission to the order persons "engaged" in blasting, coal mining, manufacturing explosives, etc., or who were "engaged" in any other occupation deemed extrahazardous by its medical examiner, or who were "engaged," either as principal, agent, or servant, in the sale of liquor as a beverage, and, should any member "engage" in any of the prohibited occupations, his membership certificate should be void. Before his death, insured and his son opened a saloon as copartners; the license being issued in their joint names. Insured was pecuniarily interested therein, but performed no labor in or about the saloon and took no active part in the business. Held that, giving the word "engaged" the same meaning throughout the clause and construing it most favorably to plaintiff, insured was not "engaged" in the liquor business. within the meaning of the policy; the gener-

al intent of the policy being to prohibit members from engaging in occupations which increased the risk. *Graves v. Knights of the Maccabees of the World*, 112 N. Y. Supp. 948, 949, 128 App. Div. 660.

The act (Laws 1903, c. 114) regulating and prohibiting the carrying of concealed weapons declares (section 4) that it shall not apply to peace officers in the discharge of their duties, nor to persons acting or engaged in the business of common carriers in the state, or to persons traveling through the state. Held, that the words "acting or engaged in the business of common carriers" did not limit the exemption to persons engaged "in common carrying," but that the exemption included persons acting or engaged in other business of common carriers than actual transportation of freight or passengers, such as the guarding of trains, depots, or property of common carriers, and that watchmen employed by a railroad company, though not engaged in train service, were within the exception. *Ex parte Davis*, 110 Pac. 1131, 1134, 33 Nev. 309.

#### **Engaged in commerce**

See Interstate Commerce.

#### **Engaged in operation of car**

An employé assisting in replacing a derailed tram car on the track was "engaged in the operation of a car," within Acts 25th Leg., approved June 18, 1896 (Laws 1897, p. 14, c. 6), making a railroad liable for injuries to a servant while "engaged in operating cars" by reason of the negligence of any other servant. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 99 S. W. 743, 745, 45 Tex. Civ. App. 128.

Sayles' Ann. Civ. St. 1897, art. 4560f, provides that every person or corporation operating a railroad shall be liable for all damages sustained by any servant thereof, while "engaged in the work of operating the cars" of such railroad, by reason of the negligence of a fellow servant. Held that, where plaintiff, a servant of a sawmill company operating a private railroad, was injured while transporting telephone poles along the track for the construction of a telephone line by the negligence of a fellow servant, he was "engaged in the work of operating the cars" at the time of his injury, and was entitled to the protection of the statute. *Mounce v. Lodwick Lumber Co. (Tex.)* 91 S. W. 240.

#### **Engaged in operating engine**

An engineer, in charge of a switching engine, and a fireman are, while the engineer is engaged in oiling the parts of the engine and the fireman in filling the tank with water after the engine has been stopped for the purpose of taking water, "engaged in operating the engine," within a statute exempting the operatives of a railroad engine from the fellow-servant rule while engaged in their

work. *Texas & N. O. R. Co. v. Walton*, 104 S. W. 415, 416, 47 Tex. Civ. App. 43.

#### **Engaged in operation of railroad**

A brakeman, in the discharge of his duties lighting lamps in a caboose, which was being switched, so as to attach it to his train, when he was injured by a collision, was "engaged in the work of operating the railroad," within a statute of Missouri making a railroad corporation liable for injuries to any servant engaged in the work of operating such railroad by reason of the negligence of a fellow servant. *St. Louis & S. F. R. Co. v. Smith* (Tex.) 90 S. W. 926, 927.

#### **Engaged in services requiring his presence**

A yard foreman of a railway company, in the discharge of whose duties it was customary and necessary for him to ride on a yard engine, and whose position on the step of the engine at the time he was thrown therefrom was the usual and proper place for him to be, is an employé "engaged in services requiring his presence" on an engine, within a constitutional provision abolishing as to such employé the doctrine of "fellow servant," so far as it affects the employer's liability for injury resulting from another's acts or omissions. *Southern Ry. Co. v. Smith*, 59 S. E. 372, 373, 107 Va. 553.

#### **Engaged in speculating**

The words "or shall engage in speculating, or in options on grain, stock, or produce," are well understood to mean the making of contracts in which the parties speculate on the rise and fall of prices. *Hoffman v. Farmers' Co-op. Shipping Ass'n*, 97 Pac. 440, 442, 78 Kans. 561.

#### **Engaged in superintendence**

See Superintendence.

#### **Engaged in transportation from one state to another**

Interstate commerce begins with the shipment of an article in one state directed and destined to another state, and ends only with the delivery at destination. All common carriers by railroad, which participate in its actual transportation from the time of shipment to the time of delivery, are "engaged in the transportation of property from one state to another," within the meaning of Interstate Commerce Act, whether their services be performed wholly in one state or in more than one state, whether their services be primary, and called "carriage," or incidental, and called "switching," whether the carrier be paid a flat sum per car or a percentage of the through rate, and whether such payment be made directly by the shipper or consignee on the one hand, or by the initial or final carrier on the other. The Chicago Junction Railway Company, as lessee, operates the railroad owned by the Union Stockyard & Transit Company of Chicago, which consists of some 250 miles of tracks

in Chicago, wholly within the state of Illinois, connecting with the tracks of interstate trunk line railroads, and extending to the Union Stockyards and some 650 different industrial establishments in the stockyard district. It is organized under the general railroad law of the state, and its business is to haul cars between receiving tracks on the trunk line roads and the stockyards and industrial plants, from which the shipments are made or to which they are consigned, for which it receives a flat rate per car, in all cases paid by the trunk line company and absorbed in its own charges. Held, that such company is a common carrier "engaged in the transportation of property from one state to another" by rail within the meaning of Interstate Commerce Act. *United States v. Union Stock Yard & Transit Co. of Chicago*, 192 Fed. 330, 334.

#### **Engaged in unlawful act**

Under Ky. St. § 68, providing that every person keeping any dog shall be liable to the party injured for all damages done by such dog, but that no recovery shall be had if the person injured is at the time on the premises of the owner of the dog after night, or "engaged in some unlawful act in the daytime." The words must be given their proper force, according to the common and approved usage of language, and, where plaintiff was bitten by defendant's dog while going to defendant's stable to speak to defendant socially, plaintiff was not engaged in an unlawful act, within the statute, and was entitled to recover for the injuries sustained. *Dillehay v. Hickey* (Ky.) 71 S. W. 1.

#### **Engaged principally in manufacture**

See Manufacturer.

#### **Engaged principally in mercantile pursuits**

See Mercantile.

#### **Engaged or employed about the premises**

The phrase, "engaged or employed about the premises," as used in Act. Pa. April 4, 1868, relating to compensation for injuries sustained by any person engaged or employed on or about the premises of a railroad company, does not include one who, after finishing his day's work, stopped at a small building on the railroad company's property for the purpose of giving in his time. *Hobbs v. Pennsylvania R. Co.*, 143 Fed. 180, 181.

### **ENGAGEMENT**

See Regular Engagement.

"Engagement," in its mechanical sense, means a seizure, a laying hold of, an active prehension, and does not include mere contiguity. *Vrooman v. Penhollow*, 179 Fed. 296, 301, 102 C. C. A. 484.

A bank's covenant of warranty in a deed is a "contract" and an "engagement" within Rev. St. U. S. art. 515, which makes

the stockholders of a national bank liable for the bank's contracts, debts, engagements, etc. *McLean v. Moore* (Tex.) 145 S. W. 1074, 1075.

## ENGINE

See Constant Pressure Engine; Constant Volume Engine; Dead Engine; Direct Acting Engine; Dinkey Engine; Live Engine; Lone Engine; Road Engine; Steam Engine; Steam Farm Engine; Traction or Road Engine; Yard Engine.

As car, see Car.

As materials, see Materials.

Engaged in operating engine, see Engaged.

Locomotive engine, see Locomotive.

## ENGINEER

The word "engineer," as used in a contract between the board of water commissioners of a city and a contractor for the construction of a pump well at such times, points, and with such force as might be directed by the engineer, was understood to refer to the engineer and superintendent of the water department of such city or his successor in office. *Murland v. Atlantic City*, 65 Atl. 1049, 1050, 75 N. J. Law, 592.

### As employé or laborer

See Employé; Laborer.

### As locomotive engineer

The word "engineer," as used in the Montana statute providing that every railroad corporation shall be liable for all damages sustained by an employé thereof without contributory negligence on his part, when such damage is caused by the negligence of "any train dispatcher, telegraph operator, superintendent, engineer, or any other employé who has superintendence of any stationary or hand signal," refers to a locomotive engineer and does not include an operator of a stationary engine used to draw a plow along the floor of flat cars for the unloading of gravel. *Reinke v. Northern Pac. Ry. Co.*, 145 Fed. 988, 993.

One charged with the duty of operating a yard engine in switching and making up trains and the like is called, in railroad parlance, a "hostler." Though his duties and work be confined to the depot yard, he is as much an "engineer" as one operating an engine from point to point on a line of a railroad. *Howard v. Chesapeake, & O. Ry. Co.* (Ky.) 90 S. W. 950, 951.

The word "engineer," as used in New Jersey Public Laws 1896, p. 305, § 88, providing that, in suits against a foreign corporation, process may be served upon any officer, agent or engineer of such corporation, cannot mean, for example, a locomotive engineer. *Erie R. Co. v. Van Allen*, 69 Atl. 484, 485, 76 N. J. Law, 119.

"The term 'driver' is not as commonly used in this country to describe one who operates a locomotive on a railroad as is the term 'engineer,' although perhaps the former is nearer the original signification than the latter," and as used in Rev. St. 1899, § 2864 (enacted in 1855), giving a right of action for death caused by the negligence of the "driver" of any stage coach or other public conveyance while in charge of the same as driver, does not include the motor-man of an electric street car. *Drolshagen v. Union Depot R. Co.*, 85 S. W. 344, 346, 186 Mo. 258.

### Engineers and other employés

Gen. St. 1901, § 5858, providing that railroad companies shall be liable for damages to any employé of said companies in consequence of any negligence of their agents or of any mismanagement of their engineers or other employés to any person sustaining such damage, does not make a distinction between agents on the one hand and "engineers and other employés" on the other, nor between negligence and mismanagement, but by the act a company is made responsible for any mismanagement of its engineers or other employés to any person sustaining damage thereby. *Missouri, K. & T. Ry. Co. of Texas v. Kellerman*, 87 S. W. 401, 404, 39 Tex. Civ. App. 274.

## ENGINEERING

See Question of Engineering.

## ENGLISH

The words "English language" refer to the well-known spoken and written tongue used by the people of this nation, and while the language is composed of words spoken and written, which consist of single letters, the letters themselves do not constitute the language, but must be formed into words, which must be used in such connection with one another that they form sentences which convey thought or meaning. *Stein v. Meyers*, 97 N. E. 295, 297, 253 Ill. 199.

### Abbreviations

Under Rev. St. 1908, § 4096, requiring that the date of signing the petition for a local option election and the residence address of the signer shall be written *opposita* his name, the use of ditto marks is permissible, for writing consists of any symbols generally used to transmit ideas, and as no particular style is required, ditto marks, which are to be read as a repetition of the line above, and are as much a part of the English language as punctuation marks, may be used. *People ex rel. Arfman v. Newell*, 113 Pac. 643, 645, 49 Colo. 349 (citing 3 Words and Phrases, p. 2141).

## ENGLISH CONSOLS

"English consols" are different from the public debt of the United States in that they

are annuities. The principal is never reimbursed, the interest only being paid, and the only way the Government can redeem them is by purchase in the market. *Henry v. Henderson*, 33 South. 960, 964, 81 Miss. 743, 63 L. R. A. 616.

### ENGLISH GEOGRAPHICAL MILES

The statute or English mile was adopted as the standard of land measurement in the thirty-fifth year of the reign of Elizabeth, 1593; the log was invented about the same time, which inaugurated measuring of the sea or marine miles, known as "English geographical miles." The statute mile measures 5,280 feet on the land; the sea mile, knot, geographical, or marine mile measures 6,086.7 feet on the sea, on the scale of 60 geographical or sea miles to a degree. It would therefore appear that the statute mile for measuring the land and the marine mile for measuring the sea by the use of the log were established and went into use at about the same time in England. *Lazell v. Boardman*, 69 Atl. 97, 99, 103 Me. 292, 13 Ann. Cas. 673.

### ENGLISH LAW

The term "English law," as used in *London Assurance v. Companhia de Moagens*, 17 Sup. Ct. 785, 167 U. S. 149, 42 L. Ed. 113, where the Supreme Court, in construing an insurance policy, said, "Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law," did not mean an act of Parliament, but the law of England as established by the decisions of its courts and by the usages prevailing at Lloyds. *Keene Five Cent Sav. Bank v. Reid*, 123 Fed. 221, 230, 59 C. C. A. 225.

### ENGROSSING

"Engrossing" is described to be the getting into one's possession, or buying up, large quantities of corn or other dead victual, with intent to sell them again. *Commonwealth v. International Harvester Co.*, 115 S. W. 703, 712, 131 Ky. 551 (quoting and adopting definition in Bl. Com. 155).

"Engrossing" was defined in the statute, 5, 6, Edward VI, c. 14, providing that whatsoever person or persons shall engross, or get into his or their hands by buying, contracting, or promise taking other than by demise, grant, or lease of land, or title, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken as unlawful engrosser or engrossers. The sole trade of anything is "engrossing" *ex rei natura*, for whoever hath the sole trade of buying and selling hath engrossed that trade, and whoever hath the sole trade of any coun-

try hath the sole trade of buying and selling the produce of that country at his own price, which is an "engrossing." *Standard Oil Co. v. United States*, 31 Sup. Ct. 502, 512, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

Under the old English law, a technical monopoly was a license or privilege, granted by the sovereign to an individual for the sole buying or selling, making, working, or using of anything, whereby the people in general were excluded from the liberty of manufacturing and trading, which they had before enjoyed. It differed from "engrossing" only in that, in case of a monopoly, a patent was had from the king, while engrossing was a transaction between individuals. *State v. Duluth Board of Trade*, 121 N. W. 395, 403, 107 Minn. 506, 23 L. R. A. (N. S.) 1260.

### ENHANCED DAMAGES

Damages engrafted on a common-law recovery on a statute in the nature of a penalty, and thereby merely accumulating the measure of recovery in actions otherwise primarily existing at common law, are denominated as "enhanced damages." *Casey v. St. Louis Transit Co.*, 91 S. W. 419, 425, 116 Mo. App. 235 (citing *Reed v. Northfield*, 13 Pick. [30 Mass.] 94, 23 Am. Dec. 662; *Huntington v. Attrill*, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123).

### ENJOIN

Abate as including, see Abate.

Under St. 1899, p. 103, which authorizes suit by the district attorney of a county to "abate" a public nuisance existing therein, suit lies to enjoin maintenance of a public nuisance by permitting noxious vapors to escape from a smelter, though, strictly construed, the words "abate" and "enjoin" have technically different meanings. *People v. Selby Smelting & Lead Co.*, 124 Pac. 692, 695, 163 Cal. 84.

### ENJOY

The word "enjoy" means to have, possess, and use with satisfaction; to occupy or have the benefit of. A bequest of personal property to a person to hold, possess, and enjoy during her natural life gave such legatee the right to apply it in any way that would contribute to her well-being and the fund was hers to expend for her personal benefit if she chose to do so. Her estate was a life estate with power of use. *Board of Trustees of Westminster College v. Dimmitt*, 87 S. W. 536, 537, 113 Mo. App. 41 (quoting and adopting definitions given in *Webst. Dict.*).

Under a statute giving to the widow the right to "enjoy the homestead" during her



life, where dower was never admeasured to a widow, she, during her life, was entitled either to occupy or rent it, at her election, without any obligation on her part to pay rent. *Lloyd v. Turner*, 62 Atl. 771, 772, 70 N. J. Eq. 425.

### ENJOYMENT

See Exclusive Enjoyment; Full Benefit and Enjoyment.

Where legatees had full and absolute control of the disposition of their share of the residue, and each was entitled to all the income accruing therefrom after the testator's death, the legacies were vested in "enjoyment," though not in possession. *Ward v. Sage*, 185 Fed. 7, 9, 108 C. C. A. 413.

### ENLARGE

#### ENLARGING BUSINESS

A bond given to an insurance company to secure performance of the duties of its agent appointed to procure applications for insurance provided that the principal and sureties should be liable for loans or advances made to the agent during his agency "for the purpose of enlarging his business or otherwise." Held, that it was the intent of the parties to secure the payment of loans or advances made for the specific purpose of enlarging the agent's business, and advances for the support of the agent's family, being merely personal, were not for that purpose within the meaning of the bond, and were not covered thereby. *New York Life Ins. Co. v. McDearmon*, 114 S. W. 57, 58, 133 Mo. App. 671.

### ENLIST—ENLISTMENT

The receiving in pledge, by a civilian from a soldier, of clothing issued to the latter during the term of his "enlistment" does not constitute a penal offense, within Rev. St. § 5438, providing that every person who purchases or receives in pledge from a soldier any arms, equipment, ammunition, clothing, military stores, or other public property, such soldier not having the lawful right to pledge or sell the same, shall be imprisoned, etc., since "enlistment" is, properly speaking, a contract between the government and the party entering its service. Hence the clothing, on being issued to a soldier, becomes his individual property and ceases to belong to the United States. *United States v. Michael*, 153 Fed. 609, 611.

### ENOUGH

See Not Enough.

As used in a contract by which plaintiff agreed to furnish "enough" material for a pavement, the term "enough," in connection with common knowledge that lumber is generally sold by the square foot, and that in

laying such a pavement as was contemplated there is necessarily some waste, the amount of which cannot be accurately determined in advance, suggests very forcibly that the quantity to be paid for was to be determined by measurement of the completed work. *Fromme v. O'Donnell*, 103 N. W. 3-5, 124 Wis. 529.

### ENROLLED—ENROLLMENT

General Election Law (Laws 1896, c. 909, § 31), providing for the adding and erasing of names on the register, is inapplicable to primaries; the recording of the voters there being an "enrollment" instead of a "registration." *People ex rel. Moscovitz v. Voorhis*, 84 N. Y. Supp. 848, 849, 41 Misc. Rep. 360.

### ENSUES

A fire policy insuring against loss by fire except as provided, but exempting the company from liability for loss caused directly or indirectly by explosion of any kind "unless fire ensues, and in that event for the damage by fire only," does not exempt the company from liability for damage caused by an explosion which is preceded and caused by the fire; the word "ensues" meaning to follow or come afterwards, to follow as a consequence or in chronological succession, to result, and the words "by explosion of any kind" not referring to the agency which produces the explosion, but to the different kinds of material which explode. *Wheeler v. Phoenix Ins. Co. of Brooklyn*, 96 N. E. 452, 454, 203 N. Y. 283, 38 L. R. A. (N. S.) 474.

### ENSUING

The words "ensuing year," used in the rules of a political party requiring the election by the voters of a district of a member of the county committee for the district for the ensuing year, mean the political year intervening between one election and the next annual election, and not a calendar year, when construed with other rules of the party providing for the management of the affairs of the party by the county committee, and making the whole machinery of party elections largely dependent upon the initiatory action of the county committee and the committeemen. *In re Chester County Republican Nominations*, 62 Atl. 258, 260, 213 Pa. 64.

### ENTER—ENTRY

See At Private Entry; Attempt to Enter; Double Entry; False Entry; Floating Entry; Person Making Entry; Re-enter; Regularly Enter; Special Entry.

### ENTER—ENTRY (In Commercial Law)

The word "entry," as used in Rev. St. § 5209, declaring that every officer, clerk, or agent of a national banking association who makes any false entries in any of the bank's

books with intent to injure or defraud the association shall be guilty of a misdemeanor, means "an item in an account." *United States v. Morse*, 161 Fed. 429, 431.

An "entry" on the books of a national bank by the cashier of a check which actually entered into the transaction of the bank will not support an indictment of the cashier under Rev. St. § 5209, for making a false entry, though the cashier knew the check to be worthless and fraudulent, as the legal effect of the entry is but a written representation to whom it may concern that the cashier in actual transaction had received the check, and that the amount stated formed the basis of the item which went with others to make up the aggregate cash items which the entry declared the cashier had at the time. *United States v. Young*, 128 Fed. 111, 114.

#### ENTER—ENTRY (In Criminal Law)

See Unlawful Entry.

"Entry," as defined in a prosecution for burglarizing a railroad car, as meaning every kind of entry except one made with the consent of the occupant, or of one authorized to give such consent, was erroneous, since in order to constitute burglary, whether the entry is by day or night, there must be a breaking; if in the daytime an actual breaking, if at night it must be done by force. *Newman v. State*, 116 S. W. 577, 578, 55 Tex. Cr. R. 273.

An "entry," whether by night or day, to constitute burglary, must be by breaking, and, if in the day by breaking externally, then it must be an actual breaking, under Pen. Code 1895, art. 839, providing that one is guilty of burglary who with intent to commit felony or theft, by breaking, enters a house in the daytime. *Bates v. State*, 99 S. W. 551, 50 Tex. Cr. R. 568.

In prosecution for burglary, a charge that by the term "entry" into a house is meant every kind but one made by free consent of one authorized to give consent was not erroneous, because ignoring necessity for a "breaking," where the charge merely defined an "entry," and the court also defined "breaking," and properly charged as to necessary elements of burglary. *Montgomery v. State*, 116 S. W. 1160, 1161, 55 Tex. Cr. R. 502.

On a prosecution for burglary, it appeared that prosecutor in the nighttime hung a pair of trousers in a room within a few feet of an open window, so that no one could get them from the outside without getting a portion of his body into the room or lifting them out with some instrument, that the trousers disappeared during the night, and defendant was subsequently found in possession of them; and the court instructed that an "entry" in burglary may be constituted by the introduction of any instrument into the

house for the purpose of taking any personal property, though no part of the body of the offender be introduced, and that it is not necessary that there be any actual breaking, when the entry is made in the nighttime, but that there must be some degree of force, however slight, and that the entry, through an unusual place, such as a window, constitutes force. Held, that there was no error in the instruction. *Hays v. State*, 100 S. W. 926, 927, 51 Tex. Cr. R. 111.

White's Ann. Pen. Code, art. 838, provides that burglary is committed by entering a house by force, threats, or fraud at night, or in like manner by entering a house during the day and remaining concealed there till night, with the intent of committing a felony or the crime of theft. Article 841 declares that the entry is not confined to the entrance of the whole body, but may consist of the entry of any part for the purpose of committing a felony, and article 842 defines the term "breaking" to mean an entry by actual force, such as the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. Held, that where defendant broke a glass of a store window in which certain shoes were displayed, but he was arrested before he abstracted any of the shoes therefrom, he was guilty of an attempt to commit burglary, regardless of the value of the property in the store. *Mason v. State* (Tex.) 100 S. W. 383, 384.

Pen. Code 1895, art. 838, defines burglary as "entering a house by force, threats or fraud at night \* \* \* with the intent \* \* \* of committing a felony or the crime of theft." Article 841 declares that the entry is not confined to the entrance of the whole body, but may consist of the entry of any part for the purpose of committing a felony. Article 842 declares that the slightest force is sufficient to constitute breaking, such as the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. Held that, under article 842, if the glass in a door through which accused thrust his arm was already broken, he would not commit burglary by inserting his hand or arm, even for the purpose of committing theft. *Jones v. State*, 87 S. W. 1157, 1158, 48 Tex. Cr. R. 336.

#### ENTER—ENTRY (In Practice)

See Docket Entries.

Filing distinguished, see File.

#### Of appeal

To "enter the appeal" from justice court means to claim it or notify the clerk, if there be a clerk, that an appeal is desired, and it is the only appellate act which must be done within 24 hours after judgment. *Wyman v. Newland*, 74 Atl. 195, 196, 105 Me. 260.

Under Rev. Laws, c. 128, §§ 13, 15, authorizing appeals from the land court to the

superior court, and providing that the appeal shall be entered within 30 days, and on the "entry of appeal" the appellant shall file in the superior court copies of all material papers in the case, certified by the recorder, etc., an entry of an appeal in the superior court is an entry with a proper officer of the court at the place where its records are kept and where the clerk does his work, and the mere receipt of the papers on appeal by the clerk or an assistant clerk at his residence is not an entry in court, since chapter 159, § 18, providing that for entering orders and issuing writs the "court shall always be open," does not mean that there is a court which is open wherever a clerk or assistant is found, without the presence of any justice. *Old Colony St. R. Co. v. Thomas*, 91 N. E. 1006, 1008, 205 Mass. 529, 18 Ann. Cas. 247.

#### Of judgment

As subsequent proceeding, see Subsequent Proceeding.

"The 'entry of a judgment' is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestible evidence of the sentence given, and designed to stand as a perpetual memorial of its action." *Simmons v. Hanne*, 39 South. 77, 78, 50 Fla. 267, 7 Ann. Cas. 322 (quoting and adopting definition in 1 Black, Judg. § 106); *Blohme v. Schmancke*, 61 S. E. 1060, 1062, 81 S. C. 81 (quoting 1 Black, Judg.).

The entry of a judgment is a matter of record, and it is the act which makes the judgment a record. *Foss v. Johnstone*, 110 Pac. 294, 296, 158 Cal. 119.

The word "entry" is not synonymous with "rendition," as used in section 336 of the California Practice Act, authorizing an appeal to be taken from a final judgment within one year after the rendition of the judgment. "There is a rendition of judgment before it is actually entered in the judgment book" (quoting and adopting *Gray v. Palmer*, 28 Cal. 416). "Rendition and entry of a judgment are entirely different acts; one is to be performed by the court and must be first in order of time, and the other by the clerk" (quoting and adopting *Peck v. Courtis*, 31 Cal. 207). *People v. Schmitz*, 94 Pac. 407, 409, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717.

The period for issuing district court executions is limited by statute to 10 years from the "entry of judgment." As applied to a justice's court judgment, this means 10 years from its entry by the justice, and not 10 years from the filing of the transcription in the district court. The act of filing the transcript is not the "entry of judgment." *Holton v. Schmarback*, 106 N. W. 36, 38, 15 N. D. 38.

"The rendition of a judgment \* \* \* is an entirely different thing from the 'entry' of it. The former is the act of the law through the mouth of the judge; the latter the act of the clerk. The former gives force and efficacy to the judgment; the latter preserves a memorial of it. The former is a judicial act; the latter a ministerial act." *Jacqua v. Harkins*, 82 N. E. 920, 922, 40 Ind. App. 639 (quoting and adopting the definition in 1 Black, Judg. § 179).

"There is a clear distinction between rendering a judgment, which is purely a judicial act and which can be performed by the court alone, and 'entering a judgment,' which is ministerial and is usually performed by the clerk." Rev. St. 1901, par. 1442, providing that a judgment may be "entered" in term time, or vacation, does not justify the "rendition" of a judgment by a judge, in vacation, without the district in which the case was tried. *Meade v. Scribner*, 85 Pac. 729, 730, 10 Ariz. 33 (citing Black, Judg. § 106).

While the "entry" of a judgment made by a clerk is evidence of what the pronouncement of the court was, yet as it is but the act of the scrivener of the court, his failure to properly and exactly put down what the court in fact ordered is a mere misprision of the clerk, which the court can and should rectify by an entry *nunc pro tunc*. *Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co.*, 136 Fed. 27, 30, 68 C. C. A. 577.

#### Of record

"Entering" is the word ordinarily used for the commencement of a proceeding on the records of the superior court, while "filing" is more commonly used in reference to papers presented for action before the county commissioners. *Cheney v. Assessors of Town of Dover*, 91 N. E. 1005, 205 Mass. 501.

The phrase "by an order entered of record," as used in a statute, providing that exceptions may be written and filed at the time, or during the term of court at which they are taken, and within such time thereafter as the court may, by order entered of record, allow, does not require the order to be spread at length upon the record but merely requires a recital of the substance of the order. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 492, 225 Mo. 414, 20 Ann. Cas. 1072.

Where parties to a controversy entered into a stipulation for the submission thereof to a justice of the circuit court as authorized by Tuley Act 1887, the filing of the agreement is sufficient to confer jurisdiction to hear the cause, though the stipulation is not then entered of record as required by such act; it being sufficient if the agreement is "entered of record" by being preserved in the judgment or decree at the conclusion of the hearing. *West Chicago Park Com'rs v. Riddle*, 91 N. E. 1060, 1063, 245 Ill. 168.

**ENTER—ENTRY (In Real Property Law)**

See Forcible Entry; Forcible Entry and Detainer; Lawful Entry; Peaceable Entry; Right of Entry for Breach of Condition Subsequent; Unlawful Entry.

Right of entry as estate, see Estate.

See, also, Right of Entry (In Real Property).

An "entry" at common law is nothing more than an assertion of title by going on the land, or, if that was hazardous, by making continual claim. Anciently an actual entry was required to be made, but now nothing of that kind is necessary; the entry is a fiction, and nothing is required but that the leasor shall have the right to enter. *Innerarity v. Mims' Heirs*, 1 Ala. 660, 674.

**ENTER—ENTRY (On Public Lands)**

See Pre-Emption Entry.

Under the homestead law, three things need to be done to constitute an "entry on public lands": First, the applicant must make an affidavit setting forth the facts which entitle him to make such entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with and the certificate of entry is executed and delivered to him, the entry is made; the land is entered. *Oregon Short Line R. Co. v. Fisher*, 72 Pac. 931, 933, 26 Utah, 179 (citing *Hastings & D. R. Co. v. Whitney*, 10 Sup. Ct. 112, 132 U. S. 357, 33 L. Ed. 363).

"The term 'entry,' as applied to appropriations of lands, was probably borrowed from the state of Virginia, in which we find it used in that sense at a very remote period. \* \* \* It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entry taker, and corresponding very much in his functions with the registers of land offices, under the Acts of the United States." *Chotard v. Pope*, 12 Wheat. (25 U. S.) 586, 588, 6 L. Ed. 737.

In statutes and in common parlance the word "entries," when applied to proceedings in the land office under the homestead law, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole. *Stearns v. United States*, 152 Fed. 900, 906, 82 C. C. A. 48.

In an indictment for conspiracy to defraud the United States by means of a false and fraudulent entry of public lands under the homestead law, the word "entry" may properly be used and construed as applying to any or all of the steps necessary to acquire

title under such law. *Bradford v. United States*, 152 Fed. 617, 619, 81 C. C. A. 607.

The desert land act provides that it shall be lawful for any citizen on payment of 25 cents an acre to file a declaration under oath with the register and receiver of the land district in which any desert land is situated that he intends to reclaim a tract of desert land, and Act March 3, 1891, c. 561, requires that, at the time of filing the declaration, the party shall also file a map of the land which shall exhibit a plan showing the mode of contemplated irrigation, which plan shall be sufficient to thoroughly irrigate it, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used. Held, that only bona fide entries made with intention to reclaim the land are contemplated; and hence, though the entryman may assign his entry, yet, if he made the same in bad faith or in evasion of the provisions of the law, it constituted a fraud on the government, so that an indictment charging that defendants conspired to make, and cause to be made, false, fraudulent, and fictitious entries of respective tracts of desert land to fraudulently obtain title to and use and possession of such tracts, and performed certain overt acts in furtherance of the conspiracy, it stated an offense punishable by Rev. St. § 5440; the term "entry" including not only the preliminary application, but the proceedings as a whole to complete the transfer of title. *Chaplin v. United States*, 193 Fed. 879, 881, 114 C. C. A. 93.

Laws 1877, c. 15, § 3, relating to the disposition of state lands, provided that no person should be allowed to enter more than 240 acres; while Ann. Code, 1892, § 2564, relating to the same subject, declares that one person may purchase as much as one quarter section of public lands in one year and no more, and that all lands acquired directly or indirectly by any person in contravention of sections 2564 or 2565 escheat to the state. Held, that there was no substantial difference between such statute; the words "enter" and "purchase," used therein, being convertible terms, and the provision for "escheat" in section 2564 meaning nothing more than that the lands should be recovered or should be reclaimed, which would be implied, though not expressed, in the act of 1877. *Wisconsin Lumber Co. v. State*, 54 South. 247, 249, 97 Miss. 571; *Newman v. Nall* (Miss.) 54 South. 250.

**ENTER—ENTRY (Under Immigration Laws)**

An alien, who falsely represents himself to be a citizen, and by such artifice and fraud secures admission to the United States, is guilty of "entering in violation of law," within the meaning of Immigration Act, and is subject to deportation thereunder. *Williams v. United States ex rel. Bougadis*, 186 Fed. 479, 481, 108 C. C. A. 457.

An "entry" or "entrance" of a Chinese person into the United States within the Chinese exclusion acts, means more than the mere act of crossing the border, and consists in his going at large or becoming domiciled in the country. *Ex parte Chow Chok*, 161 Fed. 627, 629.

Failure of an alien to enter at a port of entry and submit to examination and inspection and entering surreptitiously is an "entry in violation of law," so that an alien so entering is found in the United States in violation of the Immigration Act Feb. 20, 1907, c. 1134, § 36, and is subject to deportation. *Ex parte Li Dick*, 176 Fed. 998, 1000.

#### ENTER—ENTRY (Under Revenue Laws)

In construing Act June 22, 1874, c. 391, § 21, which provides that the "settlement of duties shall, after the expiration of one year from the time of entry, \* \* \* be final and conclusive," held, that the "entry" referred to does not mean the entire transaction leading up to the liquidation, but the act of the importer in presenting to the collector the document known as an "entry." *Cassel v. United States*, 146 Fed. 146, 147.

Act Cong. June 10, 1890, c. 407, provides that if any importer or owner shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter or other means, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of duty or any portion thereof, he shall be fined, etc. Rev. St. § 2979, declares that the owner of goods may re-export the same under the inspection of the proper officers without the payment of any duty thereon. Held, that where the defendant was charged with having withdrawn certain imported beans from the warehouse for exportation upon bond and permit, all on January 15, 1902, and the indictment then alleged that the goods were not exported "then and there," but were withheld and concealed with the knowledge of the defendants, the goods would be regarded as "entered," and the duties therefrom due when the owners or the truckmen to whom the custody was intrusted disregarded the limitations put on them and introduced the goods into the unrestricted commerce of the country, though the time within which the goods might be properly exported had not arrived; hence the indictment was not objectionable because it did not allege that defendants concealed or withheld the goods, not only at the time of their removal, but for all the period which was allowed to export them. *United States v. Ehrgott*, 182 Fed. 267, 271.

The word "entry," as used in Rev. St. § 5445, which makes it a criminal offense to knowingly effect the entry of any goods or merchandise at less than the true weight or measure thereof, etc., is used in its broad sense, and includes the series of acts which

are necessary to put the goods through the custom house. *Heike v. United States*, 192 Fed. 83, 99, 112 C. C. A. 615; *United States v. Mescall*, 164 Fed. 580, 583.

Section 5444, Rev. St. U. S., relating to the crime of illegally admitting imported goods to "entry," does not refer merely to the act of filing at the custom house the document known as an "entry," but comprises the transaction of entering the goods into the body of the commerce of the country; that is, the whole process of passing the goods through the customhouse, which cannot be deemed complete until liquidation has been had. *United States v. Mescall*, 164 Fed. 584, 585.

A manifest clerical error in a liquidation made within one year after original entry cannot be corrected more than one year after such entry, because not within the provision in Customs Administrative Act, authorizing the Secretary of the Treasury to correct such errors "within one year from the date of such entry," as the term "entry," as there used, refers to the document filed by the importer on entry. *United States v. F. B. Vandegrift & Co.*, 175 Fed. 772, 773, 99 C. C. A. 598.

In the provision in section 33, Tariff Act July 27, 1897, c. 11, for "merchandise previously imported, for which no 'entry' has been made," the word "entry" refers to an "entry for consumption." *John B. Ellison & Sons v. United States*, 136 Fed. 909, 972 (overruling *Hartwell Lumber Co. v. United States*, 128 Fed. 306).

While it is a condition to the entry of merchandise that invoices should be carried before an American consul, this is not necessarily a part of the entry, within the meaning of Customs Administrative Act, relating to illegal "entry," as the earliest entry does not begin until the owner, after the goods reach this country, begins that series of acts through which, by application to the customs officials, he gains possession of the goods. It is not necessary to determine with strictness in this case just how much the term "entry" includes; all that is necessary being to show that the taking out of a fraudulent invoice in Paris is not part of the entry. *United States v. One Trunk*, 171 Fed. 772, 774.

#### ENTER AND REMAIN

Under a statute giving a parent a right of action against any liquor dealer who allows his minor child to enter and remain in a saloon, it was error to charge that the length of time the minor remained therein was immaterial; it not being sufficient that the minor "enters or remains," but both must concur, and a mere entry in all cases does not constitute remaining. *Cox v. Thompson*, 75 S. W. 819, 820, 32 Tex. Civ. App. 572.

Where the entering and remaining was only for a time sufficient to purchase and

drink a glass of liquor, and the sale was made in good faith on reasonable grounds of belief that the person was an adult, there was not such a permitting, by the liquor dealer, of a minor to "enter and remain" in his liquor store as amounted to a violation of the condition of his bond that he would not permit a minor to enter and remain in the store. *Minter v. State*, 76 S. W. 312, 314, 33 Tex. Civ. App. 182.

### ENTERED INTO

An allegation, in an action for the breach of a contract, that a certain written contract was "entered into" is sufficient to admit proof that memorandum thereof was delivered. *Bailey v. Leishman*, 89 Pac. 78, 79, 32 Utah, 123, 13 Ann. Cas. 1116.

### ENTERON

"According to the Century Dictionary, the term 'intestines' is used in biology in a wider sense to include the whole enteron, and the term 'enteron' is there defined as meaning, in anatomy, 'the intestines, alimentary canal, including its annexes and appendages.'" *Hampton v. State*, 39 South. 421, 426, 50 Fla. 55.

### ENTERPRISE

See Gift Enterprise; Useful Enterprise.

### ENTERTAIN

#### ENTERTAINED BY THE COURT

The Supreme Court of the United States has held in a series of cases that, if a motion for a new trial in a law case or a petition for rehearing in an equity case is made or presented in season and "entertained by the court," the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Just what is meant by the term "entertained by the court" is not defined in these decisions. It would seem, however, that the term so industriously repeated must have some significance, and that the court thereby meant to say that something was necessary more than the mere filing of the motion. *Klein v. Southern Pac. Co.*, 140 Fed. 213, 214.

#### ENTERTAINMENT

Any other entertainment, see Any Other. Other entertainment, see Other.

An "entertainment" is a source or means of amusement; a diverting performance, especially a public performance, as a concert, drama, or the like. *People v. Klaw*, 106 N. Y. Supp. 341, 351, 55 Misc. Rep. 72 (quoting and adopting definition in Stand. Dict.).

In enactments respecting houses for public refreshment, resort, and entertainment, the expression "entertainment" cannot be understood as meaning a theatrical or musical or other similar performance, but as some-

thing contributing to the enjoyment of the refreshment. *Bryan v. Menefee*, 95 Pac. 471, 476, 21 Okl. 1 (quoting End. Interp. St. § 296).

#### ENTERTAINMENT OF THE STAGE

Under a statute making it unlawful to exhibit on Sunday any interlude, tragedy, comedy, etc., or any other "entertainment of the stage," the term "any other entertainment of the stage" covered all performances of any character in a place of public amusement on Sunday, and was not limited by the rule of *ejusdem generis* to entertainments similar to those specifically named. In re *Hammerstein*, 108 N. Y. Supp. 197, 198, 57 Misc. Rep. 52 (quoting Mayor, etc., of New York City v. Eden Musee Amer. Co., 8 N. E. 40, 102 N. Y. 593).

A license is not required for a free moving picture show in an ice cream saloon and candy store to draw trade, under Greater New York Charter, requiring a license for the exhibition to the public in any building, garden or grounds, concert room, or other place or room in the city of New York, of any interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy, or dancing, or "any other entertainment of the stage," or any equestrian, circus, or dramatic performance, or any performance of jugglers or rope dancing, or acrobats; such show not being within the meaning and purview of the act, and not within the words "any other entertainment of the stage." *Weistblatt v. Bingham*, 109 N. Y. Supp. 545, 546, 58 Misc. Rep. 328.

### ENTICE

The word "entice," as used in Cr. Code, § 20, declaring that any person who shall maliciously or forcibly or fraudulently lead, take, or carry away, or entice away any child under the age of 18 years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, must be given its ordinary and usual meaning, which is to draw on; to instigate by inciting hope or desire; to allure, especially in a bad sense; to lead astray; to tempt; to incite. Its synonyms are "to allure"; "to coax"; "to destroy"; "to seduce"; "to tempt"; "to inveigle"; "to persuade"; and "to prevail on." *Gould v. State*, 99 N. W. 541, 543, 71 Neb. 651.

"Entice" means to draw on by exciting hope and desire, to allure, to attract. An invitation to a boy about 15 years old to take a trip somewhere, accompanied with a promise to pay all of his expenses, and to give him anything in the world he wanted, would come within the definition of "entice," as used in Pen. Code 1895, § 110, relating to the inveigling of children away from home. *Arington v. State*, 59 S. E. 207, 208, 3 Ga. App. 30.

The words "entice, persuade, and decoy," as used in Pen. Code 1895, § 122, providing

that, if any person shall by offering higher wages or in any way entice, persuade, or decoy any servant to leave his employer during the term of service, he shall be guilty of a misdemeanor, indicate that there must be some word or act of incitement or inducement on the part of the offender whereby he influences the will of the servant so that the latter becomes dissatisfied with his employment and is allured away. *Bright v. State*, 61 S. E. 289, 4 Ga. App. 333 (quoting *McAllister v. State*, 122 Ga. 744, 50 S. E. 921).

In order that a parent may maintain an action for the enticement of a minor son from the parent's service, there must have been an actual service of the parent by the son, and some active or affirmative effort by defendant to detract the child from that service. It is not enough that the son has voluntarily left the parent's service without the latter's consent, and has entered into the employment of defendant. *Kenney v. Baltimore & O. R. Co.*, 61 Atl. 581, 582, 101 Md. 490, 1 L. R. A. (N. S.) 205.

## ENTIRE

### ENTIRE BOARD

Salem City charter provides that a board of county commissioners may borrow money only after the passing of an ordinance by a three-fourths vote of the entire board. Held, that the use of the words "entire board," and not the words "entire board elected" or similar term, indicates that the Legislature intended that three-fourths of the entire membership of the board in existence at the passage of the ordinance, as distinguished from three-fourths of the entire board elected, should have power to pass the ordinance. The word "board," when used in municipal charters, has two meanings, one abstract, having reference to the legislative creation, the corporate entity, which is continuous, and the other referring to the members, the individuals, composing the board. The words "entire board," as used in the Salem charter, refer to the membership of the board and were evidently inserted to guard against the hasty legislation by requiring three-fourths of all the members to concur. As the board, the corporate body, was composed of only six members when the ordinance was finally adopted, five of its members being present and voting for the passage, the requirements of the charter were complied with. Also, in a case where the power of a motion was conferred on a municipal council to be exercised by a vote of three-fourths of that body, it was held to give the power of removal to three-fourths of a legal quorum. *Board of Com'rs of Town of Salem v. Wachovia Loan & Trust Co.*, 55 S. E. 442, 444, 143 N. C. 110 (citing *Warnock v. City of Lafayette*, 4 La. Ann. 419).

### ENTIRE BUSINESS SERVICE

In a contract by which a party agreed to give his entire business services to another for a specified time, the phrase "entire business services" had reference to his calling or business, and did not mean any business or work which the defendant might choose to put him to from time to time, and, where the contract did not disclose what his calling or business was, it could be proved by extrinsic evidence. *Davis v. Dodge*, 110 N. Y. Supp. 787, 793, 126 App. Div. 469.

### ENTIRE CHARGE

See Take Entire Charge.

### ENTIRE CONTRACT

"A contract is 'entire' and not severable. when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. \* \* \* A 'severable contract' is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." The entirety or separability of a contract depends primarily upon the intention of the parties, rather than upon the divisibility of the subject, although the latter aids in determining the intention. Where the consideration or promise is single, there is no difficulty in pronouncing the contract indivisible and in declaring the whole void if there be illegality in the consideration or promise. *Packard & Field v. Byrd*, 51 S. E. 678, 679, 73 S. C. 1, 6 L. R. A. (N. S.) 547 (quoting and adopting definition in *Wooten v. Walters*, 14 S. E. 734, 110 N. C. 251); *Sterling v. Gregory*, 85 Pac. 305, 306, 149 Cal. 117 (quoting and adopting the definition in *Wooten v. Walters*, 14 S. E. 734, 736, 110 N. C. 251).

"If it reasonably appears from the language of the contract that the parties intended that full and complete performance should be made with respect to the subject-matter of the contract by one party in consideration of the obligation of the other party to the contract, such contract is an entirety. In other words, if a party contracts with another to do certain work in the aggregate consisting of several items to be paid for by the other party at so much for each item as it is performed, the work to continue for a certain period of time, if it appears from a character and nature of the subject-matter alone, or in connection with the relation of the parties to such subject-matter, that it was their intention that full and complete performance of such work should be made, the contract should be held to be entire." A contract to print, bind and deliver to a publisher volumes of law reports, etc., agreeing to deliver to the publisher a thousand

copies of each report and necessary plates therefor within 90 days after the original copy had been received, providing that it should remain in force for a term of two years, the publisher agreeing to pay for each thousand copies a specified price as delivered, is an "entire contract" with subsidiary provisions relating to performance. *Jones & Co. v. Gammel-Statesmen Pub. Co.* (Tex.) 94 S. W. 191, 193, 194 (citing 2 Pars. Cont. § 217; 3 Page, Cont. § 1484; *Widman v. Gay*, 80 N. W. 450, 104 Wis. 277; *History Company v. Flint* [Tex.] 15 S. W. 912; *Barrie v. Earle*, 8 N. E. 639, 143 Mass. 1, 58 Am. Rep. 126; *Norrington v. Wright*, 6 Sup. Ct. 12, 115 U. S. 188, 29 L. Ed. 366; *Cresswell Rancho & Cattle Co. v. Martindale*, 63 Fed. 86, 11 C. C. A. 233; *Olmstad v. Bach*, 37 Atl. 501, 78 Md. 132, 22 L. R. A. 74, 44 Am. St. Rep. 273).

"An 'entire contract,' in its legal interpretation, is an unconditional agreement for the whole of the several articles or number or quantity of goods contracted for, and precludes by its terms, and equally by the plain intention of the parties, all idea of divisibility." *Bradford & Carson v. Montgomery Furniture Co.*, 92 S. W. 1104, 1100, 115 Tenn. 610, 9 L. R. A. (N. S.) 979 (quoting and adopting definition in *Story*, Cont. §§ 21, 22).

A contract is not entire and indivisible because embraced in one instrument and signed by the same parties. *Strauss v. Yeager*, 93 N. E. 877, 880, 48 Ind. App. 448.

In case of a contract naturally and accurately severable, such as a contract for the sale of a bill of goods at certain prices for each article, courts incline to hold the contract "severable," and to grant a recovery for that portion of the goods actually delivered, less damages for the nondelivery of any portion not delivered; but, if it appears by express terms or necessary implication that the intent was to make payment of the consideration depend on delivery of all the articles, the contract will be held "entire," though the consideration may be measured by units and be actually severable. Contracts for the sale of goods naturally severable, like the sale of a quantity of gloves of different kinds at fixed prices, will not be held entire, in absence of express or implied provision to that effect, or persuasive circumstances showing such is the intent. The entirety of a contract of sale is a question of intent, which severability of the subject-matter and measurement of consideration by units may assist in determining, but not necessarily determine. *National Knitting Co. v. Bouton & Germain Co.*, 123 N. W. 624, 625, 141 Wis. 63.

As a general rule, a contract is "entire" when by its terms, nature, and purpose it contemplates and intends that each and all of its parts and the consideration shall be common each to the other and interdepend-

ent. The question whether a given contract is entire or separable is very largely one of intention, to be determined from the language used and the subject-matter of the agreement. The divisibility of the subject-matter or of the consideration is not necessarily conclusive, though of aid, in determining the intention. *Quarton v. American Law Book Co.*, 121 N. W. 1009, 1015, 143 Iowa, 517, 32 L. R. A. (N. S.) 1.

"An 'entire contract' is one where, in the intention of the parties, full and complete performance on the one part constitutes the consideration for performance on the other. It is not necessary that the price named shall be a lump sum. It may be measured by quantity or by units. Nor is it essential that, by the terms of the contract, actual payment is to be postponed until after full completion, if earlier payments are merely advancements upon the whole price, and not ratable payments for performance of several and distinct parts. It suffices that full performance is the consideration of the price to be paid, and earlier actual payments on account of the full price are not necessarily inconsistent with entirety." *Fessman v. Barnes* (Tex.) 108 S. W. 170, 171 (quoting and adopting definition in *Widman v. Gay*, 80 N. W. 450, 104 Wis. 277).

"Entire," as used in a provision that this entire policy shall be void if, etc., is held by some courts (even in jurisdictions where separate valuations are ordinarily regarded as rendering the contracts divisible) to make the contract entire and indivisible, while other courts hold that no valid distinction can be drawn between the words "this entire contract shall be void" and "this entire policy shall be void." *Goorberg v. Western Assur. Co.*, 89 Pac. 130, 133, 150 Cal. 510, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801.

Where an insurance policy is issued, and different classes of property are insured, each class being separated from the others and insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered not as one entire in itself, but as one which is severable. *Miller v. Delaware Ins. Co. of Philadelphia*, 75 Pac. 1121, 1123, 14 Okl. 81, 65 L. R. A. 173, 2 Ann. Cas. 17.

Where plaintiff agreed to furnish defendants a certain quantity of crushed stone for a fixed price per cubic yard, at a stated rate per day, the contract was "entire," requiring full performance before payment of the consideration was due. *Prautsch v. Rasmussen*, 113 N. W. 416, 417, 133 Wis. 181.

In an action to enforce an oral agreement to take back certain mining stock at \$1 per share, which had been sold to plaintiff at 50 cents per share, the jury found that defendant agreed, as a condition to the sale



of the stock to plaintiff, that he would purchase it back at \$1 per share, and that the repurchase would be made within one year from the date of sale, and that plaintiff offered back the stock to defendant at \$1 per share within the year. Held, that the agreement was an "entire contract" for the sale of the stock, and that plaintiff was entitled to recover \$1 per share, and not merely the purchase price, with interest, on the theory that the agreement to repurchase embodied two elements, one of which gave the right to rescind and demand the purchase money, and the other a promise of defendant to pay an additional 50 cents per share upon such rescission, which would be within the statute of frauds. *Vohland v. Gelhaar*, 116 N. W. 869, 870, 136 Wis. 75, 16 Ann. Cas. 781.

### ENTIRE ESTATE

The word "entire," in a will whereby testator bequeathed his entire estate, both real and personal, to his wife, and requested that as soon as convenient after his death the wife should sell personal property to pay his entire indebtedness, and requested that at the wife's death the estate testator was then seised of should be equally divided between his children, measures the duration of the estate devised, and the wife acquired a fee-simple title in the real estate, though the word "entire" may sometimes be used as a measure of extent or breadth only. *Snodgrass v. Brandenburg*, 71 N. E. 137, 138, 164 Ind. 59.

### ENTIRE LEASE

Laws 1905, p. 163, c. 103, § 5, provides that an original lessee of school lands, or the assignee of an "entire lease," out of which no sale of one complement of land has been made under this act, may purchase out of his lease the quantity of land allowed to one purchaser. School lands were leased. In 1901, part of the lands were sold to a third person with the consent of the lessee. The lessee assigned his lease, and the assignee sought to purchase other land embraced in the lease. Held, that the assignee was entitled to purchase; the lease of the part not sold to the third person being an "entire lease" within the statute. *Garza v. Terrell*, 90 S. W. 1092, 1093, 99 Tex. 506.

### ENTIRE MINING PROPERTY

Where a lease of a coal mining property required the lessee to surrender the premises at the end of the term in good condition as an "entire mining property," and during the term worthless buildings were destroyed by fire without the lessee's negligence, the lessee need not rebuild the burned buildings, since they were not necessary to constitute the premises an "entire mining property." *Junction Min. Co. v. Springfield Junction Coal Co.*, 78 N. E. 902, 911, 222 Ill. 600.

### ENTIRE TERM

Pen. Code 1876, § 1590, provided that, in deducting credits for good conduct in favor of a convict, they should be deducted from the "entire term" of penal servitude to which he had been sentenced. St. 1889, p. 410, c. 264, § 20, provides that a convict shall be allowed from "his term," for good behavior, certain deductions. Held that, under the language of the original section, it was intended to make the successive periods of imprisonment under cumulative sentences continuous for commutation purposes, but that under the latter statute, where one is convicted of two offenses, and as a punishment for each sentenced to imprisonment, the second sentence to commence at the expiration of the term of imprisonment imposed by the prior sentence, each term is to be considered by itself as regards the allowance of credits for good behavior. *Ex parte Clifton*, 78 Pac. 655, 656, 145 Cal. 186.

### ENTIRE, UNCONDITIONAL, AND SOLE OWNERSHIP

See, also, Sole and Unconditional Ownership; Sole Ownership; Unconditional and Sole Ownership.

### Equitable title

An equitable owner is an entire and sole owner within a policy stipulating that insured was the sole and unconditional owner of the property. *Modlin v. Atlantic Fire Ins. Co.*, 65 S. E. 605, 607, 151 N. C. 35.

### ENTIRE USE

See Full and Entire Use.

### ENTIRE WIDTH OF LOT

The phrase "entire width of the lot," in Tenement House Act (Laws 1901, c. 334) § 53, as amended by Laws 1902, c. 352, providing that behind every tenement house there shall be a yard extending the "entire width of the lot," and section 56, as amended by Laws 1903, c. 179, § 29, providing that, where a lot running through from street to street is over 100 feet in depth, a yard space shall be left throughout the center of the lot midway between the two streets and shall extend across the "entire width of the lot," is not of doubtful meaning, and it does not mean two open spaces interrupted by solid walls of masonry extending across the center of the lot midway between the two streets, and no tenement house building may be erected without a yard space, and the tenement house commissioner will not be compelled by mandamus to approve plans which do not provide for such yard space. *People ex rel. Ungrich v. Crain*, 95 N. Y. Supp. 906, 909, 47 Misc. Rep. 281.

### ENTIRELY

The word "entirely," as used in railroad rules regulating the approach of trains to a station, declaring that the responsibility for

a collision would rest "entirely" with the approaching train in connection with instructions requiring the engineer to have his train "under control" and so to proceed until the track was "plainly seen to be clear," meant that his control should be adjusted to the distance he could see along the track as he advanced, and that he should proceed on the theory that the responsibility for a collision would rest "entirely" with his train. *Great Northern Ry. Co. v. Hooker*, 170 Fed. 154, 158, 95 C. C. A. 410.

#### ENTIRELY AND CONTINUOUSLY CONFINED

The words "entirely and continuously," as used in a health insurance policy, providing for certain monthly payments to members who, by reason of sickness or disease, are "entirely and continuously" confined to bed, must receive a common-sense construction. It is not intended by the employment of these words that a person must spend every minute of his time, while sick, in bed in order to bring himself within its provisions, but the meaning of it is that he must be bedridden in a substantial sense, or, in other words, the indemnity is payable for such sickness only as will confine the patient to his bed nearly all or about all the time of each day, and will not permit him to be absent therefrom for any considerable portion of the time on any day. Where insured was confined to bed a greater portion of the time every day during his sickness, though at times he sat outside of the house, was once driven a few blocks, and was in and out of bed many times, he was "entirely and continuously" confined to his bed, within the meaning of such policy. *Hays v. General Assembly American Benev. Ass'n*, 104 S. W. 1141, 1142, 127 Mo. App. 195.

Where a policy of insurance provided certain weekly indemnity for sickness or disease, whereby the insured as a result thereof is "entirely and continuously confined in bed," under the charge of a physician, though the clause does not mean that the patient must stay every minute in bed for his right to indemnity to accrue, the manifest purpose was not to indemnify for loss of time due to sickness, unless the patient was bedridden in a substantial sense, and there can be no recovery by an insured, notwithstanding he was under the attention of a physician throughout his sickness and was wholly incapacitated to attend to any business, when he was never, even at his worst, confined to the bed, though he rested occasionally in bed during the daytime, but spent most of the hours of the day out of doors under the advice of his physician, and according to his own testimony was never confined to his bed constantly but sometimes stayed in bed two or three days out of a week. *Bradshaw v. American Benevolent Ass'n*, 87 S. W. 46, 47, 112 Mo. App. 435,

#### ENTIRELY WITHOUT UNDERSTANDING

The phrase "entirely without understanding," as used in Civ. Code, § 39, providing that "a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission in this Code," means a want of capacity to understand transactions of the kind involved in the particular case, and it is impossible that a person without the capacity of understanding a particular transaction can in fact understand it. *Ripperdan v. Weldy*, 87 Pac. 276, 279, 149 Cal. 667 (citing *Jacks v. Estee*, 73 Pac. 247, 139 Cal. 507).

This phrase, in Rev. St. 1887, § 2410, making a conveyance on contract of a person "entirely without understanding" void, does not include a person who is sane on one subject but not on another. *Ratliff v. Baltzer's Adm'r*, 89 Pac. 71, 73, 13 Idaho, 152.

#### ENTIRETY (Estate by)

An "estate by entirety" is one held by husband and wife by virtue of title acquired by them jointly after marriage. In re *Rhodes' Estate*, 81 Atl. 648, 645, 232 Pa. 489.

A "tenancy by the entirety" is created by a conveyance of land to a husband and wife; the survivor taking the whole estate. *Oliver v. Wright*, 83 Pac. 870, 871, 47 Or. 322,

A "tenancy by entirety" arises whenever an estate vests in two persons who are, at the time when the estate vests, husband and wife. It may exist in personality as well as real property; in choses in action as well as choses in possession. In re *Klenkes' Estate*, 60 Atl. 166, 210 Pa. 572 (citing In re *Bramberry's Estate*, 156 Pa. 628, 27 Atl. 405; 22 L. R. A. 594, 36 Am. St. Rep. 64).

"Tenancy by the entirety" arises where an estate in land is given to the husband and wife, or where a joint purchase is made by them during coverture; there being no words in the devise or conveyance showing that the grantor intended them to take either as joint tenants or as tenants in common. *Aubry v. Schneider*, 60 Atl. 929, 930, 69 N. J. Eq. 629 (citing *Fulper v. Fulper*, 54 N. J. Eq. 431, 34 Atl. 1063, 32 L. R. A. 701, 55 Am. St. Rep. 590).

An "estate by entirety" is one held by husband and wife by virtue of title acquired by them jointly after marriage. Being regarded as one person in law, they take not in parts or shares like joint tenants or tenants in common, but each takes the whole, or, in the ancient phrase, they are seized not *per mie et per tout*, but *per tout* only. Incident to this estate is the right to survivorship with the difference that on the death of husband or wife the survivor takes no new title or estate but he or she is in possession

of the whole from its inception. *Alles v. Lyon*, 66 Atl. 81, 82, 216 Pa. 604, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 137.

An estate by entirety is held by husband and wife as one person, and under one title, the grant, gift, or devise which created the estate operating in such manner as to give each the whole, and each is seised of the whole of the estate in the survivor; the survivor, on the other's death, not taking as a new acquisition, but holding under the original limitation, his title being merely freed from participation by the other. *Maitlen v. Barley*, 92 N. E. 738, 174 Ind. 620.

Divorce severs the estate by entirety which is then held as joint tenants or tenants in common. *Maitlen v. Barley*, 92 N. E. 738, 174 Ind. 620.

"Tenancy by the entirety" is an estate in which each tenant is seised of an entirety, and, under the married women's acts, each tenant is a tenant in common or joint tenant of the use, and each is entitled to a half of the rents and profits during their joint lives. *Niehaus v. Niehaus*, 125 N. Y. Supp. 1071, 1072, 141 App. Div. 251.

Where the grantees in a deed are named as Daniel H. and Lyda H., his wife, etc., and the granting clause is "do by these presents grant, bargain and sell, convey and confirm unto the said (grantees), their heirs and assigns," etc., an estate by the entirety is created in the grantees. *Holmes v. Kansas City*, 108 S. W. 9, 12, 209 Mo. 513, 123 Am. St. Rep. 495.

"If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common, for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the 'entirety,' per tout et non per my, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." *Green v. Cannady*, 57 S. E. 832, 834, 77 S. C. 193 (quoting the definition in 1 *Sharswood's Blackstone*, 181).

Where a husband purchased property from his own funds and took the title in the name of himself and wife, they became "tenants by the entirety." *Hayes v. Horton*, 81 Pac. 386, 387, 46 Or. 597.

A deed to a husband and wife jointly creates in them an "estate in entirety," and the survivor takes the whole fee. *Naler v. Ballew*, 99 S. W. 72, 73, 81 Ark. 328.

A conveyance of land, after the passage of the married woman's act, to husband and wife creates in them an "estate in entirety," gives to each a right to a half of the rents and profits, and vests in each a freehold estate corresponding to the rights of each. *Bilder v. Robinson*, 67 Atl. 828, 830,

73 N. J. Eq. 169 (citing *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52; *Kip v. Kip*, 33 N. J. Eq. 213; *Rosenblath v. Buttler*, 7 N. J. Law J. 143).

#### Joint tenancy distinguished

See Joint Tenancy.

### ENTITLE

See Beneficially Entitled.

#### ENTITLED THERETO

Under Municipal Court Act (Laws 1902, c. 580) §§ 271, 276, and section 307, as amended by Laws 1910, c. 540, making it the duty of a city marshal to collect on execution and pay the amount to the "party entitled thereto," and requiring him within 20 days to make a return and payment to the clerk or to such party, his payment to the attorney of record of the party in whose favor the judgment was rendered, or to such attorney's managing clerk, will discharge him from liability, unless he has knowledge of a revocation of the attorney's authority. *Schuldenfrei v. Enright*, 138 N. Y. Supp. 1065, 1066, 79 Misc. Rep. 1.

#### ENTITLED TO DEBENTURE

Chapter 101 of the Laws of 1905 requires registration with the State Auditor of public utility bonds issued by cities, "and the said Auditor shall be entitled to a fee of not exceeding fifty cents for each bond so registered in his office." Held, that such fees collected by the plaintiff when Auditor belonged to him, and he was not required by section 4, c. 5, of Laws of 1909, to account for or turn them over to the State Treasurer; "entitled" meaning to give a claim right or title to. *Nation v. Tully*, 121 Pac. 507, 508, 86 Kan. 564.

The words "entitled to debenture," in Rev. St. § 3030, giving the importer of any merchandise "entitled to debenture" the right to transfer the same into new packages when necessary for its safety or preservation, mean imported goods upon which the duties have been paid or secured to be paid which have been entered for export and therefore have the benefit of the drawback and become "entitled to debenture." *W. H. Thomas & Son Co. v. Barnett*, 144 Fed. 338, 341, 75 C. C. A. 300.

#### ENTITLED TO LEGACY

The general guardian of an infant legatee is not a person "entitled" to a legacy, within a statute declaring who may apply to the surrogate's court to compel an administrator or executor to pay legacies. In re *Patton*, 28 N. Y. Supp. 160, 161, 7 Misc. Rep. 377.

#### ENTITLED TO LETTERS TESTAMENTARY

In a statute providing that a married woman is not entitled to letters testamentary

unless her husband consent in writing, the expression "is not entitled" means that she has no claim, no right to be appointed; it does not import the absolute disqualification and incapacity of a married woman to take administration without his consent; such an appointment would be revocable, but not absolutely void. *English's Ex'r v. McNair's Adm'rs*, 34 Ala. 40, 49.

## ENTITY

Joint-stock association as entity, see Joint-Stock Companies and Association.

Railroad as entity, see Railroad—Railway.

A corporation is a legal "entity" distinct from the stockholders, and this rule applies though all the stock is owned by one person. *Roberts v. W. H. Hughes Co.*, 83 Atl. 807, 812, 86 Vt. 76.

When a corporation sues in the circuit court, claiming jurisdiction through diversity of citizenship, it can obtain jurisdiction only by showing that it is the creation of the state of which it claims to be a corporation, and that it is really a corporation, otherwise it is not a "legal entity," a person in the eye of the law. *Gastonia Cotton Mfg. Co. v. W. L. Wells*, 128 Fed. 369, 373, 63 C. C. A. 111.

The estate of a deceased person, pending administration, is a legal "entity," and in charging the crime of embezzlement it is sufficient, as to the matter of ownership, to allege in the information that the money or property belonged to such an estate. *Hendee v. State*, 113 N. W. 1050, 1051, 80 Neb. 80.

"There are two conceptions of a 'partnership,' one springing from the agreement, on which it is founded, that it is an aggregation of persons associated together to share its profits and losses, owning its property and liable for its debts. The other that it is an artificial being, a distinct entity separate in estate, in rights, and in obligation from the partners who compose it. In most of its relations to persons and things the latter conception is the more accurate." Under Bankr. Act July 1, 1898, c. 541, a "partnership" is a distinct "entity," a person separate from the partners who compose it. It owns its property and owes its debts apart from the individual property of its members, which it does not own, and apart from the individual debts of its members, which it does not owe. It may be adjudged bankrupt, although the partners who compose it are not so adjudicated. The trustee of the estate of a bankrupt partnership is not the trustee of the individual property of the unadjudicated partners and has no more right to administer that property than he has to administer the property of indorsers of the commercial paper of the firm or the property of sureties

for its debts. He is not the trustee or the assignee of the claims of the partnership creditors nor their agent nor attorney to collect those claims out of other than the partnership property, and, where no partner is adjudged bankrupt, he has no powers to enforce such claims against any property except the partnership property or against any unadjudicated partner or other person who has none of the partnership property. Under Act March 2, 1867, c. 176, 14 Stat. 517, and the Massachusetts Insolvency Law of 1838 (Laws 1837-38, p. 449, c. 163), a partnership was an aggregation of partners, and the insolvency or bankruptcy of the partners conditioned the bankruptcy of the partnership. It is not so under the act of 1898, and therefore many of the rules of law applicable under the former acts do not obtain under the latter. In *re Bertenshaw*, 157 Fed. 363, 365, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986 (citing *Walker v. Wait*, 50 Vt. 668, 676; *Robertson v. Corsett*, 39 Mich. 784; *Cross v. National Bank*, 17 Kan. 340).

Though a "partnership" may be regarded as a "legal entity" for the consideration of the rights of partners inter se, it has no legal existence apart from the members composing it with reference to the rights of third persons. *State v. Krasher*, 83 N. E. 498, 500, 170 Ind. 43.

A "partnership" is a "legal entity," as well as a corporation, except in a more limited sense. Though partners are not jointly liable, and cannot be sued as a firm for slanderous words spoken by one of them unless by the direction or authority or approval of the others, they are liable as a firm for slander committed by a servant whom they have directed or authorized to speak the words for them, or where, with knowledge of what their servant has done, they ratify it. *Duquesne Distributing Co. v. Greenbaum*, 121 S. W. 1026, 1028, 135 Ky. 182, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481.

A "partnership," under the Bankruptcy Act of 1898, is a distinct "entity," and as such it may be adjudged to be a bankrupt irrespective of any adjudication against the individual members, but, when there is no adjudication against the firm, the partnership assets cannot be administered where there is one partner not adjudicated a bankrupt, unless he consents and it is not an act of bankruptcy for which a firm may be adjudged a bankrupt that one of its members out of his individual estate prefers one of his own or one of the firm creditors. *Mills v. J. H. Fisher & Co.*, 159 Fed. 897, 899, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656 (citing *re Meyer*, 98 Fed. 976, 39 C. C. A. 368; *re Mercur*, 122 Fed. 384, 58 C. C. A. 472; *Loveland, Bankr.* [3d Ed.] §§ 96-98).

A "partnership" is really not a "legal entity." It is not a person, and the use of

the partnership name is of no value except as it represents natural persons. In *re Levin Bros.* Estate, 73 Pac. 159, 162, 139 Cal. 350.

"Partnership" is a legal, but not a social "entity." It can own property, it can buy and sell, it can sue and be sued, and it can plead and be impleaded in the courts of the land; but it can neither marry nor be given in marriage, nor perform any other social function essential to its being elevated to the dignity of becoming the head of the family. A member of a partnership firm, although the head of a family, cannot claim, as exempt from a forced sale upon execution, any portion of the partnership property which has been levied upon to satisfy the claims of the creditors of the firm. *Lynch v. Englehardt-Winning-Davison Mercantile Co.*, 96 N. W. 524, 525, 1 Neb. (Unof.) 528.

A "partnership," unlike a corporation, is not an "entity." A firm, as such, is not regarded as having any legal existence apart from the members composing it. *Bergstrom v. Ridgway-Thayer Co.*, 103 N. Y. Supp. 1093, 1094, 53 Misc. Rep. 95.

A "partnership" is an "entity" distinct from that of its members, and is recognized in law as a person. *Clay, Robinson & Co. v. Douglas County*, 129 N. W. 548, 549, 88 Neb. 363, Ann. Cas. 1912B, 756.

The common law does not recognize a "partnership" as an "entity" existing and having rights and liabilities apart from its members; yet a judgment may be rendered against a partnership in a case where citation has been served on one of the partners as well as against the partner cited. *State v. Cloudt* (Tex.) 84 S. W. 415, 416.

#### ENTITY DOCTRINE

The "entity doctrine," adopted by the United States Supreme Court in *Hill v. Farmers' & M. Nat. Bank*, 97 U. S. 450, 24 L. Ed. 1051, is that in manufacturing plants, where machinery is used in connection with the plant, the intention to devote such machinery to the use of the realty, accompanied with the act of bringing it on the realty, amounts to annexation. In *re Egel Horse-shoe Co.*, 163 Fed. 699, 701, 90 C. C. A. 283.

#### ENTRANCE

See Nearest Entrance.

One of the definitions in Webster's International Dictionary of "entrance" is "passage, door, or gate for entering." A sheriff's return on an order providing for the surrender and reissue of county warrants, reciting that the sheriff posted notices at each "entrance" to the courthouses in two places specified, sufficiently showed that the notices were posted at the courthouse "door," as required by statute. *Yell County v. Wills*, 103 S. W. 618, 619, 83 Ark. 229.

A trapdoor nailed down and kept securely and permanently fastened except when it had been pried open and used by a workman as a means of access to the cellar for a proper purpose, maintained in the floor of a mulct law saloon, did not constitute an "entrance" to the saloon in violation of Code, § 2448, subd. 4, providing that the sale of intoxicating liquors should be carried on in a single room having but one entrance or exit, and that opening on the public business street. *Johannsen v. Hutchinson*, 132 N. W. 20, 21, 151 Iowa, 608.

Under Liquor Tax Law (Laws 1896, p. 60, c. 112) § 17, subd. 8, requiring the consent of at least two-thirds of the owners of dwelling houses within 200 feet of a proposed saloon, such distance to be measured in a straight line from the nearest entrance to a building occupied exclusively for dwelling, a rear door in a city house leading to a back yard and inaccessible to anybody desiring to pass from the street into the dwelling is not an "entrance." *McDougal v. Malaghan*, 77 N. E. 12, 13, 184 N. Y. 253.

#### ENTRANCE FEES

Predecessors in title of defendant by deed conveyed to a city a right of way over land on the ocean front, with a restriction against buildings on the ocean side of the lands conveyed, reserving a right to build a pier on which the owners would not permit sale of commodities and charge only an entrance fee. Defendant erected a pier of the kind permitted and charged an entrance fee, dependent on whether entrance to it only was desired, or access to certain reserved parts, or certain amusements thereon provided. Held, that such charges other than the fee for entrance were in violation of the covenant that the pier owner should charge only an entrance fee. *Atlantic City v. Associated Realities Corp.*, 72 Atl. 61, 62, 75 N. J. Eq. 568.

#### ENTRUST

See Intrust.

#### ENTRY

See Enter—Entry.

#### ENTRY NUNC PRO TUNO

See Nunc Pro Tunc.

#### ENTRY TAKER

See Book of an Entry Taker.

#### ENUMERATE

In order to remove an imported article from the operation of a tariff provision for merchandise "not enumerated," it is not necessary to show that there is an enumeration of the article according to its chief use. It is enough if there is an enumeration de-

scribing any minor use. *Dodge & Olcott*, 130 Fed. 624, 625.

## ENVELOPE

See Paper Envelopes.

The Standard Dictionary defines "envelope" as a case or wrapper, usually of paper, with gummed edges for sealing, in which a letter or like may be sent through the mail or inclosed for any purpose. A second and broader definition is also given, any inclosing covering. *Hunter v. United States*, 134 Fed. 361, 362, 67 C. C. A. 343.

## EN VENTRE SA MERE

Child as including quick child, see Child  
—Children (In Statutes).  
Child as living, see Living.

## EPICURE

The word "epicure," deprived from Epicurus, a Greek philosopher, who taught that peace of mind based on meditation is the origin of all good, in its original sense, indicated a follower of or believer in the ethical system of that philosopher, but through popular misapprehension of his teachings has come to mean, and is chiefly used to designate, a devotee of sensual enjoyment; a voluptuary; a gourmand. *Beadleston & Woerz v. Cooke Brewing Co.*, 74 Fed. 229, 232, 20 C. C. A. 405.

## EPILEPSY

A person may be "epileptic" who has about him anything pertaining to epilepsy. He may be an intelligent and active man or a helpless imbecile. In Conn. Pub. Acts 1895, p. 667, c. 325, prohibiting marriage by an epileptic while the woman is under the age of 45 years, does the Legislature mean by an epileptic person one whose disease has taken the form of imbecility or feeble-mindedness? It is suggested that the Legislature had in mind a bodily condition which often descended from parent to child. The provisions of the act imply this. That epilepsy is a disease of a peculiarly serious and revolting character, tending to weaken mental force and often descended from parent to child, or entailing upon an offspring of the sufferer some other grave form of nervous malady, is a matter of common knowledge of which the courts will take judicial notice. *Gould v. Gould*, 61 Atl. 604, 612, 78 Conn. 242, 2 L. R. A. (N. S.) 531.

Proof of epilepsy does not necessarily directly establish insanity, as epilepsy is not as a matter of fact or law insanity, though evidence thereof may bear on the mental condition of the afflicted person to the extent of establishing insanity. *Oborn v. State*, 126 N. W. 737, 748, 143 Wis. 249, 31 L. R. A. (N. S.) 966.

## EPISCOPAL

See Protestant Episcopal Jurisdiction.

## EQUAL

See As Nearly Equal as May Be; Unequal.

The word "equal," as used in a will devising to trustees all testator's estate to pay the income to the wife during her life, and upon her death to divide the estate into three equal parts, and to assign one part to each of two sons and hold the remainder to pay the income to his daughter during her life, implies parts equal in all respects, in quantity, character, and value. *In re Spreckels' Estate*, 123 Pac. 371, 378, 162 Cal. 559.

## EQUAL ACCOMMODATIONS

Under a statute requiring railroad companies to provide separate waiting rooms of "equal and sufficient accommodations" for the two races, the accommodations need not be the same, nor need the waiting rooms be of the same dimensions. If as good, they would be of equal accommodation within the meaning and spirit of the statute; its object being to prevent discrimination. *Choctaw, O. & G. R. Co. v. State*, 87 S. W. 426, 427, 75 Ark. 279.

## EQUAL AND UNIFORM TAXATION

See, also, Uniform Taxation.

That taxation may be equal within the requirement of the Constitution it is not necessary that the benefits arising therefrom be enjoyed by all the people in equal degree, nor that each person should participate in each particular benefit. *Sawyer v. Gilmore*, 83 Atl. 673, 676, 109 Me. 169.

The requirement that all taxation shall be "equal and uniform" means, with reference to taxes on occupations, that the burden imposed shall fall alike on all persons who are in substantially the same situation—a rule generally recognized, even in the absence of an express constitutional requirement as to uniformity. Within the boundaries of this limitation the broad fields of legislative discretion, which should not be invaded by the court. In seeking to secure equality and uniformity, the Legislature may tax some trades and not others; it may—indeed, must—classify occupations for the purpose of taxation; and the more exhaustive its system of arrangement, the more nearly similar will be the situation of all who are embraced within any designated class. *In re Watson*, 97 N. W. 463, 465, 17 S. D. 486, 2 Ann. Cas. 321.

The term "equal and uniform," as used in the Constitution, providing that "taxation shall be equal and uniform, and that all property in the state whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as pro-

vided by law," does not require that the method of ascertaining the value of property subject to an ad valorem tax be the same. *Missouri, K. & T. Ry. Co. of Texas v. Shannon*, 100 S. W. 138, 143, 100 Tex. 379, 10 L. R. A. (N. S.) 681.

In the clause of the Constitution requiring the Legislature to provide by law for uniform and "equal rate of assessment and taxation," "equality in the rate of assessment" means proportional valuation, relative, not absolute equality; and "equality in the rate of taxation" means that the percentage shall be the same, or absolutely equal. The result is relative equality of taxation. *Lake County v. Schroder*, 81 Pac. 942, 944, 47 Or. 136 (quoting and adopting definition in *Crawford v. Linn County*, 5 Pac. 738, 11 Or. 482).

Diversity of method of taxation, with respect to the amount imposed and the species of property selected for taxation or exemption, is not inconsistent with perfect uniformity and "equality" of taxation, since the equality of operation of tax laws does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. *State v. Clement Nat. Bank*, 78 Atl. 944, 945, 952, 84 Vt. 187, Ann. Cas. 1912D, 22.

"Equality of taxation," as a maxim of politics, means equality of sacrifice. It means apportioning the contributions of each person towards the expenses of government, so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his. There is evidence that this was the equality sought by the framers of the New Hampshire Constitution. While an inheritance tax need not comply with Bill of Rights, art. 12, and article 5, pt. 2, requiring taxes to be proportional, it must be an "equal tax" in the sense that it must affect all persons equally. *Thompson v. Kidder*, 65 Atl. 392, 394, 396, 74 N. H. 89, 12 Ann. Cas. 948 (quoting definition in *Mills' Pol. Economy*, Book 5, c. 2, § 2).

#### License and occupation taxes

Conceding that when a tax is imposed on avocations or privileges, or on corporate franchises, it must be equal and uniform, the "equality and uniformity" consists in the imposition of the like tax upon all who engage in the avocation or who may exercise the privilege taxed. *City Council of Montgomery v. Kelly*, 38 South 67, 69, 142 Ala. 552, 70 L. R. A. 209, 110 Am. St. Rep. 43 (quoting and adopting definition in *Phoenix Carpet Co. v. State*, 22 South. 628, 118 Ala. 151, 152, 72 Am. St. Rep. 143).

#### EQUAL ANNUAL INSTALLMENTS

See Payable in Equal Annual Installments.

#### EQUAL APPORTIONMENT BY LOT

In Const. 1879, art. 130, providing that all prosecutions instituted in the criminal district court of the parish of Orleans should be equally apportioned between the two judges thereof by lot, "equal apportionment by lot" meant an indiscriminate equal distribution or repartition among the judges, by resort to chance. *State v. Rose*, 38 South. 858, 859, 114 La. 1061.

#### EQUAL DISTRIBUTION

See Just and Equal Distribution.

#### EQUAL ELECTION

A guaranty of an "equal election" merely requires the vote of each elector to be counted for all it is worth in proportion to the whole number of qualified electors desiring to exercise their privilege, but does not give unqualified electors the privilege of voting. *Ex parte Wilson*, 125 Pac. 739, 746, 7 Okl. Cr. 610.

#### EQUAL FACILITIES

See, also, Unjust Discrimination.

Plaintiff, after buying a ticket for a train, the usual place of boarding which was on the depot side, where the ground between the tracks was macadamized and smooth, and where the conductor and assistants stood during the letting off and taking on of passengers, went to the further side of and beyond the tracks, and then returning to and attempting to board the train from such further side, where the ground was lower and less smooth, was thrown and injured, the train having started up before he attempted to board it, or while he was in the act of doing so. His requested instruction that, where it is customary for passengers to alight at a station on both sides of the train, it is the carrier's duty to provide equal facilities for passengers to alight or take passage on both sides, was given with the qualification: "That would be so if the railroad company expressly or impliedly invited them to alight on both sides, but not otherwise." Held that, construing the term "equal facilities" to include the keeping of equal watch or lookout on both sides to prevent injury to passengers, there was no error, though the carrier might know, without entering protest, that passengers for reasons of their own frequently got on or off the wrong side at the station in question. *Du Bose v. Atlantic Coast Line R. Co.*, 62 S. E. 255, 257, 81 S. C. 271.

#### EQUAL MEANS OF KNOWLEDGE

While a servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and cannot blindly rely upon the skill and care of his master, this does not involve the question of "equal means of knowledge," which doctrine, although having had a place in the decisions

of this state at one time, has been frequently ignored and expressly denied, and the case upon which it rested to that extent overruled in effect if not in terms. The master is required to do all that ordinary prudence and care requires to acquaint himself with the condition of the premises on which he sets his employé to labor, and the servant may rely on the master's implied assurance of the premises being reasonably safe for the purpose for which they are used, without inquiry or examination, unless the defect is obvious and certain and one which must come to his notice in the regular discharge of his work, without having to stop to suspect or hunt for it. *Kentucky Freestone Co. v. McGee*, 80 S. W. 1113, 1114, 118 Ky. 306.

### EQUAL PROTECTION OF THE LAW

See, also, Privileges and Immunities.

Within the general declarations of the Bill of Rights in which uniformity and equality are laid down as a rule of government, there is no "equality" without uniformity. In *re Opinion of Justices*, 63 Atl. 505, 509, 73 N. H. 625, 6 Ann. Cas. 689.

The "equal protection of laws" is secured if the law operates alike on all of the same class, provided the classification is not arbitrary or unreasonable, and arises out of the business engaged in, or the peculiar manner in which it is conducted, and bears a just and proper relation to the attempted classification. *Sons & Daughters of Justice v. Swift*, 84 Pac. 984, 985, 73 Kan. 255.

To constitute "equal protection of the law," it is only necessary that there be equality among those similarly situated. *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 85 N. E. 1070, 1072, 193 N. Y. 148, 24 L. R. A. (N. S.) 201.

The "equal protection of law" guaranteed by the Constitution means equal security or burden under the law to all similarly situated, and the law must bear alike on all individuals, classes, and districts which are similarly situated; the purpose of the amendment being to prevent arbitrary and capricious laws. In *re Van Horne*, 70 Atl. 986, 987, 74 N. J. Eq. 600. It means equal exemption with others of the same class from all charges and burdens of every kind; but the inequality which will violate the Constitution must be substantial, affect a substantial right, and result in unequal burdens. *State v. Farmers' & Mechanics' Savings Bank of Minneapolis*, 130 N. W. 445, 449, 114 Minn. 95. It means subjection to equal laws applying alike to all in the same situation. *Adams v. Standard Oil Co. of Kentucky*, 53 South. 692, 694, 97 Miss. 879. Equal protection is secured if the laws operate upon all alike and do not subject the individual to the arbitrary exercise of the powers of government. *Miller v. City of Birmingham*, 44 South. 388, 389, 151 Ala. 460,

125 Am. St. Rep. 31. It means that equal protection and security shall be given to every person under like circumstances in his life, liberty, and property and in the pursuit of happiness and in the exemption from any greater burdens, and charges than are imposed upon others. *Ex parte Mallon*, 102 Pac. 374, 375, 16 Idaho, 737, 22 L. R. A. (N. S.) 1123.

Const. U. S. Amend. 14, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." *Sellers v. Hayes*, 72 N. E. 119, 123, 163 Ind. 422 (quoting and adopting from *Barbler v. Connolly*, 5 Sup. Ct. 357, 359, 113 U. S. 27, 31, 28 L. Ed. 923).

### Classification and punishment of crimes

The Legislature being entitled to classify crimes and penalties according to terms of imprisonment, a statute providing a death penalty in cases of assaults with a deadly weapon, or likely to produce great bodily injury, by life convicts, was based on a valid classification and, being equally applicable to all persons within the same class, was not unconstitutional, as denying such convicts "equal protection of the law." *Ex parte Finley*, 81 Pac. 1041, 1044-1046, 1 Cal. App. 198.

Bringing a convict after judgment before the court of another county in a separate proceeding instituted conformably to W. Va. Code, chap. 165, §§ 1-5, by information charging him with prior convictions which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, §§ 23, 24, in such cases prescribes, does not deny him the "equal protection of the laws" because of the difference in procedure between the case where the fact of former conviction is alleg-



ed in the indictment and determined by the jury on the trial of the charge of crime, and the case where it is charged in the information, and determined by a jury in a proceeding thereby instituted. *Graham v. West Virginia*, 32 Sup. Ct. 583, 588, 224 U. S. 616, 58 L. Ed. 917.

#### Classification of persons, etc.

Legislation affecting alike all persons of a class is not in violation of Const. art. 1, § 5, or Const. U. S. Amend. 14, prohibiting the denial of the equal protection of the laws, where the classification is not arbitrary, but based on reasonable grounds. *Ex parte Hollman*, 60 S. E. 19, 31, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

"Equal protection of the laws," given by the Constitution, requires that the law shall have equality of operation, but that does not mean equality of operation on persons merely as such, but on persons according to their relations." Such reasonable classifications do not violate this constitutional principle, where all persons who come within the jurisdiction of the law are affected alike, even though they may constitute a class. *Wash. Laws 1901*, p. 362, c. 174, § 12, requiring subsequently formed fraternal insurance associations to adopt mortuary assessment rates not lower than those indicated as necessary in the fraternity congress mortality table, operates alike upon all corporations similarly situated, and hence does not violate Const. art. 1, § 12, forbidding the grant to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which do not belong to all citizens or corporations. *State v. Fraternal Knights and Ladies*, 77 Pac. 500, 502, 35 Wash. 338.

A law prohibiting the carrying on of the business of a barber on Sunday is not unconstitutional as a denial of "equal protection of the laws." *State v. Bergfeldt*, 83 Pac. 177, 178, 41 Wash. 234, 6 Ann. Cas. 979.

An ordinance requiring owners, etc., of property to remove snow from adjoining sidewalks does not infringe the constitutional prohibition against denial of "equal protection of the laws." *State v. McCrillis*, 66 Atl. 301, 306, 28 R. I. 165, 9 L. R. A. (N. S.) 635, 13 Ann. Cas. 701.

Singling out the milk business in the city of New York as a proper subject for regulation does not deny the "equal protection of the laws," where all milk dealers in the city are equally affected by such regulation. *New York ex rel. Lieberman v. Van De Carr*, 26 Sup. Ct. 144, 147, 199 U. S. 552, 50 L. Ed. 305.

Code 1904, art. 43, § 83, providing for the registration of physicians, and exempting from its provisions those who practiced in the state before January, 1898, and were still in practice and could prove by affidavit that they had treated at least 12 persons within a year, does not violate Const. U. S.

Amend. 14, guarantying "equal protection of the laws," as an unreasonable and arbitrary discrimination or classification. *Watson v. State*, 66 Atl. 635, 637, 105 Md. 650.

2 Gen. St. p. 1853, § 6, prescribing the qualifications of grand jurors, and declaring that, where any person disqualified shall be summoned as a grand juror, it shall be good cause of challenge, provided that no exception to any such juror on account of his citizenship or age shall be allowed after he has been sworn, does not deny to one the "equal protection of the laws" in not being afforded an opportunity to challenge members of a grand jury, disqualified by reason of age, because the crime charged against him was committed while the grand jury was in session, for it operates alike on all persons under like circumstances. *State v. Lang*, 66 Atl. 942, 943, 75 N. J. Law, 1.

Act March 9, 1903 (Acts 1903, p. 276, c. 153), makes sales by a merchant of any of his stock, save in the usual course of trade, void as to creditors whose claims arise from a sale of some of the stock, or from money loaned for the business, unless certain conditions as to a publication of a schedule of such creditors, etc., are complied with, and provides that the merchandise in the hands of the purchaser shall be liable to such creditors, and, if withdrawn, the purchaser shall be liable to such creditors of such seller to the value of the merchandise received by him and withdrawn. Held, that the statute is void in that it creates preferred classes of creditors, in violation of Const. U. S. Amend. 14, prohibiting any state from denying the "equal protection of the law," or depriving any person of life, liberty, or property without due process of law. *McKinster v. Sager*, 72 N. E. 854, 856, 857, 163 Ind. 671, 68 L. R. A. 273, 106 Am. St. Rep. 268.

Pen. Code 1895, § 1192, as amended by Laws 1907, p. 24, making it a misdemeanor for a person not a member of one of certain societies to wear or use the insignia or ceremonials of such society, but providing that the act shall not apply to the wives, daughters, sisters, or mothers of members of such societies, is repugnant to the fourteenth amendment of the federal Constitution, prohibiting any state from passing laws denying to persons within its jurisdiction the "equal protection of the law," in that the relatives of members of the societies, who are excluded from the operation of the statutes, bear the same relation to the subject of the legislation as all other women in the community, as well as men who are not members of such societies. *State v. Holland*, 96 Pac. 719, 722, 37 Mont. 393.

Liquor sellers are not denied the "equal protection of the laws" because producers or manufacturers of domestic wines are exempted, by Tex. Rev. Civ. St. 1895, art. 5060i, while such wines are in their hands, from

the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors. *Cox v. Texas*, 26 Sup. Ct. 671, 673, 202 U. S. 446, 50 L. Ed. 1099.

Act Dec. 10, 1906, p. 114, No. 117, requiring a mining, quarrying, manufacturing, etc., or railroad corporation to pay its employes each week, and that payment shall be in lawful money, is not, as to a railroad corporation, a denial of the "equal protection of the laws," in violation of Const. U. S. Amend. 14, though not including all corporations; the rule being that special legislation does not contravene the equality clause of that amendment, if within the sphere of its operation all persons within its provisions are treated alike. Though class legislation discriminating against some and favoring others is prohibited, special legislation does not violate the constitutional prohibition, if, within the sphere of its operation, all are treated alike. *Lawrence v. Rutland*, 67 Atl. 1091, 1092, 80 Vt. 370, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475.

The "equal protection of the laws" is not denied to manufacturers and sellers of mixed paints containing other ingredients than pure linseed oil, pure carbonate of lead, oxid of zinc, turpentine, Japan dryer, and pure colors, by a state statute which makes the manufacture and sale of such paints a misdemeanor, unless the label shows the constituent ingredients and the quantity or amount of each, because the manufacture and sale of mixed paints containing only the ingredients specified in the statute, and possibly of all paste paints, are free from such consequence or condition. *Heath & Milligan Mfg. Co. v. Worst*, 28 Sup. Ct. 114, 120, 207 U. S. 338, 52 L. Ed. 236.

The exemption of merchants and dealers who sell patented things in the usual course of business from the operation of Kirby's Dig. Ark. §§ 513-516, requiring a negotiable instrument taken in payment for a patented article to show on its face for what it was given or be void, does not render such statute repugnant to Const. U. S. Amend. 14 as denying the "equal protection of the laws." *Ozan Lumber Co. v. Union County Nat. Bank*, 28 Sup. Ct. 89, 91, 207 U. S. 251, 52 L. Ed. 195.

Corporations are not denied the "equal protection of the laws" secured by Const. U. S. Amend. 14, by the provisions of Vermont act of October 9, 1906, under which corporations alone may be compelled to produce before a court or grand jury material books and papers in their custody or control. *Consolidated Rendering Co. v. Vermont*, 28 Sup. Ct. 178, 182, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

The statutes requiring foreign insurance companies only to take out licenses for their agents, as a condition to doing business in the state, do not contravene Const. U. S.

Amend. 14, forbidding any state from denying to any person the "equal protection of the laws." *Commonwealth v. Gregory*, 89 S. W. 168, 170, 121 Ky. 256.

Civ. Code of Practice, Ky. § 51, subsec. 6, which provides that "in actions against an individual residing in another state . . . engaged in business in this state the summons may be served on the manager or agent of, or person in charge of, such business in this state," as applied to actions in personam, is invalid as in conflict with the constitutional provision forbidding any state to deny to any person within its jurisdiction the "equal protection of the law." *Moredock v. Kirby*, 118 Fed. 180, 186.

The law requiring corporations doing business in the state to produce upon notice before any court, etc., all books, etc., concerning proceedings, pending before such body, etc., is not unconstitutional as denying to corporations "equal protection of the laws." *In re Consolidated Rendering Co.*, 66 Atl. 790, 799, 80 Vt. 55, 11 Ann. Cas. 1069.

Common carriers are not denied the "equal protection of laws" by the provisions of Act Feb. 23, 1903, S. C. p. 81, § 2, requiring them to adjust and pay every claim for loss or damage to an intrastate shipment within 40 days after the filing of a claim, under penalty of \$50 for each failure or refusal, where there can be no award of a penalty under the statute unless there is a recovery of the full amount claimed. *Seaboard Air Line Ry. v. Seegers*, 28 Sup. Ct. 28, 29, 207 U. S. 73, 52 L. Ed. 108.

Act No. 70 of 1886, § 1, which provides that in suits against railroads for the killing, etc., of stock, it shall suffice in order to recover to prove the killing or injury unless defendant shows that it did not result from carelessness on its part, etc., does not deny to railroads the "equal protection of the laws." *Learned & Koontz v. Texas & P. Ry. Co.*, 54 South. 931, 932, 128 La. 430.

Code 1902, § 1895, giving corporations, organized under the article, power to construct railroads and canals for their own use, and to effect a crossing with any existing railroad or public road, but with no power to condemn lands, except for crossing existing railroads or public roads, is not in violation of Const. art. 1, § 5, or the fourteenth amendment of the Constitution of the United States, as denying "equal protection of the laws," in that it denies to existing railroads the right to condemn crossings over tramroads, electric railways, turnpikes, and canals. *D. W. Alderman & Sons Co. v. Wilson*, 57 S. E. 756, 757, 77 S. C. 165.

Rev. Laws, c. 112, § 72, requiring street railway companies to carry pupils of the public schools when going to and returning from school at rates not exceeding one-half the regular fare, and leaving unchanged the pre-

vious laws exempting the Boston Elevated Railway Company from the operation of chapter 112, is not thereby rendered unconstitutional as depriving other railway companies of the "equal protection of the laws," inasmuch as the difference in conditions is sufficient to justify the distinction made by statute. *Commonwealth v. Interstate Consol. St. Ry. Co.*, 73 N. E. 530, 532, 187 Mass. 436, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419.

Sess. Laws 1905, p. 376, c. 180, prohibits any one but a duly authorized agent of a railroad to sell railway transportation; requires such agent to be provided with a certificate from the railroad showing his authority, and to have a fixed place of business in which his certificate shall be conspicuously shown; makes it unlawful for any one not possessed of such certificate to sell railroad transportation or to set up, establish, and conduct any office or place of business for the sale or transfer of railroad transportation. Held, that the act is not unconstitutional as denying to unauthorized ticket brokers "equal protection of the laws" by granting special privileges to railroads not enjoyed by others. *In re O'Neill*, 83 Pac. 104, 105, 41 Wash. 174, 3 L. R. A. (N. S.) 558, 6 Ann. Cas. 869.

That provision of the act of 1903 (Acts 1903, p. 579), amending the charter of the city of Macon, which authorizes the city authorities to determine which of the existing roads and alleys in the territory annexed to the city by the act shall be declared to be public streets of the city, does not deny to them the "equal protection of the law," within the meaning of the fourteenth amendment to the Constitution of the United States. *Smith v. City of Macon*, 58 S. E. 713, 714, 129 Ga. 227.

A state law, which places five towns in a class by themselves, organizes them into a municipal corporation, casts upon them the burden of constructing and maintaining highways and bridges, and subjects them to a different control in respect thereto from other towns, is within the provision of the state Legislature, and not a denial of the "equal protection of the laws," in the meaning of the fourteenth amendment to the federal Constitution. *Williams v. Eggleston*, 18 Sup. Ct. 617, 619, 170 U. S. 304, 42 L. Ed. 1047.

#### **Same—Race discrimination**

"The equal protection of the laws" is not denied to colored persons by a law which makes no discrimination against the colored race in terms, but which grants a discretion to certain officers which can be used to the abridgment of the right of colored persons to serve on grand or petit juries, where it is not shown that the actual administration of the law was evil, but only that evil was possible under it. *Montgomery v. State*, 42 South. 894, 896, 53 Fla. 115.

#### **Due process synonyms**

There is a substantial distinction between the fifth amendment of the federal Constitution which is obligatory only on the United States, and secures due process of law, and the fourteenth amendment, which is obligatory on the states and prohibits the denial of the equal protection of the law; the latter expression being broader than the former, though the mere denial of equal protection of the laws may run into the other limitation. Mere discrimination, however, does not necessarily have that effect. *United States v. New York, N. H. & H. R. Co.*, 165 Fed. 742, 745.

The terms "due process of law" and "equal protection of the laws," as used in Const. U. S. Amend. 14, mean practically one and the same thing. The words "law of the land" were borrowed from Magna Charta and have a recognized significance. "Due process of law means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." "Equal protection of the law" means equal security under them by every one on similar terms in his life, liberty, and the pursuit of happiness. *State v. Barrett*, 50 S. E. 506, 514, 138 N. C. 630, 1 L. R. A. (N. S.) 626 (dissenting opinion of Brown, J., quoting and adopting definitions in *Cooley*, Const. Lim. § 335; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. 722).

#### **Unequal taxation or exemption**

The words "equal protection of laws" mean the subjection to equal laws, which applies alike to all persons in the same situation. Ala. Code 1907, §§ 2391-2400, imposing an additional franchise tax upon foreign corporations for the privilege of doing business within the state without imposing such tax on domestic corporations carrying on the same business, deprives such foreign corporation of the equal protection of the law. *Southern R. Co. v. Greene*, 30 Sup. Ct. 287, 289, 216 U. S. 400, 54 L. Ed. 536, 17 Ann. Cas. 1247.

Where a tax law does not deprive the taxpayer of property without due process of law, and the law does not violate the constitutional requirement that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value," it cannot be said that the law denies to the taxpayer the "equal protection of the laws," since the "law," to whose equal protection the citizen is entitled, is that very provision of our Constitution, which requires a uniform rule of taxation. *Central R. Co. of New Jersey v. State Board of Assessors*, 67 Atl. 672, 685, 75 N. J. Law, 120.

The provisions of the fourteenth constitutional amendment, prohibiting states from

depriving any person of his property "without due process of law," and from denying to any person the "equal protection of the law," do not prevent a state from changing its system of taxation in all proper and reasonable ways, nor compel it to adopt any iron rule of equality, but it may lawfully classify property for the purposes of taxation, and impose different rates on different classes, it being sufficient if there is no discrimination in favor of one as against another of the same class, and the method of assessment and collection of the tax is not inconsistent with natural justice. *Pere Marquette R. Co. v. Powers*, 138 Fed. 223, 229 (citing *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Giozza v. Tiernan*, 148 U. S. 857-862, 13 Sup. Ct. 721, 37 L. Ed. 599; *Adams Express Co. v. Ohio*, 165 U. S. 104-228, 17 Sup. Ct. 305, 41 L. Ed. 683; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Billings v. Illinois*, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400; *Merchants' & M. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *Home Insurance Co. v. New York State*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; *Gulf, etc., Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; *New York State v. Barker*, 179 U. S. 279, 21 Sup. Ct. 124, 45 L. Ed. 194; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 266, 35 L. Ed. 1051; *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949; *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 609; *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70; *Florida, etc., R. Co. v. Reynolds*, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283).

The Illinois state board of equalization, when making an assessment pursuant to the supposed command of a writ of mandamus, represents the state, and its action is repugnant to Const. U. S. amend. 14, if it denies any one the "equal protection of the laws" protected by that amendment against impairment by the state. *Raymond v. Chicago Union Traction Co.*, 28 Sup. Ct. 7, 12, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757.

Compelling the owner of distilled spirits contained in government warehouses or the warehousemen to pay taxes thereon is not a denial to them of the "equal protection of the law." *Thompson v. Commonwealth*, 94 S. W. 654, 655, 123 Ky. 302, 124 Am. St. Rep. 362.

Const. art. 2, §§ 29, 30, and Acts 1903, p. 632, c. 258, exempt from taxation in the direct product of the soil in the hands of the producer and his immediate vendee and articles manufactured of the produce of the

state. Held, that a tax on logs purchased in and brought from another state and lumber manufactured from such logs, belonging to a domestic corporation, is not violative of the fourteenth amendment to the federal Constitution, as a denial of the "equal protection of the laws." The fourteenth amendment of the federal Constitution does not prohibit the states from classifying property and from according treatment to the different classes. There is nothing in the amendment requiring taxes to be equal and uniform. The states may classify objects of legislation if the classification is not clearly arbitrary and unreasonable. The declaration that no state shall deny to any person within its jurisdiction the "equal protection of the laws" intended not only that there should be no arbitrary deprivation of life, or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in their personal and civil rights; that all persons should be equally entitled to pursue happiness and acquire and enjoy property; that they should have like access to the courts for the protection of person and property, for the prevention and redress of wrongs, and for the enforcement of contracts; that no impediment should be imposed to the pursuits of any one, except as applied to the same pursuits to another in like circumstances; that no greater burden should be laid upon the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than upon another for a like offense. But this amendment was not designed to interfere with the police power of the state, to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate for the promotion of the industries of the state for the development of its resources, and to add to its health and prosperity. The amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways, or to compel the adoption of an iron rule of equal taxation. To give it that construction would not only supersede the constitutional provisions and laws of the state, the object of which is to secure equality of taxation, but would render nugatory those discriminations which the best interests of society require and which are necessary for the encouragement of needful and useful industries, and the discouragement of intemperance and vice. *I. M. Darnell & Son v. City of Memphis*, 95 S. W. 816, 818, 819, 116 Tenn. 424 (citing *Travelers' Ins. Co. v. Connecticut*, 22 Sup. Ct. 673, 185 U. S. 364, 46 L. Ed. 949; *Barbier v. Connolly*, 5 Sup. Ct. 357, 113 U. S. 27, 31, 28 L. Ed. 923; *Bell's Gap R. Co. v. Pennsylvania*, 10 Sup. Ct. 533, 134 U. S. 232, 33 L. Ed. 892; *Michigan Central R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744;

*American Sugar Refining Co. v. Louisiana*, 179 U. S. 89-94, 21 Sup. Ct. 43, 45 L. Ed. 102, approved in *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; *Pacific Express Co. v. Selbert*, 143 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *People ex rel. Park Davis & Co. v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323; *Cox v. Texas*, 202 U. S. 446, 26 Sup. Ct. 671, 50 L. Ed. 1099).

The so-called "Duffield Act" (P. L. 1905, p. 189) relating to taxation of railroads, does not conflict with article 14 of the amendments to the federal Constitution, which provides that no state shall "deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the 'equal protection of the laws.'" *Bergen & D. R. Co. v. State Board of Assessors*, 67 Atl. 668, 672, 74 N. J. Law, 742 (citing *Kentucky Railroad Tax Cases*, 6 Sup. Ct. 57, 115 U. S. 321, 337, 338, 29 L. Ed. 414; *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 427, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Winona & St. P. Land Co. v. Minnesota*, 16 Sup. Ct. 83, 159 U. S. 526, 538, 40 L. Ed. 247; *Weyerhaeuser v. Minnesota*, 20 Sup. Ct. 485, 176 U. S. 550, 557, 44 L. Ed. 583).

A statute making debts due from solvent debtors subject to taxation does not deny to any person within the state the "equal protection of the laws." *Kingsley v. Merrill*, 99 N. W. 1044, 1048, 122 Wis. 185, 67 L. R. A. 200, 2 Ann. Cas. 748.

Laws 1905, p. 2059, c. 729, providing for taxation of mortgages, does not deny the "equal protection of the law," because applying only to mortgages recorded after July 1, 1905; it making no distinction between persons in the same class or condition. *People ex rel. Elisman v. Ronner*, 95 N. Y. Supp. 518, 519, 48 Misc. Rep. 436.

Assessing the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations, of the same class for the same year, which results in enormous disparity and discrimination, denies the "equal protection of the laws," protected by Const. U. S. Amend. 14, against impairment by a state. *Raymond v. Chicago Union Traction Co.*, 28 Sup. Ct. 7, 12, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757.

The "equal protection of the laws" is not denied a foreign meat packing house by the tax imposed on its local business, under Pub. Laws N. C. 1903, c. 247, taxing "every meat packing house doing business in this state," although, at the points where such local business is carried on, persons selling meat packing house products, but not doing a meat packing house business either in North Carolina or elsewhere, are not subjected to the tax. Meat packing houses are not denied the "equal protection of the laws" by the tax imposed on their business by Pub.

Laws N. C. 1903, c. 247, because houses packing vegetables and the like are not included in the same classification and subjected to the same tax. *Armour Packing Co. v. Lacy*, 26 Sup. Ct. 232, 235, 200 U. S. 226, 50 L. Ed. 451.

### EQUAL SHARES

The words "in equal shares" do not manifest a purpose to modify what has been clearly and aptly expressed and can be given effect by interpreting them as meaning with such equal regard to the rights of all heirs at law as the law itself recognizes in the statute of distributions. *Thompson v. Thornton*, 83 N. E. 880, 881, 197 Mass. 273.

### EQUAL TO

An agreement to pay a man money "equal to" a definite per cent. of the gross profits of a business means "measured" or "estimated" by such proportion of the profits, and gave the recipient no interest in the profits, as such, necessary to make him a partner. *Fechtelor v. Palm Bros. & Co.*, 133 Fed. 462, 471, 66 C. C. A. 336.

### EQUAL VOTE

Under Ill. Const. art. 2, § 18, providing that all elections shall be free and "equal," the vote of an elector is "equal" when counted at the same value as the vote of every other qualified elector exercising the privilege, but this expression does not entitle members of an opposite political party to vote at the primary of another party. *Rouse v. Thompson*, 81 N. E. 1109, 1123, 228 Ill. 522.

### EQUALITY

As equity, see Equity.

### EQUALITY OF REPRESENTATION

"The Constitution therefore must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of representatives among the several states, according to their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case approximation becomes a rule. It takes the place of the other rule, which would be preferable, but which is found inapplicable and becomes itself an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as a matter of discretion, but as an intelligible and definite rule, dictated by justice and conforming to the common sense of mankind—a rule of no less binding force

in cases to which it is applicable, and no more to be departed from than any other rule." Act Ky. March 23, 1906 (Acts 1906, p. 472, c. 139), redividing the state into representative districts and placing Ohio, Butler, and Edmonson counties with a population of 53,263 and a combined area of 1,241 square miles into one district with only one representative, while Spencer county, with only 7,407 population and 204 square miles, is made a district by itself, entitled to one representative, constituted such an unequal division as to violate Const. § 33, requiring a division of the state into districts as nearly equal in population as may be without dividing any county except where a county may include more than one district, etc. *Ragland v. Anderson*, 100 S. W. 865, 869, 125 Ky. 141, 128 Am. St. Rep. 242 (quoting and adopting definition of Daniel Webster as chairman of a senatorial committee).

### EQUALIZATION

"'Equalization' of assessments has, for its general purpose, to bring the assessments of different parts of a taxing district to the same relative standard so that no one of the parts may be compelled to pay a disproportionate part of the tax." *Huidekoper v. Hadley*, 177 Fed. 1, 8, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505 (quoting and adopting the definition in *Cooley, Tax.* [2d Ed.] p. 421); *Hacker v. Howe*, 101 N. W. 255, 258, 72 Neb. 385.

"To accomplish 'equalization,' assessment rolls are equalized by county courts, boards of supervisors, or commissioners, and the aggregate of the county assessments by a state board established for the purpose. This is not done by changing individual assessments, but by fixing the aggregate sum for the several districts at what, in the opinion of the board, they should be, so that general taxes may be levied according to their determination, instead of on the assessor's footings." *Hacker v. Howe*, 101 N. W. 255, 258, 72 Neb. 385 (quoting and adopting definition in 1 *Cooley, Tax.* [3d Ed.] 784).

### EQUALIZE

Under Comp. Laws 1909, § 7620, requiring the state board of equalization to equalize, correct, and adjust assessments, the word "equalize" requires the board to make the assessments equal with reference to the fair cash value of the property. Appeal of McNeal, 128 Pac. 285, 291, 35 Okl. 17.

The word "equalize," as used in revenue statutes creating a board of equalization, means to bring the assessment of different parts of a taxing district to the same relative standard so that no one of the parts may be compelled to pay a disproportionate part of the tax. *Huidekoper v. Hadley*, 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505.

"Equalize" is defined as: "To make equal; to cause to correspond or be like in amount or degree as compared with something." *Wells Fargo & Co. v. State Board of Equalization*, 56 Cal. 194, 196.

### EQUALLY

It was error to instruct that the law presumes that parties in their dealings intend to conduct them honestly, and, where a transaction which is challenged will admit "either" of an honest or a dishonest construction, it is the duty of the jury to accept the former, though it was probable that the word "either" was used when it was intended to use the word "equally." Had the word "equally" been used, the charge would not have been objectionable. *Detroit Electric Light & Power Co. v. Applebaum*, 94 N. W. 12, 13, 132 Mich. 555.

#### As creating tenancy in common

A devise to W. and B. to take and to hold during their natural lives "equally between them" means that they were to hold several estates, and not to hold jointly. *Wells v. Fairbanks*, 6 R. I. 474, 477.

The word "equally," in a conveyance to two or more persons "equally," unaccompanied by any controlling word implies a tenancy in common. Under a statute providing that all conveyances and devises made to two or more persons shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy, and to the survivor of them, or it shall manifestly appear that it was intended to create an estate of joint tenancy, a will, devising property in remainder to be owned "equally" and "jointly" by testator's children or in case of the decease of any of said children his or her share to descend to the heirs of their body, creates a tenancy in common and not a joint tenancy, notwithstanding the use of the word "jointly." *Taylor v. Stephens*, 74 N. E. 980, 983, 165 Ind. 200 (citing 2 *Powell, Devises*, 370; *Freeman, Cotenancy & Partition*, § 23).

### EQUALLY DIVIDED

#### As division per capita

Where a will directs that property shall be "equally divided between" persons standing in different degrees of relationship to the testator, it will be construed, in the absence of anything in the will showing a different intention, as requiring a distribution per capita. *Armstrong v. Crutchfield's Ex'rs*, 150 S. W. 835, 836, 150 Ky. 641.

The words "equally to be divided," when used in a will, mean a division per capita, and not per stirpes, whether the devisees be children and grandchildren, brothers and sisters, nephews or nieces, or strangers in blood to the testator, unless a contrary intention is

discoverable from the will. *Kaufman v. Anderson* (Ky.) 104 S. W. 340, 341 (citing *Purnell v. Culberson*, 12 Bush [75 Ky.] 369; 2 Jarm. Wills, p. 80).

The phrase "equally share and share alike," as used in a will whereby a testator bequeathed his residuary estate, without lawful heirs, and directed that the same should be equally divided among the heirs, share and share alike, meant that in the distribution of the estate the testator's lawful heirs took per capita, and not per stirpes. *Mooney v. Purpus*, 70 N. E. 894, 896, 70 Ohio St. 57.

Under a bequest of property to be equally divided between the children of two of testator's brothers, the nieces and nephews take per capita, and not per stirpes. *Hughes v. Hughes*, 82 S. W. 408, 409, 118 Ky. 751.

#### As division per stirpes

Where the residue was bequeathed to testator's heirs at law, "such heirs to share equally," they took per stirpes. *Allen v. Boardman*, 79 N. E. 260, 261, 193 Mass. 284, 118 Am. St. Rep. 497 (citing *Daggett v. Slack*, 8 Metc. [49 Mass.] 450; *Holbrook v. Harrington*, 16 Gray [82 Mass.] 102; *Houghton v. Kendall*, 7 Allen [89 Mass.] 72; *Balcom v. Haynes*, 14 Allen [96 Mass.] 204; *Bassett v. Granger*, 100 Mass. 348; *Rand v. Sanger*, 115 Mass. 124; *King v. Savage*, 121 Mass. 303; *Hall v. Hall*, 2 N. E. 700, 140 Mass. 267; *Cummings v. Cummings*, 16 N. E. 401, 146 Mass. 501; *Townsend v. Townsend*, 31 N. E. 632, 15 Mass. 454; *Siders v. Siders*, 48 N. E. 277, 169 Mass. 523; *Coates v. Burton*, 77 N. E. 311, 191 Mass. 180).

The word "equally," when used in a will devising certain property to testator's brother's children and heirs, to be divided "equally," means the property is to be divided between the children and heirs per stirpes.—*McClench v. Waldron*, 91 N. E. 126, 127, 204 Mass. 554.

#### As creating tenancy in common

It is a general rule that, when a bequest is made to several persons of income to be divided "equally" among them, they take as tenants in common, and not as a class or as joint tenants. *Loomis v. Gorham*, 71 N. E. 981, 982, 186 Mass. 444.

### EQUIP

Safety Appliance Act, while in terms it requires only that engines and cars shall be "equipped" with the required appliances, must be construed to mean equipment which, if there, is capable of being operated, and that it shall be kept in good order and repair; but it cannot be construed to require that the equipment shall in fact be efficiently operated by those in charge of the train. *United States v. Illinois Cent. R. Co.*, 156 Fed. 182, 193.

### EQUIPMENT

See Railroad Equipment.

Where a corporation executed a mortgage covering all its buildings, structures, improvements, machinery, etc., and then recited that it was intended to include all the property of every description owned by the corporation, constituting a part of its "plant and equipment," the term "equipment" should be construed to mean whatever was used in equipping, the collective designation for the articles comprising an outfit, to fit out or supply with whatever was necessary to efficient action in any way, and hence included the company's office furniture and articles used in the office in the conduct of the business, etc. *Landau v. Sykes*, 54 South. 3, 4, 98 Miss. 495, Ann. Cas. 1913B, 197.

#### Of passenger

The Century dictionary defines "equipment" as the act of equipping or fitting, or the state of being equipped, as for a voyage or an expedition. The term "equip" is derived from words of similar meaning, and often similar sound in various other languages, all meaning or relating to a ship, voyage, or expedition. Under *Wilson's Rev. & Ann. St. 1903*, § 709, providing that "luggage" may consist of any articles intended for the use of a passenger while traveling or for his personal equipment, the reasonable interpretation of the term "personal equipment" is that it only includes clothing, jewelry, and such things as are used in the protection or adornment of the person. It does not include the tools with which one may gain a livelihood after the journey is completed. *Choctaw, O. & G. R. Co. v. Zwirtz*, 73 Pac. 941, 942, 13 Okl. 411.

#### Of railroad

*Train Railway Act*, § 35, providing that a street railway company may, for money to construct and operate its road, give a mortgage on its franchise, road, superstructure fixtures, rolling stock, and equipments, and that its mortgage on its right of way shall be a lien thereon and on the superstructure and fixtures thereon, whether built before or after, makes the lien of the mortgage superior to titles subsequently reserved in contracts for furnishing material for the road, which, when put in place, becomes a fixture, notwithstanding section 6336, providing that any contract for sale of railroad "equipment or rolling stock" may provide that title to the property shall not vest in the purchaser till the purchase price is paid; this referring to movable personalty, as distinguished from the permanent fixed property forming an integral part of the railway as an entirety. *Detroit Trust Co. v. Detroit, F. & S. Ry. Co.*, 124 N. W. 45, 51, 159 Mich. 442.

### EQUITABLE

See Inequitable.

**EQUITABLE ACTION**

As. proceeding, see Proceeding.

An action to set aside a default entered in a foreclosure proceeding, and to have the decree entered therein vacated and declared void, is an equitable action within Const. art. 6, § 4, giving the Supreme Court jurisdiction in equity cases; and hence an appeal in such action was improperly brought to the Court of Appeal. *Litch v. O'Connor*, 97 Pac. 207, 208, 8 Cal. App. 489.

Action for money had and received is an "equitable action," governed by equitable principles, and in it plaintiff waives torts, trespasses, and damages, and it may be maintained whenever one has money belonging to another which in equity and good conscience he ought to pay the other. *Williams v. Smith*, 72 Atl. 1093, 1101, 29 R. I. 562.

**EQUITABLE ASSETS****Choses in action**

"Choses in action" are not equitable assets, and in absence of any special equity, they can only be reached by creditors for the payment of debts in pursuance of the modes provided by statute. *Clapp v. Smith*, 19 Atl. 330, 331, 16 R. I. 717.

**Proceeds of decedents' lands**

"Ordinarily and strictly, the term 'equitable assets' applies only to property and funds belonging to the estate of a decedent, which by law are not subject to the payment of debts, in the course of administration by the personal representatives, but which the testator has voluntarily charged with the payment of debts generally, or which, being nonexistent at law, have been created in equity, under circumstances which fasten upon them such a trust. To constitute equitable assets, the trust imposed by the party, or by the court, must be for the benefit of creditors generally." *Freedman's Sav. & T. Co. v. Earle*, 4 Sup. Ct. 228, 110 U. S. 710, 718, 28 L. Ed. 301.

**EQUITABLE ASSIGNMENT**

An equitable assignment is an assignment of a portion of a debt which a court of equity will recognize and a court of law will not. In *re Macauley*, 158 Fed. 322, 327.

To constitute an "equitable assignment" good as between the assignor and assignee, it is not essential that the fund should have been earned or in esse at the time of the assignment, or that notice be given to the present or future holder of the fund, but, if the intent of the parties to create the lien is apparent, it is sufficient that there be a reasonable expectancy that the funds will be fully earned and come into existence. *Barnes v. Shattuck*, 114 Pac. 952, 954, 13 Ariz. 338.

An assignment of a portion of money to be earned in the future is an "equitable as-

signment." *Cogan v. Conover Mfg. Co.*, 60 Atl. 408, 411, 69 N. J. Eq. 358.

Defendants testified that P., before becoming a bankrupt, arranged to pay defendants their full claim of \$5,400 when the United States paid P. the final balance due to him on a claim then pending; but no definite amount was agreed on to be paid to defendants, nor was the "arrangement" recognized by the government—the disbursing officer only promising to notify defendants when settlement was to be made, so that they might be present. At the settlement a check for \$5,000 was made payable to the bankrupt, which was turned over to defendants; the bankrupt refusing to pay more. *Held*, that such facts were insufficient to constitute an enforceable equitable assignment. *Speckman v. Smedley Bros.*, 153 Fed. 771, 772.

**Order for payment out of particular fund or property**

"In order to constitute a valid assignment in equity, all that is necessary is an order from the person to whom the money is due or coming on the person in whose hands or under whose control it may be to pay to the payee." *Mack Mfg. Co. v. Smoot & Co.*, 47 S. E. 859, 861, 102 Va. 724 (quoting *Chesapeake Classified Bldg. Ass'n v. Coleman*, 94 Va. 433, 26 S. E. 843).

An agreement to pay a certain sum out of, or that one is entitled to receive the same from, a designated fund when received, does not operate as an "equitable assignment." The test, even of an equitable assignment, "is whether the debtor would be justified in paying the debt, or the portion contracted about, to the person claiming to be the assignee." *Donovan v. Middlebrook*, 88 N. Y. Supp. 607, 608, 95 App. Div. 365 (citing *Fairbanks v. Sargent*, 22 N. E. 1039, 117 N. Y. 320, 6 L. R. A. 475).

Where an order requesting payment to another relates to the whole amount of the funds in the hands of the debtor belonging to the assignor, it is an "equitable assignment" of the claim. *Brady v. Ranch Min. Co.*, 94 Pac. 85, 86, 7 Cal. App. 182.

"An agreement to pay out of a particular fund, however clear in its terms, is not an 'equitable assignment'; a covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund holder is bound



from the time of notice. A bill of exchange or check is not an assignment pro tanto of the funds of the drawer in the hands of the drawee." One who had a contract with a railroad to furnish board to a track gang entered into an arrangement with a supply firm whereby it was to extend him credit, and he in turn gave it an order on the railroad, directing it to pay to the firm any sums due from the railroad to him. It was agreed between the contractor and the firm that the latter was not to present the order unless the former did not keep up his payments. In pursuance of this agreement the order was not presented for over a year, and then just one day before the contractor, being insolvent, filed a voluntary petition in bankruptcy. Held, that the order did not operate as an equitable assignment as of the date when it was given, but was effective as a transfer only when presented to the railroad, and therefore constituted a preference, within Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562, declaring a transfer of property by an insolvent, the effect of which is to enable any creditor to obtain a greater percentage of their debts than any other creditors of the same class, a preference. *Johnston v. Huff, Andrews & Moyler Co.*, 133 Fed. 704, 706, 66 C. C. A. 534.

A mere promise, although of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity; but to make an "equitable assignment" there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the assignee, even where the circumstances do not admit of its immediate exercise and to divest the assignor of control over the fund. *Smedley v. Speckman*, 157 Fed. 815, 819, 85 C. C. A. 179.

### EQUITABLE CONVERSION

Equitable conversion is a constructive alteration in the nature of property by which realty is regarded as personality or personality as realty. *Beaver v. Ross*, 118 N. W. 287, 289, 140 Iowa, 154, 20 L. R. A. (N. S.) 65, 17 Ann. Cas. 640.

Conversion is a fiction of equity, applied to carry out the intention of the testator, but, where that intention or purpose fails, it will not be applied, and, if there be a total failure of purpose, the heir at law takes, and may not only prevent a sale, but may compel the trustee, if any, to convey the real estate to him; while in case of a partial failure the heir takes his share according to the course of inheritance under the intestate law. In *Reed's Estate*, 85 Atl. 138, 139, 237 Pa. 125.

To constitute a "conversion" of real estate into personality, in the absence of an actual sale, it must be made the duty of the trustee to sell in any event; such conversion resting upon the principle that equity con-

siders that as done which ought to have been done. A mere discretionary power to sell produces no such conversion. *Christopher v. Mungen*, 55 South. 273, 277, 61 Fla. 513, 534 (citing 2 Words and Phrases, pp. 2437, 2438).

"Equitable conversion" is that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such; the doctrine being founded on the maxim that equity regards and treats that as done which in good conscience ought to be done. *Geiger v. Bitzer*, 88 N. E. 134, 135, 80 Ohio St. 65, 22 L. R. A. (N. S.) 285, 17 Ann. Cas. 151.

"The doctrine of 'equitable conversion' is based on the rule that what is or ought to be done shall be treated as if done already. It is a fiction, therefore, invented to sustain and carry out the intention of the testator or settlor." Conversion is always a matter of intent. In order to work a conversion there must be either "(1) a positive direction to sell, (2) an absolute necessity to sell in order to execute the will, or (3) such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate and to bequeath the said fund as money. In each of the two latter cases an intent to convert will be implied." In *re Vanuxem's Estate*, 61 Atl. 876, 877, 212 Pa. 315, 1 L. R. A. (N. S.) 400 (quoting *Appeal of Hunt*, 105 Pa. 128; *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186).

To operate as a "conversion," direction that the form of the property be changed must be imperative, in the sense of being positive and unmistakable. If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the trustee to sell or not as he deems best, the court is not at liberty to say that conversion has taken place, but must deal with the property according to its actual form and character. The doctrine of conversion of real into personal property is recognized in this state, and the provision for the sale of real estate and distribution of the proceeds contained in a will is evidence sufficient to show the intention of the testator to make such conversion, and is effective to do so. But the intention to make the conversion must be clear and certain and the direction to sell for that purpose imperative and unconditional. The intention must appear by expressed direction and the conversion be obligatory upon the executor or trustee. If the direction to sell is made to depend upon contingencies, or discretion is given to the executors to sell for distribution or divide the property in kind, the intent of the testator to make conversion is not sufficiently evident and positive, and none is effected.

Where testator gave his real and personal property to his widow for life for the joint use for herself and children and authorized her to dispose of the personalty at discretion, and on the arrival of any child at age to give the child any property she might desire, preserving equality among the children, and empowered her to sell any real estate as she might think best, and providing that at her death any remaining property should be sold and equally divided among the children, there was no "equitable conversion" of real estate into personalty. *Bennett v. Gallaher*, 92 S. W. 66, 67, 115 Tenn. 568 (quoting and adopting *Wheless v. Wheless*, 21 S. W. 595, 92 Tenn. 293, and *Bedford v. Bedford*, 75 S. W. 1017, 110 Tenn. 204).

By "equitable conversion of property" is meant an implied or equitable change of property from real to personal or from personal to real, so that each is construed as transferable, transmissible, and descendible, according to its new character as it arises out of the contracts or other intentions of the parties. This change is a mere consequence of the common doctrine of courts of equity that where things are agreed to be done they are to be treated for many purposes as if they were actually done. Where the owner of land made a contract to convey, and left his heirs only the interest then owned, which was virtually but a right to the proceeds, the holder of the contract being entitled to have the land conveyed to him upon paying the purchase price, the vendor's property for the purposes of administration is personal rather than real. *Grigg's Land Co. v. Smith*, 89 Pac. 477, 479, 46 Wash. 185 (quoting and adopting definition in *Story*, Eq. Jur. [11th Ed.] 789, 790, 1212).

In order to work a conversion of testator's lands into money from the time of his death, there must be either a positive direction to sell or an absolute necessity to sell, in order to execute the will, or such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath it as money. In *re Cooper's Estate*, 56 Atl. 67, 68, 206 Pa. 628, 98 Am. St. Rep. 799 (citing *Irwin v. Patchen*, 164 Pa. 51, 30 Atl. 436).

Where testator devised his real estate to his wife for life, with remainder to a nephew, who predeceased testator, so that there was a lapse of the devise to the nephew into the residuary clause of the will, providing that after the death of testator's wife all the rest of his estate should be sold, and the proceeds equally divided and paid over to the children of testator's brother, there was an "equitable conversion" of the real estate into personalty for the purpose of devolution. *Duckworth v. Jordan*, 51 S. E. 109, 111, 138 N. C. 520.

To effect a "conversion" of realty into personalty, it is not necessary that there should be an imperative direction to the executors to sell; but the testator's intention may be gathered from the general scope and tenor of his will and the necessity of a sale to carry out its provisions, the conversion arising on the theory that the testator must have intended that everything essential to his scheme should be done. A testator in his will used the expression "inasmuch as I shall hereafter give my executors power to sell or lease my real estate and personal estate," etc., and in the last clause after appointing his executors, said: "I confer upon my executors power \* \* \* to make sale \* \* \* of my real estate, \* \* \* only for the purpose of paying my debts, but as herein before provided, it being contemplated by me that they will sell my real estate, though not with undue haste." Held, that it was his intent that his whole estate, real and personal, should be converted into money. *Boyce v. Kelso Home*, 68 Atl. 550, 552, 107 Md. 190.

Where executors sold real estate for part cash and part reservation of ground rent, there was no "conversion" of the real estate represented by the ground rent, and the executors would have to account for it as real estate and not as personalty. In *re Harrison's Estate*, 66 Atl. 854, 356, 217 Pa. 207.

#### EQUITABLE DEFENSES

In Code Civ. Proc. § 507, authorizing the defendant in an action to interpose any defense he may have, either legal or equitable, "equitable defense" means a defense which a court of equity would recognize, or a defense founded on some distinct ground of equitable jurisdiction. *City of New York v. Holzderber*, 90 N. Y. Supp. 63, 64, 44 Misc. Rep. 509.

The term "equitable defense" in Greater New York Charter Laws, 1901, c. 466, § 934, as amended by Laws 1904, c. 624, authorizing an order dismissing an action to enforce a personal property tax in the city, if defendant has an "equitable defense," means a defense which a court of equity will recognize or a defense founded on some distinct ground of equitable jurisdiction; and, where the moving paper simply denied that defendant was liable for an assessment for the year and stated that he had never before been taxed on his personalty and received no notice of the assessment until long after the time for correcting the assessment rolls and had no personal property subject to taxation but not stating that he was unable to pay his tax, there was no ground for dismissing the action to recover a personal property tax. *City of New York v. Holzderber*, 90 N. Y. Supp. 63, 64, 44 Misc. Rep. 509.

**EQUITABLE ELECTION**

See Election.

**EQUITABLE ESTATE**

As real property, see Real Property.

**EQUITABLE ESTOPPEL**

See Estoppel in Pais.

**EQUITABLE INTEREST**

Interest as including, see Interest (in Property).

**EQUITABLE JOINTURE**

When the statutory requisites are not all found in a provision by a husband for the wife by will or otherwise, yet it is manifest that the husband did not intend her to have the provision and her dower also, she will be compelled in equity to elect between them, which election is known as "equitable jointure." A contract, made in contemplation of marriage, by which a woman purports to release her claim to her intended husband's lands, but in which it is nowhere declared to be in satisfaction of her dower, and in which no provision is made for her support after the husband's death, but simply permits her to receive the rents out of her dower in a former husband's estate, does not constitute an equitable jointure. *King v. King*, 82 S. W. 101, 103, 184 Mo. 99.

Any reasonable provision which an adult person agrees to accept in lieu of dower will amount to an "equitable jointure," and, though it be wanting in the requisites of a legal jointure, in equity it will bar dower. *Rieger v. Schaible*, 115 N. W. 560, 563, 81 Neb. 33, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700.

**EQUITABLE LEVY**

The right to an equitable lien is sometimes called "equitable levy." *Hudson v. Wood*, 119 Fed. 764, 776, 777.

**EQUITABLE LIEN**

See, also, Lien.

Equitable liens are such as arise either from a written contract which shows an intention to charge some particular property with a debt or obligation, or declared by a court of equity from the facts and circumstances of the case, and do not depend on possession. Strictly speaking, they are not a *jus in re*, nor a *jus ad rem*, but are more properly a charge on the thing, which can be enforced only in equity. *Garrison v. Vermont Mills*, 69 S. E. 743, 744, 154 N. C. 1, 31 L. R. A. (N. S.) 450.

The foundation of every equitable lien is a contract, which deals with some specific property, made by some authorized person, or arising by implication from his acts, before a lien in equity may be created against the property of the person to be affected

thereby. *Vivion v. Nicholson*, 116 S. W. 386, 388, 54 Tex. Civ. App. 43.

The doctrine of "equitable lien" follows the doctrine of subrogation. They both come under the maxim, "Equality is equity," and are applied only in cases where the law fails to give relief and justice would suffer without them. The doctrine of "equitable lien" is not a limitless remedy to be applied according to the measure of the conscience of the particular chancellor any more than, as an illustrious law-writer said, to the measure of his foot. The right to such lien arises when a party at the request of another advances him money to be applied, and which is applied, to the discharge of a legal obligation of that other, but when, owing to the disability of the person to whom the money is advanced, no valid contract is made for its repayment, as where money is advanced to a minor to pay a debt which he has incurred for necessities furnished him, no action at law lies to recover of the minor on a contract, express or implied, but, as the money was loaned to discharge a debt for which the minor was liable at law and it was used for that purpose, a court of equity will charge a lien on the minor's property to repay the sum advanced. The doctrine is limited to cases where the same principle applies as is illustrated in the supposed case. It does not, however, apply in favor of a mere volunteer. *Capen v. Garrison*, 92 S. W. 368, 372, 193 Mo. 335, 5 L. R. A. (N. S.) 838.

"An equitable lien arises where there are some personal obligations or duty to be enforced." Where testator bequeathed to his wife and daughter the use of his estate for life, with remainder, subject to a power of sale in the life tenants, over to defendants, one of the life tenants, by temporarily waiving her right to share in the estate so that a sale of the property was avoided, was not entitled to an equitable lien on the property so as to be able to reach defendant's remainder interest through that medium, but was, as to defendant, a mere volunteer. *Hare v. Congregational Society of Ferrisburg*, 57 Atl. 964, 965, 76 Vt. 362.

"Where in terms the parties agree that one making advances for the purchase of merchandise to be shipped to him shall have a lien on the same, the lien arises upon the purchase of the merchandise before it is consigned to the creditor. The lien, in such case, attaches to the merchandise purchased, and in the hands of the debtor at the time of his bankruptcy, and may be asserted against the debtor's assignee in bankruptcy. Judge Story said that the possession of the property by the debtor was not a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of his general creditors, and therefore the agreement to give a lien or equitable charge was binding upon the prop-

erty in the hands of the assignee." *Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee*, 78 S. W. 413, 415, 117 Ky. 478, 64 L. R. A. 219 (quoting *Jones, Liens*, § 63).

Every written contract which shows an intention to charge some particular property therein described or identified with a debt or obligation creates an equitable lien, and a written agreement to convey or transfer property as security for a debt creates an equitable lien, and a verbal contract will create such a lien on personal property. *Atlanta Nat. Bank v. Four States Grocer Co.* (Tex.) 135 S. W. 1135, 1138.

It is said that: "Every express agreement in writing, whereby the party clearly indicates an intention to make some particular property therein described as security for a debt, creates an 'equitable lien' upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged." *Port v. Carpenter*, 114 N. W. 615, 616, 138 Iowa, 553, 19 L. R. A. (N. S.) 206.

#### EQUITABLE MORTGAGE

A writing which is in all respects sufficient as a deed of trust securing a debt, except that it is not under the seal of the party purporting to be the grantor therein, is an "equitable mortgage." *Holly's Ex'r v. Curry*, 51 S. E. 135, 137, 58 W. Va. 70, 112 Am. St. Rep. 944.

An agreement to execute an agricultural lien is not an "equitable mortgage." An equitable mortgage to secure a debt may be created, by parol agreement, on crops to be raised, and attaches as soon as they are in esse. *Creech v. Long*, 51 S. E. 614, 616, 72 S. C. 25.

Agreements of the nature above referred to are usually termed "equitable mortgages," but the name is not important. If the effect is to create a lien to secure a debt, possession given to the creditor in pursuance of the agreement may be held under the rules applicable to mortgages in possession. Equity requires the payment of the debt before relinquishment of the security can be compelled. *Charple v. Stout*, 128 Pac. 396, 398, 88 Kan. 318.

Where title deeds and other securities were deposited with the depositor's sureties to secure them against liability on a bond, and an instrument executed reciting that the papers were deposited to secure them against any loss by reason of signing such bond, and the writing included the real estate in controversy, which was pledged to the sureties as above stated, such writing was sufficient in form to create an equitable mortgage on the

property to secure the sureties' liability. *Port v. Carpenter*, 114 N. W. 615, 616, 138 Iowa, 553, 19 L. R. A. (N. S.) 206 (quoting and adopting definition in *Howard v. Iron & Land Co.*, 64 N. W. 896, 62 Minn. 298).

A written agreement entered into by parties to make certain property a security for past indebtedness and for future advances, and upon the faith of which both parties have acted in making and accepting payments and advances, constitutes an "equitable mortgage" or lien upon the property. *Earle v. Sunnyside Land Co.*, 88 Pac. 920, 925, 150 Cal. 214.

In order to avoid foreclosure of a deed of trust, the mortgagor quitclaimed the property to the mortgagee, who executed an agreement to reconvey the property on condition of the payment by the mortgagor of the debt, taxes, and other incumbrances before a certain date. If these obligations were not so paid, the agreement was to be void. Held, that the conveyance vested an absolute title in the mortgagee, and the transaction did not constitute an "equitable mortgage." *Bailey v. St. Louis Union Trust Co.*, 87 S. W. 1003, 1005, 188 Mo. 483.

A consent judgment, declaring that defendant "has an equity to redeem" land on the payment to plaintiff of a specified sum, and in case of the failure to pay the same within the time limited "defendant shall stand debarred absolutely" of all equity in the premises, establishes the relation of mortgagor and mortgagee between the parties. *Bunn v. Braswell*, 51 S. E. 927, 929, 139 N. C. 135.

A. bought certain land from B. for C., taking a deed from B., and giving him in return a mortgage for the purchase money. He then put C. into possession and agreed to convey to him on payment of the purchase money. After payment he refused to convey. Held, A. could not be considered toward C. as a mortgagee. *Kean v. Landrum*, 52 S. E. 421, 423, 72 S. C. 556.

To create an equitable mortgage on property for the payment of a debt, an intent to create it must be manifest as distinguished from an intent to apply to the payment of the debt the proceeds from the sale of the property. An agreement setting out that whereas plaintiff and defendant purchased certain land in the proportion of a two-third interest in plaintiff and a one-third interest in Rainey, and plaintiff had paid the entire purchase money and defendant had agreed to repay the same, and that plaintiff had made necessary advancements for improvements, and that all the moneys advanced by him should be considered as a loan and repaid by defendant as rapidly as possible from the receipts of sales or the income of the property, and that, if all such advancements were not fully paid within five years, the defendant, on demand, would pay the one-third

thereof then unpaid, with interest, does not disclose an intent to create an equitable mortgage or lien in favor of plaintiff on defendant's interest in the property purchased. *Smith v. Rainey*, 83 Pac. 463, 464, 9 Ariz. 362.

#### Absolute deed

A mortgage created by an absolute deed of the property made to the mortgagee, taken in connection with the contract, may be regarded as an "equitable mortgage" in contradistinction from a legal mortgage. *Fitch v. Miller*, 65 N. E. 650, 653, 200 Ill. 170.

An absolute conveyance of property in partial satisfaction of a debt, accompanied by a parol agreement that, if the property enhances in value within a certain time and to a certain extent, notes given in satisfaction of the remainder of the debt shall be delivered up and canceled, does not constitute an "equitable mortgage." *Pearson v. Dancer*, 39 South. 474, 475, 144 Ala. 427.

#### EQUITABLE OWNER

As owner, see Owner.

An "equitable owner" is one who has not the legal title but is entitled to the beneficial interest. In *re Folwell's Estate*, 62 Atl. 414, 415, 68 N. J. Eq. 728, 2 L. R. A. (N. S.) 1193 (quoting and adopting definition in 2 Bouv. Law Dict. p. 24, "Legal Estate").

A parol gift of land followed by possession and improvements by the donee makes the donee the equitable owner. *Maas v. Anchor Fire Ins. Co.*, 111 N. W. 1044, 1045, 148 Mich. 432.

One who has acquired a complete right to public lands, but to whom a patent has not been issued, is usually regarded as an "equitable owner"; the federal government or the state holding the naked title in trust. *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 629, 20 Okl. 687.

#### EQUITABLE PLAINTIFF

The "legal plaintiff" is the person in whom the legal title or right of action is vested, while the "equitable plaintiff" is the person who does not have the legal title to the right of action but is in equity entitled to the thing sued for. *Burrell v. United States*, 147 Fed. 44, 46, 77 C. C. A. 308.

#### EQUITABLE PROCEEDING

Mandamus is not an equitable proceeding, and a mandamus issued after judgment against a county, to compel the levy of a tax to pay the same, is not a proceeding in equity, but one at law, in the nature of an execution to enforce satisfaction. *Carter County v. Schmalstig*, 127 Fed. 126, 127, 62 C. C. A. 78 (citing *Riggs v. Johnson County*, 73 U. S. [6 Wall.] 106, 18 L. Ed. 768; *Heine v. Levee Com'rs*, 86 U. S. [19 Wall.] 655, 22 L. Ed. 223).

A proceeding under Rev. St. 1899, § 42, providing for the removal of administrators for specified causes, upon a complaint in writing and affidavit by any person interested and 10 days' notice to the person complained of, is not a common-law but a statutory proceeding, equitable in nature, addressed originally to the discretion of the probate court, and not within Const. art. 2, § 28, guaranteeing the right to trial by jury as heretofore enjoyed, so that a jury is not demandable in either the probate court or on appeal to the circuit court. *Stevens v. Lawrill*, 84 S. W. 113, 115, 110 Mo. App. 140 (citing *Bray v. Thatcher*, 28 Mo. 132; *Whaley v. Whaley*, 50 Mo. 577).

#### EQUITABLE RECEIVER

An "equitable receiver" is a mere custodian, without title and without any power saving that conferred upon him by the order appointing him. *Cogan v. Conover Mfg. Co.*, 60 Atl. 403, 415, 69 N. J. Eq. 358.

#### EQUITABLE TITLE

"An 'equitable title' is a right or interest in land which, not having the properties of a legal estate, but merely a right of which courts of equity will take notice, requires the aid of such court to make it available." *Pogue v. Simon*, 81 Pac. 566, 567, 47 Or. 6, 114 Am. St. Rep. 903, 8 Ann. Cas. 474 (quoting and adopting definition in 1 Bouv. Law Dict. [Rawle's Ed.] p. 680).

An "equitable title" is a right possessed by a person to have the legal title to property transferred to him upon the performance of specified conditions. *Karalis v. Agnew*, 127 N. W. 440, 441, 111 Minn. 522; *Joy v. Midland State Bank of Omaha, Neb.*, 133 N. W. 276, 277, 28 S. D. 262; *Harris v. Mason*, 115 S. W. 1146, 120 Tenn. 668, 25 L. R. A. (N. S.) 1011. In order that he may draw to himself an equitable title, he must show that the one from whom he derives his right had himself a right to transfer. *Harris v. Mason*, 115 S. W. 1146, 1154, 120 Tenn. 668, 25 L. R. A. (N. S.) 1101.

An equitable title is a right imperfect at law, but which may be perfected by the aid of a court of chancery either by compelling parties to do that which in good faith they are bound to do, or by removing obstacles interposed in bad faith to the prejudice of another. When a party's grantors were not the possessors of a legal right and could neither sell nor convey, he acquired nothing which could be perfected by a court of equity. Nor will a court of equity decree an equitable title where conveyances are shown to have been taken under a treaty which provided for valid conveyances upon conditions, unless such conditions appear to have been complied with. *Ayres v. United States*, 42 Ct. Cl. 385, 413.

**EQUITABLE WASTE**

"Equitable waste" is such acts as at law would not be esteemed to be waste under the circumstances of the case, but which is so esteemed by a court of equity because of their manifest injury to the inheritance, although not inconsistent with the legal rights of the party committing them. It is a wanton and unconscientious abuse of the rights of the party in possession, ruinous to the interests of other parties; such acts as a prudent man would not do with his own property. *Landers v. Landers*, 151 S. W. 386, 391, 151 Ky. 206.

**EQUITY**

See Court of Equity; Inchoate Equity; Intervening Equity; Justice and Equity; On Hearing in Equity; Suit in Equity.

Plea in equity, see Plea.

"Equity" is the correction of that wherein the law, by reason of its universality, is deficient." *Mutual Life Ins. Co. v. Blair*, 130 Fed. 971, 974; *Baltimore & N. Y. R. Co. v. Bouvier*, 62 Atl. 868, 875, 70 N. J. Eq. 153; *Thels v. Spokane Falls Gaslight Co.*, 74 Pac. 1004, 1006, 34 Wash. 23. Its special mission is to relieve from fraud and to enforce the observation of broad and just principles." *Thels v. Spokane Falls Gaslight Co.*, 74 Pac. 1004, 1006, 34 Wash. 23. In equitable actions, the rigid rules of law are relaxed, thereby giving the conscience of the chancellor more latitude. *Lynn v. Waldron*, 80 Pac. 292, 293, 38 Wash. 82 (quoting Bl. Comm.).

Aristotle (*Ethics*, book 5, c. 10) defines "equity" as "a better sort of justice which corrects legal justice where the latter errs through being expressed in a universal form and not taking account of particular cases." *Baltimore & N. Y. R. Co. v. Bouvier*, 62 Atl. 868, 875, 70 N. J. Eq. 158.

"Equity" is a system, both in England and this country, of well-established law. Equity is not a chancellor's mere notions of what is equality. *Laird v. Union Traction Co.*, 57 Atl. 987, 208 Pa. 574.

"Equity" is now also the law. "Equity" is a rogish thing. For law we have a measure and know what we trust to. Equity is according to the conscience of him that is chancellor; and, as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing as the chancellor's conscience. *Cox v. Burgess*, 96 S. W. 577, 579, 139 Ky. 699 (quoting from *Table Talk*, tit. Equity).

While "equity" operates on fixed rules, as well defined as are the rules of law, it

exercises a judicial discretion which may be likened to the civil conscience, and which will vary in the relief afforded according to the facts and peculiar circumstances of the case. This is not, as was formerly charged against the chancellor's exercise of prerogatives which were at variance with the rules of law, according to the individual conception of the judge in the case as to what was right between man and man. *Cox v. Burgess*, 96 S. W. 577, 579, 139 Ky. 699.

**As equality**

"Equality" is equity. *Hayden v. Collins*, 81 Pac. 1120, 1123, 1 Cal. App. 259.

**EQUITY AND GOOD CONSCIENCE**

"Equity and good conscience" is an elastic phrase often applied in adjudicating the rights of parties, but it is not a doctrine or rule under which a party will be deprived of his property without due process. *City of Leadville v. Leadville Sewer Co.*, 107 Pac. 801, 813, 47 Colo. 118.

**EQUITY CASE**

As civil action, see Civil Action—Case—Suit—Etc.

As proceeding in bankruptcy, see Bankruptcy Proceeding.

Bill of Interpleader as equity proceeding, see Bill of Interpleader.

**EQUITY JURISDICTION**

See Error or Mistake as to Common-Law or Equity Jurisdiction.

The question of equity jurisdiction relates technically to power itself, but in a broader sense when such power should or should not be used. *Wadhams Oil Co. v. Tracy*, 123 N. W. 785, 787, 141 Wis. 150, 18 Ann. Cas. 779.

Though jurisdiction in its proper sense means authority to hear and decide a cause, jurisdiction of a court of equity involves the question whether equity ought to assume jurisdiction, and hear and decide the cause. *Miller v. Rowan*, 96 N. E. 285, 287, 251 Ill. 344.

Const. 1874, art. 7, § 15, conferring on the circuit courts jurisdiction in matters of equity until the Legislature shall establish courts of chancery, refers to such jurisdiction as a court of chancery could properly exercise at the time of the adoption of the Constitution, and, though the Legislature may create courts of chancery and vest the same with jurisdiction in matters of equity, it may not enlarge their jurisdiction when created. *Gladish v. Lovewell*, 130 S. W. 579, 581, 95 Ark. 618.

The term "equity jurisdiction" is used in contradistinction to "jurisdiction" in general, and to "common-law jurisdiction" in particular. In its most general sense the term "jurisdiction," when applied to a court, is the power residing in such court to de-

termine judicially a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity; if it does exist, the determination, however erroneous in fact or in law, is binding upon the parties until reversed or set aside in some proceeding authorized by the practice, and brought for that express purpose. "Equity jurisdiction," therefore, in its ordinary acceptation as distinguished on the one side from the general power to decide matters at all, and on the other from the jurisdiction "at law" or "common-law jurisdiction," is the power to hear certain kinds and classes of civil causes according to the principles of the method and procedure adopted by the court of chancery, and to decide them in accordance with the doctrines and rules of equity jurisprudence, which decision may involve either the determination of the equitable rights, estates, and interests of the parties to such causes, or the granting of equitable remedies. In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or, if it be a remedy which may also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure. At the same time, if a court clothed with the equity jurisdiction as thus described should hear and decide, according to equitable methods, a case which did not fall within the scope of the equity jurisprudence, because both the primary right invaded constituting the cause of action and the remedy granted were wholly legal, and belonging properly to the domain of the law courts, such judgment, however erroneous it might be and liable to reversal, would not necessarily be null and void. It is plain, from the foregoing definitions, that the question whether a given case falls within the equity jurisdiction is entirely different and should be most carefully distinguished from the question whether such case is one in which the relief peculiar to that jurisdiction should be granted, or in which the equity powers of the court should be exercised in maintaining the primary right, estate, or interest of the plaintiff. The constant tendency to confound these two subjects, so essentially different, has been productive of much confusion in the discussion of equitable doctrines. Equity jurisdiction is distinct from equity jurisprudence. One example will suffice to illustrate this important proposition. A suit to enforce the specific performance of a contract, or to reform a written instrument on the ground of mistake,

must always belong to the equity jurisdiction, and to it alone, since these remedies are wholly beyond the scope of common-law methods and courts; but whether the relief of a specific performance, or of a reformation, shall be granted in any given case, must be determined by an application of the doctrines of equity jurisprudence to the special facts and circumstances of that case. "Jurisdiction," in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action; it does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case before the court, and does not relate to the rights of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced nor the right of a plaintiff to avail himself of it if it exists. It precedes those questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity either in the plaintiff or in any one else. Jurisdiction is entirely independent of the manner of its exercise, involving the power to decide either way upon the facts presented to the court. The term "jurisdiction," as generally used in equity jurisprudence, imports, not the power to hear and decide, but the cases and occasions when that power will be exercised, and is to be distinguished from the use of that term in its strict meaning. While the Supreme Court may not by rule or otherwise limit the jurisdiction conferred on the United States Circuit Courts by statute, it may, and must when the occasion demands, determine what cases are within the equitable jurisdiction of such courts, and may prescribe by rule the cases or classes of cases in which they will grant equitable relief, and such rules govern in all cases, whether commenced in such courts or removed into them from state courts. *Venner v. Great Northern R. Co.*, 153 Fed. 408, 413, 414 (quoting and adopting definitions in 1 *Pom. Eq. Jur.* [3d Ed.] §§ 129-131; *People ex rel. Gaynor v. McKane*, 28 N. Y. Supp. 981, 985, 78 Hun. 154. (Citing *Anderson v. Carr*, 19 N. Y. Supp. 992, 993, 65 Hun. 179; *Hunt v. Hunt*, 72 N. Y. 217, 27 Am. Rep. 129; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.)

### EQUITY OF REDEMPTION

An "equity of redemption" is defined to be a right which the mortgagor of an estate has of redeeming it after it has been forfeited at law by nonpayment, at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs. *Ebelharr v. Tennelly*, 80 S. W. 459, 460, 118 Ky. 43 (citing *Bouv.*).

The "equity of redemption" is the mortgagor's interest before foreclosure; while his "right of redemption" is a mere personal privilege given by statute to the mortgagor after a sale under the mortgage. *Lewis v. McBride* (Ala.) 57 South. 705, 706.

The term "right to redeem" is appropriate to express the right, interest, or the estate of a mortgagor, and not a vendee. When we speak of the interest of one in, or right to, real estate as an "equity of redemption," which is synonymous with "right to redeem," we understand that reference is made to the status of a mortgagor, not a vendee. We are also impressed with the expression that the defendant "has a right to redeem." *Bunn v. Braswell*, 51 S. E. 927, 929, 139 N. C. 135 (quoting and adopting definition in *Robinson v. Willoughby*, 65 N. C. 520).

An equity of redemption is not the difference between the value of the property, in respect to which it is held, and the amount of the liens thereon, but an equitable estate in the property capable of being enlarged into complete legal title by discharging the liens, and in such case, the interest of the owner therein, within the meaning of Code 1899, c. 75, § 3, is such equitable estate. *Grant v. Cumberland Valley Cement Co.*, 52 S. E. 36, 38, 58 W. Va. 162.

"An 'equity of redemption' is an estate in the mortgaged property and is subject to all the incidents of ownership. It may be conveyed or devised. It descends to the owner's heirs or personal representatives according to the nature of the mortgaged property and is subject to curtesy and homestead." A surplus arising on a foreclosure sale of land of a decedent's estate is not thereby converted into personalty, but partakes of all the incidents of real estate and is distributable to the widow and children as realty according to the statute of descent and distribution. *Kitchens v. Jones*, 113 S. W. 29, 30, 87 Ark. 502, 19 L. R. A. (N. S.) 723, 128 Am. St. Rep. 36.

The term "equity of redemption," used in the old charter of the city of Rochester (Laws 1880, p. 15, c. 14, as amended by Laws 1898, p. 371, c. 182), providing that when land is sold for taxes and bid in by the city the owner may redeem within two years, and that at the end of that time the city may serve notice on the owner requiring him to redeem within 30 days, and if not redeemed the mayor must execute a certificate of the fact of sale, which entitles the city to possession of the land and bars the equity of redemption, means some right of the owner which has already been imperilled, but which he may still exercise and redeem the land. *Rochester v. Fourteenth Ward, Co. Op. Bldg. Lot Ass'n*, 75 N. E. 692, 694, 183 N. Y. 23.

Originally a mortgage conveyed the title to the mortgagee, to be defeated, however, upon the payment of the debt. If the debt was not paid at maturity, there was a breach of the condition, and the title became absolute in the mortgagee without further action by any one. The harshness of this rule became apparent, and courts of conscience relieved against it by holding that the purpose of the mortgage was to secure the payment of the debt and that when the debt was paid the debtor should be satisfied, and hence, notwithstanding the terms of the mortgage, the debtor still had, in good conscience, an interest in the land which was called an "equity of redemption"; that is, a right to pay off the debt even after condition broken in a reasonable time. At the present time the term "equity of redemption" denominates a legal estate which may be the subject of grant and is within the rule as to ejectment and is not simply an equitable right to redeem, which can be enforced only in a court of equity, and an outstanding mortgage or deed of trust with condition broken held by a third person is not such an outstanding title as will defeat an action of ejectment. *Benton Land Co. v. Zeitler*, 81 S. W. 193, 199, 182 Mo. 251, 70 L. R. A. 94.

"The 'equity of redemption,' as usually recognized and applied, has its origin in the early chancery practice, where a strict foreclosure was decreed in cases where an equity only in real estate remained in the debtor or mortgagor, and which, by a formal decree, was cut off and barred if the property was not redeemed at a time as therein stated. Under our practice, we now speak of it as belonging to the owners of the legal title to real estate mortgaged or incumbered otherwise, where, in the enforcement of the lien, the jurisdiction of a court of equity is invoked for the purpose of decreeing a sale of the property for the satisfaction of the debt. Strictly speaking, it is the right to redeem from the lien, and may be taken advantage of at any time before the decree or thereafter, before a sale and confirmation in pursuance of the decree, by means of which the equity of redemption becomes extinguished." It should be distinguished from the statutory right of redemption which exists for a specified time after foreclosure sale. *Logan County v. McKinley-Lanning Loan & Trust Co.*, 101 N. W. 991, 992, 70 Neb. 406.

"By invoking the general maxim that 'equity regards as done what ought to be done,' and applying the doctrine of equitable conversion, it follows that, when a valid contract for the sale of real property and the execution of a deed therefor has been consummated, an equitable title to the premises becomes vested in the vendee, who thereafter is treated as the owner of the land, while the money which is to be paid as a consideration therefor is regarded as the property of the vendor; so that, upon the



death of the purchaser, his heirs succeed in equity to the rights of their ancestor to the real property, and upon the death of the vendor his personal representative succeeds to his rights to the purchase money remaining unpaid." *Collins v. Creason*, 106 Pac. 445, 447, 55 Or. 524 (citing *Minor*, Real Prop. § 1284; *Sievers v. Brown*, 34 Or. 454, 56 Pac. 171, 45 L. R. A. 642; *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209).

## EQUIVALENT

"Equivalent" means "equal in worth or value, force, power, effect, import and the like," and hence under Rev. Codes, § 6521, providing that personal service of a copy of the summons and complaint out of the state is "equivalent" to publication and mailing, and that service of summons is complete on the day of the fourth publication, a defendant has the same time to appear, 4 weeks and 20 days, whether service be by publication and mailing or by delivery of copies of the complaint and summons. *McLean v. Moran*, 99 Pac. 836, 837, 38 Mont. 298.

### EQUIVALENT (In Patent Law)

See Mechanical Equivalent.

An "equivalent" must not vary in any manner the idea of means, or affect it in any degree. It is quite true that the equivalent may perform some new or additional function in the invention, and still be an equivalent; but it must perform all the functions of the element for which it is a substitute in substantially the same way. It is not material that the element for which another is substituted has more parts or less parts. The substitution of an equivalent is, however, a mere change of parts and form involving no inventive skill, but suggested by the invention itself to every person skilled in the particular art. If the alleged equivalent not only performs the function of the element for which substituted and perhaps more, but introduces into the combination a new idea, or new ideas, or a much more extended development of the idea of means, then we do not have the substitution of an equivalent, but a patentable improvement—something different in principle and function. *Dey Time Register Co. v. Syracuse Recorder Co.*, 152 Fed. 440, 450.

The test of "equivalents" in the law of patents is whether the devices in question produce the same effect or perform the same function. A spring may be an equivalent for a pivot. *Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co.*, 159 Fed. 144, 151.

Under a clause in a patent claim describing an advertising rack for street cars, making an element of the combination with "screws or equivalent devices for connecting the rack to the car, engaging with the moldings outside the grooves therein," plus, nails,

hooks, or moldings, or plain boards properly fastened extending over the edges of the rack, and capable of being removed and replaced, constitute "equivalent devices" for connecting the rack to the car. *American Street Car Advertising Co. v. Jones*, 122 Fed. 803, 807.

### EQUIVALENT CIRCUMSTANCES

Other equivalent circumstances, see Other.

While mere words, threats, menaces, or contemptuous gestures will not constitute "equivalent circumstances," within the meaning of section 65, Pen. Code 1895, which will reduce murder to manslaughter, yet what circumstances will present this equivalence and justify the excitement of passion, and exclude all idea of deliberation or malice, the law does not specifically declare. It furnishes a standard, and leaves the jury in each case to make the comparison and determine whether the special facts of the case before them come up to that standard or not. There was therefore no error in omitting to charge that certain acts other than those referred to in the Penal Code would constitute "equivalent circumstances." *Findley v. State*, 54 S. E. 108, 108, 125 Ga. 579.

## ERASURE

See Without Addition or Erasure.

## ERECT—ERECTION

See Duly Laid Out or Erected; For and in the Erection; Standing or Erected Upon.

One of the primary definitions of the word "erect" is "to raise, as a building; to build, to construct." *Butz v. Murch Bros. Const. Co.*, 97 S. W. 895, 897, 199 Mo. 279 (quoting *Webst. Dict.*).

The carrying of planks from which another constructed a contrivance did not constitute the "erection" of the contrivance itself within Labor Law (Laws 1897, p. 467, c. 415). *Madden v. Hughes*, 93 N. Y. Supp. 324, 326, 104 App. Div. 101.

The term "erection," used with reference to building, means the putting together of the materials that are used therein, the putting together of the brick and mortar, wood and other materials making the construction. *Scharff v. Southern Illinois Const. Co.*, 92 S. W. 126, 130, 115 Mo. App. 157.

Where a statute authorized a city to issue bonds to erect an electric light plant, the use of the word "construct," instead of "erect," in city ordinances providing for the issuance of bonds was immaterial; the word "erect" meaning "to construct." *State ex rel. City of Chillicothe v. Gordon*, 135 S. W. 929, 931, 233 Mo. 383.

Labor Law (Laws 1901, c. 257) § 1 (Sanborn's St. Supp. 1906, § 1636—81). provides

that a person employing another in labor of any kind in erecting, repairing, altering, or painting of a house, building, or structure shall not furnish, for the performance of such labor, scaffolding, holsts, stays, ladders, or other mechanical contrivances which are unsafe, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed. Held that, as "structure," as used in such act, included work below as well as above ground, and the word "erecting" was used in its broad sense to mean the creating of a particular thing out of its parts, an action for injury to an employé by the collapse of a derrick used to lower sections of water main pipe into place in a trench dug to receive it was within the statute; the derrick being within the prohibited instrumentalities, the setting up of the water main an "erection," and the putting in of new pipes an "altering," and the waterworks system a "structure" within the meaning of the act. *Koslowski v. City of Milwaukee*, 139 N. W. 187, 188, 152 Wis. 223.

A statute giving a board of taxation right to increase assessments in case of increase of value by "erection of improvements" did not justify the board in raising an assessment without regard to the location of the improvements, whether on the land itself or in close proximity thereto; but the increase of value justifying such raise must have arisen solely from improvements on the land. *Hancock County v. Simmons*, 38 South. 337, 339, 86 Miss. 302.

#### **As establish**

Under a contract to pay a railroad company a sum specified when it had built a certain line of railroad and "erected a regular station for freight and passengers" at a place named, the sum named does not become payable on the completion of the road and the erection of a small building at the place designated, where no sidewalk was built and there were no facilities for receiving or shipping freight, and no ticket office or agent and no trains stopped except on signal. The word "erect," as used in the contract, means to "establish." *Port Huron & N. W. R. Co. v. Richards*, 51 N. W. 680, 90 Mich. 577.

#### **Maintain synonymous**

See Maintain.

#### **Purchase authorized**

Express power to "erect" a jail includes the implied power to purchase a site on which to erect such jail. *Territory ex rel. Overholser v. Baxter*, 83 Pac. 709, 710, 16 Okl. 359.

#### **Remodeling for different use**

Pub. Laws 1911, c. 702, § 2, provides that every theater "hereafter erected" shall be built to comply with the regulations of such section, etc. Held, that the word "erected," as so used, was synonymous with "built," and

hence the act was not restricted to subsequent erection of a new building, but applied as well to the alteration of a stable into a theater, consisting of a demolition of a large part of the stable, and using only such parts of the walls, etc., as were suitable for the new construction. *Greenough v. Allen Theater & Realty Co.*, 80 Atl. 260, 264, 33 R. I. 120.

#### **Removal to new site**

"The word 'erect' is defined in Anderson's Law Dict. p. 410: 'to lift up, build, construct; as to erect a building, a fixture. Removing a building is not erecting it, nor is elevating or materially changing it.'" Under a statute authorizing a city council to prevent the erection of wooden buildings in such part of the city as they might determine, it could prohibit the removal of such buildings from a point within or without to a point within the fire limits. *Kaufman v. Stein*, 37 N. E. 333, 335, 138 Ind. 49, 46 Am. St. Rep. 368 (citing and adopting *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 4 Conn. 68; *State v. Brown*, 16 Conn. 54; *Brown v. Hunn*, 27 Conn. 334, 71 Am. Dec. 71).

The word "erect," as used in an ordinance forbidding persons to "erect" any wooden building within certain fire limits, does not mean the present construction and adjustment of its component parts to the smallest detail; and though ordinarily the word "erect" has a different meaning from the word "move" it is to be construed in the ordinance as prohibiting the moving of such a building into such limits. *Red Lake Falls Milling Co. v. City of Thief River Falls*, 122 N. W. 872, 873, 109 Minn. 52, 24 L. R. A. (N. S.) 456, 18 Ann. Cas. 182.

#### **Scaffold**

Labor Law, § 18, provides that one employing or directing another to perform labor in the "erection," repairing, or altering of any structure shall not furnish or erect, or cause to be furnished or erected, any scaffolding which is unsafe or improper. A scaffold consisted of joists laid upon irons, constituting a part of the permanent structure of a dock, across which joists planks were placed, so that they could be shifted as occasion required. Held that a servant, while moving a plank from one place to another for use in the work, was not engaged in building a scaffold. *O'Neill v. Manufacturers' Automatic Sprinkler Co.*, 127 N. Y. Supp. 692, 694, 143 App. Div. 56.

#### **ERECTED**

A contract with the architect contained the statement, "The undersigned proposes to furnish architectural services for your flat to be erected on or before 1st May, 1902," etc. Held, that the word "erected" is synonymous with "completed." *Hartrath v. Holsman*, 127 Ill. App. 560, 562.

## EROSION

Where land bordering on a body of water is lost by "erosion," which is the gradual and imperceptible wearing away of the land by the natural action of the elements, the state succeeds to the ownership thereof; where the land is added by "accretion," which is such a slow and gradual deposit of articles that its progress cannot be measured though its results may be discerned from time to time, the new land formed belongs to the owner of the upland to which it attaches; but where lost by "avulsion," which is the sudden or violent action of the elements, the effect and extent of which is perceptible while it is in progress, the boundaries do not change. In re City of Buffalo, 99 N. E. 850, 852, 206 N. Y. 319.

"The channels of the rivers and other streams and bodies of water may and do become changed and their physical location altered by the forces of nature operating upon their shores or banks. When the change is made insensibly, by gradual and imperceptible washing away of one shore and the formation in like manner upon the other shore, it is said to be 'by erosion and accretion.' When it is made suddenly and violently, and is visible and the effect certain, it is called 'avulsion.' Where the boundary lines between individuals, as well as states and nations, are marked by streams, and the location of the stream is altered by erosion and accretion, it continues to be the boundary line; but, where the alteration occurs as the result of an avulsion, no change is made, but the limits of the private estates or national territory and jurisdiction remain as before." State v. Muncie Pulp Co., 104 S. W. 437, 451, 119 Tenn. 47.

## ERRONEOUS

### ERRONEOUS TRANSMISSION

A telegram was delivered to defendant company in May, 1906, for transmission to plaintiff, which the company did not deliver to plaintiff at all, and no claim for damages was made to defendant until January, 1907. Code, § 2164, provides that no action against a telegraph company for damages caused by erroneous transmission or unreasonable delay in delivery of a message shall be maintained, unless the claim has been presented to the company within 60 days from the accrual of the cause of action. Held, in plaintiff's action against the company for damages, that defendant's entire omission to deliver the message was neither "erroneous transmission" nor "unreasonable delay in delivery," and that plaintiff was not required to present his claim to the company as a condition precedent to his right of action. Larsen v. Postal Telegraph Cable Co., 130 N. W. 813, 814, 150 Iowa, 748.

### ERRONEOUSLY ALLOWED

The right to the repayment of the purchase price of public coal lands, given by the act of June 16, 1880, § 2, where the entry is subsequently canceled because "erroneously allowed," does not extend to cases where the entry was fraudulently procured. United States v. Colorado Anthracite Co., 32 Sup. Ct. 617, 619, 225 U. S. 219, 56 L. Ed. 1063.

### ERRONEOUSLY ASSESSED

The term "erroneously assessed," as used in Kirby's Dig. § 7180, providing that in case any person has paid taxes on any property, real or personal, "erroneously assessed," on satisfactory proof, etc., the court shall make an order refunding the amount of the county tax so erroneously assessed and paid, and make provision for refunding the state tax. Referred to an assessment which was illegal because of a jurisdictional defect, such as an assessment levied on exempt property, or property not located within the county, and did not include a mere error of judgment on the part of the assessing officers in valuing the property. Clay County v. Brown Lumber Co., 119 S. W. 251, 252, 90 Ark. 413.

### ERRONEOUSLY EXACTED OR PAID

Code, § 1374, authorizes the county treasurer to demand taxes on property withheld from taxation within five years from the date at which such property should have been assessed. A county treasurer notified an owner that unless he showed cause property withheld from taxation for several years, including a year more than five years from the date the assessment should have been made, it would be assessed according to law. The owner effected a compromise with the tax ferrets for all the years stated in the notice, and voluntarily paid the taxes imposed, pursuant to the compromise. The owner had wrongfully withheld his property, and owed the taxes paid. Held, that the taxes paid for the first year stated in the notice, though not collectible, could not be recovered back under section 1417, providing for the refunding of taxes "erroneously or illegally exacted or paid," there being no assessment, or, if one, a mere overassessment, nor any demand for taxes. Kehe v. Blackhawk County, 101 N. W. 281, 282, 125 Iowa, 549.

## ERROR

See Assignment of Error; Clerical Error; Distinct Specification of Error; Fundamental Error; Invited Error; Manifest Error; Obvious Error; Petition in Error; Substantial Error; Technical Error; Writ of Error.

Presenting error, see Present—Presented—Presentation.

Proceedings in error as civil action, see Civil Action—Case—Suit—Etc.

**As error in law**

The word "error," as used in a statute conferring on circuit courts jurisdiction to annul a physician's registration certificate obtained by "error" of the board of medical examiners, is used in the sense it is ordinarily understood, as applied to trials in courts before juries, viz., aside from jurisdictional errors, such absence of evidence in support of the board's decision that in no reasonable view thereof could its decision be justified, or prejudicial refusals to admit or exclude evidence, or other judicial misapprehensions of law, errors which in a general sense are purely judicial, in that a decision is binding on all concerned until set aside by some proper proceeding for that purpose. *State v. Schmidt*, 119 N. W. 647, 649, 138 Wis. 53.

**ERROR APPARENT**

"An 'error apparent on the face of the record,' which may be considered on the view without assignment, is a prominent error, either fundamental in character or determining a question upon which the very right of the case depends." *San Antonio Traction Co. v. Yost*, 88 S. W. 428, 429, 39 Tex. Civ. App. 551 (quoting and adopting definition in *Wilson v. Johnson*, 60 S. W. 242, 94 Tex. 272); *Applebaum v. Bass* (Tex.) 113 S. W. 173, 175.

In an action against a city to recover a balance due on a street-paving contract, an alleged error, in that, on the undisputed evidence, plaintiff could not recover on a ground, the determination of which would require an examination of almost the entire record, including the pleadings and evidence contained in a lengthy statement of facts, was not an "error apparent on the face of the record," within Rev. St. 1895, art. 1014, authorizing a review of such errors without assignment. *City of Beaumont v. Masterson* (Tex.) 142 S. W. 984, 987.

The trial judge's failure to make up and file a statement of facts within the time prescribed by law is not assignable, in the Court of Civil Appeals, on ex parte affidavit showing such failure as an error, since it is not one of the subjects which Rev. St. 1895, art. 1014, authorizes that court to review, and not being an error "apparent upon the face of the record" within such article. *Applebaum v. Bass* (Tex.) 113 S. W. 173, 174.

The recovery of a judgment against a surety on a guardian's bond for an amount exceeding the limit of his liability is an error appearing on the record within the meaning of Comp. St. 1910, § 5109, authorizing the Supreme Court to modify a judgment of the district court for errors appearing on the record. *United States Fidelity & Guaranty Co. v. Nash* (Wyo.) 121 Pac. 541, 544.

**ERROR CORAM NOBIS**

See Writ of Error Coram Nobis.

**ERROR CORAM VOBIS**

See Writ of Error Coram Vobis.

**ERROR IN EXTREMIS**

In an action to recover for the death of one killed by being caught between the top of a descending elevator and a floor sill, where there was evidence that the decedent put one foot through the partly opened elevator door and upon the floor sill without the elevator being stopped, there was no warrant for an instruction upon the doctrine of "error in extremis" which presupposes that the party who invokes it is himself free from fault in creating the emergency. *Real Estate Trust & Ins. Co. v. Gwyn's Adm'x*, 74 S. E. 208, 211, 113 Va. 337.

**ERROR NOT CAUSING SUBSTANTIAL INJURY**

Where it appeared in an action against two persons jointly on a contract that one was liable, the irregularity of rendering a judgment against the other was "error not causing substantial injury" to the one liable within the meaning of Code Civ. Proc. § 475, providing that no judgment shall be reversed for any error not causing substantial injury to the party complaining. Hence a reversal of the judgment against the one liable was not unwarranted by the error in question. *McKee v. Cunningham*, 84 Pac. 260-262, 2 Cal. App. 684.

**ERROR OF FACT**

An "error of fact" takes place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist. *Scott v. Ford*, 80 Pac. 899, 900, 45 Or. 531, 68 L. R. A. 469 (quoting and adopting *Mowatt v. Wright* [N. Y.] 1 Wend. 355, 360, 19 Am. Dec. 508).

Failure to appoint a guardian ad litem for an infant plaintiff in a suit for separation is not an irregularity, within Code Civ. Proc. § 1282, requiring a motion to vacate the judgment on such grounds to be made within one year, but is an "error in fact not arising upon the trial," within sections 1283 and 1290, for which a motion to vacate may be made in two years. *Byrnes v. Byrnes*, 96 N. Y. Supp. 308, 307, 109 App. Div. 535 (citing *Maynard v. Downer* [N. Y.] 13 Wend. 575; *Camp v. Bennett* [N. Y.] 16 Wend. 48; *Arnold v. Sandford* [N. Y.] 14 Johns. 417; *Peck v. Coler* [N. Y.] 20 Hun, 534).

**Error in judgment**

Where, on appeal by defendant from a justice's judgment, a reversal was had, and a new trial directed before another justice, the erroneous determination of such justice that plaintiff was stayed until payment of the costs of reversal was not an "error in fact," within Code Civ. Proc. § 3066, providing that on an appeal from a justice, if the judgment is reversed for an error in fact not

affecting the merits, the costs of the appeal are in the discretion of the Appellate Court, but an error of law requiring a reversal entitles the successful party to costs. *Smith v. Cayuga Lake Cement Co.*, 93 N. Y. Supp. 959, 960, 105 App. Div. 307.

### ERROR OF LAW

An "error of law" is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law, which is properly before it and within its jurisdiction to make. *Pratt v. Pratt*, 74 Pac. 742, 743, 141 Cal. 247.

The error of the circuit court in sustaining a motion to dismiss an appeal from a judgment of a justice of the peace is not an "error of law occurring at the trial," within the meaning of the statute authorizing a motion for a new trial on this ground, and hence is properly presented on appeal by an independent assignment of error. *Hughes v. Chicago, I. & L. Ry. Co.*, 98 N. E. 317, 318, 50 Ind. App. 278.

Gen. Laws 1909, c. 298, § 12, provides that a party entitled to appeal after verdict, except in a cause tried before a jury in a superior court, may file with the clerk of such court a motion for new trial for any reason other than "error of law occurring at the trial." Gen. Laws 1909, c. 297, § 2, declares that a party in any action in a superior court in which the trial was not fair and impartial may, after verdict, petition the Supreme Court for a new trial. Defendant, in grounds of his motion for a new trial after verdict in a prosecution for assault with a dangerous weapon, claimed that he did not have a fair and impartial trial, in that the presiding judge allowed the prosecuting attorney, over objection, to state that it was improper for defendant to converse with a witness summoned by the state relative to the testimony to be given by said witness at the trial, and in that the court instructed that the state's witnesses had been approached by defendant's attorney to learn what they were to testify, and that the state's witnesses should be left alone by the defendant. Held, that the claims stated "error of law occurring at the trial," and were inappropriate, under chapter 298, § 12, and that the remedy under chapter 297, § 2, was exclusive. *State v. Papa*, 80 Atl. 12, 14, 32 R. I. 453.

The overruling or sustaining of a demurrer to a pleading is not included in "errors of law occurring at the trial," within St. 1893, § 4196, since a trial does not commence until an issue of fact is joined, so that no error can be assigned thereon that can be reviewed on a transcript. *Haynes v. Smith*, 119 Pac. 246, 247, 29 Okl. 703.

Denial of a motion for a jury trial, made when the cause was called for trial in its order on the calendar, was an order made

during the trial and reviewable on appeal from an order denying a new trial on the ground of "errors of law occurring at trial." *Hasey v. McMullen*, 123 N. W. 1078, 1080, 109 Minn. 332.

Where on appeal by defendant from a justice's judgment, a reversal was had and a new trial directed before another justice, the erroneous determination of such justice that plaintiff was stayed until payment of costs of reversal held an error of law, but not of fact, within Code Civ. Proc. § 3086, providing that, on an appeal from a justice, if the judgment is reversed for an error in fact not affecting merits, the costs of the appeal are discretionary, that an error of law requiring reversal entitles successful party to costs. *Smith v. Cayuga Lake Cement Co.*, 93 N. Y. Supp. 959, 960, 105 App. Div. 307.

### ERROR OR MISTAKE AS TO EQUITY OR COMMON-LAW JURISDICTION

Dismissal of a cause in the chancery court for want of jurisdiction, where it should have transferred it to the circuit court as required by Const. 1890, § 162, is not an "error or mistake as to whether the cause was of equity or common-law jurisdiction," within Const. 1890, § 147, providing that the Supreme Court could not reverse a decree or judgment therefor. *Murphy v. City of Meridian (Miss.)* 60 South. 48.

### ESCAPE

See Wasting by Escape.

See, also, Prison Breach.

An escape is where one who is under arrest gains his liberty before he is delivered by due course of law, and where an escape from confinement is effected by the prisoner with force, it is called a "prison breaking," and where it is effected by others with force, it is known as a "rescue." *State v. Sutton*, 84 N. E. 824, 826, 170 Ind. 473.

An indictment for "escaping" from prison, made a felony by Pen. Code, § 105, will support a plea of guilty of an "attempt to escape," made a felony by section 106; the former necessarily including the latter. *Ex parte Cook*, 110 Pac. 352, 354, 13 Cal. App. 399.

Pen. Code 1895, § 314, provides that if one convicted of an offense below the grade of felony shall escape from the chain gang or other place of confinement for violation of any law, and be thereafter retaken, he shall be guilty of a misdemeanor. Section 315 provides that, if one shall aid or attempt to aid a prisoner to escape so confined or imprisoned, he shall be guilty of a misdemeanor. Held, that the crime of escaping from a chain gang where municipal or misdemeanor convicts are worked is an act continuous in its nature, and is not finally completed until the

convict is retaken, and the person who knowingly assists such a convict to escape from a chain gang, or to elude the officers after he has once gotten away and prior to his recapture, is punishable under section 315. *Smith v. State*, 68 S. E. 1071, 1072, 8 Ga. App. 297.

An escape is effected in the circumstances stated, upon the principle that legal custody exists only when the custodian has a right under the warrant to possession of the prisoner. *Gebhardt v. Holmes*, 135 N. W. 860, 865, 149 Wis. 428.

Code Cr. Proc. art. 886, that when a defendant appeals from a conviction of a misdemeanor he shall, if he is in custody, be committed to jail, unless he enter into a recognizance to appear, and, if he be not in custody, an appeal shall not be effective until he enter into a recognizance, held, that where defendant, convicted of a misdemeanor, did not enter into a recognizance at the term of his conviction, but after the term had expired gave bond to the sheriff, who released him from custody, such release constituted an "escape," requiring a dismissal of the appeal. *Roberson v. State*, 132 S. W. 766, 60 Tex. Cr. R. 514.

One is not guilty of escape within Pen. Code 1895, § 314, who affects his own deliverance from jail when his confinement is no part of a sentence imposed by a court, but whose imprisonment is for the purpose of safe-keeping only. *Welch v. State*, 61 S. E. 496, 497, 4 Ga. App. 388.

To constitute the offense of "escape" by an officer in permitting a prisoner to go at large, it is unnecessary that such permission be granted with intent to save the prisoner from trial or execution of a sentence. *Houpt v. State*, 140 S. W. 294, 297, 100 Ark. 409, Ann. Cas. 1913C, 690.

At common law, it was a misdemeanor for a sheriff having lawful charge of a prisoner to voluntarily or negligently permit him to depart from his custody, however short a time the departure might be. A sheriff in charge of a county jail in Iowa who permits a federal prisoner legally sentenced to the jail to go at large from time to time violates Rev. St. § 5409, and Code Iowa 1897, § 4891 et seq., punishing escapes, an "escape" being defined to be the voluntarily or negligently permitting a person lawfully confined in jail to leave the prison where he is confined before he is entitled to be released therefrom. *Ex parte Shores*, 195 Fed. 627, 630.

Where a person is confined in a jail under an indictment regularly brought against him for a crime and he attempts to escape, he commits a crime, although the bench warrant under which he was arrested was irregularly issued; but, when the imprisonment is unlawful, the right to liberty is absolute, and the one who is confined is not guilty of

the offense of "escape" by regaining it. *State v. Clark*, 104 Pac. 593-595, 32 Nev. 145, Ann. Cas. 1912C, 754 (citing *People v. Ah Teung*, 28 Pac. 578, 92 Cal. 425, 15 L. R. A. 190).

#### As evade

In the statute authorizing the back-assessment of property that has "escaped taxation," "the words 'escaped taxation' \* \* \* should receive the meaning usually and popularly accorded to them. The evil to be remedied demonstrates this. The object of the law, in respect to the back-assessment of property by the revenue agent, was to prevent property which had not been actually assessed at all from escaping its proper portion of the public burden of taxation. Property may escape taxation in various ways, as, for example: (a) By being willfully withheld from assessment by the owner; (b) by being inadvertently or accidentally omitted by the owner in returning his property to the assessor. In either of these two cases, and in others which may be conceived, there has been in fact—there has been actually—escape of such property from taxation. It has never been assessed at all as a matter of fact, and it was the purpose of the law, in cases like these, where the regularly constituted fiscal officers had failed to assess all property liable to taxation, to authorize the revenue agent to back-assess such property never heretofore in fact assessed at all, and which was therefore described as property which had in fact escaped taxation. But, where an assessment has in fact been made, where the assessment roll shows on its face all that it ought to show, \* \* \* but that assessment is irregular or imperfect or defective, or even absolutely and utterly void, by reason of some vital and fundamental requirement of the law, such property cannot, within the meaning of these words, 'escaped taxation,' be said to be property which has 'escaped taxation' in fact." *Adams v. Luce*, 39 South. 418, 419, 87 Miss. 220.

Where on a trial for the murder of a lone, unarmed woman, the evidence of the condition of her clothing and the scratches on the person of accused, and circumstances indicated that accused had made a wicked assault on her, and practically the only defense was defect of mind, the error in an instruction on self-defense that, if at the time accused killed decedent, he was in danger of death or of great bodily harm at the hands of decedent, and it was necessary, or believed by him to be so in the exercise of reasonable judgment, to kill decedent in order to "escape or avert" the danger, he was entitled to an acquittal on the ground of self-defense, arising from the use of the word "escape," implying that accused must seek safety in flight rather than in defending himself from impending danger, was not prejudicial. *Frazier v. Commonwealth (Ky.)* 124 S. W. 797, 799.

**Unlawful departure**

One who had been convicted of crime and delivered into the custody of the officers of a chain gang is guilty of an escape under Pen. Code 1895, § 314, if he voluntarily leaves such custody, though prior to the escape he was not fettered but was treated as a trusty. *Johnson v. State*, 50 S. E. 65, 122 Ga. 172.

**ESCHEAT**

The word "escheat" has a distinct and definite legal meaning, and can never be construed to mean "sale" and "purchase." *Woodrough v. Douglas County*, 98 N. W. 1092, 1094, 71 Neb. 354.

"The word 'escheat' is an old one, and a common in the law. It seems to have been derived from a French word, 'echoir,' meaning to happen. It is also defined in its etymology to mean: 'To fall to; to fall to the lot of; to fall back.' In feudal tenure the fief held the land of some superior on condition of rendering him services. Anciently the fee was limited to the use of the land by the vassal (*Spelman, Feuds, c. 1*), but this view was soon abandoned in favor of the one which now prevails; that is, that it is an estate of inheritance (2 Bl. Com. 106). But as the vassal and his heirs were not deemed to hold it upon the same condition, to wit, that of rendering service to the lord of the manor, when the tenant died, and there were no heirs to whom the lord could look for service, the title descended to the original tenant reverted to the lord. It fell back. Hence it was described as escheat. Or, if the tenant, by reason of attainder of blood, was rendered incapable alike of holding or transmitting the title, the feud fell back into the lord's hands by a termination of the tenure. 1 Washb. Real Prop. 2. By a logical extension of the doctrine, when the line of inheritance failed, and the tenure was determined by any unforeseen event, the land resulted back, by a kind of reversion, to the grantor, or lord of the fee. 2 Shars. Bl. Com. 244. As in the United States there are no feudal tenures, escheats are invariably held to go to the state as the sovereign within whose jurisdiction the property may be situated, by way of reversion of the title to its source. Personal property never escheated in the original and technical sense of the term. *Commonwealth v. Blanton's Ex'rs*, 2 B. Mon. 393. January, 1840, the Legislature provided: 'Estates within the commonwealth as to which the owner had previously died or might subsequently die intestate, without legal heirs or distributees, should be vested in said commonwealth without office found.' And it was held in *Commonwealth v. Blanton*, supra, and in *White v. White*, 2 Metc. 185, that personal, as well as real, estate was included. The same term and the same idea are carried forward into the existing statutes in this state. Although title to land in

this state is allodial, as it is throughout the states of the Union, it seems to be the universal rule, in consonance with that of all civilized society, that, when the title lapses by reason of a failure of heirs, and possibly for other reasons, it vests in the public, and is at the disposal of the government. Shars. Bl. Com. 244, 245. The reason is now probably that, as no one of the public could rightfully claim it or enter upon it to the exclusion of others, and as it ought not to be suffered to lie barren, the government in behalf of all has a better right to it than any one, although the right is also likened to and is by many supposed to rest upon the doctrines of the feud as they existed at the common law. The title to all lands within the state was formerly in the state, which had the right to declare upon what conditions it might be held, or transmitted. This is peculiarly so as to corporations holding land within the state." *Commonwealth, for use of Louisville School Board, v. Chicago*, St. L. & N. O. R. Co., 99 S. W. 596, 597, 124 Ky. 497.

The word "escheat," as used in Const. § 192, and Ky. St. § 567, providing that a corporation shall not hold property not necessary for its legitimate business for more than five years under penalty of escheat, and Ky. St. § 2971, being a part of the laws relating to government of cities of the first class, providing that property which shall escheat to the commonwealth shall vest in the board of education for the benefit of the schools, and that the board may in the name of the commonwealth sue for and recover such property at law or in equity, was used in its ordinary meaning which is that land affected shall revert or fall back to the state or to an instrumentality of its choosing; and hence the disposition provided must obtain, so that, on a petition by the board, the court cannot order a sale, and, after payment of costs, allow the corporation to have the balance of the proceeds. *Louisville Ins. Co. v. Commonwealth*, 143 S. W. 1044, 1045, 147 Ky. 72.

Laws 1877, c. 15, § 3, relating to the disposition of state lands, provided that no person should be allowed to enter more than 240 acres; while Ann. Code 1892, § 2564, relating to the same subject, declares that one person may purchase as much as one quarter section of public lands in one year and no more, and that all lands acquired directly or indirectly by any person in contravention of section 2564 or 2565 escheat to the state. Held, that there was no substantial difference between such statute; the words "enter" and "purchase," used therein, being convertible terms, and the provision for "escheat" in section 2564 meaning nothing more than that the lands should be recovered or should be reclaimed, which would be implied, though not expressed, in the act of 1877. *Wisconsin Lumber Co. v. State*, 54 South. 247, 249, 97 Miss. 571; *Newman v. Nall* (Miss.) 54 South. 250.

## ESCROW

An "escrow" is a written instrument, which by its terms imports a legal obligation deposited by the grantor, promisor, obligor, or his agent with a stranger or a third person not a party to the instrument as grantee, etc., to be kept by the depository until the performance of a condition of the happening of an event, and then to be delivered to take effect. A deposit of an instrument in escrow need not be in any particular form, nor need it be in writing, nor is it necessary that the term "escrow" be used. *Bronx Inv. Co. v. National Bank of Commerce of Seattle*, 92 Pac. 380, 381, 47 Wash. 566 (quoting and adopting 16 Cyc. pp. 561, 564).

An "escrow" *ex vi termini* is a deed delivered to some third person to be by him delivered to the grantee upon performance of some precedent condition by the grantee or another, or the happening of some event. *Anderson v. Goodwin*, 54 S. E. 679, 682, 125 Ga. 663 (citing *Duncan v. Pope*, 47 Ga. 451; *Civ. Code* 1895, § 3603); *Seibel v. Higham*, 115 S. W. 987, 990, 216 Mo. 121, 129 Am. St. Rep. 502.

An "escrow" is a written instrument, which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor, or his agent, with a stranger or third person—that is, a person not a party to the instrument, such as the grantee, promisee, or obligee—to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to take effect. *Masters v. Clark*, 116 S. W. 186, 187, 89 Ark. 191; *Murphey v. Greybill*, 34 Pa. Super. Ct. 339, 340.

A "delivery" in escrow requires that the deed be absolutely delivered; that is, it must pass beyond the dominion of the grantor. The delivery to a third party in escrow, in order that it may be sufficient to vest title in the grantee, must be such as to deprive the grantor of all control over the deed. *Ellott v. Murray*, 80 N. E. 77, 79, 225 Ill. 107 (citing *Shults v. Shults*, 43 N. E. 800, 159 Ill. 654, 50 Am. St. Rep. 188).

Where defendant claimed that a deed had been delivered in "escrow," but the evidence did not show that the attorney to whom the grantor had delivered the deed understood that it had been delivered to him beyond the power of control of the grantor, and at her request such attorney without protest surrendered the deed to her, there was no delivery sufficient to sustain the conveyance. *Hayden v. Collins*, 81 Pac. 1120, 1122, 1 Cal. App. 259.

A deed in "escrow," before delivery, conveys no title. *Corr v. Martin*, 77 N. E. 870, 871, 37 Ind. App. 655.

An "escrow" is defined as: "In the great majority of cases, the instrument deposited, together with the stipulation as to the condi-

tion or the event upon performance of happening of which the instrument is to take effect, constitutes a contract. Indeed, by the general rule, there must be a valid existing agreement between the parties, containing all the elements of a contract. As a general rule, the condition must be part of a contract between the parties." "In order that an instrument may operate as an escrow, not only must there be sufficient parties, a proper subject-matter, and a consideration, but the parties must have actually contracted. When the instrument purports to be a conveyance of land, for instance, the grantor must have sold, and the grantee must have purchased, the land. A proposal to sell or a proposal to buy, though stated in writing, will not be sufficient. The minds of the parties must have met, the terms must have been agreed upon, and both must have assented to the instrument, as a conveyance of the land, which the grantor would then have delivered and the grantee received, except for the agreement then made that it be delivered to a third person, to be kept until some specified condition be performed, and thereupon be delivered to the grantee by such third person." Where an offer to sell land at a certain price within a specified time was not accepted within the time, the deposit of a deed by the owner in a bank with instructions to collect the price named did not constitute an "escrow," since the owner was not under contract. *Davis v. Brigham*, 107 Pac. 961, 963, 56 Or. 41, Ann. Cas. 1912B, 1340 (quoting 16 Cyc. pp. 562, 564).

"Whether, when a deed is executed and not immediately delivered to the grantee but handed to a stranger to be delivered to the grantee at a future time, it is to be considered as a deed of the grantor presently or as an 'escrow' is often a matter of some doubt. It generally depends more upon the intention of the parties, to be gathered from the words used and the purposes expressed, than from the terms they employ in naming the depository, or from the name the parties give to the instrument. Where the future delivery is to depend upon the performance of some condition, it will be deemed an escrow. Where it is merely to await a lapse of time or the happening of some contingency, and not the performance of a condition, it will be deemed the grantor's deed presently." *Burnham v. Burnham*, 111 N. Y. Supp. 252, 254, 58 Misc. Rep. 385 (quoting and adopting language of *Hathaway v. Payne*, 34 N. Y. 105).

To constitute the holding in escrow of a deed it must have been deposited under an agreement which prevents the grantor from recalling it. *Anderson v. Messenger*, 158 Fed. 250, 253, 85 C. C. A. 468.

A warranty deed, duly signed and acknowledged, purporting to convey lands by description so definite that they can be ascertained with certainty, and delivered to a third person, under an agreement with the



grantee that the depository is to deliver the deed to him on the doing of a certain thing by the grantee, is an "escrow." *Guild v. Althouse*, 81 Pac. 172, 71 Kan. 604.

#### Conditions or contingencies

Where a deed is placed in the hands of a depository for conditional future delivery to the grantee, a distinction has by some courts been recognized between cases where the future delivery depends upon the performance of some condition, and those where it depends upon the death of the grantor. In the former case the deed does not become operative until rightfully delivered by the depository to the grantee, while in the latter, upon delivery to the depository, it is deemed to be the grantor's deed presently, taking effect for many, if not for most, purposes, from the time of its delivery to the depository. The deed, in either of these cases, is usually called an "escrow," but perhaps more frequently and more properly that word is used to designate the deed in the former rather than in the latter case. Where a grantor delivered a deed to a third person to be delivered by the depository to the grantee on the grantor's death, the grantee took an immediate estate, subject to a life use of the grantor. *Grilley v. Atkins*, 62 Atl. 337, 338, 78 Conn. 380, 4 L. R. A. (N. S.) 816, 112 Am. St. Rep. 152.

Where a deed was delivered to a bank with the stipulation that it should not be turned over to the grantee until notified to that effect by the grantor, it was not put in escrow, but remained in constructive possession of the grantor, a deed not being in escrow, unless its delivery to the grantee is dependent upon the occurrence of some event or the performance of some condition; so where the grantor took back the deed without delivering it to the grantee, in his action to set aside a copy of the deed obtained by the grantee, the grantee could not obtain relief, except by setting up such facts as to warrant specific performance. *Peters v. Strauss* (Tex.) 132 S. W. 953, 958.

A delivery in escrow presupposes a valid contract pursuant to which the deposit is made. And if the condition of the escrow is performed, but the deed is not delivered during the lifetime of the grantor, the delivery is nevertheless sustained. *Bosea v. Lent*, 90 N. Y. Supp. 41, 42, 44 Misc. Rep. 437. To be valid the delivery must be with the assent of the grantor. If it is made to depend upon the performance of certain conditions, his consent is withheld until such performance. *Powers v. Rude*, 79 Pac. 89, 93, 14 Okl. 381.

A deed is delivered in "escrow" when the delivery is conditional, that is, where it is delivered to a third person to keep until something is done by the grantee or some other person, and is of no force until the condition be performed. Yet where the grantee with knowledge of the contents of the deed

accepts it in writing there is a sufficient delivery, though there was no actual delivery until after the grantor's death; the acceptance rendering the deed irrevocable. *Fitzgerald v. Allen*, 88 N. E. 240, 245, 240 Ill. 80.

#### Depositories

An "escrow" is a deed delivered to some third person to be by him delivered to the grantee on the performance of some precedent condition by the grantee or another on the happening of some event. If the instrument remains in the dominion of the maker, it is not an escrow. To constitute an escrow, the deed must be delivered to a third person, and not to the agent of the grantor. *Van Valkenburg v. Allen*, 126 N. W. 1092, 111 Minn. 333, 137 Am. St. Rep. 561.

A conditional delivery to a party to a contract does not create an "escrow." The delivery of a lease and rent notes to an agent of the landlord, though on condition that they were to be returned in case a proposed sale of land to him was consummated, did not create an "escrow." *Bemis v. Allen*, 93 N. W. 50, 51, 119 Iowa, 160.

#### Instruments deliverable in escrow

A deed absolute on its face cannot be delivered to the grantee therein named to be by him held in "escrow," and a delivery which purports to be such will operate as absolute and freed from all parol conditions, and title will vest at once. *Whitney v. Dewey*, 80 Pac. 1117, 1121, 10 Idaho, 633, 69 L. R. A. 572.

#### Time when instrument takes effect

Where a deed is delivered as an "escrow" to be delivered upon the performance of certain conditions, it is, until such performance, a mere scroll, and, if the grantee obtains possession thereof before the performance of the conditions, he acquires no title by obtaining possession of the deed even by the voluntary act of the depository. *Powers v. Rude*, 79 Pac. 89, 92, 14 Okl. 381.

## ESPECIAL

The granting of especial privileges by any form of legislative action, and not merely the conferring of such privileges as a part of the grant of a forbidden private character, was what was prohibited by the provision of Washington Organic Act March 2, 1867, c. 150, 152, 14 Stat. 426, that the territorial Legislature should not grant private charters or especial privileges, but might enact general incorporation acts. The generic prohibition against the granting of especial privileges, made by Washington Organic Act March 2, 1867, c. 150, 14 Stat. 426, cannot be construed as intended to forbid merely the creation of such privileges as a legislative grant of an exclusive right to ferries, bridges, etc., even if it be conceded that such grants were a common form of territorial legislative abuse prior to the adoption of that

statute, and were the generating cause of the insertion of this prohibition. A territorial statute giving perpetual succession to an incorporated educational institution, and endowing it with a perpetual exemption from taxation as to all its property, real and personal, grants an especial privilege within the meaning of the provisions of Washington Organic Act March 2, 1867, c. 150, 14 Stat. 426, that the territorial Legislature shall not grant private charters or especial privileges, but may enact general incorporation acts. *Berryman v. Board of Trustees of Whitman College*, 32 Sup. Ct. 147, 222 U. S. 334, 56 L. Ed. 225.

## ESPECIALLY

The use of the word "especially," in an instruction stating a proposition and declaring that the same would be "especially" true if a fact was established, indicates that the foregoing proposition was true and would be given additional weight if the additional fact was established. *Chason v. Anderson*, 46 S. E. 629, 630, 119 Ga. 495.

Land necessary for railroad tracks and buildings and used for railroad purposes solely is not "especially benefited" by the paving of the street in front of it, so as to be subject to assessment therefor under 7 Sp. Laws, p. 217. *Naugatuck R. Co. v. City of Waterbury*, 61 Atl. 474, 475, 78 Conn. 193.

## ESPIONAGE

"Espionage" is the practice of spying or secretly watching for the purpose of detecting wrongdoing, excessive or offensive surveillance. And an allegation, in a husband's complaint for divorce, that his wife had maintained an unreasonable espionage, was not too uncertain as a charge of one of the forms of cruelty creating mental suffering. *Hubbell v. Hubbell*, 95 Pac. 664, 665, 7 Cal. App. 661 (quoting *Stand. Dict.*).

## ESSENTIAL

A municipal corporation only possesses the powers granted to it in its charter in express words, those necessarily implied in or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation, using the word "essential" in the sense of indispensable, and not merely convenient. *City of St. Louis v. Drelsoerner*, 147 S. W. 998, 999, 243 Mo. 217, 41 L. R. A. (N. S.) 177.

## ESSENTIALLY

The word "essentially," as used in the description in letters patent, wherein a patented vessel is described as "essentially a bowl with a flange," etc., is used as synonymous with "practically" or "substantially," and not in the sense that this precise bowl shape

is indispensable. *Electric Candy Machine Co. v. Morris*, 156 Fed. 972, 974.

## ESTABLISH

See Duly Established; Hereafter Established; If Established; Regularly Establish.

"Establish" means to fix or settle unalterably. *Hart v. Hart* (Tex.) 110 S. W. 91, 92 (citing 3 Words and Phrases, p. 2472).

"Established" has no statutory definition given it by our statute, but as usually understood it means settled, fixed, confirmed. *Suit v. State*, 17 S. W. 458, 30 Tex. App. 319, 322.

To "establish" means to originate and secure the permanent existence of; to found; to institute; to create and regulate; to make stable and firm. Under the Muskegon charter, as amended, permitting the city to issue electric light bonds, and requiring that a sinking fund therefor be created at the time of "establishing" the plant, the fund was properly created the same day the council authorized issuance of the bonds, and not at the earlier date when the electors voted to issue the bonds. *Muskegon Traction & Lighting Co. v. City of Muskegon*, 132 N. W. 1060, 1063, 187 Mich. 331.

To give effect to the probable intention of a testatrix as gathered from the language of her will, a hospital was held to have been "established" within five years from her death, when, beginning shortly after her death, a movement was started and thereafter carried forward without cessation which, within the five years, resulted in a charter for its establishment, the acquisition of a building site, and preparation for building, and which within 18 months after the expiration of the five years brought the hospital into actual operation. In *re Pierpoint's Will*, 47 Atl. 780, 781, 72 Vt. 204.

Webster's International Dictionary defines the verb "to establish" as "to appoint or constitute for permanence, as officers, laws, regulations," etc. The same authority defines or gives as the equivalent of "bureau" "a department of public business requiring a force of clerks; the body of officials in a department who labor under the direction of a chief." *Bouvier* says of the word "bureau" "In the classification of the ministerial officers of government, and in the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet." A fair deduction from these definitions is that the word "bureau" in the connection and sense in which it is used in Const. art. 12, § 155, providing that the state corporation commission shall elect one of its members chairman of the same and shall have one clerk, one bailiff and such other clerks, officers, assistants and

subordinates as may be provided by law and that the general assembly may establish subordinate divisions or bureaus of insurance, banking or other special branches of the business of that department, implies not merely a division where business is to be conducted under certain rules and regulations but includes the operating force as well, and hence Act March 9, 1906 (Laws 1906, p. 122, c. 112), establishing a bureau of insurance, in providing that the commissioner of insurance shall be elected by the general assembly, does not contravene Const. art. 12, § 155, as the power of appointing the insurance commissioner was not given by the Constitution to the commission, but his election was entrusted to the general assembly by the provisions authorizing it to establish the bureau of insurance. *Button v. State Corporation Commission of Virginia*, 54 S. E. 769, 770, 105 Va. 634.

Rev. St. 1892, § 5492, provides that an order for the arrest of defendant shall be made by the clerk of the court in which the action is brought when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, stating the nature of the plaintiff's claim, that it is just, and the amount thereof as nearly as may be, and "establishing" one or more of the following particulars: That he fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought; that the affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of such particulars. The word "establishing" standing alone would seem to mean the same as proving by affidavit, but the latter part of the section, which provides that the affidavit shall also contain a statement of the facts, etc., seems to modify the meaning of the word to the extent that, when the plaintiff has a belief in the existence of one or more of said particulars and sets out facts tending to justify such belief and makes positive affidavit thereto, he thereby establishes such particular. *Luhrig Coal Co. v. Ludlum*, 69 N. E. 562, 563, 69 Ohio St. 311, 100 Am. St. Rep. 675.

#### **As construct**

Although the term "establishment" of a drainage ditch means the action of the board of supervisors in ordering it, and "construction" means the actual work, these terms are so interchangeable that, in the absence of evidence showing greater damage at one point than another, they may be used as synonymous in instructions in a proceeding to assess damages for the taking of land for a drainage ditch. *Larson v. Webster County*, 130 N. W. 165, 168, 150 Iowa, 344.

#### **Determine distinguished**

See Determine.

#### **As erect**

See Erect.

#### **As locate**

Const. art. 7, § 23, after designating the temporary location of the seat of government and certain other state institutions, provides that the Legislature shall not locate any other public institutions except under general laws and a vote of the people. Section 1 of such article 7 imposes upon the Legislature the duty of providing for the establishment and maintenance of high schools and such other institutions as may be necessary, and section 18 of the same article provides that such charitable reformatories and penal institutions as the claims of humanity and the public good may require, may be established and supported by the state in such manner as the Legislature may prescribe. Held, that the words "establish" and "established" are not synonymous with the word "locate," and the act of the people in voting to locate an institution at a particular place does not have the effect of establishing the institution, and hence it was proper for the Legislature to repeal an act providing for the establishment of an agricultural college at a place designated by a vote of the people; such repeal not constituting an attempt to abolish an institution created by the people by their vote in locating it. *State ex rel. Wyoming Agricultural College v. Irvine*, 84 Pac. 90, 106, 107, 14 Wyo. 318.

#### **As prescribe**

The word "prescribed," as used in Rev. Code, City of Chicago, § 1477, relating to the police department of cities and declaring that the department shall embrace as many patrolmen "as has been or may be prescribed by ordinance, is equivalent to "established." *Bullis v. City of Chicago*, 85 N. E. 614, 617, 235 Ill. 472.

The word "established," as used in Acts Sp. Sess. 1909, p. 316, § 25, providing that for a court "established for and held" in a territorial division of a county only the names of jurors residing in that territory shall be placed in the jury box and drawn, and Act Feb. 23, 1907 (Loc. Acts 1907, p. 61), dividing St. Clair county into two judicial divisions, and providing for the holding of terms of court in each division, with a branch clerk's office and sheriff's office in the division established by the act, and with process returnable to it, and that all criminal cases in the county shall be tried in the judicial division where the offenses were committed, is not limited to the meaning of "to found" or "set up," but often means putting in a settled or efficient state an existing legal organization or institution, and is often synonymous with "prescribed." Hence the act of 1907 "established" a court to be held in a territorial subdivision of the county, within the meaning of section 25, though the two courts exercised exclusive jurisdiction within their respective divisions and together constituted the circuit court of the county, and hence

that the jury for the new division should be drawn under the provisions of section 25. *Shell v. State*, 56 South. 39, 42, 2 Ala. App. 207.

#### As purchase

The word "establish" is a word of various meanings; but there does not seem to be any dictionary definition that is the exact equivalent of the word "purchase." Its primary definition is: To make stable; to settle or fix firmly. Other definitions are: To set up or found; to place on a permanent footing; to put in a settled or efficient state or condition; to place upon a firm foundation. Held, that an electric plant, if it were about to be removed, or taken down, or to fall into disuse or decay, or was for any other cause in a precarious or inefficient condition, when purchased by a city to put it on a permanent footing, would be "established" within the definition. *Hurd v. City of Fairbury*, 128 N. W. 638, 640, 87 Neb. 745.

#### Conclusiveness of evidence

An instruction that, if plaintiff had established by a preponderance of the evidence that at a certain conference he had accepted defendant's proposal, then the jury should answer a certain question submitted in a special verdict in the affirmative was not objectionable on the ground that the word "established" imposed a greater burden on plaintiff than he was required to bear; the word being used in its common acceptation and therefore not misleading. *Gamble v. Martin* (Tex.) 151 S. W. 327, 330.

The word "establish," as used in an instruction requiring a party to clearly "establish" a fact by evidence, means to settle certainly or fix permanently what was before uncertain, doubtful, or disputed, and is therefore improper as applied to the party having the burden of proof in a civil case, in that it requires too high a degree of proof. *Fisher v. Travelers' Ins. Co.*, 138 S. W. 316, 330, 124 Tenn. 450, Ann. Cas. 1912D, 1246.

The word "establish" in an instruction as to the quantum of evidence necessary to warrant the existence of a fact in issue is more appropriate to a criminal than to a civil case (citing *Words and Phrases*, vol. 3, p. 2471). A charge that the burden of proof is on plaintiff to "establish" the facts essential to his cause of action by a preponderance, or greater weight, of evidence, sufficiently informs the jury that they must be "satisfied by a preponderance of the evidence" in order to find for plaintiff. *Jones v. Monson*, 119 N. W. 179, 183, 187 Wis. 478, 129 Am. St. Rep. 1082.

The phrase "established by the defendant" is practically equivalent to "shown by the defendant." Hence an instruction that contributory negligence must be established by the defendant and must be shown by the preponderance of the evidence is not erroneous as stating that it must be proven by de-

fendant's own testimony. *Wistrom v. Redlick Bros.*, 92 Pac. 1048, 1050, 6 Cal. App. 671.

To "establish" is to make certain. Where there is a reasonable doubt as to the degree of homicide of which accused is guilty, accused is entitled to an acquittal of the higher degree, and the evidence need not "establish" the existence of the inferior degree. Consequently a charge that, in order to convict of murder in the second degree, the evidence must "fail to establish" manslaughter, and must "fail to establish" self-defense, is erroneous. *Casey v. State*, 90 S. W. 1018, 1019, 49 Tex. Cr. R. 174.

An instruction which requires a party to "establish" his case by a preponderance of the evidence imposes a greater burden than the law requires. *International, etc., R. Co. v. Duncan*, 121 S. W. 362, 367, 55 Tex. Civ. App. 440.

An instruction that evidence of the declaration of a testator before and after the execution of a will is not admissible to prove the actual fact of undue influence being exercised upon the testator in making the will, but competent to establish the effect of external acts of undue influence, if any are shown, upon the mind of the testator, is improper as a charge upon the weight of the evidence, for the word "competent" means answering to all requirements, adequate, sufficient; and the word "establish" means "to fix or settle unalterably." Hence the instruction being about evidence, and the connection in which the term was used being with reference to evidence, the jury would naturally imply the word "evidence" in the term and construe the words as meaning "sufficient evidence to settle unalterably, or prove, the effect of the external acts of undue influence." *Hart v. Hart* (Tex.) 110 S. W. 91, 92.

An instruction that the burden of proof was on plaintiff, and that before he could recover he must establish all the facts necessary to his recovery by a preponderance of the evidence, the burden resting on defendant "to establish his plea of self-defense," was not erroneous in the use of the word "establish," as requiring too high a degree of proof, it being used in the sense of "prove"; the court having also charged that the jury should find for plaintiff, if they believed from a preponderance of the evidence that defendant made an unlawful assault on plaintiff, and to find for defendant, if they believed from a preponderance of the evidence that plaintiff was about to make an attack, real or apparent, on defendant. *Sumner v. Kinney* (Tex.) 136 S. W. 1192, 1195.

In an action for injuries to a servant from the sudden application of compressed air to a derrick, causing it to jerk the servant into the air, the court charged that the burden was on plaintiff "to show, by preponderance of evidence, by which is meant the greater weight and degree of credible testi-

mony, the facts which will entitle him to recover," and that a like burden was on defendant to establish its plea of contributory negligence of plaintiff. Held, that the use of the word "establish," considering the charge as a whole, did not amount to a charge that defendant should "establish" its plea of contributory negligence by conclusive evidence. *Houston & T. C. R. Co. v. Johnson*, 127 S. W. 539, 540, 103 Tex. 320.

#### County

Under Const. art. 11, § 3, providing that no new county shall be established which shall reduce any county to a population less than 4,000, nor shall a new county be "formed", containing a population of less than 2,000, the word "established" means finally established. *State ex rel. Chehalis County v. Superior Court of Pacific County*, 92 Pac. 345, 347, 47 Wash. 453.

#### Grade

A street grade can be established only by ordinance regularly adopted. "Establishing a grade" does not mean the actual lowering or raising the surface of the street, but it means the fixing of a base line or plane of reference and certain measurements from that plane. *Reilly v. Ft. Dodge*, 92 N. W. 887-889, 118 Iowa, 633.

The "establishment of a grade of a street" takes place when corporate action is had to that end. The establishment of the grade may, and usually does, precede actual grading of the street. Therefore an adjacent owner is entitled to damages for the change in a street grade only when the prior grade in conformity to which his improvements were made was established by proper municipal authority in the manner prescribed, notwithstanding Comp. Laws 1897, § 2784, which provides that, where a street grade has been established and adjacent property has been improved in conformity therewith, such grade shall not be changed without compensation to the owner for all damages to such property resulting therefrom. *Cummings v. Dixon*, 102 N. W. 751, 752, 139 Mich. 269.

#### High school

A high school is "established" within Laws 1909, c. 210, providing that in counties in which high schools have been established and maintained for one year under the provisions of Barnes high school law, by a majority of the votes cast on such proposition, such act, as amended, shall be in force and effect, when such high school is brought up to the standard and meets the requirements prescribed in the Barnes high school law, though the school was in existence when such law took effect; the word "establish" meaning to confirm or ascertain, fix or settle. *Armstrong v. George*, 114 Pac. 209, 210, 84 Kan. 248.

#### Post office

Const. art. 1, § 8, cl. 7, authorizes Congress to establish post offices and post roads,

and Rev. St. § 3829, empowers the Postmaster General to establish post offices at all such places on post roads established by law as he may deem expedient. Held, that the government's mere occupation of a rented building on a post road for a post office did not constitute the establishment of a post office in the sense of accomplishing of itself any appropriation or dedication of the site selected to public use, or any interference with existing rights therein. *United States v. Boston Elevated Ry. Co.*, 176 Fed. 963, 965.

#### Will

To "establish" a will is to make it the subject of such proof and finding as will entitle it to probate. In *re Abel's Will*, 118 N. Y. Supp. 429, 431, 63 Misc. Rep. 169.

#### ESTABLISH AND MAINTAIN

The words "establish and maintain," in a contract binding one to pay a specified sum to a railroad company on condition that it shall "establish and maintain" a station at a specified place, mean that a depot shall be established and thereafter maintained at the place designated; the word "maintain" meaning a continuing obligation. *Piper v. Choctaw Northern Townsite & Improvement Co.*, 85 Pac. 965, 966, 16 Okl. 436.

An averment that a highway was one over which a rural mail route was maintained does not show that it was one on which a mail route had been "established and maintained," within Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), making it an offense for certain officers to refuse, after due notice, to repair such a highway. *State v. Collier*, 86 N. E. 1015, 1017, 171 Ind. 606.

#### ESTABLISHED BUSINESS

See, also, Established Place of Business.

St. 1895, p. 573, c. 488, § 14, provided for the condemnation of land for a reservoir, and that any person owning an established business on land in town of B., whether the same should be taken or not, should be entitled to damages for decrease in value, whether by loss of custom or otherwise. The village of O. in such town was destroyed by the construction of the reservoir, and it appeared that petitioner for 15 years had owned a small farm, by which he supported himself and family; that he had no other business; and that such products as were not required for the support of the family were sold in the village of O., though he had no regular route for customers. Held, that petitioner had an "established business" within the meaning of the statute. *Allen v. Commonwealth*, 74 N. E. 287, 289, 188 Mass. 59, 69 L. R. A. 599.

#### ESTABLISHED FACTS

By "established facts" is meant the questions of fact which are passed upon by the

jury under competent testimony and correct instructions. *Averbuch v. Great Northern R. Co.*, 104 Pac. 1103, 1105, 55 Wash. 633.

### ESTABLISHED GRADE

A street grade is "established" "when corporate action is had to that end, and this usually—if not necessarily—is a matter of definite record." *Cummings v. Dixop*, 102 N. W. 751, 752, 139 Mich. 269 (citing *Larned v. Briscoe*, 29 N. W. 22, 62 Mich. 393).

Where prior to the adoption of Greater New York Charter (Laws 1901, p. 400, c. 466) § 951, providing that, in all cases where a change of grade of any street has been made prior to the taking effect of this act, the right of abutting owners to damages shall be governed by the laws in force when the change was made, and that a grade shall be deemed "established" within the section, where it was originally adopted by the action of the public authorities, or where a street has been used by the public, as of right, for 20 years and been improved by the public authority at the expense of the public or of the abutting owners, a street, the grade of which had been established by user, was improved, and the established grade changed the right of an abutting owner, who had erected buildings according to the old grade, to damages for the change was governed by the county and village law, and not by the charter provision. *Mayer v. City of New York*, 86 N. E. 563, 193 N. Y. 535.

The term "established grade," as used in Code, § 782, providing that sidewalks shall not be constructed until the streets have been graded so that such sidewalk will be at the established grade, means the grade as established for the street. *Gallaher v. City of Jefferson*, 101 N. W. 124, 128, 125 Iowa, 324.

### ESTABLISHED PLACE OF BUSINESS

The office of a corporation in a city, which office is made the depository of the books and records of the company by a vote of the directors and is the place at which a large share of the corporate business is transacted, is "the established place of business" of the corporation as affecting the venue of an action against it. *Androscoffin & K. R. R. Co. v. Stevens*, 28 Me. 434, 436.

### ESTABLISHED RATE

If a new rate, to be charged by a carrier, was filed and posted for the requisite period, such a rate was "established" within the interstate commerce act. *Houston Coal & Coke Co. v. Norfolk & W. Ry. Co.*, 171 Fed. 723, 725.

### ESTABLISHED ROAD OR WAY

The word "established," in Pol. Code 1895, § 671, providing that if a private way is "established" over the wild lands of a person

who has no notice of the proceeding he may within six months after receiving such notice, and not thereafter, proceed to have his damages assessed, has the same meaning as the words "laid out" in section 672; that is, the laying out of a way under the order of the ordinary. *Watkins v. Country Club*, 47 S. E. 538, 539, 120 Ga. 45.

Laws 1907, c. 201, § 16, provides that if after the changing, locating, or relocating of any public road, or opening and establishing any new public highway, any person be aggrieved, and he and the superintendent of roads cannot agree on the damages, if any, he may apply within six months after such change or opening and establishment of a new road for the assessment of damages. Held, that the word "change" refers not to a change contemplated and directed, but to a change completed, and that the word "establish" was used in the sense of "to found, prepare, make, institute, and confirm"; and hence an application to the clerk for an assessment of damages within six months after a change of a public road had been accomplished was in time. *Bost v. Cabarrus County*, 67 S. E. 1066, 1067, 152 N. C. 531.

The word "establish," as used in the Louisiana statute empowering police juries to establish ferries and toll bridges within their respective parishes, means to found; to create; to regulate. Police juries throughout the state have plenary powers with respect to the establishment of public ferries, bridges, and roads, and with respect to their abandonment or discontinuance, and may in their discretion convert a free bridge or road into a toll bridge or road, and vice versa, and may operate a toll ferry or road directly or through their lessees. *Police Jury of Lafourche v. Robichaux*, 40 South. 705, 707, 116 La. 286 (citing 16 Cyc. p. 591, and reaffirming *Plank Road Co. v. Kline*, 30 South. 854, 106 La. 325).

Under Pub. St. 1901, c. 67, § 12, a town situated on the Connecticut river may authorize its selectmen to contract with the officers of any contiguous town in Vermont for the purchase of the real estate, franchise, etc., of any bridge corporation, if in their opinion the public good requires a highway to be laid over said property. Held that, in proceedings thereunder, a proposed highway is "established" when the selectmen enter into such contract and purchase such property. *O'Neill v. Town of Walpole*, 66 Atl. 119, 120, 74 N. H. 197.

### ESTABLISHMENT

See Business Establishment; Manufacturing Establishment; Permanent Establishment.

Any other dangerous, etc., establishment, see Any Other.

Mercantile establishment, see Mercantile.

## ESTATE

See Claim Against Estate; Contingent Estate; Conventional Life Estate; Debt Against Estate; Dominant Estate; Entire Estate; Eventual Estate; Expectant Estate; Funds of Estate; Future Estate; Next Eventual Estate; Particular Estate; Private Estates; Property Alleged to Belong to Estate; Residuary Estate; Right and Estate; Separate Estate; Servient Estate or Tenement; Total Estate; Transmission of Estates; Vested Estate.

All my estate, see All.

Balance of estate, see Balance.

Distribution of estate, see Distribution.

Interest in estate, see Interest.

Leasehold estate, see Leasehold.

Merger of estates, see Merger.

My estate, see My.

Other estate, see Other.

Presentation of claim against, see Present—Presented—Presentation.

Privity in estate, see Privity—Privy.

Residue of estate, see Residue.

Such estate, see Such.

Support as creating, see Support.

The term "estate," when used in its broad sense, includes every species of property. *Lessler v. De Loynes*, 138 N. Y. Supp. 503, 505, 153 App. Div. 903.

The word "estate" has a variety of significations. It may mean the property of a living man, the property of a decedent, which passes to his administrator for the payment of debts of the community, or the property of a husband and wife of which the husband dies seised. It may also be appropriately, though not accurately, used to signify the property of a decedent so long as it remains undivided. *West v. Herman*, 104 S. W. 428, 432, 47 Tex. Civ. App. 131 (citing 16 Cyc. pp. 599, 600).

There being no such legal entity as an "estate" where the record of a scire facias surmunicipal lien for taxes shows on its face that the registered owner is dead, an acceptance of service for her or for her "estate" is fatally defective. The term "estate" is a convenient phrase sometimes to identify the subject of litigation in the orphans' court, and in proceedings in rem it may be treated as harmless superfluity. *Jones v. Beale*, 66 Atl. 254, 255, 217 Pa. 182.

#### Decedent's estate or assets and succession

The word "estate," as generally used, means property of every character and is ordinarily applied to property of a decedent, a ward, a lunatic, a bankrupt, etc.; that is, to property being administered in the courts. A contract for the sale of realty, describing the vendor as "Estate of F.," did not sufficiently describe the vendor to comply with the statute of frauds (*Sayles' Rev. Civ. St.*

1897, art. 2543). *Morrison v. Hazzard* (Tex.) 88 S. W. 385, 386.

It might perhaps be correctly assumed that in all dispositions *causa mortis* the words "estate" and "succession" are synonymous; but, however this may be, the word "estate," as used by a testator in disposing of the whole of his estate to three persons in equal portions, the whole passing into the hands of his executors by the terms of the will, had the same sense and meaning as the term "succession." *Thomas v. Blair*, 35 South. 811, 812, 111 La. 678 (citing *Shane v. Withers' Legatees*, 8 La. 489).

Under Mansf. Dig. § 3, providing for the assignment of estates not exceeding \$300 in value, whether of real or personal property, to the widow or children of deceased, the word "estate" means the mass of property left by decedent. *Wilson v. Massie*, 65 S. W. 942, 943, 70 Ark. 25.

"The word 'estate,' or 'that part of my estate,' has always been construed to describe not only the land devised, but the whole interest of the testator in the subject of the devise." *Abbott v. Essex Co.*, 18 How. (59 U. S.) 202, 207, 15 L. Ed. 352.

The use of the word "estate," in referring to a person's estate, is used in relation to the property of a deceased person, as it is unnatural and unusual for the word "estate" to be used in relation to the property of a living person. *Pearce v. Dyess*, 101 S. W. 549, 551, 45 Tex. Civ. App. 406.

Under an instrument reading in substance that, I, S. M., desire and so affirm that my stepdaughter shall receive out of my estate a sum of money, or its equivalent, that shall aggregate \$2,000, the term "estate" refers to the property that the maker of the paper should possess at the time of her death. *In re Megary's Estate*, 55 Atl. 963, 964, 206 Pa. 260.

The word "estate," as used in Code Supp. 1907, § 296, providing that the clerk of the district court shall be entitled to collect for services in the settlement of a decedent's estate, where the value of the estate does not exceed \$3,000, \$3, where the value is between \$3,000 and \$5,000, \$5, where the value is between \$5,000 and \$7,000, \$8, and where the value exceeds \$7,000, \$10, referred only to the estate to be administered, and, where decedent left a homestead and real property in another state, neither of which was necessary to pay debts, the value thereof was not to be considered as part of the estate in determining the amount the clerk was entitled to charge. *In re Pitt's Estate*, 133 N. W. 660, 661, 153 Iowa, 269.

Where defendant, holding a note upon which plaintiff's decedent was guarantor, contracted to refrain from making any claim against the estate of decedent, but to share proportionately in any surplus remaining on

the winding up of a partnership of which decedent was a member, provided defendant's share in such surplus should not exceed his claim against the estate under the contract of guaranty, the agreement should not be construed to mean merely that defendant would make no claim against the partnership assets, but that he should make no claim against decedent's individual estate. The word "estate" did not mean the interest of the decedent in firm. The words used had but one natural meaning, and if taken literally are sensible, but with the defendant's construction they become abstract. *Whitman v. Taylor*, 64 N. E. 206, 182 Mass. 37.

Where a testator was entitled under the will of his father to a small interest in the real property owned by the latter, and was by descent entitled to other and larger interests in the same real property, a will bequeathing all his interest in the estate of his father, which was the only property that the testator owned, includes not only that interest taken under the will of the father, but all interest owned by the testator, the word "estate" in its most common usage covering the property composing the assets of the decedent, and it must be presumed that the testator did not intend intestacy as to part of the interest owned by him. In *re O'Gorman's Estate*, 120 Pac. 33, 34, 161 Cal. 654.

Civ. Code, § 1313, declares that no devise or bequest of any estate, real or personal, to any charitable or benevolent society or corporation, or to any person or persons, in trust for charitable uses, shall collectively exceed one-third of the estate of the testator, leaving legal heirs. Held, that such section was intended not to fix a state polity, but for the protection of heirs at law, and that, in determining whether a bequest to charity exceeds one-third of the testator's estate, the court is not limited to the property bequeathed to charity within its jurisdiction, but should consider all the property bequeathed by testator to charity wherever situated. In *re Dwyer's Estate*, 115 Pac. 242, 244, 159 Cal. 680.

A claim against a city for the instantaneous death of plaintiff's intestate, through the city's negligence, stated that the claim was for damages sustained by his estate, legal representatives, and heirs, and that his estate, legal representatives, and heirs claimed a specified sum as damages. Held, that the words "legal representatives" were not used in their strictly technical sense as executors or administrators, nor was the word "heir" used in its primary and technical sense as one who, by reason of birth in lawful wedlock, inherits real property, but that the expression, "estate, legal representatives, and heirs," was used with the idea of using words broad enough in their significance to include all persons having claims against the city on account of the death, and hence the claim was sufficient as a basis for an action for

the benefit of the widow under the statute. *Moyer v. City of Oshkosh*, 139 N. W. 378, 380, 151 Wis. 586 (citing 4 Words and Phrases, 3241-3264; 5 Words and Phrases, 4070-4079).

#### **Dower interest**

An inchoate right of dower is not such an "estate" as gives a wife the right to redeem land sold for taxes, within Laws 1885, c. 405, § 7, authorizing the redemption by persons having an "estate" in the land sold. *Rosenblum v. Eisenberg*, 108 N. Y. Supp. 350, 351, 123 App. Div. 896.

#### **Fee imported**

"An 'estate' will be presumed to be a fee simple, unless it is expressed that the estate shall be a lesser one." *Beatson v. Bowers*, 91 N. E. 922, 924, 174 Ind. 601.

#### **As freehold**

See Freehold.

#### **Income**

Where a testatrix directed that annuities be paid by my executor "from my estate," the words "from my estate" did not contemplate payment from income, as the word excludes the idea of payment from dividends, rent, or interest. *Walcott v. Pitcher*, 7 R. I. 555, 561.

#### **In inheritance tax law**

Under Transfer Tax Law, § 242, defining the word "estate," that term is taken to mean the property or interest therein of the testator passing or transferred to the successor thereof, when not exempted. In *re Hellman's Estate*, 79 N. Y. Supp. 201, 204, 77 App. Div. 355.

The words "property" and "estate" are often used synonymously, and are so used in a statute imposing an inheritance tax, at a specified rate on every \$100 of the market value of the "property" received by each person. *People v. Koenig*, 85 Pac. 1129-1131, 37 Colo. 283, 11 Ann. Cas. 140.

The words "estate" and "property," as used in the Transfer Tax Law (Laws 1896, c. 908), are defined by section 242 to mean the property or interest therein of the testator, intestate, grantor, bargainer, or vendor passing or transferred. A husband and wife deposited moneys with two trust companies; either of them, or the survivor, having power to draw such deposits. In the earlier account the husband's name came first, and in the later one the wife's name came first. The moneys deposited in both accounts previously belonged to the wife, and the checks drawn on the early account were generally signed by the husband to pay household expenses, and the later account was drawn upon by checks signed by the husband with the names of both parties to pay for traveling expenses, and often checks were drawn on the later account and deposited in the first account and disbursed for family expenses. The husband contributed his whole salary to the household



expenses. On the death of the wife, the balances in the joint accounts were not subject to the transfer tax. *In re Stebbins' Estate*, 103 N. Y. Supp. 563, 565, 52 Misc. Rep. 438.

The "estate" meant by the provision of Revenue Act 1906, that the first \$500 of every estate shall not be subject to the tax thereby imposed on legacies to strangers and collateral heirs and inheritances by collateral heirs, is not the estate of deceased, but that passing to a stranger or collateral heir, so that each legacy is entitled to the exemption; and this, though the executor or administrator is required to pay it in the first instance, he being also required to deduct it from the estate passing to the legatee or collateral heir. *Booth's Ex'r v. Commonwealth ex rel. Jefferson County Attorney*, 113 S. W. 61, 65, 130 Ky. 88, 33 L. R. A. (N. S.) 592; *Allen's Ex'rs v. McElroy*, 113 S. W. 66, 130 Ky. 111.

#### Interest synonymous

See Interest (In Property).

#### Kind and quantum of interest

"An 'estate' is defined \* \* \* to be the quantity of interest which a person has, from absolute ownership down to naked possession." *Hayes v. City of Atlanta*, 57 S. E. 1087, 1089, 1 Ga. App. 25 (quoting and adopting the definition of Justice Little in *Lowery v. Powell*, 34 S. E. 297, 109 Ga. 194); *Clear Creek Water Co. v. Gladville Imp. Co.*, 58 S. E. 586, 587, 107 Va. 278, 13 Ann. Cas. 71. It is in this sense that the term is employed in the amendment of 1906 (page 452, c. 257), requiring the condemnation of the entire estate proposed to be taken by a public service corporation, but a partial interest in the land, such as a water right, may be condemned when a partial interest only is needed. *Clear Creek Water Co. v. Gladville Imp. Co.*, 58 S. E. 586, 587, 107 Va. 278, 13 Ann. Cas. 71.

Since, under Code Civ. Proc. § 1519, requiring the verdict in ejectment to specify the estate of plaintiff in the property recovered, a verdict not defining plaintiff's estate is fatally defective, plaintiff's proof of the estate owned by him is a condition precedent to recovery in ejectment; the term "estate" being defined as the quantity of interest which one has in land. *Meehan v. Dobson*, 131 N. Y. Supp. 37, 38.

The word "estate," as used in Revisal 1905, § 28, providing that a foreign executor has no authority to "intermeddle" with the "estate" until he shall have entered into bond, etc., embraces an interest in anything that is the subject of property. *Glascok v. Gray*, 62 S. E. 433, 434, 148 N. C. 346.

The statute on descent provides that estates, both real and personal, of resident and nonresident proprietors dying intestate shall descend, etc. Held, that the word "estates" refers to all interests in property to which decedent is entitled. *North v. Graham*, 85

N. E. 267, 270, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189.

As used in a statute providing that no license shall issue to an executor or administrator to sell lands until notice shall have been given to all persons interested in the estate, the word "estate" does not mean the land to be sold but the title of the testator. This is the strict meaning of the term. It denotes the interest a party has in lands, tenements, and hereditaments; as an estate for life or in fee, etc. *Yeomens v. Brown*, 8 Metc. (49 Mass.) 51, 57.

The term "estate," as descriptive of rights in property, signifies the quantity of interest which a person has from absolute ownership down to naked possession, and, as between vendor and vendee of real property, the term may be defined to be an interest in real property which confers the right to a full and complete, or to a limited, beneficial use of the property itself; while the "title" is the means whereby the owner of lands has the just possession of his property, and may be said to be the evidence of the right. *State ex rel. Dillman v. Weide*, 135 N. W. 696, 701, 29 S. D. 109.

#### Liens

See, also, Vendor's Lien.

Under Pub. Laws 1893, p. 37, c. 6, § 1, as amended by Pub. Laws 1903, p. 1121, c. 763, providing that an action may be brought by any person against another who claims an estate or interest in real estate adverse to him to determine such adverse claims, and that if judgment has been docketed, whether in favor or against the person bringing the action or the person against whom such action was brought, the lien of such judgment shall be such a claim of an estate or interest in real estate as is contemplated by the act, where a creditor had his debt determined by a judgment, and by attachment of land brought it within the jurisdiction of the court, and had it condemned as the property of his debtor to the satisfaction of his debt, and a third person claims the entire and absolute estate in the land, under deeds which antedate the action of the creditor and the levy of the attachment, his claim is of an "estate or interest in real estate," within the act, and he may sue to quiet his title thereto. *Crockett v. Bray*, 66 S. E. 666, 667, 151 N. C. 615.

#### Note secured by trust deed

Under Code Civ. Proc. § 675, providing that an action to determine adverse claims may be brought by any person against another claiming an "estate or interest in real property" adverse to him, an owner of a note secured by a trust deed may sue to quiet title as against parties claiming title adverse to the trust deed. *Battelle v. Wolven*, 102 N. W. 297, 298, 19 S. D. 87.

### **Ownership or possession and choses in action**

The term "estate" may be used to describe a mere chose in action. *Veeder Mfg. Co. v. Marshall-Sanders Co.*, 63 Atl. 641, 642, 79 Conn. 15; *State v. Fidelity & Deposit Co. of Maryland*, 80 S. W. 544, 553, 35 Tex. Civ. App. 214.

The ownership of undiscovered minerals constitutes an "estate" in the land. *Hansen v. Hall*, 132 N. W. 457, 167 Mich. 7.

The expressions "estate in lands" and "interest in lands" are broad enough to include the right to an easement therein. *Oates v. Town of Headland*, 45 South. 910, 911, 154 Ala. 503.

### **Perpetuity**

See Perpetuity.

### **Persons and personal faculties, status or rank**

"An estate" is a person, within the contemplation of the law. Forgery with intent to defraud an "estate" is within this meaning. *Bennett v. State*, 36 S. W. 947, 948, 62 Ark. 516.

The word "estate," in a contract for the sale of land made by the agent of the estate of the former owner, could not be construed to mean "heirs" of such deceased owner, nor could it be shown to have been so intended by parol. *Morrison v. Hazzard*, 92 S. W. 33, 35, 99 Tex. 583.

A will bequeathed to testator's wife all his household property, and devised to her the homestead for life, "at her death to revert to my estate," gave her one-third of the rents during life from land devised to testator's son, and also devised certain land to another son, and the succeeding paragraph required the "residue" of the estate to be divided, one-half to testator's wife, one-eighth to each son, etc. Held, that the will did not give a contingent remainder in the homestead to those persons who were testator's heirs at the widow's death, but the remainder interest therein fell into the "residue" of the estate, so that the widow, upon partition during her life, would be entitled to a one-half interest therein; the words "revert to my estate" ordinarily meaning "the return to the aggregate of all the property which I may leave at my death," and the word "estate" not being equivalent to the word "heirs." *Downing v. Grigsby*, 96 N. E. 513, 514, 251 Ill. 568.

### **Property compared and distinguished**

The words "property" and "estate" are often used synonymously, and are so used in a statute imposing an inheritance tax on every \$100 of the market value of the property received by each person. *People v. Koenig*, 85 Pac. 1129-1131, 37 Colo. 283, 11 Ann. Cas. 140.

The word "estates," in its primary sense, as used in a will, without limitation by context, is a word of extensive meaning. It is nearly synonymous with the word "property," where that word is not qualified. Property of every description will ordinarily pass under the word "estate," and the presumption is that, when used in a will, it is used in its broad sense, unless restricted. *Powell v. Wood*, 62 S. E. 1071, 1072, 149 N. C. 235 (citing 1 Underhill, Wills, § 295; *Foil v. Newsome*, 50 S. E. 597, 138 N. C. 115, 3 Ann. Cas. 417); *Foil v. Newsome*, 50 S. E. 597, 598, 138 N. C. 115, 3 Ann. Cas. 417 (quoting and adopting definition in 1 Underhill, Wills, 295).

In Civ. Code, § 485, making railroads responsible for injury they may occasion to domestic animals in a line which passes through or along the property of the owner of the animals, "property" is interchangeable with "estate." That a tenant has a property in land may not be doubted. *Walther v. Sierra R. Co.*, 74 Pac. 840, 841, 141 Cal. 288.

Laws 1895, c. 98 (Pol. Code, § 544), makes the amount incurred by a county for maintenance of an insane person in a hospital for the insane a charge against the estate of the insane person, provided that he "has no heirs within the United States dependent on said estate for support, and that no real property shall be sold during the life of the insane person." Held, that the statute did not exempt the whole estate where only part of the heirs were dependent on the insane person; the term "estate," as used therein, not being equivalent to "property" in the popular meaning, and the words "heirs dependent on said estate" not being equivalent to the words "person dependent on said estate"; so that, where only one heir was dependent on an insane person, the remainder of the estate left after the insane person's death was liable to the county's claim for maintenance. *Minnehaha County v. Boyce* (S. D.) 138 N. W. 287, 289.

### **Property, real and personal**

The word "estates" in a will was broad enough to cover all property, whether real or personal, which the testator left behind him. *Hacker v. Hacker*, 138 N. Y. Supp. 194, 199, 153 App. Div. 270.

The word "estate" includes all species of property, applicable alike to real and personal, and in its broadest sense is held to include choses in action. *State v. Fidelity & Deposit Co. of Maryland*, 80 S. W. 544, 553, 35 Tex. Civ. App. 214.

A testator's "estate" includes both realty and personalty. *Harper v. Harper*, 62 S. E. 553, 555, 148 N. C. 453.

The word "estate" is a general term and in modern construction may be said to embrace prima facie the whole estate of testa-

tor, both real and personal, and his property of every description. *Snodgrass v. Brandenburg*, 72 N. E. 1030, 1031, 164 Ind. 59 (quoting and adopting definition in *Schouler, Wills* [3d Ed.] § 510).

In its true legal significance the word "estate" embraces an interest in anything that is the subject of property, especially in lands. *Preston* defines it to be the interest which any one has in lands or in any other subject or property, and *Coke* and other English authorities are to the same effect. In America the word "estate" is a word of the greatest extension and broadest significance. It comprehends every species of property, real and personal. *Glascok v. Gray*, 62 S. E. 433, 434, 148 N. C. 346 (citing 1 *Prest. Est.* 20; 2 *Black. Com.* 103; 2 *Crabb, Real Prop.* § 942, *Coke, Lit.* 345; 2 *Redfield, Wills*, c. 14, § 48).

Where a will provides for the management and devise and distribution of the said estate, the words "the said estate" refer to an estate consisting of both the real and personal property. *Dickson v. New York Biscuit Co.*, 71 N. E. 1058, 1064, 211 Ill. 468.

The word "estates" is genus generalissimum and includes all things, real and personal, and when legacies are directed to be paid out of the "estate" of a testator, and there is nothing to restrict the meaning of the word "estate" to personalty, the real estate is held to be charged with legacies. *Hartson v. Elden*, 26 Atl. 561, 562, 50 N. J. Eq. 522 (citing *Cox v. Corkendall*, 13 N. J. Eq. 138; *Hunt v. Hunt*, 70 Mass. [4 Gray] 190, 193; *Jackson ex dem. Pearson v. Housel*, 17 Johns. [N. Y.] 281).

The word "estate," as used in a will in which the testator had bequeathed to his wife a house and lot, and also \$300 in good and lawful money, and certain other chattels, reciting, "And I do hereby make and ordain T. and D. executors of this my last will and testament, all of such legacies to be paid out of my estate," was used by the testator in its broadest meaning, which would, of course, include both realty and personalty. *Getchell v. Rust*, 68 Atl. 404, 406, 8 Del. Ch. 284.

The word "estate" may include real as well as personal property. A clause giving and devising all the rest and residue of the testator's property and "estate" of every description, and wherever situate, after the payment of all debts and certain legacies named, passes real estate, unless such construction be prevented by the other parts of the will. *Chapman v. Chick*, 16 Atl. 407, 409, 81 Me. 109.

The direction in a will that the testator's business shall be carried on with his "estate and property" comprehends the use of all his real and personal property for that purpose. It would seem to be evident that

to use, in carrying on the business, the testator's estate and property, is to apply thereto all income, however it may be produced, from either form of property. *Thorn v. De Breteuil*, 71 N. E. 470, 473, 179 N. Y. 64.

The residuary clause devising and bequeathing the balance and residue of the "estate of every kind" includes real as well as personal property and included the reversionary interest in the real estate from which a life estate had been carved out. *Foil v. Newsome*, 50 S. E. 597, 598, 138 N. C. 115, 3 Ann. Cas. 417.

In Ky. St. 1909, § 1907, providing that every gift, conveyance, assignment, etc., by a debtor of any of his estate without valuable consideration, shall be void as to existing liabilities, the word "estate" includes personal as well as real property. *Patton v. Walker's Trustees* (Ky.) 118 S. W. 312, 313.

A testator made the following provisions in his will: "Item. I give, devise and bequeath to my wife, E. A. M., all my estate both real and personal wherever found and however situate for her use during life. Item. At the death of my said wife, whatever may remain of said estates, I give, devise and bequeath to my daughter, E. A. Y." Held, that a power of sale by the life tenant was annexed by implication to the devise of the life estate in the first item, and that it sufficiently appears that the testator intended the power of sale to extend to both the real and the personal estate. The devise of whatever "should remain of said estate" was not a devise of whatever should remain of his estate in general but whatever should remain of the real estate and of the personal estate. The word "estates" in the plural naturally has this significance, and in this case it expressed the real intention of the testator. By saying that only so much of the real estate as might "remain" at the death of the wife should pass to the daughter, testator expressed a purpose that the use given to the wife should extend to a sale of the property subject to the use, if she wished to sell the same or the proceeds of the property was needed for her support. Unless this construction is placed on the language, there is no practical significance in the use of the word "remain." *Young v. Hillier*, 67 Atl. 571, 572, 103 Me. 17, 125 Am. St. Rep. 283.

#### Real estate only

The word "estate" is used with a variety of meanings, its primary and technical sense referring only to an interest in land, and such is its meaning under the common-law definition of possibility of reverter. *North v. Graham*, 85 N. E. 267, 270, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189 (citing 16 Cyc. p. 599).

#### Right of entry

"A right of entry is not \* \* \* an 'estate' in any just and legal sense of the

word. Neither is it a 'thing in action,' for it does not depend upon any right to sue, but may be enforced by a mere entry. Indeed, a right of action and a right of entry are often used in contradistinction to each other." *Ingals v. Sailor's Snug Harbour*, 3 Pet. (28 U. S.) 99, 180, 7 L. Ed. 617.

**Term synonymous**

See Term.

**ESTATE AND PROPERTY**

The direction in a will that the testator's business shall be carried on with his "estate and property" comprehends the use of all his real and personal property for that purpose. It would seem to be evident that to use, in carrying on the business, the testator's estate and property, is to apply thereto all income, however it may be produced from either form of property. *Thorn v. De Breteuil*, 71 N. E. 470, 473, 179 N. Y. 64.

**ESTATE AT SUFFERANCE**

See Tenant at Sufferance.

**ESTATE AT WILL**

See Tenant at Will.

**ESTATE BY THE CURTESY**

See Curtesy.

**ESTATE BY ENTIRETY**

See Entirety (Estate by).

**ESTATE FOR LIFE**

See Life Estate.

**ESTATE FOR YEARS**

Code Ga. of 1910, § 3685, defines an "estate for years" as one which is limited in its duration to a period fixed, or which may be made fixed and certain, and declares that, if it be in lands, it passes as realty and may be made for any number of years, so that the limitation be within the rule against perpetuities. *Louisville & N. R. Co. v. Wright*, 199 Fed. 454, 457.

"A lease for a thousand years is considered only an 'estate for years,' and the lessee has only a 'chattel interest,' which by the common law goes into the hands of his executor or administrator at his decease." *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 497, 225 Mo. 414, 20 Ann. Cas. 1072 (quoting 1 Swift Dig. p. 87).

While a technical "estate for years" is not an inheritable estate and therefore goes to the personal representative on the death of the owner, it is an estate in land, and an "estate for years," if taxable, is not taxed as personalty. An assessment of taxes against a lessee on account of his interest in land held under a so-called lease for 99 years renewable to the lessee, his heirs and assigns, forever, where the rent reserved is grossly disproportionate to the value of the land, is not invalid. *Ocean Grove Camp Meeting*

*Ass'n v. Reeves*, 75 Atl. 782, 784, 79 N. J. Law, 334.

A "tenancy for years" is determinable by the mere expiration of the period for which the lands were demised and neither demand nor notice is necessary or requisite to enable the landlord to re-enter or maintain ejectment for possession, but such tenancy may be converted into a tenancy at will or a periodical tenancy, and, when so changed, it can only be terminated as other tenancies of the kind. *Wolfer v. Hurst*, 82 Pac. 20, 21, 47 Or. 156, 8 Ann. Cas. 725.

**As real property**

See Real Property.

**As tenement**

See Tenement.

**ESTATE IN BANKRUPTCY**

See Property Belonging to Estate in Bankruptcy.

**ESTATE IN EXPECTANCY**

See Expectant Estate.

**ESTATE IN FEE**

See Fee.

**ESTATE IN JOINT TENANCY**

See Joint Tenancy.

**ESTATE IN POSSESSION**

"At common law estates in real property, with respect to the time of their enjoyment, were either in 'possession' or 'expectancy.' The person who had the present enjoyment of that out of which the enjoyment arose had an estate in possession. The person whose enjoyment was postponed had an estate in expectancy, which, however, was created at the same time as that upon which it was expectant. Expectant estates were either in remainder, limited to take effect and to be enjoyed after the particular estate, or in reversion; the residue of the estate left in the grantor or his heirs to commence in possession after the determination of the particular estate." *State ex rel. Tozer v. Probate Court of Washington County*, 113 N. W. 888, 893, 102 Minn. 268.

"Estates, as respects the time of their enjoyment, are divided into 'estates in possession' and 'estates in expectancy.' An estate which entitles the owner to immediate possession of the property is an 'estate in possession.' An estate in which the right of possession is postponed to a future time is an 'estate in expectancy.'" *In re Perry*, 96 N. Y. Supp. 879, 884, 48 Misc. Rep. 285 (quoting *Real Property Law*, § 25).

**ESTATE IN REMAINDER**

See Remainder (Estate in).

**ESTATE IN REVERSION**

See Reversion.

**ESTATE OF BANKRUPT**

Interest in, see Interest.

**ESTATE OF DECEASED PERSON**

As person, see Person.

The phrase "estates of deceased persons," as used in Gen. St. 1902, §§ 2367-2377, imposing a succession tax on any property within the jurisdiction of the state which shall pass by will or inheritance, refers to the residuum of the decedent's property inventoried under the law remaining after claims of creditors and charges of administration have been satisfied. Appeal of Gallup, 57 Atl. 699, 702, 76 Conn. 617.

**ESTATE OF DOWER**

See Dower.

**ESTATE OF INHERITANCE**

An interest in land which may pass by devise or descent is an "estate of inheritance." Charles A. Warren Co. v. San Francisco Savings Union, 96 Pac. 807, 808, 153 Cal. 771.

A full equitable title to real estate and a beneficial interest therein, the holder of the legal title having no duty to perform except to convey to the holder of the equitable title, is an estate of inheritance within the dower statute. Harley v. Harley, 122 N. W. 761, 764, 140 Wis. 282.

Where one is seised of an estate in land, limited on his dying without lawful children, the estate, being one that can pass to heirs if lawful children are born, is an "estate of inheritance," in which his widow is dowerable, though it expired by failure of issue, under Code 1906, c. 65, § 1. Couch v. Eastham, 73 S. E. 314, 315, 69 W. Va. 710, 39 L. R. A. (N. S.) 307.

Act March 30, 1874, St. 1873-74, p. 940, c. 671, § 1, provides that any citizen may lay down and plant oysters in any of the public waters of the state, and that the ownership of and the exclusive right to take up the same shall remain in such person, etc. Following sections provide that the person desiring to use the right must define the limits of his claim by stakes, etc., maintain thereon a sign with the words "Oyster Beds," and record a description of such beds, etc., and makes the carrying off of the oysters or the removal of boundary marks by strangers a misdemeanor. Section 9 provides that the act shall not apply to any tidelands which the state may have sold to private parties, and that nothing herein shall be so construed as to interfere with the right of the state to sell any of the tidelands, nor affect the rights of purchasers at any sale of the land by the state. Held, that the privilege given by the act is a mere personal license, and not an "estate of inheritance," subject to partition under Code Civ. Proc. § 752, providing for the partition of real property. Darbee & Immel Oyster & Land Co. v. Pacific Oyster

Co., 88 Pac. 1090, 1091, 150 Cal. 392, 119 Am. St. Rep. 227.

**Donation claim**

"An estate of inheritance" is one which descends or may descend to the heir upon the death of the ancestor." Under the Donation Law (Act Cong. Sept. 27, 1850) a settler and his wife have but a bare right of possession until completion of the four years' residence and occupation, and no "estate of inheritance" until then. Quinn v. Ladd, 59 Pac. 457, 459, 37 Or. 261 (citing and adopting Hall v. Russell, 101 U. S. 503, 25 L. Ed. 829; Farris v. Hayes, 9 Or. 81).

**ESTATE ON CONDITION**

See Condition.

**ESTATE ON LIMITATION**

See Limitation.

**ESTATE REMAINING**

The words "estate remaining," as used in a will devising real estate to testator's son, to hold "the same to him and his heirs forever," and providing that if he died leaving no issue surviving, or if such issue should die during minority, the "estate remaining" at the death of the son should go to designated persons, did not mean a remainder in a technical sense, but meant what the son should not dispose of during life, and by necessary implication the son had power to dispose of any or all of the estate, and the limitation over, being inconsistent with the power of disposal, could not take effect as an executory devise. Galligan v. McDonald, 86 N. E. 304, 305, 200 Mass. 299, 128 Am. St. Rep. 421.

**ESTATE TAIL**

Created by use of words, heirs of the body, see Heirs of the Body.

Words of procreation are not indispensable in establishing an "estate tail," but it is sufficient if the unmistakable implication limits the heirs to particular bodies. A deed to James A. Hall and Mary Hall, his wife, during their or either of their natural lives, and in fee to the heirs of the said Hall and his wife, conveying real estate unto them, their heirs and assigns, forever, by unmistakable implication limits the heirs taking to the particular heirs of the grantees named as husband and wife (that is, to the issue of the marriage), who take an estate tail, which, under the Illinois statute abolishing estates tail became a fee simple, so that the grantees, Hall and wife, take life estates, and the fee simple vests in their children as tenants in common. Hall v. Hankey, 174 Fed. 139, 140, 98 C. C. A. 173.

An "estate tail general" is one limited to a man and the heirs of his body without any further specifications. A will devising lands "not only to the said (devisee) but to the heirs of his body" creates an estate tail

which, by reason of Comp. Laws 1897, § 8785, abolishing estates tail is an estate in fee simple in the devisee. *Rhodes v. Bouldry*, 101 N. W. 206, 207, 138 Mich. 144.

A conveyance to a grantee and to the heirs of her body, reciting that if she should die without issue then the lands should revert to the grantor's heirs at law, created an "estate tail," and vested in the grantee a life estate only, under Sand. & H. Dig. § 700, providing that when by the common law any person, who would become seised in fee tail of any lands or tenements by virtue of a conveyance, such person, instead of being or becoming seised thereof in fee tail, shall be adjudged to be seised for life only, and that the remainder shall pass in fee simple absolute to the person to whom the estate tail would have first passed, according to the course of the common law. *Black v. Webb*, 80 S. W. 367, 368, 72 Ark. 336.

Testatrix bequeathed to her executor not less than \$8,500 nor more than \$10,000 for the sole use of her sons for life, then to her grandchildren, to be theirs when they reached 21, the grandchildren to have their father's part, and if any died before such age or condition fulfilled, without brothers or sisters, his share should go to testatrix's surviving grandchildren of proper age on condition fulfilled; the intent being to protect part of testatrix's estate for the benefit of her own children while they lived, then for her own flesh after they were gone. Held, that the limitation of the trust created an executory devise, and was therefore not within Code 1906, § 2765, prohibiting estates tail. *Thomas v. Thomas*, 53 South. 630, 632, 97 Miss. 697.

#### ESTATE TO BE KEPT TOGETHER

See When Estate is to be kept Together.

#### ESTHETIC

See Aesthetic.

#### ESTIMATE

See Containing by Estimate.

The word "estimate" precludes accuracy, and its ordinary meaning is to calculate roughly or to form an opinion from imperfect data, and the word "estimate" has no more certainty than the term "about" or "more or less." *Bautovitch v. Great Southern Lumber Co.*, 56 South. 1026, 1027, 129 La. 857, Ann. Cas. 1913B, 848 (citing 3 Words and Phrases, p. 2493).

"Estimate," as defined by Webster, is to "Judge and form an opinion of the value of, from imperfect data; \* \* \* to fix the worth of roughly or in a general way." *National Mut. Fire Ins. Co. v. Duncan*, 98 Pac. 634, 637, 44 Colo. 472, 20 L. R. A. (N. S.) 340.

The word "estimate," in Rev. St. 1899, § 5858, providing that, before the council shall

make any contract for building bridges, sidewalks, or sewers, an "estimate" of the cost thereof shall be made by the city engineer, or other proper officer, and submitted to the council, and no contract shall be entered into for any such work for a price exceeding the "estimate," does not mean a correct statement of the cost of such work but an approximation of such cost. The filing of a statement that the cost of a sewer would not exceed a certain amount does not comply with the statute. *City of Boonville v. Rogers* (Mo.) 101 S. W. 1120, 1122.

The term "estimates" is not an appropriate expression to indicate the determination of the cost of past construction; hence the plans and estimates of cost which the board of supervisors is directed to procure under San Francisco Charter, art. 12, § 3, on receipt of a petition for the purchase of a public utility, are those of the original construction and not those of the past construction or completion of existing utilities owned by any other corporation. *O'Connell v. Behan*, 124 Pac. 1038, 1042, 19 Cal. App. 111.

A contract for street paving required the work to be done as a whole, and not in sections, according to specifications under the direction of the city's engineer. The notice to bidders and specifications alone provided for payment on semimonthly estimates as the work progressed, with a retention of 10 per cent. on each "approximate estimate." The contract also provided that the contractor should be responsible for any work until its completion and final acceptance, and that the acceptance should not relieve the contractor of any obligation to do reliable work previously described. Held, that the word "approximate" was tautologically used to accentuate the word "estimate," which was not to be construed as a final mathematical ascertainment of what was set forth, and hence the acceptance of sections of the work by the city engineer and issuance of approximate estimates thereon to the contractor did not bar the city's right to defend, when sued for the balance due under the contract, on the ground that the work in the sections estimated did not constitute a compliance with the specifications. *City of Greensboro v. Southern Pav. & Const. Co.*, 168 Fed. 880, 882, 94 C. C. A. 292.

A city engineer's written report to a city council that, "in compliance with my duty as such engineer, I have computed the cost of paving, \* \* \* and find that the work should be done at a cost not to exceed \$1.47 per square yard," is a sufficient compliance with Rev. St. 1899, § 5858, subd. 8, which requires a city engineer's estimate of the cost of paving before any contract is made; the word "estimate" meaning the fixing of the worth or value roughly or in a general way, sometimes from imperfect data. *City of Boonville ex rel. Cosgrove v. Stephens*, 141 S. W. 1111, 1116, 238 Mo. 339.

Where the estimate of the cost of the construction of a sewer totaled in gross a specified sum, and the details thereof were of service only as specifications of the particular work to be done, and a bid for the work totaled a less sum, though the price of some of the items exceeded the estimate thereof, and the amount allowed the bidder obtaining the contract for the work was less than the bid, the special tax bills issued for the cost of the work were not void, on the ground that the cost of the work exceeded the estimate, within Rev. St. 1909, § 9407, providing that no contract shall be entered into for any work for a price exceeding the estimate; an "estimate" meaning a rough calculation. *Gratz v. City of Kirkwood*, 145 S. W. 870, 873, 165 Mo. App. 196.

An account for building materials for a dwelling, filed for the establishment of a mechanic's lien, which omits to show the prices charged for the different items, and which, for the purpose of showing that the materials were contracted for at a gross sum, merely recites "amount of estimate, \$450," is insufficient, under Code 1904, § 2476, providing that a contractor, to perfect a lien, must file an account showing the amount and character of the work done or materials furnished, the prices charged therefor, etc.; the word "estimate," defined as a valuation based on opinion and roughly made from imperfect data, etc., not conveying the idea that the materials were contracted for as an entirety at the price named. *Brown & Hoof v. Cornwell*, 60 S. E. 623, 625, 108 Va. 129.

The original estimates for the construction of a building estimated the lumber needed at \$1,400. Considerable of the lumber included in the estimate was not furnished, and for such deficiency \$226.90 was credited back; and \$900 was also credited on the account for cash payment. Held, that any recovery in excess of the difference between \$1,400 and the sum of the two credits was excessive, though the parties had stipulated that \$1,390.06 worth of lumber was furnished under the "estimate," since the word "estimate," as used in the stipulation, referred to the original estimate, and not to extras that may have been furnished, and hence recovery for extras by reason of the stipulation was not warranted. *Moorer v. Leland Lumber Co.*, 48 South. 621, 622, 95 Miss. 503.

Where defendant in writing agreed to pay for lumber to be furnished for a building a certain sum "on basis of your estimate," the word "estimate," taken in its ordinary meaning excludes the idea of an exact detailed schedule of material, not to be increased or diminished as the building progressed, but, on the contrary was an approximate calculation of the lumber required. *Mills-Carleton Co. v. Huberty*, 95 N. E. 383, 384, 84 Ohio St. 81.

Where a policy of life insurance provides that, on the surrender of the policy, the in-

sured may withdraw in cash the full amount of the surrender value, and there is attached thereto a table of surrender values, headed "illustration of the value calculated under this policy," such table cannot be regarded as a mere "estimate," but must be construed as a part of the agreement. *Sweetland v. Banker's Life Ins. Co.*, 105 N. Y. Supp. 627, 730.

The word "estimated," in a state statute imposed an annual tax on the capital stock of a corporation estimated on its last report, carries with it the idea of valuation rather than of mathematical apportionment. It suggests that the property reported by the corporation is to be the basis on which the assessors shall make their valuation, so that the tax is "estimated" on that property rather than fixed by mere process of multiplication or division. *Powers v. Detroit, G. H. & M. Ry. Co.*, 26 Sup. Ct. 556, 559, 201 U. S. 543, 50 L. Ed. 860.

#### As opinion

To "estimate" the amount of work done means to form an opinion from imperfect data, comparison, or experience, to calculate roughly, or to rate; and an "estimate" involves an exercise of judgment in determining the amount, importance, or magnitude of things with their other exterior relations. *O'Hehir v. Central New England R. Co.*, 137 N. Y. Supp. 627, 633, 152 App. Div. 677.

A witness' "opinion" as to damages to property from the construction of a railroad is synonymous with "estimate," and an estimate of value, as well as of damages, may be made by one familiar with the facts who states the facts upon which he bases his "estimate." *Wray v. Knoxville, L. F. & J. R. Co.*, 82 S. W. 471, 474, 113 Tenn. 544.

In a conveyance or contract for conveyance of land, the statement of the quantity conveyed as "estimated" "does not afford a shield against liability for false representations." *Boddy v. Henry*, 101 N. W. 447, 452, 126 Iowa, 31.

#### ESTIMATED REVENUE

The words "estimated revenue," as used in the Baltimore city charter, providing that in case of any surplus arising in any fiscal year by reason of an excess of income received from the estimated revenue over expenditures for such year the surplus shall be passed to the commissioners of finance, to be credited to the general sinking fund, do not include a loan authorized by the city to be procured for the purpose of extending the water service and constructing a reservoir. *Callaway v. City of Baltimore*, 57 Atl. 661, 663, 99 Md. 315.

The expression "estimated excess of revenues," in Act No. 32, p. 39, of 1902, is used in its ordinary sense, and it is a sufficient compliance with the provisions of that statute (to the effect that "no dedication of fu-

ture revenues shall be made which alone, or with other prior dedications in force, shall exceed the estimated excess of revenues," etc.) that a police jury, in good faith, though not necessarily by ordinance, and not necessarily for publication, makes an estimate of the future revenues (predicated upon the rates of taxation and expenditure), which, with reasonable certainty, will show the prospective existence of the surplus appropriated or dedicated; and this, in any given case requiring it, the courts will presume to have been done, unless there is proof to the contrary. *Murphy v. Police Jury, St. Mary Parish, 42 South. 979, 982, 118 La. 401.*

### ESTIMATED WEIGHT

"Estimated weight" is the means of ascertaining the weight by a standard fixed and adopted by dealers in structural steel. For example, steel columns, girders, and other connections necessary for the steel part of a structure, according to their dimensions, are given a standard weight by manufacturers and dealers in such materials. *Hale Bros. v. Milliken, 90 Pac. 365, 369, 5 Cal. App. 344.*

### ESTIMATION

As valuation, see Valuation.

## ESTOPPEL

See Quasi Estoppel.

"According to my Lord Coke, an estoppel is that which 'shuts a man's mouth from speaking the truth.' With this forbidding introduction a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer law as a system. The harsh words which the very learned commentator upon Littleton uses in giving a definition of this principle are to be attributed to the fact that before his day 'the scholastic learning and subtle disquisition of the Norman lawyers (in the language of Blackstone) had tortured this principle so as to make it the means of great injustice; and the object of my Lord Coke was to denounce the abuse which he says had got to be "a very cunning and curious learning" and "was odious," and thereby restore the principle and make it subserve its true purpose as a plain, practical, fair, and necessary rule of law.' Estoppels must be mutual; that is, if one side is bound, the other must be. It only includes parties and privies, and does not extend to a stranger." *Allred v. Smith, 47 S. E. 597, 599, 135 N. C. 443, 65 L. R. A. 924 (quoting Armfield v. Moore, 44 N. C. 157).*

The word "estoppel" is sometimes used to indicate the existence of an ordinary prior paramount right in the absent party, or a general rule of law, or to indicate the conclusive effect of a judgment, or to express

the rule that courts will not enforce a demand contrary to public morals, or the rule of equity that he who commits iniquity shall not have equity, or that suitors who invoke relief from equity must come into court with clean hands; but it applies to matters of fact, though one has been said to be estopped from setting up a right under the Constitution or to take inconsistent legal propositions. *Chicago, St. P., M. & O. Ry. Co. v. Douglas County, 114 N. W. 511, 514, 134 Wis. 197, 14 L. R. A. (N. S.) 1074.*

An "estoppel" is a bar which precludes a person from denying the truth of a fact which has, in contemplation of law, become settled by the act of the party himself, either by conventional writing or by representations express or implied, in pais. If a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that that state of facts does in truth exist. *Stevenson Co. v. Bethea, 61 S. E. 99, 103, 79 S. C. 478 (citing 16 Cyc. p. 679; Lites v. Addison, 3 S. E. 214, 27 S. C. 226).*

"Estoppel," as predicated upon the maxim that no one can be heard alleging his own turpitude, is a doctrine which forms part of the policy of the law by reason of its recognition by the courts, but, as the law itself is paramount as to its policy, it follows that, in matters concerning which it speaks definitely, it cannot be controlled by an estoppel which is but the creature of its creature, and that such an estoppel cannot be given the effect of subordinating the law and the policy of the law as declared by the law itself, to the will or infirmity of the citizen. *Ackerman v. Lerner, 40 South. 581, 586, 116 La. 101.*

An "estoppel" is that which concludes and shuts a man's mouth from speaking the truth, where to permit him to speak would allow a departure from fair dealing and render it impossible to administer law as a system. *Beaufort County Lumber Co. v. Price, 56 S. E. 684, 685, 144 N. C. 50 (citing Armfield v. Moore, 44 N. C. 157).*

There are three kinds of "estoppel," namely, by matter of record, by matter of writing, and by matter in pais. The ground of holding a matter of record to act as an estoppel is that a record imports such absolute verity that no person against whom it is producible shall be permitted to impeach it. Where the sureties on an official bond have been sued for a specific breach, and a judgment is entered therefor, but not for the penalty of the bond, and the judgment is paid, the state cannot thereafter sue the same sureties for breaches not alleged when the first suit was brought. *State v. Sandifer, 46 S. E. 1006, 1008, 68 S. C. 204.*



"An 'estoppel' may be defined, in a general sense, to be a preclusion of a person to deny the truth of a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record, or by deed, or which has, by an act in pais, induced another to believe and act upon to his prejudice." The Attorney General, by making public bills and certifying that they are correct, on which he receives warrants by which he draws money from the state treasury, which bills begin, "To moneys contracted for, advanced and paid out by me \* \* \* in the discharge of duties \* \* \* on account of legal expenses of the insurance department," and contain items for services rendered by plaintiff, is not estopped, in an action against him for such money had and received, to assert that plaintiff did not render part of the services and had been paid for the others. *Richolson v. Moloney*, 63 N. E. 188, 190, 195 Ill. 575 (citing *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39).

### ESTOPPEL BY DEED

An "estoppel by deed" is a bar precluding a party to a deed and his privies from asserting, as against the other party and his privies, any title in derogation of the deed, or from denying the truth of any material fact therein; and a grantor cannot assert, to defeat the grantee's title, that grantor had no title at the time of the conveyance; nor can he deny the deed its full operation as such. *Simmons' Adm'r v. Simmons*, 150 S. W. 59, 61, 150 Ky. 85.

An "estoppel by deed" is a preclusion against competent parties to a valid sealed contract and their privies to deny its force by any evidence of inferior solemnity. *Pedro v. Pedro*, 127 N. Y. Supp. 997, 999, 71 Misc. Rep. 296.

There is a distinction between "estoppel by deed," commonly known as technical estoppel, and estoppel in pais or equitable estoppel, arising from act and conduct. The latter estoppel may be given in evidence under a plea of the general issue. *Dickson v. New York Biscuit Co.*, 71 N. E. 1058, 1068, 211 Ill. 468 (citing *German Fire Ins. Co. of Peoria v. Grunert*, 112 Ill. 68, 1 N. E. 113; *Mann v. Oberne*, 15 Ill. App. 35; *Welland Canal Co. v. Hathaway*, 8 Wend. [N. Y.] 483, 24 Am. Dec. 51).

### ESTOPPEL BY JUDGMENT

See *Res Adjudicata*.

### ESTOPPEL BY RECORD

There is a distinction between "estoppel by record," commonly known as technical estoppel, and estoppel in pais or equitable estoppel. *Dickson v. New York Biscuit Co.*, 71 N. E. 1058, 1068, 211 Ill. 468 (citing *German Fire Ins. Co. of Peoria v. Grunert*, 112 Ill. 68, 1 N. E. 113; *Mann v. Oberne*, 15

Ill. App. 35; *Welland Canal Co. v. Hathaway*, 8 Wend. [N. Y.] 483, 24 Am. Dec. 51).

### ESTOPPEL BY VERDICT

Where a specific fact or question has been adjudicated in a suit, and the same fact or question is put in issue in a subsequent suit between the same parties, the determination in the former suit is conclusive on the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not; and this species of estoppel is known to the law as an "estoppel by verdict," and is equally available to a plaintiff in support of his action as when offered by a defendant as a matter of defense. A judgment of the probate court allowing a party an award as a widow of a decedent is conclusive, in a proceeding by her for assignment of dower, and homestead, on the validity of her marriage to decedent, as against his heirs, where the heirs appeared before the probate court and contested the award on the ground of the alleged invalidity of the marriage. *Potter v. Clapp*, 68 N. E. 81, 84, 203 Ill. 592, 96 Am. St. Rep. 322.

A judgment on the merits in a case is an absolute bar to a subsequent action concluding parties not only as to every matter which was offered and received to sustain or defeat the action or demand, but as to any other admissible matter which might have been offered for that purpose; but, where the second action between the same parties is on a different claim, the judgment in the prior action operates as an "estoppel" only as to those matters in issue or points controverted, on the determination of which the finding or verdict was rendered. *Baldwin v. Hanecy*, 68 N. E. 560, 562, 204 Ill. 281 (citing *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Riverside Co. v. Townshend*, 9 N. E. 65, 120 Ill. 9).

### ESTOPPEL IN PAIS

"In the broad sense of the term, 'estoppel' is a bar which precludes a person from denying the truth of a fact which has, in contemplation of law, become settled by the facts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, expressed or implied in pais. An 'estoppel' arises where a man has done some act which the policy of the law will not permit him to gainsay or deny." *Pollock v. Pegues*, 51 S. E. 514, 521, 72 S. C. 47 (quoting and adopting definition in *Greenleaf's Evidence*, c. 4; 16 Cyc. p. 679).

"Equitable estoppel" is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good

faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. *Holt v. Holt*, 102 Pac. 187, 195, 23 Okl. 639 (quoting and adopting 2 Pom. Eq. Jur. §§ 804, 805); *Memphis Consolidated Gas & Electric Co. v. Simpson*, 103 S. W. 788, 790, 118 Tenn. 532 (quoting and adopting the definition in 2 Pom. Eq. Jur. § 804); *Porter v. Goudzwaard*, 127 N. W. 295, 297, 162 Mich. 158; *Miller v. Ahrens*, 163 Fed. 870, 876.

"The following elements must be present in order to constitute an 'estoppel' by conduct: (1) There must have been a representation or concealment of material facts. (2) The representation must have been made with knowledge of the facts. (3) The party to whom it was made must have been ignorant of the matter. (4) It must have been made with the intention that the other party would act upon it. (5) The other party must have been induced to act upon it." *Dye v. Crary*, 85 Pac. 1038, 1040, 13 N. M. 439, 9 L. R. A. (N. S.) 1136 (quoting and adopting definition in *Bigelow, Estop.* [4th Ed.] 445; 1 *Bouv. Law Dict.* [Rawle's Ed.] 695; citing *And. Law Dict.*, 16 Cyc. pp. 722, 726); *Musconetcong Iron Works v. Delaware, L. & W. R. Co.*, 76 Atl. 971, 972, 78 N. J. Law, 717, 20 Ann. Cas. 178 (citing *Central R. Co. of New Jersey v. MacCartney*, 68 N. J. Law, 165, 52 Atl. 575); *Walker v. Ehresman*, 113 N. W. 218, 220, 79 Neb. 775; *Grice v. Woodworth*, 80 Pac. 912, 916, 10 Idaho, 459, 69 L. R. A. 584, 109 Am. St. Rep. 214 (quoting and adopting definition in 16 Cyc. p. 726); *Penn. v. Rhoades*, 100 S. W. 288, 289, 124 Ky. 798 (quoting and adopting definition in 16 Cyc. p. 726); *Supreme Tent Knights of Maccabees of the World v. Stensland*, 68 N. E. 1098, 1100, 206 Ill. 124, 99 Am. St. Rep. 137; *Boddie v. Bond*, 70 S. E. 824, 826, 154 N. C. 359; *Ergenbright v. Henderson*, 82 Pac. 524, 525, 72 Kan. 29; *Osburn v. Ct. of Honor*, 133 S. W. 87, 90, 152 Mo. App. 652; *Fayter v. North*, 83 Pac. 742, 753, 30 Utah, 156, 6 L. R. A. (N. S.) 410 (citing 16 Cyc. p. 726); *Lewis v. Brown*, 87 S. W. 704, 705, 39 Tex. Civ. App. 139; *Schott v. Linscott*, 103 Pac. 997, 999, 80 Kan. 536; *Miller v. Ahrens*, 163 Fed. 870, 876; *Town of Sapulpa v. Sapulpa Oil & Gas Co.*, 97 Pac. 1007, 1011, 22 Okl. 347 (citing 4 Am. & Eng. Dec. Eq. 267, 268); *Bragdon v. McShea*, 107 Pac. 916, 918, 26 Okl. 35; *Harrison v. McReynolds*, 82 S. W. 120, 125, 183 Mo. 533 (quoting *Bigelow, Estop.* [3d Ed.] 484); *State v. Portland General Electric Co.*, 95 Pac. 722, 731, 52 Or. 502.

2 Wds. & P.2d Ser.—22

"The important and primary ground of estoppel by matter in pais is that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted." *Spence v. Renfro*, 78 S. W. 597, 598, 179 Mo. 417 (citing *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129; *Campbell v. Johnson*, 44 Mo. 247; *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Taylor v. Zepp*, 14 Mo. 482, 55 Am. Dec. 113; *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378); *Dechenbach v. Rima*, 78 Pac. 666, 667, 45 Or. 500; *Tennent v. Union Cent. Life Ins. Co.*, 112 S. W. 754, 762, 133 Mo. App. 345; *State v. Mutual Life Ins. Co. of New York*, 93 N. E. 213, 222, 175 Ind. 59, 42 L. R. A. (N. S.) 256; *Dreyfus v. W. A. Gage & Co.*, 36 South. 248, 250, 84 Miss. 219.

The indispensable elements of an "estoppel" are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance upon that representation. *Williams v. Neely*, 134 Fed. 1, 11, 67 C. C. A. 171, 69 L. R. A. 232.

"An 'estoppel' is where a man is concluded by his own act or acceptance to say the truth." Where a party by his statements as to matters of fact, or as to his intended abandonment of existing rights, designedly induces another to change his conduct or alter his condition in reliance upon them, he cannot be permitted to deny the truth of his statements or enforce his rights against his declared intention of abandonment. *Richards v. Shepherd*, 49 South. 251, 159 Ala. 663 (quoting and adopting definition given in *Edmundson v. Montague*, 14 Ala. 370).

An "estoppel in pais" is grounded on the principle that no man shall construct a right on his own wrong; and whatever a man has said or implied wrongfully to his own advantage, he is bound by when it may turn to his disadvantage, however false it may be in fact. *El Paso & S. W. R. Co. v. Elchel & Welkel*, 130 S. W. 922, 940.

An "estoppel in pais" is conduct intended and calculated to induce, and in fact inducing, another person to alter his condition, so that it would be a fraud on him to allow the other person to take an inconsistent attitude to his detriment. *Scharfenberg v. Town of New Decatur*, 47 South. 95, 96, 155 Ala. 651.

"The doctrine of an 'estoppel in pais' is that where a party, by conduct or words, represents one state of facts, knowing or intending that the other party will or shall rely upon them as true, and shape his conduct by them, which representations are untrue, the party making them shall not thereafter be allowed to show their untruth or contradict the statement of fact by which he induced the action of the other party. It is essential to the application of the rule that

the party to whom the statement is made shall rely upon it and shape his conduct thereby." *Reisman v. Silver*, 95 N. Y. Supp. 483, 484, 48 Misc. Rep. 399.

"Estoppel in pais" is applied to preclude a party from maintaining by evidence that which he has before expressly or tacitly denied, or disproving that which he has before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive. *Shapley v. Abbott*, 42 N. Y. 443, 447, 1 Am. Rep. 548.

To constitute "estoppel in pais" it is essential that the defendant should by word or act have represented the fact to be different from what he now attempts to show it to have been. Mere disappointment in expectation or breach of promise or covenant relating to the future cannot constitute an "estoppel in pais." *Illinois Life Ins. Co. v. Tully*, 174 Fed. 355, 365, 98 C. C. A. 259 (quoting and adopting *Jackson v. Allen*, 120 Mass. 64, 79).

"An 'estoppel in pais' is defined as a right arising from acts, admissions, or conduct, which have induced a change of possession in accordance with the real or apparent intention of the party against whom they are alleged." *Wither v. Kansas City Sub. Belt R. Co. (Mo.)* 126 S. W. 432, 439 (citing *Gray v. Gray*, 83 Mo. 106).

The principle of "estoppel in pais" is "that one person cannot assume a position in his business relations with another, in respect to a transaction of a pecuniary nature upon which such other, acting reasonably, has a right to rely, and, after such other has so acted, change his position to that other's prejudice, and obtain judicial aid to enable him to effectuate his fraudulent purpose." *Welch v. Fire Ass'n of Philadelphia*, 98 N. W. 227, 229, 120 Wis. 456.

An "estoppel" is a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, or which he has by an act in pais induced another to believe and act upon to his prejudice. *Robinson v. City of Vicksburg*, 54 South. 858, 859, 99 Miss. 439.

To constitute "estoppel," the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he specifically proposes to make. The other party, too, must have acted upon the strength of such admission or conduct. *Madson v. Spokane Valley Land & Water Co.*, 82 Pac. 718, 719, 40 Wash. 414, 6 L. R. A. (N. S.) 257 (citing *New York Rubber Co. v. Rothery*, 14 N. E. 269, 107 N. Y. 310, 1 Am. St. Rep. 822; *Rigney v. Tacoma Light & Water Co.*, 38 Pac. 147, 9 Wash. 576, 26 L. R. A. 425).

"Lord Coke says: 'An "estoppel" is where a man is concluded by his own act or acceptance to say the truth.' The principle is that the acts and admissions of a party operate against him in the nature of an 'estoppel,' where in good conscience and honest dealing he ought not to be permitted to gainsay them. This is called an estoppel in pais. As a general rule a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence, and when such denial will operate to the injury of the latter." *Welland Canal Co. v. Hathaway (N. Y.)* 8 Wend. 480, 483, 24 Am. Dec. 51; *Dezell v. Odell (N. Y.)* 3 Hill, 215, 38 Am. Dec. 628; *Ray v. McMurtry*, 20 Ind. 307, 83 Am. Dec. 322, \* \* \* *Memphis Consol. Gas & Electric Co. v. Simpson*, 103 S. W. 788, 790, 118 Tenn. 532 (quoting and adopting the definition in *Ridgway v. Morrison*, 28 Ind. 201); *Rogers v. Portland & B. St. Ry.*, 60 Atl. 713, 714, 100 Me. 86, 70 L. R. A. 574.

The doctrine of "equitable estoppel" or "estoppel in pais" is that a party may be precluded by his acts or conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it. *Draper v. Oswego County Fire Relief Ass'n*, 82 N. E. 755, 756, 190 N. Y. 12.

The essential elements which must unite to create an equitable estoppel by conduct are that a party in good faith relied upon the representations or conduct of the other party, and thereby was led into such a course of conduct that he will be substantially prejudiced if the other be permitted to repudiate his former action or representation. *O'Donnell v. McCann*, 75 Atl. 999, 1005, 77 N. J. Eq. 188.

To constitute estoppel in pais, the party against whom it is sought to be enforced must have made some representation, the effect of which would be to influence the conduct of the one seeking to enforce the estoppel and inducing him to so change his position as to materially injure him, if the party making the representation is allowed to deny its truth. *Pope v. Ferguson*, 83 Atl. 353, 354, 82 N. J. Law, 566.

An "estoppel" "may consist of a waiver by which the plaintiff has foregone or abandoned a previously subsisting and valid cause of action." *Webber v. Ingersoll*, 104 N. W. 600, 601, 74 Neb. 393.

An estoppel involves the idea that a person has failed to speak when it was his duty to speak, so that he will not be allowed to speak when he desires so to do. *Dudley v. Strain (Tex.)* 130 S. W. 778, 784.

The doctrine of "equitable estoppel" is based upon the theory that the party to be estopped has made some misrepresentation which has misled the other party, and which it would be inequitable to permit him to deny.

Falls City Lumber Co. v. Watkins, 99 Pac. 884, 886, 53 Or. 212.

The doctrine of estoppel in pais has no application where everything is equally known to both parties or the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was influenced by the acts pleaded as an estoppel. *Miller v. Ahrens*, 163 Fed. 870, 877 (quoting 3 Words and Phrases, p. 2500).

The doctrine of "estoppel in pais" is an equitable doctrine originally applied to prevent an advantage to be taken of strict legal rights, and the equities of the particular facts must control in applying it. *Hilton v. Sloan*, 108 Pac. 689, 694, 37 Utah, 359.

An "estoppel in pais" is not applicable to infants. *Kirkham v. Wheeler-Osgood Co.*, 81 Pac. 869, 871, 39 Wash. 415, 4 Ann. Cas. 532.

Where one of two parties must lose, the loss should fall upon the one whose action or conduct has induced or made possible such loss. *Pennypacker v. Latimer*, 81 Pac. 55, 57, 10 Idaho, 625.

Where a party has once recognized the existence and validity of a contract, he cannot subsequently set up a technicality and seek to avoid its binding effect. *Eau Claire Canning Co. v. Western Brokerage Co.*, 115 Ill. App. 71, 79.

The doctrine of equitable estoppel should not be implied, unless in any given case all the elements exist essential to create such estoppel. *Rogers v. Portland & B. St. Ry.*, 60 Atl. 713-715, 100 Me. 86, 70 L. R. A. 574.

"Whether certain acts, misrepresentations, or silence on the part of a person will raise an 'equitable estoppel' against him from claiming title to real property depends largely upon the circumstances in each individual case, and such a plea is addressed to the conscience of the trial court, whether in equity and good conscience he should be allowed under the circumstances to set up and establish such a claim. True, such an estoppel may be raised in courts of law, but the principle is one of equity." *Dye v. Crary*, 85 Pac. 1038, 1040, 13 N. M. 439, 9 L. R. A. (N. S.) 1136.

Equitable estoppel, so far as it relates to the trial of title to land, is a doctrine by which a party is prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience. *Coram v. Palmer*, 58 South. 721, 722, 63 Fla. 116.

"The authorities establish the doctrine that the owners of land may by an act in pais preclude himself from asserting his legal title, but it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity it is

opposed to the letter of statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character. To authorize the finding of an estoppel in pais against the legal owner of the land there must be shown, we think, either actual fraud or fault or negligence equivalent to fraud on his part in concealing his title, or that he was silent when the circumstances would impel an honest man to speak." No definition of an "equitable estoppel" can well be formulated that will include all cases that should properly come within its purview. *Clark v. Hindman*, 79 Pac. 56, 60, 46 Or. 67.

As a general rule, if a man knowingly suffers another to purchase and expend money on land under an erroneous opinion of title, though he does it passively by looking on, without making known his claim, he shall not afterwards be permitted to exercise his legal right against that person. This rule is especially applicable where the owner has encouraged the parties to deal with each other in such sale and purchase. "To constitute an 'estoppel' by misrepresentation or concealment of facts, certain prerequisite facts must be proved. As fraud is not presumed, but when charged must be strictly proved, the authorities uniformly hold that the evidence to establish the essential elements of an estoppel by conduct or misrepresentation must be clear, precise, and unequivocal. And it has been held that this rule should be strictly applied where the estoppel is invoked against a claim to real estate. The doctrine is opposed to the letter of the statute of frauds and would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light and doubtful character. It is held that the facts necessary to work an estoppel must appear affirmatively." *Pollock v. Pegues*, 51 S. E. 514, 521, 72 S. C. 47 (citing 2 Pom. Eq. Jur. § 803).

#### As available in law

"Estoppels by matter in pais, as distinguished from estoppels by record or deed, are sometimes called 'equitable estoppels,' because they originated in courts of equity. But it is not meant by this that they are not available in courts of law, or are cognizable only in courts of equity. Such estoppels were early recognized in courts of law, and came to be so readily and freely sustained as matter of defense at law that it is neither necessary nor permissible to resort to equity for the mere purpose of obtaining the benefit of such an estoppel, when there is not otherwise a ground of equitable jurisdiction." *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 733, 68 C. C. A. 89 (citing *Barnard v. German-American Seminary*, 13 N. W. 811, 49 Mich. 444; *Vermont Copper Mining Co. v. Ormsby*, 47 Vt. 709, 713; *Martin v. Maine Cent. Ry. Co.*, 21 Atl. 740, 83 Me. 100; *Drexel v. Berney*, 7 Sup. Ct. 1200, 122 U. S. 241, 253, 30 L. Ed.

1219; *Dickerson v. Colgrove*, 100 U. S. 578, 584, 25 L. Ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 76, 78, 26 L. Ed. 79; *Wehrman v. Conkin*, 15 Sup. Ct. 129, 155 U. S. 314, 327, 39 L. Ed. 167; *Bigelow, Estop.* [4th Ed.] pp. 543, 544; 2 *Herm. Estop.* §§ 1297, 1298).

"Estoppels in pais are called equitable estoppels, not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just." The defense of equitable estoppel is as available at law as in equity. *Hoge v. Fidelity Loan & Trust Co.*, 48 S. E. 494, 495, 103 Va. 1 (quoting *Barnard v. German American Seminary*, 13 N. W. 811, 49 Mich. 444); *Ming v. Olster*, 92 S. W. 898, 900, 195 Mo. 460 (quoting and adopting definition in 16 Cyc. p. 682).

An "estoppel in pais" establishes rights and determines remedies, and it is of equitable origin though applicable in courts of law, and its office is to show what equity and good conscience requires under the particular circumstances of a case, irrespective of what might be the legal rights of the parties. *Holmes v. Brooks*, 80 Atl. 773, 774, 84 Conn. 512.

"Estoppel in pais," like waiver, is recognized at law as well as in equity. "Estoppel in pais" and waiver are in insurance law employed as synonymous terms and used indiscriminately. *German American Ins. Co. v. Hyman*, 94 Pac. 27, 32, 42 Colo. 156, 16 L. R. A. (N. S.) 77.

"'Estoppels in pais' are called 'equitable estoppels' because they arise upon facts which render their application, in the protection of rights, equitable and just, and they are just as readily and freely recognized in courts of law as in courts of equity." *Murphy v. Dafoe*, 99 N. W. 86, 89, 18 S. D. 42 (quoting headnote in *Barnard v. Ger. Am. Sem.* 13 N. W. 811, 49 Mich. 444).

"Estoppels in pais" originated in equity. They stand on principles of refined ethics and were always ahead of equity jurisdiction. The doctrine was merely borrowed by courts of law as a convenience. That the law has been enriched and enlarged by such borrowing principle ought not to oust courts of equity from enforcing the ancient principles of equity, for the jurisdiction of equity often runs concurrently with that of law. In proceedings to recover land, matter constituting an estoppel in pais may be relied on by defendants as an equitable counterclaim on which to base a prayer for affirmative relief, though it is also a sufficient defense at law to a suit in ejectment. *Hubbard v. Slavens*, 117 S. W. 1104, 1110, 218 Mo. 598.

"Estoppel in pais," a creation of equity, has come to be applied at law as well as those matters of estoppel by deed or record.

*Wright v. Williams* (Ky.) 77 S. W. 1128, 1129.

#### Intent

The essential and necessary elements of an "estoppel" are that it must have been made with the intention that the other party should act on it, and the other party must have been induced to act on it. *Beaman v. Stewart*, 74 Pac. 342, 344, 19 Colo. App. 222 (citing *Patterson v. Hitchcock*, 3 Colo. 533, 536).

"Estoppel" precludes a person from denying what he has said of the implication from his silence or conduct upon which another has acted. There must be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud, and, in respect to the title of real property, the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. *Crary v. Dye*, 28 Sup. Ct. 360, 362, 208 U. S. 515, 52 L. Ed. 595.

Conduct creating an estoppel may be without an intention to deceive or mislead, if such as to induce a reasonable man to act on it. *Globe Nav. Co. v. Maryland Casualty Co.*, 81 Pac. 826, 829, 39 Wash. 299.

In the absence of expressly proved fraud, "estoppel" cannot be based on acts or conduct of the party sought to be estopped, where such conduct is as consistent with honest purpose or with an absence of negligence as with their opposites. *Standard Sanitary Mfg. Co. v. Arrott*, 135 Fed. 750, 757, 68 C. C. A. 388 (affirming *Arrott v. Standard Sanitary Mfg. Co.*, 131 Fed. 457).

If a person by his words or conduct expressly or impliedly represents to another that a certain state of facts exists, and thereby induces the other to act in reliance on said representation, he will be "estopped" to deny the nature of the truth of the representation to the other's prejudice, and by the application of this doctrine an agency may be created of rights by estoppel, irrespective of the actual intention, and even though it may be conceded that there was no agency in fact. If a person knowingly permits another to act for him in a particular transaction, or otherwise clothes him, either intentionally or by negligence, with an apparent authority to act for him therein, he will be estopped to deny the agency as against third persons, who in good faith, and in the exercise of reasonable prudence, deal with the apparent agent, in the belief that his apparent authority is real. *President, etc., of City Bank of New Haven v. Thorp*, 64 Atl. 205, 209, 79 Conn. 194.

It is unnecessary to create an estoppel that the conduct of the parties should be

characterized by intent to deceive. *Rogers v. Portland & B. St. Ry.*, 60 Atl. 713-715, 100 Me. 86, 70 L. R. A. 574.

#### Knowledge by party claiming benefit

To the application of the principle of "equitable estoppel," it is essential that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the state of facts, but also destitute of any available means of acquiring such knowledge, and a party setting up an estoppel must have acted in reliance on the conduct or representations of the party sought to be estopped, and one who was cognizant of the facts of a claim to the premises is charged with knowledge of the equities arising out of such facts. *Gallagher v. Northrup*, 74 N. E. 711, 712, 215 Ill. 563 (citing 16 Cyc. p. 738).

The truth concerning facts relied in to create an "estoppel" must be unknown to the party claiming the benefit of the estoppel at the time of the conduct creating the estoppel. *Holt v. Holt*, 102 Pac. 187, 195, 23 Okl. 639; *Pond v. Pond's Estate*, 65 Atl. 97, 98, 79 Vt. 352, 8 L. R. A. (N. S.) 212.

To constitute estoppel, there must be want of knowledge of the matter in issue on the part of the party relying on the estoppel. *Indianapolis Traction & Terminal Co. v. Henby* (Ind.) 97 N. E. 313, 317; *Campbell v. Golden Cycle Min. Co.*, 141 Fed. 610, 616, 73 C. C. A. 260.

To create an estoppel the conduct, representations or silence of the person claimed to be estopped must be made in the presence of a person having no knowledge of the true state of the facts, and who did not have the same means of ascertaining the truth, as did the other party. *Rogers v. Portland & B. St. Ry.*, 60 Atl. 713-716, 100 Me. 86, 70 L. R. A. 574.

#### Knowledge by party to be estopped

The facts relied on to create an "estoppel" must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. *Holt v. Holt*, 102 Pac. 187, 195, 23 Okl. 639.

To constitute equitable estoppel, the false representation or concealment must have been made or done knowingly by the party estopped, and his conduct relied upon and acted upon by the one claiming an estoppel to his injury. *Freeland v. Williamson*, 119 S. W. 560, 564, 220 Mo. 217.

An indispensable element of an "equitable estoppel" is knowledge and misrepresentation of facts by the parties to be estopped. *Campbell v. Golden Cycle Min. Co.*, 141 Fed. 610, 616, 73 C. C. A. 260.

One of the essential elements of an "estoppel in pais" is knowledge of the facts on

which the estoppel is sought to be predicated. An estoppel in pais is never presumed, but must be proved. *Crosthwaite v. Lebus*, 41 South. 853, 854, 146 Ala. 525.

"The ground upon which an estoppel proceeds is fraud, actual or constructive, on the part of the person sought to be estopped." "Estoppel" by acquiescence in silence is founded on knowledge and assent; and, unless the party against whom the estoppel invoked knew all the material facts, there is no estoppel. *Tennent v. Union Cent. Life Ins. Co.*, 112 S. W. 754, 761, 133 Mo. App. 345 (citing and adopting 2 Herm. Estop. § 944; *Jones, Pledges* [2d Ed.] §§ 647b-743; *Hayward v. Elliot Nat. Bank*, 96 U. S. 611, 24 L. Ed. 885; *Hill v. Finigan*, 19 Pac. 494, 77 Cal. 267, 11 Am. St. Rep. 279; *Downer v. Whittier*, 11 N. E. 585, 144 Mass. 448; *Earle v. Grant*, 14 R. I. 228).

#### Legal estoppel distinguished

While at common law estoppel was founded on deeds and records of courts, equitable estoppel arises out of the facts and circumstances. *Carruthers v. Whitney*, 105 Pac. 831, 833, 56 Wash. 327, 134 Am. St. Rep. 1114.

"Estoppels" by matter in pais, as distinguished from estoppels by record or deed, are sometimes called "equitable estoppels" because they originated in courts of equity, but they are also fully cognizable in courts of law. *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 733, 68 C. C. A. 89.

There is a distinction between estoppel by deed or record, commonly known as "technical estoppel," and estoppel in pais, or "equitable estoppel," arising from act or conduct. The latter estoppel may be given in evidence under a plea of the general issue. *Dickson v. New York Biscuit Co.*, 71 N. E. 1058, 1068, 211 Ill. 468 (citing *German Fire Ins. Co. of Peoria v. Grunert*, 1 N. E. 113, 112 Ill. 68; *Mann v. Oberne*, 15 Ill. App. 35; *Welland Canal Co. v. Hathaway* [N. Y.] 8 Wend. 483, 24 Am. Dec. 51).

#### Prejudice to party claiming benefit

One to invoke the doctrine of estoppel in pais must show that he was misled to his prejudice by the conduct of which he complains. *Yellowstone County v. First Trust & Savings Bank of Billings*, 128 Pac. 596, 599, 46 Mont. 439.

"'Equitable estoppel' is defined as a right arising from acts, admissions, or conduct which have induced a change of position in accordance with a real or apparent intention of the party against whom they are alleged. *Dye v. Crary*, 85 Pac. 1038, 1040, 13 N. M. 439, 9 L. R. A. (N. S.) 1136 (quoting and adopting definition in *Bigelow, Estop.* [4th Ed.] 445).

Estoppel is a rule of law which prevents a party from asserting his right when he

has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. His conduct need not be such as to deceive or mislead, but his acts, declarations, or silence must be of such a character as to have the natural effect of influencing the person to whom they are addressed to do or not to do, to his detriment, what he would not have otherwise done. *Holt v. New England Telephone & Telegraph Co.*, 85 Atl. 159, 160, 110 Me. 10.

To create an "estoppel by conduct," the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied, except for such conduct. *North British & Mercantile Ins. Co. v. Robinett & Green*, 72 S. E. 668, 672, 112 Va. 754.

To constitute an estoppel in pais, the party claiming such estoppel should have proceeded upon the admission, or declaration, or statement, or whatever it may be to his prejudice. *Acklin v. Parker*, 29 Ohio Cir. Ct. R. 625, 626.

"Estoppel en pais" arises only where the other party has been led to change his position. *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 41 South. 332, 347, 117 La. 1; *Campbell v. Golden Cycle Min. Co.*, 141 Fed. 610, 616, 73 C. C. A. 260; *Powers v. Wells*, 91 N. E. 717, 720, 244 Ill. 558; *Cartun v. Myers*, 82 Atl. 14, 78 N. J. Eq. 303; *Dent v. Smith*, 92 Pac. 307, 308, 76 Kan. 381.

An "estoppel in pais," on the ground of fraud, is personal to the particular creditor defrauded, and does not pass the property so as to inure to the benefit of creditors generally. "To constitute such an estoppel, a party must have designedly made an admission inconsistent with the defense or claim which he proposes to set up and another party have, with his knowledge and consent, so acted on that admission that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel." *Ellison v. Ganiard*, 79 N. E. 450, 457, 167 Ind. 471 (quoting and adopting definition in *Audenried v. Betteley*, 5 Allen [87 Mass.] 382, 81 Am. Dec. 755); *Marion Trust Co. v. Bennett*, 82 N. E. 782, 786, 169 Ind. 346, 124 Am. St. Rep. 228 (quoting and adopting the definition in *Audenried v. Betteley*, 5 Allen [87 Mass.] 382, 81 Am. Dec. 755).

Under Civ. Code 1895, § 5150, an essential element of every "estoppel in pais" is that the person invoking the estoppel has acted thereon to his injury and hurt, and one invoking the conduct of another as an estoppel in pais must show that he has acted thereon to his detriment, or has been hurt thereby, before he can successfully urge such conduct as an estoppel in pais. *Hancock v. King*, 66 S. E. 949, 950, 133 Ga. 734.

There can be no "estoppel" unless some one has been caused to act to his injury or hurt by the conduct of the party sought to be estopped. It must be based upon fraud, actual or constructive. *Franklin v. Texas Savings, etc., Inv. Ass'n (Tex.)* 119 S. W. 1166, 1168.

"To constitute an 'estoppel' it is not sufficient to show that the language, acts, or conduct of one might have misled a party to his prejudice; but it must affirmatively appear that such party was in fact misled or induced by such acts, conduct, or language to do something that he would not otherwise have done except for such acts, language, or conduct." *McQueen v. Bank of Edgemont*, 107 N. W. 208, 209, 20 S. D. 378 (quoting and adopting definition in *Sutton v. Consolidated Apex Min. Co.*, 89 N. W. 1020, 15 S. D. 410).

The essence of "estoppel in pais," arising from misrepresentation or concealment of material facts, is that the party relying on the estoppel was misled to his prejudice, by reason of the silence of the other party, when in equity and good conscience he ought to have spoken, or by reason of the affirmative acts or conduct of such other party. *Kennedy v. Grand Fraternity*, 92 Pac. 971, 976, 36 Mont. 325, 25 L. R. A. (N. S.) 78.

"In order to create an 'estoppel in pais,' the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect." *Schwab v. Edge*, 64 Atl. 80, 81, 214 Pa. 602 (quoting and adopting definition in 16 Cyc. p. 744).

The substance of estoppel is the inducement of another to act to his prejudice. *Steffens v. Nelson*, 102 N. W. 871, 873, 94 Minn. 365.

Where one by his conduct induces another to act on the supposition that certain conditions exist, he will not be heard to deny their existence, where the other would be prejudiced by such denial. *Anthes v. Schroeder*, 103 N. W. 1072, 1073, 74 Neb. 172.

In order that a person may have a standing in equity to claim rights against another on the ground of estoppel, he must show that he changed his position reasonably relying on the conduct of such person so that if the latter were allowed to change his attitude he would thereby be prejudiced. *McDougald v. New Richmond Roller Mills Co.*, 103 N. W. 244, 247, 125 Wis. 121.

#### **Ratification distinguished**

The distinction between "ratification" and "estoppel in pais" is that in the former case the party is bound because of his intention, assent, or ratification in fact, while in the latter he is bound, notwithstanding there was no such intention, because, unless the law treated him as legally bound, the other

party would be prejudiced and defrauded by his conduct. *Stiebel v. Haigney*, 119 N. Y. Supp. 455, 458, 134 App. Div. 516.

The substance of "estoppel" is the inducement to another to act to his prejudice, and is distinguished from ratification in that the latter is confirmation after conduct. *Steffens v. Nelson*, 102 N. W. 871, 873, 94 Minn. 365 (quoting *Bigelow*, *Estoppel* [5th Ed.] pp. 456, 457).

#### Reliance on acts or representations

In order for one to be estopped by his conduct, the other party must have relied thereon. *Scottish-American Mortgage Co. v. Bunckley*, 41 South. 502, 503, 88 Miss. 641, 117 Am. St. Rep. 763 (citing *Pom. Eq. Jur.* § 805; *Houston v. Witherspoon*, 8 South. 515, 68 Miss. 188, 190; *Hignite v. Hignite*, 4 South. 345, 65 Miss. 417; 7 Am. St. Rep. 673; 7 *Ballard*, *Real Prop.* p. 40); *Reisman v. Silver*, 95 N. Y. Supp. 483, 484, 48 Misc. Rep. 399; *Maryland Telephone & Telegraph Co. v. Ruth*, 68 Atl. 358, 361, 106 Md. 644, 14 L. R. A. (N. S.) 427, 124 Am. St. Rep. 506, 14 Ann. Cas. 576; *Cartun v. Myers*, 82 Atl. 14, 19, 78 N. J. Eq. 303; *Dent v. Smith*, 92 Pac. 307, 308, 76 Kan. 381.

"There can be no 'estoppel' unless the party alleging it relied upon the representation, whether in words, acts, or silence, of the party to be estopped, was induced to act by it, and, thus relying and induced, did take some action." *Royce v. Carpenter*, 66 Atl. 888, 892, 80 Vt. 37.

One cannot be held to have reasonably relied on assurance by another of authority from a minor to bind him as regards a sale of his real estate, or rely on a mere verbal assurance of such authority as to one not a minor, where opportunity to know the truth of the matter is open, and there is no reasonable ground for not dealing with the owner himself. *McDougald v. New Richmond Roller Mills Co.*, 103 N. W. 244, 247, 125 Wis. 121.

The doctrine of "equitable estoppel" or "estoppel in pais" is that a party may be precluded by his acts or conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it. *Draper v. Oswego County Fire Relief Ass'n*, 82 N. E. 755, 756, 190 N. Y. 12.

To constitute an "equitable estoppel," there must have been not only a false representation or concealment of the facts, but they must have been made knowingly by the one to be estopped, and believed and acted upon by the one claiming the estoppel. *Freeland v. Williamson*, 119 S. W. 560, 564, 220 Mo. 217 (citing *Blodgett v. Perry*, 10 S. W. 891, 97 Mo. 272, 10 Am. St. Rep. 307; *Scrutchfield v. Sauter*, 24 S. W. 137, 119 Mo. 623).

#### Representations

The term "equitable estoppel in pais" signifies an estoppel by misrepresentation.

*Simmons' Adm'r v. Simmons*, 150 S. W. 59, 61, 150 Ky. 85.

The elements essential to "equitable estoppel," or estoppel by misrepresentation, are: A misrepresentation of a material fact respecting subject-matter in which the parties have an interest or are dealing; the existence of a legal duty by the party sought to be estopped to the person asserting the estoppel, whether under the law of negligence or of deceit; and a violation of the duty in such a manner that the estoppel assertor could maintain an action for damages. *Conway Nat. Bank v. Pease*, 82 Atl. 1068, 1070, 76 N. H. 319.

"Estoppel" cannot be predicated upon mere promises, expressions of intention, expectation, hope, or belief. "The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right and is made to influence others, and by which they have been induced to act." *Illinois Life Ins. Co. v. Tully*, 174 Fed. 355, 365, 98 C. C. A. 259 (quoting and adopting *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 547, 24 L. Ed. 674).

"The principle of 'equitable estoppel' or 'estoppel in pais' is that where one party has, by his representations, induced the other party to a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage. \* \* \* Insurance contracts are within this principle, and equity will interpose, not only in cases of fraud, but also of mistakes, where a policy is drawn up in form different from the application, or anything is omitted which it is the duty of the company to insert or indorse on the instrument. \* \* \* The doctrine of equitable estoppel has, especially in insurance cases, been extended and applied at law, as well as in equity, by adjudication of the courts of last resort in many other states, and the current and weight of judicial precedent and authority in this country have established the proposition that, in such cases, the estoppel is equally available in either tribunal." *Continental Ins. Co. v. Reynolds*, 68 Atl. 277, 279, 107 Md. 96 (citing *National Fire Ins. Co. of Baltimore v. Crane*, 16 Md. 260, 77 Am. Dec. 289; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. [13 Wall.] 222, 20 L. Ed. 617).

Estoppel by misrepresentation, or equitable estoppel, is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct



and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of control or remedy. *Vallancey v. Hunt*, 129 N. W. 455, 459, 20 N. D. 579, 34 L. R. A. (N. S.) 473.

The doctrine of "equitable estoppel" is based on the ground of promoting the equity and justice of the individual case, and it is not to be carried further than the end for which the estoppel is created. A person who intentionally or by culpable negligence induces another to act on his representations is estopped from denying the truth, and, under the circumstances creating the estoppel, representations made by words, acts, or silence, when duty requires the party to speak, are conclusively presumed to be true as against him and in favor of the person whom he misled. *Cleveland, C., C. & St. L. R. Co. v. Moore*, 82 N. E. 52, 61, 170 Ind. 328 (citing 2 *Herman*, *Estoppel and Res Judicata*, §§ 782, 749, 788).

The doctrine of "equitable estoppel" or estoppel in pais involves a question of legal ethics. It lies at the foundation of morals, and "applies whenever a party has made a representation by word or conduct which he cannot in equity and in conscience prove to be false." In most instances, whether the acts or admissions shall operate as an estoppel must depend upon the circumstances of the particular case. Where a mortgagee, who loaned money on the security of a mortgage of real property, the deed to which the mortgagor had forged, was, through her attorney, aware, the day before the loan was made, that the owner had not conveyed his land to the mortgagor, she and her attorney could not have relied on a previous statement of the owner that he had sold his land to the mortgagor, and the owner was not estopped by his statement from asserting his right to have the mortgage declared void as a cloud on his title. *Williams v. Ketcham*, 77 N. E. 285-288, 37 Ind. App. 506.

Conduct, declarations, or silence, relied on to create an equitable estoppel, must be made to or in the presence of a person known to have an interest in the subject-matter, and must be such as would influence the conduct of the person to whom it is addressed. *Rogers v. Portland & B. St. Ry.*, 60 Atl. 713-715, 100 Me. 86, 70 L. R. A. 574.

Where false representations are made by a vendor, the application of the doctrine of equitable estoppel may rest on the principle that one who by representing that a certain state of facts exists has misled another is precluded from denying the truth of such representations and from setting up a claim inconsistent with the facts as represented. *Westerman v. Corder*, 119 Pac. 868, 870, 86 Kan. 239, 39 L. R. A. (N. S.) 500, Ann. Cas. 1913C, 60.

"Estoppel by misrepresentation" generally involves some misrepresentation of a past or existing fact. Hence, generally representations de futuro do not form the basis of waiver or estoppel. It cannot be a basis for estoppel to assert conditions, in a fire policy against incumbering the property without consent written on the policy, that insured, when applying for the policy, told the agent he intended to put a small mortgage on the property, as he did after obtaining the policy, and that the agent told him this would make no difference; these matters not relating to a known or existing fact, but to something intended to be done in the future. *McCarty v. Piedmont Mut. Ins. Co.*, 62 S. E. 1, 2, 81 S. C. 152, 18 L. R. A. (N. S.) 729

#### Silence

"Silence" is a species of conduct, and constitutes an implied representation of the existence of facts in question, and the estoppel therefrom is accordingly a species of estoppel by misrepresentation. When silence is of such character and under such circumstances that it would become a fraud on the other party to permit the silent party to deny what his silence has induced the other to believe and act upon, it will operate as an estoppel. *Carmine v. Bowen*, 64 Atl. 932, 934, 104 Md. 198, 9 Ann. Cas. 1135.

To accomplish an "estoppel" by silence or acquiescence it must appear: First, that the party against whom the "estoppel" is invoked has stood by and seen the other party committing an act infringing upon his rights; and, second, that his failure to speak has induced the person committing the act to believe that he assents to its being committed. *Crisman v. Lanterman*, 87 Pac. 89, 92, 149 Cal. 647, 117 Am. St. Rep. 167 (citing *Carpy v. Dowdell*, 47 Pac. 695, 115 Cal. 677).

Willfully permitting another to deal with property with the intention in the mind of the true owner to actually deceive and mislead is not an essential element of "estoppel." If one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. An instruction on such estoppel was not erroneous for omitting the words "intent or design." *Lydick v. Gill*, 94 N. W. 109, 112, 68 Neb. 273.

For the silence of a party to constitute an estoppel against him, the party in whose favor it is invoked must have been misled into doing that which he would not have done otherwise. *Bragdon v. McShea*, 107 Pac. 916, 919, 26 Okl. 35.

There is a species of estoppel known as "estoppel by silence," which arises in a case where a person who, by force of circumstances, is under a duty to another to speak refrains from so doing, and thereby leads the

other to believe in the existence of a state of facts, in reliance upon which he acts to his prejudice. Such silence constitutes acquiescence, and acquiescence of a principal in the unauthorized acts of his agent implies ratification. Technically, perhaps, there is this distinction between ratification by silence and estoppel arising therefrom. Ratification acts by conferring the necessary power on the agent, while estoppel acts by preventing the denial of the fact that the agent was originally clothed with the necessary power; but, by whatever name it may be called, its effect is the same. Where a physician employed by the local agent of a railroad company to treat an injured employé reported to the general superintendent that he had been so employed, it was a question for the jury whether the railroad was estopped to deny ratification. *Hall v. New York, N. H. & H. R. Co.*, 65 Atl. 278, 280, 27 R. I. 525.

An "equitable estoppel," bottomed on silence, arises where there is not only a duty to speak; but where silence amounts to a legal fraud in that it thereby misleads the other party ignorant of the truth, and so where both parties know the truth, there can be no estoppel by silence. *Wingert v. Snouffer & Ford*, 108 N. W. 1035, 1040, 134 Iowa, 97.

An "estoppel" does not require the element of designed fraud. It may arise from silence as well as words, where there is a duty to speak, and the party on whom the duty rests has an opportunity to speak and, knowing the circumstances requiring him to speak, keeps silent. Where a son, who was engaged in the mercantile pursuit, was indebted to his father, that the father remained silent at an interview between the son and one of the son's creditors, in which the creditor declared that he would extend further credit to the son if he would make a disclosure of his financial standing by producing his books, did not estop the father to assert his claim after the death of the son, in the absence of a showing that the son's books did not disclose an indebtedness due the father. *In re Saunders*, 113 N. Y. Supp. 251, 253, 129 App. Div. 406 (citing *Thompson v. Simpson*, 28 N. E. 632, 128 N. Y. 289).

When one party to a cause, by his silence when it was his duty to speak, has naturally induced conduct on the part of his adversary, he is estopped to take advantage of any act or omission so induced to the latter's disadvantage. *Fair Haven & W. R. Co. v. City of New Haven*, 60 Atl. 651, 654, 77 Conn. 667; *Rogers v. Portland & B. St. Ry.*, 60 Atl. 713-716, 100 Me. 86, 70 L. R. A. 574.

#### Waiver distinguished

The defenses of laches, waiver, and estoppel are in a certain sense akin to each other, and run into each other; yet they are distinct defenses. "Laches," with some support-

ing circumstances, may run into waiver, and likewise into estoppel; but each has its own individuality. "Waiver" may run into "estoppel." *Berwind-White Coal Min. Co. v. Metropolitan S. S. Co.*, 173 Fed. 806, 809.

"Waiver" is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. \* \* \* 'Estoppel' is the shield of justice interposed for the protection of those who have not been wise or strong enough to protect themselves. It is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud." *Johnson v. Aetna Ins. Co.*, 51 S. E. 339, 341, 123 Ga. 404, 107 Am. St. Rep. 92 (quoting and adopting definition in *Ostrander, Fire Ins.* § 366).

Waiver and "estoppel," as applied to insurance law, are identical. *Hopkins v. Northwestern Nat. Life. Ins. Co.*, 83 Pac. 1019, 1021, 41 Wash. 592.

While the terms "waiver" and "estoppel," as applied to the law of insurance contracts, are usually considered as synonymous, yet there are some essential differences between them, as a waiver involves the act or conduct of one of the parties to the contract only, and is the intentional relinquishment of a known right, and does not necessarily imply that one has been misled to his prejudice, while an estoppel involves the act or conduct of both parties, and may arise where there is no intent to mislead, and also involves the misleading of one party to his prejudice. *Webster v. State Mut. Fire Ins. Co.*, 69 Atl. 319, 320, 81 Vt. 75.

That, in an action on an employer's liability policy, plaintiff alleged that defendant "waived" the right of objection that a claim was not covered by the policy, did not restrict it to a recovery in accordance with the doctrine of waiver, if the facts showed an estoppel; the terms "waiver" and "estoppel" being sometimes loosely used interchangeably, especially with reference to situations arising under insurance policies. *Humes Const. Co. v. Philadelphia Casualty Co.*, 79 Atl. 1, 3, 32 R. I. 246, Ann. Cas. 1912D, 906.

"Waiver" of a right or benefit may be established by the actions, declarations, acquiescence, or silence of a party, as well as by his expressed consent and approval. It may be said to occur wherever one in possession of a right conferred by law or contract, and knowing the attendant facts, does or forbears to do something inconsistent with the right, or of his intention to rely upon it, in which he is said to have waived it; and he is "estopped" from claiming anything by reason of it afterward. While it is not in the proper sense of the term a species of "estoppel," yet, where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive

certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled. In order to work an estoppel, it is not necessary that acts or declarations should be made to mislead, but it is sufficient if they were calculated to and did in fact mislead. *Marine Iron Works v. Wiess*, 148 Fed. 145, 153, 78 C. C. A. 279 (quoting and adopting statements in *Bish. Cont.* § 792; 16 Cyc. p. 805; *Swain v. Seamens*, 9 Wall. [76 U. S.] 274, 19 L. Ed. 554).

A "waiver" is a voluntary and intentional relinquishment of a known right, and may be shown by the express contract or other affirmative act of the party charged therewith, or it may be inferred from such conduct as warrants the conclusion that a waiver was intended. The term "waiver" generally implies an intention on the part of the person possessing some right under the contract or the law to relinquish it for the benefit of another. It is ordinarily personal, and, in the absence of some special agreement or consideration, its existence is to be determined solely from the conduct of the parties making it, independent of the acts of the other party affected. It is distinguished from "estoppel," in that this personal element is not an essential of estoppel. Nor in estoppel is the intention to relinquish a right necessarily present; estoppel in pais arising in a case where, by the fault of one person, another has been induced, ignorantly or innocently, to change his position for the worse, and it being essential to an estoppel that the representation or concealment relied on must be made with the intention that the other party shall act or rely on it, that the opposite party must have been induced to act, and must have acted to his injury thereon. *Johnson v. Spencer*, 96 N. E. 1041, 1042, 49 Ind. App. 166; *Same v. Roberts*, 96 N. E. 1043, 49 Ind. App. 697.

"This court has always recognized the distinction between waiver and 'estoppel,' and holds that a waiver need not be based either on a new agreement or an estoppel. In *re Millers' & Manufacturers' Ins. Co.*, 106 N. W. 485, 488, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144.

"'Waiver' and 'estoppel' are not synonymous terms. Waiver belongs in a sense to the family of estoppel, and yet estoppel in pais has connections that are no kin to waiver. Waiver is voluntary and intentional; estoppel in pais may arise from an involuntary and unintentional act. 'Estoppel' results from an act which operates to the injury of the other party, and there may be a waiver, although the opposite party is beneficially affected. Estoppel may arise even as between consistent remedies, but it depends rather upon what a party caused his adversary to do, while waiver depends upon what one himself intends to do. *Kennedy v. Man-*

*ry*, 66 S. E. 29, 31, 6 Ga. App. 816 (citing *French v. Seamans*, 48 N. Y. Supp. 9, 13, 21 Misc. Rep. 722, 726; *Peabody v. Maguire*, 12 Atl. 630, 79 Me. 572, 585; *Austin v. Welch*, 72 S. W. 881, 31 Tex. Civ. App. 526; *Dailey v. Kennedy*, 31 N. W. 125, 64 Mich. 208; *Cowenhoven v. Ball*, 23 N. E. 470, 118 N. Y. 234; *Robb v. Vos*, 15 Sup. Ct. 4, 155 U. S. 13, 39 L. Ed. 52).

While waivers and "estoppels" are theoretically very different things, and the distinction between them is one easy to preserve when express waivers are under consideration, it is nevertheless true that the dividing line between waivers implied from conduct and estoppels oftentimes become so shadowy that in the law of insurance the two terms have come to be quite commonly used interchangeably. When the term "waivers" is so used, however, the elements of an estoppel almost invariably appear, and it is quite apparent that it is employed to designate, not a pure waiver, but one which has come into existence of effectiveness through the application of the principles underlying estoppels. Where an insurer under a policy containing a provision that no representative of the company should have power to waive any power or condition thereof, sent a general agent to insured after a fire, who, after he was furnished by insured with certain information, told him that there were no further papers for him to make out, the company was estopped to deny waiver of proof of loss and the fact that plaintiff pleaded a waiver instead of an estoppel was of no consequence, since an estoppel in pais need not be pleaded. *Bernhard v. Rochester German Ins. Co.*, 65 Atl. 134, 136, 79 Conn. 388, 8 Ann. Cas. 298.

## ESTRAY

An "estray" is an animal, the owner of which cannot be found, or any animal which is away from its accustomed range (*Laws* 1903, p. 30, § 1). *State v. Cunningham*, 90 Pac. 755, 758, 35 Mont. 547.

The primary meaning of the word "travelling" is passing from place to place. Whether an animal which came out of a pasture and walked off a defective bridge on the highway was a "traveler" on the bridge, within the meaning of a statute, or an "estray" depends on whether the owner was guilty of contributory negligence. *Howrigan v. Town of Bakersfield*, 64 Atl. 1130, 1131, 79 Vt. 249, 9 Ann. Cas. 282.

## ESTREPEMENT

See Writ of Estrepeement.

## ESTUARY

An "estuary" is that part of the mouth or lower course of a river flowing into the sea which is subject to tides, and, specifical-

ly, an enlargement of a river channel towards its mouth, in which the movement of the tide is very prominent. *Vall v. McGuire*, 96 Pac. 1042, 1043, 50 Wash. 187.

## ET AL.

Impleaded synonymous, see Impleaded.

"Et al.," in everyday use in writs, pleadings, styles of cases, and entries in minutes and dockets, means "and another" or "and others," as the case may be. *Garrigan v. Huntimer*, 111 N. W. 563, 564, 21 S. D. 269 (citing *Anderson's Law Dict.*).

The words "et al." are in common and everyday use in style of cases and entries on the minutes and dockets of courts, and are known to mean "and another" or "and others," as the case may be. While the words are incapable of standing in the place of the names of parties required by law to be stated in a subpoena or writ of error, they may be used in indorsing the title of the cause on the copy of subpoena, when there is no statute or rule requiring the names of the parties to be indorsed thereon. *Sadler v. Smith*, 45 South. 718, 54 Fla. 671, 14 Ann. Cas. 570.

The lien for paving a sidewalk cannot be enforced in favor of a borough unless there has been a previous demand on the owner to do the paving and a refusal, and an allegation in the lien that the paving was done on the failure of K. "et al." to do the same, and after due and regular notice so to do, K. being a life tenant, did not show notice to the remaindermen, since it was indeterminate whether "et al." meant "and another," or "and others," or in either case to what other persons it referred. *Meanor v. Goldsmith*, 65 Atl. 1084, 1087, 216 Pa. 489, 10 L. R. A. (N. S.) 342.

Lands assessed to "A. et al." are in legal effect assessed to A. and other parties unknown. When the sheriff receives a notice of expiration of redemption from a tax sale, in which the lands appear to be assessed to "A. et al.," he is not required to investigate the records and ascertain the name of the true owner of the lands. If the lands are vacant and unoccupied, he may serve the notice upon such unknown owners by publication. He has no duties to perform other than those prescribed by the statute. *Berg v. Van Nest*, 106 N. W. 255, 256, 97 Minn. 187.

The use of the Latin abbreviation "et al." in the entry of an appeal will not include any one as a party except those who are expressly and fully named as parties in such entry; and where the appeal is from a decree in partition, all the parties to such decree must expressly and by name be made parties, otherwise the appeal will be dismissed for want of necessary parties. *Lowe v. Delaney*, 44 South. 710, 711, 54 Fla. 480.

## ET CETERA—ETC.

See "&c."

"Et cetera," abbreviated "etc.," means "and others," or "and other things." *Doty v. American Telephone & Telegraph Co.*, 130 S. W. 1053, 1055, 123 Tenn. 329, Ann. Cas. 1912C, 167.

The term "etc." is defined in the *Century Dictionary* as: "And others; and so forth; and so on; generally used when a number of individuals of a class have been specified to indicate that more of the same sort might have been mentioned, but for shortness are omitted." As used in an act of sale of property, describing the property sold by enumerating various articles and concluding with the term "etc.," the vendor does not intend that the description shall be regarded as complete and exhaustive and as exclusive of everything not expressly mentioned, but, on the contrary, that other articles exist, which for brevity are not mentioned. *Bagley v. Rose Hill Sugar Co.*, 35 South. 539, 548, 111 La. 249.

Where a decree of confirmation recites that the case came on to be heard on petition, proof of publication, deeds, etc., the abbreviation "etc.," which follows the word "deeds," tends to show that the case was heard, not only on the petition, proof of publication, and deeds, but that other papers besides the deeds were read in evidence. *Ingram v. Sherwood's Heirs*, 87 S. W. 435, 437, 75 Ark. 176.

In an action for the conversion of a piano by the seller thereof after it had been sold under a conditional sale, the court's instructions to the jury that, if they "should find that a copy of the lease was not furnished to the plaintiff, 'etc.," the rights of the defendants under the lease were suspended during such default" meant that, if the provisions of the statute relating to conditional sales had not been complied with, the defendants' rights were suspended. *Lee v. Gorham*, 42 N. E. 556, 557, 165 Mass. 130.

### As indefinite term

"Etc." denotes "et cetera." When used in a proposition under an assignment of error stating that it is error to admit parol evidence of the contents of a written instrument without proof of the loss, etc., of the original, it is too indefinite in its specification to permit consideration. *International Harvester Co. of America v. Campbell*, 96 S. W. 93, 96, 43 Tex. Civ. App. 421.

### As others of like character

The words "et cetera" mean "and others" or "and other things." In a statute authorizing incorporation "for the purpose of manufacturing electricity for telephoning purposes, etc.," the legislative intent was not "to confine the powers of telephone companies to the manufacture of electricity, but

to confer on such companies the power to do other things of like character incidental to the business. These words of this provision 'et cetera' must have been used for some purpose. It should not be construed as meaningless, and it is our duty to give it its natural significance, giving to the meaning the conclusion that the intention of the act was to give the telephone companies the right to do other things beside the right to manufacture electricity. It empowered them, not to only manufacture electricity for telephone purposes, but to do other things for telephoning purposes." *Doty v. American Telephone & Telegraph Co.*, 130 S. W. 1053, 1055, 123 Tenn. 329, Ann. Cas. 1912C, 167.

The term "et cetera," as used in a railroad rule providing that, when trackmen were making repairs in the nature of obstructions, such as laying new steel, making a heavy raise in the track, "etc.," a flagman should be sent in each direction and a torpedo placed on the rail, meant other repairs which should constitute obstructions similar in character to those specified and did not make the rule applicable to a hand car, being propelled by trackmen to their place of employment. *Louisville & N. R. Co. v. Sewell*, 134 S. W. 162, 164, 142 Ky. 171.

A set of scales and a quantity of rock salt is not covered by a pledge of "iron, junk, hides, etc.," the "etc." being held only to refer to property of the same general character as "iron, junk, and hides." *Morganstein v. Commercial Nat. Bank of Chatsworth*, 125 Ill. App. 397, 399.

A subscription to stock of a corporation to be formed for the purposes "of acquiring and carrying on a general produce and merchandising business, etc.," did not bind subscribers to take stock in a corporation formed, not only for such purposes, but also for dealing in real estate, bonds, mortgages, etc.; the abbreviation "etc.," which, as commonly understood, stands for "et cetera," meaning "and others" or "other things," not covering such other purposes under the rule of ejusdem generis, and, conceding that by the abbreviation it was intended that other and independent lines of business might be carried on by the corporation, there being no evidence as to what lines of business were intended to be so included. *Hanford Mercantile Store v. Sowlevere*, 104 Pac. 708, 709, 11 Cal. App. 261.

A contract for the construction of a sewerage system, stipulating that the city may pay for the work in legally issued bonds or in cash out of the general fund as it may elect, but that the city shall pay for any re-advertising, "etc.," that the bonds are legally issued, requires the contractor to accept legally issued bonds and not to merely accept such bonds as his attorney shall advise him are legally issued, and, where such at-

torney assumes that it is impossible to issue any valid bonds in any way, the contractor cannot refuse to perform because of the failure of the city to pay the cost of advertising, etc., required to satisfy the attorney of the legality of the bonds; the term "etc." meaning other things of like character. *Naylor v. McColloch*, 103 Pac. 68, 70, 54 Or. 305.

"The commonly accepted definition of 'etc.' is 'and so forth,'" and, where an instruction authorized consideration of the nature and character of an injury, the mental and physical pain, the value of time lost, depreciated ability to earn money, "etc.," in assessing the damages, it gave the jury authority to consider, in connection with the matters enumerated by the court, other matters of a like character, leaving them to determine for themselves whether such matters were of a like character, and the use of the abbreviation was calculated to mislead and confuse the jury. *Lodwick Lumber Co. v. Taylor*, 87 S. W. 358, 360, 39 Tex. Civ. App. 302.

## ET UXOR

A citation reciting that a person named "et uxor are plaintiffs" is not sufficient under the statute requiring the citation to give the names of the parties, and that, when a wife is a party plaintiff with her husband, her name must be stated, though the court may assume that the words "et uxor" mean "and wife." *Higgins v. Shepard*, 107 S. W. 79, 48 Tex. Civ. App. 365.

## ETHICS

"It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive." *Adler v. Fenton*, 24 How. 407, 410, 16 L. Ed. 696.

## EUNUCH

The primary and general definition of the word "eunuch" given in all the dictionaries is "a castrated male of the human species." It must be given its usual and ordinary sense, as understood in the place where used. A newspaper publication that a man is a eunuch is actionable per se. *Eckert v. Van Pelt*, 76 Pac. 909, 910, 69 Kan. 357, 66 L. R. A. 268.

## EUQUININE

"Euquinine" is, as its name implies, a preparation more or less directly from cinchona bark, for use in medicine. Its medicinal qualities are substantially the same as those of sulphate of quinia and other preparations from the same source. The physical qualities have been so modified that

the bitter taste, usually characteristic of quinine preparations, has been eliminated, and the disagreeable sensation in the ears, which often accompanies the administration of quinine, is also avoided. Though alcohol is used in its preparation, it was wrongly classified under paragraph 67, as medicinal preparations containing alcohol, or in the preparation of which alcohol is used, and should have been admitted under the free list (paragraph 647) as "salts of cinchona bark." *United States v. Merck & Co.*, 168 Fed. 244, 245, 94 C. C. A. 74.

## EUROPEAN PLAN

Hotel as restaurant, see Restaurant.

As applied to hotels, the term "European plan" means that under it the guests patronize the hotel table or not, as they please, and, when they do so, pay for what they order. *New Galt House Co. v. City of Louisville*, 111 S. W. 351, 129 Ky. 341, 17 L. R. A. (N. S.) 566.

This phrase, as applied to the conducting of a hotel, means that the keeper does not provide meals for the guests. *Steward v. Denechaud*, 45 South. 561, 564, 120 La. 720.

## EVANGELICAL

Under a will providing for the distribution of the residue of a fund created by a sale of certain of testator's real property and the rents and profits thereof among such Free Protestant and Evangelical Protestant Churches as his executors or a majority of them should in their discretion deem most deserving, it is to be doubted whether testator, by the expression "evangelical," intended any more definite designation than those churches which conform to the principles of the gospel of Christ, notwithstanding there is a religious body known as the Evangelical Church. *Stewart v. Woolley*, 106 N. Y. Supp. 99, 103, 121 App. Div. 531 (citing Cent. Dict.).

## EVANGELIST

The term "evangelist" is defined as "a bringer of the glad tidings of Christ and his doctrines." *Greer v. Synod, Southern Presbyterian Church in Kentucky*, 150 S. W. 16, 17, 150 Ky. 155.

## EVASION

The organization of a corporation under the laws of another state by citizens and residents of the state of Missouri is not an "evasion" of the laws of that state, within Laws 1903, p. 121, providing that licenses shall not be granted to foreign corporations, where they were organized by citizens of Missouri for the purpose of evading the Mis-

souri laws, where the corporation so formed does not propose to transact business contravening the laws of Missouri, or for which corporations could not be formed under the Missouri laws. *State ex rel. Brown Contracting & Building Co. v. Cook*, 80 S. W. 929, 930, 181 Mo. 596 (citing *Demarest v. Flack*, 28 N. E. 645, 128 N. Y. 205, 13 L. R. A. 854).

In the statute providing that no one shall sell or "give in consideration of the purchase of any property, or of any services, or in evasion of the statute" any intoxicating liquor, the language quoted must be construed to mean that such gift shall be illegal only when its purpose is to evade the law by subterfuge or by dealing intended to conceal unlawful sales. The giving of a drink from samples of liquor by the agent of a foreign dealer, for the purpose of showing the grade and quality of liquors which were to be sold in another state, is not an "evasion of the statute." *State v. Bernstein*, 105 N. W. 1015, 1016, 129 Iowa, 520.

## EVEN

Defendant's request to charge that, "Even should you find for the plaintiff, he can recover in this action only for actual damages," was properly refused, as "even" carried with it an intimation that the jury would not so find, and was an invasion of the province of the jury. *Manistee Mill Co. v. Hobdy*, 51 South. 871, 873, 165 Ala. 411, 138 Am. St. Rep. 73.

The purpose of the statutory provision that, in all cases of addition to or deduction from assessments by the board of equalization, the rate per cent. of addition or deduction shall be "even and not fractional" is to facilitate the labor of computing the decrease or increase, and hence an increase of 12½ per cent. is authorized. *Clark v. Lawrence County*, 111 N. W. 558, 21 S. D. 254.

In an action for the death of a person struck by a car, a requested charge that, even if the jury believed that the motorman saw plaintiff's intestate running towards the tracks, he could assume that intestate would stop and listen for the car before actually going on the track, and need not make any effort to stop the car until the circumstances indicated that intestate would not so stop and listen, was properly refused, as the word "even" carries an intimation against the supposition. *Birmingham Ry., Light & Power Co. v. Saxon* (Ala.) 59 South. 584, 593.

## EVENING SCHOOLS

The words "evening school," as used in Const. art. 9, § 6, providing that the public school system shall include primary and grammar schools and such high schools, evening schools, commercial schools and technical schools as may be established by the Legislature or by municipal or district authority,

were merely intended to obviate doubt as to the power to provide for schools holding evening sessions, so that the section did not prevent the conduct of an evening high school as a part of the public school system. *Board of Education of the City & County of San Francisco v. Hyatt*, 93 Pac. 117, 118, 152 Cal. 515.

## EVENT

See Contingent Event; Costs to Abide Event; In the Event.

Uncontrollable event, see Uncontrollable.

The word "event," as used in an order of the Appellate Term reversing the judgment of the lower court and granting a new trial with costs to abide the "event," means determination at the second trial that the successful party is by law entitled to costs. *Lennon v. Charig*, 105 N. Y. Supp. 1039, 1040, 54 Misc. Rep. 298 (citing *People ex rel. Shiels v. Greene*, 99 N. Y. Supp. 679, 114 App. Div. 169).

The phrase "event causing injury," in an accident policy against loss caused by bodily injury, provided notice thereof is given within 10 days of the "event causing injury," and binding the insurer to pay a specified amount in case of loss of life occurring within 90 days of the "event causing injury," etc., means the accident causing the injury, and the notice must be given within 10 days of the accident. *Hatch v. United States Casualty Co.*, 83 N. E. 398, 399, 197 Mass. 101, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290.

A bet by parties, not aware of the fact, involving the question whether a third person has a lease on designated real estate, refers to an event unknown to the betters, and constitutes "gambling" within Const. art. 1, § 9, forbidding pool selling, book making, or any other kind of gambling, and within Betting and Gaming Law, declaring that bets depending on any chance, "or unknown or contingent event," shall be unlawful, etc.; the word "unknown" referring to that which was unknown to the parties to a wager, the word "contingent" showing that the event referred to applies equally to existing or nonexisting events, the word "event" meaning that in which an action, operation, or series of operations terminates and having reference to something that has taken place, the words "unknown event" meaning a past circumstance unknown to the parties, and the words "contingent event" referring to one that hereafter may or may not occur. *Thomson v. Hayes*, 111 N. Y. Supp. 495, 497, 59 Misc. Rep. 425.

A suit was brought to foreclose a mortgage on a leasehold and both to have the proceeds of a sale applied to plaintiff's claim and also to charge defendant with a deficiency, on the theory that he was personally liable for the debt. In order to obviate a receivership because the security was inadequate, it was

stipulated that the rents and profits should be deposited to the joint credit of defendant and plaintiff's attorney to be applied to the payment of taxes, water rates, insurance premiums, and ground rent of the mortgaged premises, and that the balance, if any, remaining should be held to abide the "event of the action." Held, that since the inadequacy of the security and not the personal liability of defendant, the owner of the equity of redemption, was the ground on which the court would have been authorized to impound the rents, the "event of the action," in so far as such surplus rents were concerned, was a decision that plaintiff's mortgage was a valid lien against the property, and that it should be foreclosed, and, this issue having been determined in plaintiff's favor, he was entitled to such surplus for the satisfaction of the deficiency, though it was also determined that defendant was not personally liable therefor. *Rutherford Realty Co. v. Cook*, 90 N. E. 1112, 1113, 198 N. Y. 29.

## EVENTUAL COSTS

The obligation in a bond to pay the "eventual costs" in said case is equivalent to the statutory words, "such further costs as may accrue by reason of such appeal." *Smith v. Jackson*, 50 S. E. 930, 931, 122 Ga. 856.

## EVENTUAL ESTATE

A will created a trust for payment of annuities, all of the beneficiaries being now dead, excepting testator's widow, and directed expenditure of \$35,000 in erecting a statue, on the widow's death, and that any remaining funds be divided between specified charitable societies. Under Personal Property Laws, § 11, and Real Property Law, § 63, undisposed of profits arising under a valid limitation of an expectant estate belong to the persons presumptively entitled to the next eventual estate. Held, that the "next eventual estate" under the will is the bequest for the statue, and not the gifts to the charitable societies. *In re Harteau*, 97 N. E. 726, 728, 204 N. Y. 292.

Under Real Property Law, providing that when, in consequence of a valid limitation of an expected estate, there is a suspension of alienation or ownership during the continuance of which the rents and profits are undisposed of and there is no valid direction for their accumulation, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate, the one-third of the rents and profits of the trust estate accumulating from both realty and personalty after the death of nephew G., during the life of testator's daughter, and which would have belonged to G., would pass to his executor under his will, G. taking the "eventual estate," by which is meant the estate which is to take effect upon the happening of the event which terminates the accumulation,

and the fact that the remainder estate given to the nephew might be defeated by the marriage of testator's daughter leaving lawful issue would not affect the disposition of the accumulated income. *Young v. Barker*, 127 N. Y. Supp. 211, 215, 141 App. Div. 801.

## EVER

See Forever.

## EVERGREEN

"'Evergreen,' used as an adjective, means 'always green; verdant throughout the year' (Century Dictionary); or 'retaining greenness or verdure throughout the year; not deciduous' (Standard Dictionary). As a noun the word is defined as 'a plant that retains its verdure through all seasons, as the pine and other coniferous trees, the holly, laurel, holm oak, ivy, rhododendron, and many others' (Century Dictionary). In the provision for 'evergreen seedlings,' the word is doubtless used by way of contrast with 'deciduous,' as indicated in the provision for 'fruit and ornamental trees, deciduous and evergreen.' A deciduous plant is one which loses its leaves, etc., every year, especially in the autumn." In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1650), the provision for "evergreen seedlings" is not restricted to such evergreen plants as the conifers and box, but extends to those that retain their verdure or greenness throughout the year; and seedlings of rhododendrons and laurels, that remain green constantly, are included in said provision. *United States v. Ouwerkerk*, 153 Fed. 916, 917.

## EVERY

Any and every, see Any.

### As all

In a tax deed reciting the sale of several tracts, the use in the granting clause of the words, "and each and every separate tract and parcel thereof," in addition to the statutory form designating the property conveyed as "the real property last hereinbefore described," indicates a purpose to convey all the land sold. *Gibson v. Kueffer*, 77 Pac. 282, 283, 69 Kan. 534.

The word "every," as used in General Corporation Act, requiring the directors of every stock corporation to keep, at its principal office in the state, correct books of account and giving every stockholder in such corporation the right to examine the books of account, means each and all; the statute not being confined to corporations organized under the General Corporation Act. *Venner v. Chicago City Ry. Co.*, 92 N. E. 643, 648, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607.

The word "every" is a term of inclusion. The provision of the Ohio statute to the effect

that every indorser undertakes to pay if the instrument is dishonored, and he has due notice, embraces every party who, by the provisions of the statute, is classed as an indorser, unless his indorsement has been qualified by appropriate words. *Rockfield v. First Nat. Bank of Springfield*, 83 N. E. 392, 394, 77 Ohio St. 311, 14 L. R. A. (N. S.) 842.

### As each

The word "every" is not always synonymous with the word "each." *Griffin v. Interurban St. R. Co.*, 72 N. E. 1142, 180 N. Y. 538.

The word "every," as used in General Corporation Act, requiring the directors of every stock corporation to keep at its principal office in the state correct books of account, and giving every stockholder in such corporation the right to examine the books of account, means each and all; the statute not being confined to corporations organized under the general corporation law. *Venner v. Chicago City Ry. Co.*, 92 N. E. 643, 648, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607.

The phrase "every refusal," in Railroad Law, § 104, imposing a forfeiture for every refusal to comply with the requirements of the section providing for the giving of transfers to passengers for one continuous trip, permits the recovery of cumulative penalties, and is equivalent to each and every. *Topham v. Interurban St. Ry. Co.*, 89 N. Y. Supp. 298, 300, 96 App. Div. 323.

### Every action

The words "every action," as used in Rev. St. 1895, art 3358, providing that "every action" other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward, does not include nor mean the demand by the probate court of a guardian for a final accounting of his transactions about the estate of his ward during the ward's minority. Such special proceeding by the probate court is not an action within the meaning of the article included. All the limitation statutes employ the words "action" and "suit." As was said in *Webb v. Allen*, 40 S. W. 342, 15 Tex. Civ. App. 605, "actions" and "suits," as generally used in these limitation statutes, are synonymous and interchangeable terms. *Whitfield v. Burrell*, 118 S. W. 153, 156, 54 Tex. Civ. App. 567.

### Every case, matter or proceeding

Only judicial action is reviewable by the writ of certiorari under Code 1899, c. 110, §§ 2, 3, providing that the writ shall lie in "every case, matter, or proceeding" before a county court, council, city, town, village, justice, or other inferior tribunal in which there has been a judgment or final order, or a judgment or order abridging the freedom of a person, and the scope of the writ is not altered by the statute in respect to the nature of the



proceedings for the review of which it may be had, but in this respect it remains as at common law. *Wheeling & E. G. R. Co. v. Town of Triadelphia*, 52 S. E. 499, 503, 58 W. Va. 487, 4 L. R. A. (N. S.) 321.

#### Every child

The words "every child," in a constitutional provision, empowering the General Assembly to enact that "every child" of sufficient ability shall attend the public schools, embraces Indians as well as whites and blacks. *State v. Wolf*, 59 S. E. 40, 41, 145 N. C. 440, 13 Ann. Cas. 189.

#### Every corporation

The phrase "every corporation in the state," as used in Laws 1908, p. 49, c. 240, § 62, providing that every corporation of this state may be sued in any county, or in the city of Baltimore, as the case may be, where its principal office is located, or where it regularly transacts business or exercises its franchises, was not intended to embrace municipal corporations, and the act did not change the common-law rule that a municipal corporation cannot be sued in courts other than those of its own territory upon a transitory cause of action. *Phillips v. City of Baltimore*, 72 Atl. 902, 905, 110 Md. 431, 25 L. R. A. (N. S.) 711.

The words "every corporation," as used in St. 1898, § 1772, as amended by Laws 1905, c. 507, p. 939, providing that every corporation organized and doing business under the laws of the state shall pay for filing and amendment increasing its capital stock, in addition to a fee of \$10, \$1 for each \$1,000 of increase, include railway corporations, notwithstanding section 1826, as amended by Laws 1901, c. 461, p. 681, covering the subject of increasing the capital stock of railway corporations, in which nothing is said expressly about the corporate action being in the form of an amendment to the articles of incorporation, or about the notice of the change being filed in the office of the secretary of state, except that, upon increased stock being issued, a report showing the amount issued and the purposes to which it has been or is to be devoted shall be filed. *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission*, 117 N. W. 846, 850, 137 Wis. 80.

The phrase "every corporation operating a railway," in its broadest and most general sense, as used in the Employers' Liability Act, is sufficient to include a street railway corporation, but in ordinary parlance the word "railway" or "railroad," when not qualified by the word "street" or other expression of similar import, has special reference to what are sometimes denominated commercial railroads. *McLeod v. Chicago & N. W. Ry. Co.*, 101 N. W. 77, 80, 125 Iowa, 270.

Under a statute, that "every railroad corporation," whose line is intersected by a

new railroad, shall unite with the corporation owning the new railroad in forming intersections applies to a case where one of the roads is a street surface road, as the article provides for the formation of railroad corporations, including street railway companies, and, in certain sections of the article, street railway companies are excepted from the provisions of those sections. *Buffalo, B. & L. Ry. Co. v. New York, L. E. & W. R. Co.*, 25 N. Y. Supp. 265, 267, 72 Hun, 583.

#### Every day

The words "every day" in the act of March 19, 1907 (Laws 1907, p. 180), requiring all persons or corporations operating railroads to run at least one regular passenger train over all lines each way "every day," includes Sunday, since it is not unlawful for travelers to ride on a railway train on Sunday, nor for a railroad company to carry them on Sunday, and hence a railroad company that fails to run any trains over a line on Sunday is liable for the penalty prescribed for violation of the act. *State v. Chicago, B. & Q. R. Co.*, 143 S. W. 785, 793, 239 Mo. 196.

#### Every part

See Each and Every Part.

#### Every person

Section 5445, Rev. St., relating to "every person" who aids in effecting the illegal entry of imports, while ordinarily not intended to apply to those individuals—customs officers—covered by the preceding section of the law, does not exclude an officer of the service if the facts bring him within the definition of the "person" at whom this provision is aimed, and may therefore include a customs weigher who aids in the way prohibited. *United States v. Mescall*, 164 Fed. 587.

Since the state has no jurisdiction to tax local interest-bearing deposits in national banks where such deposits are the property of nonresidents, the words "every person," as used in P. S. 809, providing for the taxation of interest-bearing deposits in national banks, and declaring that every person having such a deposit shall semiannually, except as otherwise provided, pay a tax to the state assessed at the rate of  $\frac{1}{20}$  of 1 per cent. semiannually on the amount of such deposit, etc., should be construed to mean "every resident of this state" having such a deposit, and as so construed the statute is valid. *State v. Clement Nat. Bank*, 78 Atl. 944, 958, 84 Vt. 167, Ann. Cas. 1912D, 22.

The term "every person," as used in Rem. & Bal. Code, § 1133, providing that "every person" furnishing material to be used in the construction of a building shall at the time the material is delivered, deliver or mail to the owner of the property on which the material is to be used a duplicate statement of all material to be delivered, etc.,

included a subcontractor. *Helm v. Elliott*, 119 Pac. 826, 827, 66 Wash. 361.

The words "every person," as used in Act Cong. Aug. 2, 1886, c. 840, § 6, declaring that all oleomargarine shall be packed by the manufacturer in packages not used before, and that all sales by manufacturers and wholesale dealers shall be in original stamped packages, that retail dealers must sell only from original stamped packages, and pack the oleomargarine sold by them in suitable wooden or paper packages, and "every person" who knowingly sells or offers for sale any oleomargarine in other form, or who packs in any package in any manner contrary to law, will be imprisoned, etc., should be construed to refer solely to manufacturers and dealers previously mentioned, so that an indictment for violating such section, failing to charge that accused was either a manufacturer or dealer in oleomargarine, and as such packed product in a manner violative of the act, stated no offense. *Morris v. United States*, 168 Fed. 682, 685, 94 C. C. A. 168.

*Wilson's Rev. & Ann. St. 1903, § 729*, entitling every person, whose message is refused or postponed contrary thereto, to actual damages against the telegraph company and \$50 in addition thereto, means by "every person whose message is refused" the person whose name is subscribed to the message. *Western Union Telegraph Co. v. Coyle*, 104 Pac. 367, 24 Okl. 740.

#### Every place

The words "every place," as used in the Liquor Tax Law, providing that the excise tax in every place in this state shall remain the same as assessed for 1899, until changed by an enumeration authorized by the state commissioner of excise, mean every place subject to the provisions of the Liquor Tax Law. *Ahlers v. Clement*, 127 N. Y. Supp. 61, 63, 141 App. Div. 891; *People ex rel. Brady v. Clement*, 127 N. Y. Supp. 68, 142 App. Div. 908.

#### Every railroad company

The provision of the Constitution that "every railroad company" shall have the right with its road to intersect, connect with, or cross any other railroad, has reference to railroad companies incorporated for the purpose of constructing a railroad. *Boca & T. R. Co. v. Sierra Valleys R. Co.*, 84 Pac. 298, 303, 2 Cal. App. 546.

#### Every such case

See In Every Such Case.

### EVERY OTHER

In the statute providing that an action other than those brought for the recovery of real estate, etc., when brought against a domestic corporation, may be brought in the county in which it is situated or has its principal office, that "every other action" than those against carriers and nonresidents

and foreign corporations must be brought in the county where defendant resides, and that, when an action is rightly brought in a county, a summons may be issued to any other county against other defendants, the words "every other action" are not intended to exclude actions where several defendants may be rightly joined. An action against an individual residing in one county and a domestic corporation having its principal office in another county, for their joint negligence in conducting log drives, is properly brought in the county of the residence of the individual. *Harrison v. Carbon Timber Co.*, 83 Pac. 215, 216, 14 Wyo. 246.

### EVICTION

See Constructive Eviction; Partial Eviction; Total Eviction.

In order that an ouster in pais should amount to an eviction, it is necessary that it shall be lawful, and, to be lawful, the adverse claim must be asserted by or in the interest of one having a better title. *McKillop v. Burton's Adm'r*, 74 Atl. 78, 80, 82 Vt. 403.

Civil Code imposes upon the seller the obligation of warranting the buyer against the latter's "eviction" of the thing sold, and defines "eviction," in article 2500, as the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claim of a third person. *Abbott's Law Dictionary* defines "eviction" as dispossession, ejection, ouster. Originally it seems confined to dispossession by judgment of law. In more modern use, it may embrace dispossession by paramount right or claim of such right. The *Century Dictionary* defines it as dispossession by judicial sentence; the recovery of lands and tenements from another's possession by due course of law; an involuntary loss of possession, or inability to get promised possession by reason of the hostile assertion of an irresistible title. *Webster's Dictionary* defines it as the act or process of evicting, or state of being evicted; the recovery of lands, tenements, etc., from another's possession by due course of law; dispossession by paramount title; ejection; ouster. The petition of a buyer alleged the purchase of real estate, the payment of the price, and actual possession of the property purchased, and further alleged a superior outstanding title, but did not allege dispossession by judicial proceedings or a pending suit to evict. Held, that it disclosed no cause of action, and was premature as to the demand for restitution of price. *Bonvillain v. Bodenheimer*, 42 South. 273, 274, 117 La. 793.

#### EVICTION (Of Tenant)

An "eviction," in its original and technical meaning, is the expulsion of a tenant by the assertion of a paramount title and by process of law; but the acts of a landlord, resulting in a substantial interference with

the tenant's right of possession or enjoyment, amount to an eviction, where the acts of the landlord indicate an intention that the tenant shall no longer continue to occupy the premises. *Nesson v. Adams*, 99 N. E. 93, 94, 212 Mass. 429.

In order to constitute an "eviction," "the act complained of must proceed from the landlord himself or some other person acting under his authority or by or through him or from the exercise of some legal right by state or municipal authorities, and must be such as deprives the tenant of the beneficial enjoyment of the whole or a part of the premises." *City of Baltimore v. Latrobe*, 61 Atl. 203, 209, 101 Md. 621, 4 Ann. Cas. 1005 (citing *Wood's Landlord & Tenant* [2d Ed.] 1098).

"Eviction" is defined to be when there has been an obstruction to the beneficial enjoyment of the premises and a diminution of the consideration of the contract by the act of the landlord. Where an accidental fire occurred during the term which consumed the roof and fourth story of the building, and the landlord, being unable to restore it to a four-story building without rebuilding the walls, restored it to a three-story building, and the tenant did not abandon the premises after the fire, as it was authorized to do, but remained in possession after it ascertained that plaintiff would not restore the building to its original condition, there was no "eviction." *Rogers v. S. E. Grote Paint Co.*, 94 S. W. 548, 549, 118 Mo. App. 300 (quoting and adopting definition in *McAdam, Landl. & T.* 478, 479).

An "eviction" may be actual or constructive, and any act of the lessor by which his agent is deprived of the enjoyment of the whole or a material part of the demised premises, or which shows an intent on the part of the lessor permanently to deprive or to obstruct or interfere with the tenant's quiet and peaceful enjoyment of the premises, amounts to an "eviction." A mere trespass, however, is not an eviction, though accompanied by such acts and committed in such circumstances as to be equivalent thereto. *Isabella Gold Min. Co. v. Glenn*, 86 Pac. 349, 350, 37 Colo. 165.

An "eviction of the tenant" exists when the landlord in any manner deprives the tenant of the whole or a substantial part of the leased premises. *Jackson v. Paterno*, 108 N. Y. Supp. 1073, 1076, 58 Misc. Rep. 201.

A landlord who makes an excavation adjacent to the leased building, and who can do the work with safety and without actual injury to the tenant's use of the building, does not thereby so interfere with the tenant's quiet enjoyment as to constitute an "eviction," which occurs when a tenant is forced to yield possession to one having a paramount title, or when the landlord dispossesses the tenant, either by actually taking possession, or by such interference with

the tenant's enjoyment that he is justified in relinquishing possession, and does relinquish it. *Fletcher v. Joseph Pfeifer Clothing Co.*, 146 S. W. 864, 866, 103 Ark. 318.

Lessee's lease required him to give three months' notice of intended removal, and to allow lessors to enter and show prospective lessees the premises and at any time visit and examine them. Lessors, less than three months prior to the expiration of the lease, wrote lessee, requesting permission to show a prospective lessee the premises, and, receiving no reply, in two days broke in, put on a new lock, and retained the key. Lessee removed forthwith. Held, that while such breaking, being merely a trespass, for which lessee might have damages against lessor, would not justify a refusal to pay rent, yet that the changing of the lock and retaining the key operated as an "eviction," so that lessor could not recover for rent subsequently accrued. *Lester v. Griffin*, 108 N. Y. Supp. 580, 581, 57 Misc. Rep. 628 (citing *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446).

"Any interference on the part of the landlord, which impairs the beneficial enjoyment of the premises, such as the creation of a nuisance in another portion of the same building, or the like, is a sufficient disturbance of possession to constitute an 'eviction.'" A landlord, by opening and maintaining a public bowling alley immediately under a leased flat, the alley being used all day and till late at night, creates a nuisance, making it impossible for the tenant to peaceably and quietly hold and enjoy his premises, constituting an "eviction," so that the tenant, leaving the premises in consequence thereof, is not liable for subsequent rent. *Donovan v. Koehler*, 103 N. Y. Supp. 935, 936, 119 App. Div. 51 (quoting and adopting definition in *Home Life Ins. Co. of Brooklyn v. Sherman*, 46 N. Y. 370).

To constitute an "eviction," there must be either an actual expulsion of the tenant, or some act of a permanent character done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the premises, or some part of them, to which he yields, abandoning the possession within a reasonable time, and the intent may be an actual intent, accompanying and characterizing the act, or it may be inferred from the act itself; but mere neglect to repair, where the landlord is under no obligation to repair, will not constitute eviction. *Voss v. Sylvester*, 89 N. E. 241, 243, 203 Mass. 233.

#### Physical expulsion unnecessary

While actual ouster of a tenant is not required to constitute an "eviction," which results from any act of the lessor in depriving the tenant of the beneficial enjoyment of the premises, there must be a substantial in-

interference with the tenant's enjoyment. *Kelley v. Long*, 122 P. 832, 834, 18 Cal. App. 150.

#### **Voluntary abandonment**

Any violation of the terms of a lease by a landlord, which deprives the tenant of the beneficial use and enjoyment of all or part of the lease and premises, amounts to an "eviction" and will warrant the tenant in abandoning the premises, whereupon he will stand exonerated from liability for rent. *Delmar Inv. Co. v. Blumenfeld*, 94 S. W. 823, 826, 118 Mo. App. 308.

Some authorities hold that where a tenant leaves the premises vacant or unoccupied, and the landlord enters without his consent and relets the premises, such action constitutes an "eviction" of the tenant and terminates the lease, and, in the absence of any other circumstance, such is the law; but, after an unauthorized abandonment by a tenant, the landlord may, by taking proper precautions, relet to another without creating a surrender by operation of law. *Higgins v. Street*, 92 Pac. 153, 154, 19 Okl. 45, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086.

## **EVIDENCE**

See Affirmative Evidence; Appear from the Evidence; Best Evidence; Bill of Evidence; Brief of Evidence; Circumstantial Evidence; Clear Evidence or Proof; Competent Evidence; Conclusive Evidence; Corroborating Evidence; Cumulative Evidence; Demonstrative Evidence; Direct Evidence; Downright Evidence; Expert Evidence or Testimony; For Use as Evidence; From the Evidence; Full Evidence; Hearsay Evidence; Incompetent Evidence; Indirect Evidence; Insufficient Evidence; Introduction of Evidence; Legal Evidence; Material Evidence or Testimony; Newly Discovered Evidence; Opinion Evidence; Papers or Evidence; Papers Read in Evidence; Positive Evidence; Presumptive Evidence; Prima Facie Evidence; Primary Evidence; Rebutting Evidence; Receiving Evidence; Satisfactory Evidence; Scintilla of Evidence; Secondary Evidence; Some Evidence; Substantial Evidence; Sufficient Evidence; Traditional Evidence; Unequivocal Evidence; Unimpeachable Evidence; Weight of Evidence; Written Evidence.

All the evidence, see All.

Any evidence, see Any.

As included in practice, see Practice (In Law).

Clear preponderance of evidence, see Clear Preponderance.

Fair preponderance of evidence, see Fair Preponderance.

Other evidence, see Other.

Preponderance of evidence, see Preponderance.

See, also, Autoptic Proference; Clearly Proven; Presumption; Res Gestæ; Testimony.

"Evidence" is the means by which facts are proved. *Taylor v. McClintock*, 112 S. W. 405, 414, 87 Ark. 243; *Board of Education of City and County of San Francisco v. Alliance Assur. Co.*, 159 Fed. 994, 998; *Neeld v. State*, 58 N. E. 734, 735, 25 Ind. App. 603 (quoting and adopting definition in *Greenl. Ev.* [15th Ed.] § 1).

"Evidence," in the sense of that which induces belief or actuates conduct, is a widely different thing from evidence as it is administered in courts of law. "Evidence" as a term of logical reasoning is much more inclusive than evidence as a term of judicial procedure, the relation between the two being that the initial assumption that all that is logically probative is legally admissible has been as a result of judicial experience subjected to a large number of exclusions based not upon logical but upon forensic considerations, which have taken the form of rules of evidence to which in turn there are exceptions, the two together making up the law of evidence. *State v. McFarland*, 83 Atl. 993, 996, 83 N. J. Law, 474.

"Evidence," as defined by Blackstone, "signifies that which demonstrates, makes clear, or ascertains the truth of the very point in issue, either on the one side or on the other." Evidence is relevant when it bears on the issues so as to tend to prove or disprove them; but testimony may be relevant when it is only a link in the chain of evidence tending to prove the issues by reasonable inference though not directly bearing upon them. *San Antonio Traction Co. v. Higdon (Tex.)* 123 S. W. 732, 734.

"'Evidence' signifies those rules of law whereby we determine what testimony is to be admitted and what to be rejected in each case, and what weight is to be given the testimony admitted." *State ex rel. Sims v. Caruthers*, 98 Pac. 474, 478, 1 Okl. Cr. 428 (quoting from *Bish. Cr. Proc.*).

That which no sane man would believe is not "evidence." *Taylor v. McClintock*, 112 S. W. 405, 414, 87 Ark. 243.

"The term 'evidence' includes not only that offered on the part of the government, but that also offered for the defense. \* \* \*" *United States v. Greene*, 146 Fed. 803, 824.

"'Evidence' is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some of the matter of fact." *State v. Danforth*, 60 Atl. 839, 840, 73 N. H. 215, 111 Am. St. Rep. 600, 6 Ann. Cas. 557 (quoting and adopting definition in *Cook v. New Durham*, 13 Atl. 650, 64 N. H. 419, 420).

The term "evidence," as used in an instruction that the jury were not to consider anything "but the evidence introduced before them and the law as laid down in the instructions of this court," is broad enough to include documentary as well as oral evidence. *Fitzgerald v. Benner*, 76 N. E. 709, 716, 219 Ill. 485.

A statement in a trustee disclosure is "evidence," and not an allegation under Rev. St. c. 88, §§ 30, 31. The allegation which must be made to let in evidence other than the disclosure must be additional to, outside of, the disclosure proper. *Thompson v. Dyer*, 62 Atl. 76, 78, 100 Me. 421.

"Evidence of innocence" consists in the proof of facts from which the inference of innocence is drawn. *State v. Reilly*, 116 Pac. 481, 482, 85 Kan. 175 (citing 3 Words and Phrases, 2522, 2523).

#### **Affidavit as evidence**

See Affidavit.

#### **As competent or legal evidence**

The word "evidence," as used in Code Cr. Proc. 1895, art. 555, providing that where defendant in a felony case persists in pleading guilty, if the punishment of the offense is not absolutely fixed and beyond the discretion of the jury to graduate, a jury shall assess the punishment, and evidence shall be submitted to enable them to decide thereupon, means legal evidence such as would be authorized to go before a jury. *Woodall v. State*, 126 S. W. 591, 593, 58 Tex. Cr. R. 513.

"Evidence," within the meaning of the rule requiring questions of fact to be submitted to the jury, if supported by a scintilla of evidence, is something of substance, and not mere vague, uncertain, or irrelevant matter, not carrying the quality of proof. *Clark v. Young's Ex'x*, 142 S. W. 1032, 1035, 146 Ky. 377; *Minahan v. Grand Trunk Western R. Co.*, 138 Fed. 37, 46, 70 C. C. A. 463.

The term "evidence of negligence," as used in conjunction with negligence per se, means competent but not conclusive evidence to be submitted to the jury on the question of negligence or no negligence. *Ashley v. Kanawha Valley Traction Co.*, 55 S. E. 1016, 1020, 60 W. Va. 306, 9 Ann. Cas. 836.

#### **Proof distinguished**

Proof is the legal effect of "evidence." *United States v. Lee Huen*, 118 Fed. 442, 456.

Proof is the effect of "evidence," rather than the medium by which a fact is established. *Lone Star Brewing Co. v. Willie*, 114 S. W. 186, 192, 52 Tex. Civ. App. 550.

"Technically there is a difference between evidence and proof. Evidence tends to establish or disprove an alleged matter of fact in issue. Proof is an effect of evidence, while evidence is merely the means of making proof. A fact is not proved unless it is

established." *Oliveros v. State*, 47 S. E. 627, 629, 120 Ga. 237, 1 Ann. Cas. 114.

Rem. & Bal. Code, § 2316, provides that no order of dismissal on the grounds of variance between the information and the proof shall bar another prosecution for the same offense. *Held*, that while the words "proof" and "evidence" were not synonymous, evidence being the medium through which proof is established and proof the effect of evidence rather than the evidence itself, the word "proof" as used in the statute was loosely used in the sense of evidence; and hence it was not essential to the application of the section that evidence should have been actually introduced at the trial and a variance so established in order that a dismissal because of variance should be relieved of its effect as former jeopardy. *State v. Poole*, 116 Pac. 468, 470, 64 Wash. 47.

#### **Statement of accused**

When the defendant made his statement, his counsel offered to swear him and allow him to be cross-examined, waiving his constitutional right. The solicitor general declined to cross-examine the defendant, and thereupon the court refused to allow the counsel for the accused to interrogate the defendant as a witness. *Held*, that this was not error. The statement of a defendant in a criminal case is not, in a technical sense, "evidence." There is no provision of law by which he may become a witness. He may be cross-examined, if he consents to be so cross-examined; but his agreement or offer to be cross-examined does not impose any obligation upon the prosecution, and unless the solicitor general accepts and acts upon the offer of the accused to be cross-examined, his counsel has no absolute right to submit him to a direct re-examination as he would a witness. The privilege of directing the attention of a defendant to a particular point, by question or suggestion, is a matter addressed to the discretion of the trial judge. *Roberson v. State*, 76 S. E. 752, 12 Ga. App. 102.

#### **Testimony distinguished**

It is incontestably true that testimony and "evidence" are not synonymous terms; that testimony is but a kind of species of evidence; that the former is in a trial the portion of the latter which may be given orally by witnesses; that the latter is inclusive of the testimony of witnesses, documents, etc.; that "evidence" is the generic term. *Columbia Nat. Bank of Lincoln v. German Nat. Bank*, 77 N. W. 346, 347, 56 Neb. 803 (citing *Gazette Printing Co. v. Morss*, 60 Ind. 153).

"Testimony" and "evidence" are not synonymous terms; the latter is the generic and the former applicable to a species or kind of "evidence." Where from an inspection of the entire bill of exceptions it is obvious that the word "testimony" was used

with reference to the evidence and as synonymous with "evidence," it may be accorded such extended signification. *Woolworth v. Parker*, 77 N. W. 1090, 1092, 57 Neb. 417 (citing *Columbia Nat. Bank of Lincoln v. German Nat. Bank*, 77 N. W. 346, 56 Neb. 803).

The statement in the printed record of appeal that "this was all the 'testimony' introduced on the trial of this cause" is not the equivalent of the statement that "this was all the evidence introduced on the trial of this cause." An assignment of error in relation to the "evidence" will not be considered unless the record shows affirmatively that all of the evidence is made a part of the record by a bill of exceptions. The word "testimony" is not synonymous with the word "evidence." *Guarantee Gold Bond, Loan & Savings Co. v. Edwards*, 104 S. W. 624, 629, 7 Ind. T. 297.

While strictly "testimony" and "evidence" are not synonymous terms, the former, as used in a statute which provides that, after the testimony on both sides, the state's counsel shall open and conclude the argument to the jury, except that if the defendant introduces no "testimony" his counsel shall open and conclude after the testimony on the part of the state is closed, means either oral or documentary evidence. *Hargrove v. State*, 45 S. E. 58, 117 Ga. 706.

What witnesses say under oath is "testimony," but only so much of it as impresses the mind of the court trying the facts is "evidence," and it is by evidence and not by testimony that the court must be governed in passing upon questions of fact. *Mick v. Mart* (N. J.) 65 Atl. 851.

There is a difference between the terms "evidence" and "testimony." The former is the more comprehensive term and includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. The latter in common acceptation embraces only the statements of witnesses upon oath, and does not include proof by writings or from other sources. A statement that the record contains all the "testimony" will, however, ordinarily be taken to amount to a statement that it contains all the "evidence." *Dibble v. Dimick*, 38 N. E. 724, 725, 143 N. Y. 549.

A charge that if any witness has willfully testified falsely, the jury are at liberty to wholly disregard his testimony "except so far as the same is corroborated by other creditable testimony in the case" is not erroneous, because using the word "testimony" instead of "evidence"; the two words being synonymous as commonly understood. *State v. Winney*, 128 N. W. 680, 681, 21 N. D. 72.

A certificate of the official stenographer "that the above and foregoing • • • con-

tains a full and correct transcript of my stenographic notes of the testimony taken and oral proceedings had on the trial," and an order of the judge settling the bill of exceptions reciting that the foregoing is "a correct transcript of the proceedings herein," do not show that the bill of exceptions contains all the evidence; the word "testimony" including only the oral statements of the witnesses while testifying, and not being synonymous with the word "evidence," including any species of proof submitted to a court or jury. *Carter v. Cummings-Nellson Co.*, 97 Pac. 334, 335, 34 Utah, 315 (citing 3 Words and Phrases, p. 2523).

While some authorities define the words "testimony" and "evidence" as technically different, making "evidence" the more comprehensive term, in common expression, even in courts, they are used synonymously, and charges are not faulty because "testimony" is referred to, where technically "evidence" might be the more proper term. *Jones v. City of Seattle*, 98 Pac. 743, 745, 51 Wash. 245.

The word "evidence" includes all the means by which any alleged matter of fact under investigation is established or disproved, and testimony is not synonymous with "evidence." The word "evidence," in a case-made reciting that it contains all of the "evidence" introduced at the trial, covers all the testimony, records, documents, papers, and proofs submitted for the consideration of the court or jury. *Southern Pine Lumber Co. v. Ward*, 85 Pac. 459, 463, 16 Okl. 131.

"The words 'testimony' and 'evidence' are not synonymous terms. Testimony is evidence, but evidence may or may not be testimony, or may consist of more than testimony. The word 'testimony' is a restricted limited term, consisting only of the statements of witnesses, while the word 'evidence' is a comprehensive term, embracing not only testimony or the statements of witnesses, but also documents, written instruments, admissions of parties, and whatever may be submitted to a court or jury to elucidate an issue or prove a case. Bouvier defines 'testimony': 'The statement made by a witness under oath or affirmation.' Black defines 'testimony': 'Any species of proof or probative matter legally presented at the trial of an issue by the act of the parties, and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.'" *Crooks v. Harmon*, 81 Pac. 95, 96, 29 Utah, 304.

The term "testimony" is not as comprehensive as "evidence" and in fact is but a species or kind of evidence, but in a certificate to the stenographer's transcript certifying that the foregoing was a true, full, and correct transcript of the testimony and oth-

er proceedings had on the trial, the term "testimony," when coupled with the expression "other proceedings," may be treated as synonymous with "evidence," making the certificate equivalent to a statement that it contained all the evidence. *Mitchell v. Jensen*, 81 Pac. 165, 167, 29 Utah, 346.

#### As witnesses

The term "whose evidence," in an instruction that there was testimony in the case from which the jury might find that the defendant was guilty of negligence, "but that depends upon 'whose evidence' you believe," is not equivalent to "whose witnesses" so as to render the charge objectionable as directing the jury to find for the plaintiff if they believe his witnesses, and for the defendant if they do not. *Harker v. Detroit United Ry.*, 114 N. W. 657, 658, 150 Mich. 697.

### EVIDENCE OF INDEBTEDNESS

Other evidence of indebtedness, see Other.

"Evidence of indebtedness," as used in Const. art. 10, § 29, providing that no bond or evidence of indebtedness of the state shall be valid unless the same shall have indorsed thereon a certificate signed by the Auditor and the Attorney General, showing that the bond or evidence of indebtedness is issued pursuant to law and is within the debt limit, means such indebtedness as is usually evidenced by a bond. *Bryan v. Menefee*, 95 Pac. 471, 475, 21 Okl. 1.

As used in 69 Ohio Laws, pp. 173, 174, the term "evidence of indebtedness" is synonymous with "securities." *Cincinnati, H. & D. Ry. Co. v. Kleybolte*, 88 N. E. 879, 880, 80 Ohio St. 311.

Rev. St. 1895, art. 3356, requiring actions for debt where the indebtedness is evidenced by or founded on any contract in writing to be commenced within four years after the cause of action accrues, applies to an action on a liquor dealer's bond for selling liquor to a minor, the cause of action being both "evidenced by and founded on a contract in writing." *Hillman v. Gallagher*, 128 S. W. 899, 900, 103 Tex. 427.

#### Judgment

"A judgment is not only an evidence of indebtedness, but it is of the highest and most conclusive nature. A judgment against a city is within the designation "other evidences of indebtedness issued for money," as used in Act Feb. 13, 1865, as amended (*Hurd's Rev. St. 1899*, c. 113), in describing the debts for which it authorizes the issuance of funding bonds. *Stone v. City of Chicago*, 69 N. E. 970, 975, 207 Ill. 492.

#### Mortgage

A mortgage is an evidence of indebtedness within B. & C. Comp. § 25, providing that payment of principal or interest on any bill of exchange, promissory note, bond, or

"other evidence of indebtedness," shall make limitations run from the time of such payment, and a part payment on a note, or on the mortgage securing it, tolls the statute as to the mortgage. *Kaiser v. Idleman*, 108 Pac. 193, 194, 57 Or. 224.

### EVIDENCE OF PROPERTY

Share of stock as, see Share of Stock.

### EVIDENCING FEATURE

The "evidencing feature" is usually a group of circumstances which as a whole constitute a feature capable of being associated with a single object. Rarely can one circumstance alone be so inherently peculiar to a single object. It is by adding circumstance to circumstance that a composite feature or mark is obtained which as a whole cannot be supposed to be associated with more than a single object. The process of constructive inference of identification thus consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects but all of which together can conceivably coexist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated. *Webb v. Ritter*, 54 S. E. 484, 493, 60 W. Va. 193.

### EVIDENT

The word "evident" means "clear to the vision, especially clear to the understanding, and satisfactory to the judgment." Its synonyms are: Manifest; plain; clear; obvious; visible; apparent; conclusive; indubitable; palpable; notorious. Under Const. Neb. art. 6, § 8, providing that all persons shall be bailable except for capital offenses when proof is evident or presumption great, Rev. Code Cr. Proc. §§ 585, 586, containing substantially the same provisions, and section 356, providing that defendant in a criminal case is presumed to be innocent, the burden is on the state, in an application for bail, to show that the proof is evident or the presumption great. *State v. Kauffman*, 108 N. W. 246, 20 S. D. 620 (quoting with approval from *Webst. Dict.*).

### EVIDENTIARY FACT

An "evidentiary fact" is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; and mere remoteness usually goes to the weight, and not the admissibility, of such evidence. *Brunger v. Pioneer Roll Paper Co.*, 92 Pac. 1043, 1044, 6 Cal. App. 691.

### EX

#### EX CONTRACTU

Claimant as creditor, see Creditor.

#### EX DELICTO

See Action Ex Delicto.

Claimant as creditor, see Creditor.

**EX DOLO**

The maxim "ex dolo," meaning out of fraud, deceitful or tortious conduct, does not apply where the right of a third person is to be affected, as, where A. obtains property from B. by fraud, he may nevertheless recover the purchase money from C. to whom he has sold the property. *Doyle v. Burns*, 99 N. W. 195, 204, 123 Iowa, 488.

**EX MALEFICIO**

See Trust Ex Maleficio.

**EX-OFFICER**

The terms "retired officer" and "ex-officer," and "ci-devant" officer are synonymous, implying that he is no longer an "officer" in the proper sense of the term. *Reed v. Schou*, 83 Pac. 77, 79, 2 Cal. App. 55.

**EX OFFICIO**

The term "ex officio," as used in Act Feb. 25, 1898, providing that in counties of less than 125,000 the county treasurer shall be "ex officio" supervisor of assessments; that he shall have an office furnished by the county board, which he shall keep open during specified hours; and that he may appoint deputies and clerks, whose compensation shall be fixed by the county board and paid by the county—implies that the county treasurer shall be supervisor of assessments by virtue of his office as county treasurer, and as appurtenant thereto. *Foot v. Lake County*, 69 N. E. 47, 48, 206 Ill. 185.

A finding in an action against an official and the surety on his bond for a defalcation as assessor that the official collected money "as assessor" or as "ex officio assessor" is of the same legal import, the charter of the city under which the officer acted declaring that the auditor shall be "ex officio assessor," and whether he styles himself "auditor and assessor" or "auditor and ex officio assessor" is immaterial. He is none the less assessor because he is only "ex officio assessor," and being styled in the bond both "auditor and ex officio assessor" is the same in legal effect as styled both "auditor and assessor." *City of Oakland v. Snow*, 78 Pac. 1060, 1064, 145 Cal. 419.

Ky. St. 1903, § 4424, referring to the board of county examiners and providing for the taking of a county school publishers' bond before the "ex officio members" of the state board of education, does not require that the ex officio members in approving and accepting the bond should act as a body, and a bond executed before such member when not so acting is sufficient. *Reid v. Commonwealth*, 94 S. W. 641, 642, 123 Ky. 240.

Every service a circuit court clerk is required by law to perform, for which no fee or charge is specified, or that cannot be legally charged to either party in any cause, is an ex officio service, for which the clerk is enti-

tled to reasonable compensation from the county. *Calhoun County v. Watson*, 44 South. 702, 703, 152 Ala. 554.

**EX PARTE**

Under Gen. St. 1902, § 305, relating to probate of foreign wills after public notice, and section 208, authorizing probate courts to make any proper order for notice to non-residents, a decree on notice by publication is not an "ex parte decree," within section 203, authorizing a probate court to modify or revoke an ex parte decree, before an appeal therefrom. *Murdoch v. Murdoch*, 72 Atl. 290, 293, 81 Conn. 681, 129 Am. St. Rep. 231.

A surrogate's order of exemption of an estate from transfer tax is in the nature of an "ex parte order," and an appeal does not lie therefrom, and, where the surrogate entered an order of exemption of an estate from transfer tax, the comptroller's method of reviewing the order is by appeal to the surrogate and from his order of affirmance to the Appellate Division. *In re Costello's Estate*, 103 N. Y. Supp. 6, 7, 117 App. Div. 807.

**EX POST FACTO**

"An 'ex post facto' law is one which renders an act punishable in a manner in which it was not punishable when it was committed." *State of Iowa v. Jones*, 128 Fed. 626, 628 (citing *Fletcher v. Peck*, 6 Cranch [10 U. S.] 87, 3 L. Ed. 162); *Meffert v. State Board of Medical Registration and Examination*, 72 Pac. 247, 251, 66 Kan. 710, 1 L. R. A. (N. S.) 811; *Hopkins v. State*, 108 Pac. 420, 4 Okl. Cr. 194; *State v. McCoy*, 127 N. W. 137, 139, 87 Neb. 385, 28 L. R. A. (N. S.) 583.

Within the meaning of the Constitution of the United States, any law is "ex post facto" which is enacted after the commission of the offense, and which, in relation to it or its consequences, in any way affects the material situation of the accused to his prejudice or disadvantage. *State ex rel. Sims v. Caruthers*, 98 Pac. 474, 477, 1 Okl. Cr. 428. This definition is subject to the qualification that, where the new law mitigates the character or punishment of a crime already committed, it does not fall within the prohibition of the Constitution, for it then is in favor of the citizen. *In re Petty*, 22 Kan. 477, 482.

"An 'ex post facto law' is a law which makes an action done before its passage, which was innocent when done, criminal, and punishes such action, or that aggravates a crime or makes it greater than when it was committed, or which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage, or that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed." *State v. Hoon*, 111 N. W. 462, 463, 78 Neb. 618 (quoting and adopting definition in *Marion v. State*, 20 N. W. 289, 16 Neb. 349).



A statute which deprives the accused of any substantial right which he possessed when the offense was committed, or which after that time changes the punishment of his offense, is as to him *ex post facto*. *People ex rel. Adams v. Johnson*, 90 N. Y. Supp. 134, 136, 44 Misc. Rep. 530.

"Every retrospective penal or criminal statute is not necessarily '*ex post facto*.' If the law under which the appellant was sentenced mitigates the punishment prescribed in the statute in existence when the offense was committed, it would not be *ex post facto*, although retrospective. A retrospective criminal or penal law that does not deprive the party of some constitutional right to which he was entitled under the law at the time the offense was committed, or does not alter his situation to his disadvantage, is not '*ex post facto*.' On page 390 of 3 Dall., page 650 of 1 L. Ed., Mr. Justice Chase defined '*ex post facto* laws' to be: '(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than when committed. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender.'" Where the law punishing a felony, when it was committed, provided for a scale of credits to be given for good behavior, *Laws 1903*, c. 375, p. 571, commonly called the "Indeterminate sentence law," containing no such provisions, was, as to one convicted of a felony before its passage, "*ex post facto*." *State v. Tyree* (Kan.) 77 Pac. 290, 291 (quoting and adopting *Calder v. Bull*, 3 Dall. [3 U. S.] 386, 390, 1 L. Ed. 648, 650, and citing *Commonwealth v. Wyman*, 12 Cush. [66 Mass.] 237; *Commonwealth v. Gardner*, 11 Gray [77 Mass.] 438; *Doland v. Thomas*, 12 Allen [94 Mass.] 421; *In re Petty*, 22 Kan. 477; *Turner v. State*, 40 Ala. 21).

"An '*ex post facto* law' is one which imposes a punishment for an act which was not punishable at the time it was committed or an additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." Changing the mode of procedure, whereby an accused is entitled to the judgment of 15 men composing the grand jury, to an examination before a magistrate, and the filing of an information by a prosecuting officer, changes the situation to the disadvantage of accused, and a law making such a change is an *ex post facto* law. *State v. Rock*, 57 Pac. 532, 533, 20 Utah, 38 (quot-

ing *Duncan v. Missouri*, 14 Sup. Ct. 570, 152 U. S. 377, 38 L. Ed. 485).

An "*ex post facto* law" is one which either makes that a crime which was not a crime when the offense was committed, or which imposes a heavier sentence than that which was prescribed by law at that time. *State v. Broadway*, 72 S. E. 987, 157 N. C. 598.

An "*ex post facto* law" is one which imposes a punishment on an act not punishable at the time of its commission, or which imposes an additional punishment to that then prescribed, or which changes the rules of evidence, so that less or different testimony is sufficient to convict than was then required. *Commonwealth v. Phelps*, 96 N. E. 349, 350, 210 Mass. 78, 37 L. R. A. (N. S.) 507, Ann. Cas. 1912C, 1119.

An "*ex post facto* law" is one which makes criminal and punishable that which was lawful and innocent when done, or a law which aggravates a crime and makes it a greater offense than it was when committed, or a law which changes the punishment, and makes it greater than was imposed by the law as it stood when the crime was committed. *Ware v. Sanders*, 124 N. W. 1081, 1086, 146 Iowa, 233.

An "*ex post facto* law" is one which retrospectively makes a crime of an act which at the time of its doing was not a crime. *State ex rel. Labauve v. Michel*, 46 South. 430, 434, 121 La. 374.

Justice Chase, in enumerating what laws he considered "*ex post facto*" within the rules and intent of the prohibition, specified "every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed," but added that he did not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. Justice Washington declared *ex post facto* any law "which, in its operation, makes that criminal or penal which was not so at the time the act was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." Chief Justice Marshall defined an *ex post facto* law to be one which makes an act punishable in a manner in which it was not punishable when committed. But this definition is subject to the qualification that, where the new law mitigates the character or punishment of a crime already committed, it does not fall within the prohibition of the Constitution, for it then is in favor of the citizen. Chapter 99, *Laws 1903*, substituting the penitentiary for the county jail as the place of confinement pending execution and directing that executions should there-

fore take place within the penitentiary walls, was not "ex post facto" as applied to one who was convicted before its passage. *State v. Rooney*, 95 N. W. 513, 515, 12 N. D. 144.

#### Application to civil actions

The term "ex post facto," as used in the Constitution, relates to criminal punishment, and has no relation to other retrospective laws. *Ex parte Clark*, 121 Pac. 492, 493, 86 Kan. 539, 39 L. R. A. (N. S.) 680, Ann. Cas. 1913C, 317; *State v. Tyree* (Kan.) 77 Pac. 290, 291; *Arbuckle v. Kelley*, 144 Fed. 276, 278; *Kentucky Union Co. v. Kentucky*, 31 Sup. Ct. 171, 177, 219 U. S. 140, 55 L. Ed. 137; *State v. Schaeffer*, 109 N. W. 522, 524, 129 Wis. 459.

The phrase "ex post facto laws" is not applicable to civil laws, but to penal and criminal laws which punish no party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, "ex post facto laws" relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively. *Diamond State Iron Co. v. Husbands*, 68 Atl. 240, 246, 8 Del. Ch. 205 (quoting *Wilson v. Mercer*, 8 Pet. 109, 8 L. Ed. 876).

Chapter 73 of the Revised Statutes, entitled "of the suppression of certain nuisances," is not, because it prohibits manufacturers and others from selling or keeping for sale within the state liquors, which may have been manufactured or bought by them previous to its passage, an "ex post facto" law; since, so far as it punishes such selling and keeping, it is prospective; and, if it lessens the value of liquors owned in the state previous to and held at the time of its passage, such civil consequence does not make it retroact criminally in such sense, as to bring it within the definition of an "ex post facto" law. *State v. Paul*, 5 R. I. 185, 190.

Act Ky. March 15, 1906, art. 3, providing for the forfeiting of land titles for failure to list and pay taxes, though retroactive, is not invalid having no criminal features. *Kentucky Union Co. v. Kentucky*, 31 Sup. Ct. 171, 177, 219 U. S. 140, 55 L. Ed. 137.

Laws 1905, p. 726, c. 422, providing for the revocation in a civil action of a physician's license for fraud in its procurement occurring prior to the adoption of the act, is not an ex post facto law. *State v. Schaeffer*, 109 N. W. 522, 524, 129 Wis. 459.

Act Feb. 21, 1907, § 6, relating to the criminal insane, and providing for proceedings for their discharge, is not unconstitutional as applied to one committed before its enactment for imposing burdens on him which did not exist at the time of his commitment, such as the requirement that he must obtain a certificate from the physician

in charge of the penitentiary and a permit from the warden to institute proceedings for his discharge; the term "ex post facto law," as used in the Constitution, being confined to laws respecting criminal punishment, and having no relation to retrospective legislation of any other description. *State ex rel. Thompson v. Snell*, 94 Pac. 926, 928, 49 Wash. 177.

The phrase "ex post facto laws" is only applicable to criminal and penal laws and does not apply to the employers' liability act. *Pittsburgh, C. & St. L. Ry. Co. v. Lighthouse*, 78 N. E. 1033, 1036, 168 Ind. 438.

#### Imposition or change of penalty

A city ordinance providing for the assessment and taxation of omitted property and providing a penalty is, to the extent of the penalty, void as an "ex post facto law"; but, since the taxpayer was originally bound to pay taxes on omitted property, the ordinance did not create any liability and was not void as an "ex post facto law" in so far as it provided for the assessment of the property. *Muir's Adm'rs v. City of Bardstown*, 87 S. W. 1096, 1098, 120 Ky. 739.

#### Nature and extent of punishment

Where the statute prescribes the qualifications of a physician, and proscribes the grossly immoral, and authorizes the cancellation of any certificate issued to such persons, the application of this law to one whose habits were grossly immoral before the passage of the law is not in the nature of a punishment, and therefore not ex post facto, but has in view only the qualifications of the physician and the protection of public morals. *Meffert v. State Board of Medical Registration & Examination*, 72 Pac. 247, 251, 66 Kan. 710, 1 L. R. A. (N. S.) 811.

An "ex post facto law" is one making that a punishable offense which was innocent at the time it was done, so that an ordinance requiring a license for certain occupations, but which does not impose a punishment for doing business prior to the time it went into effect, is not retrospective or ex post facto. *City of Louisville v. Roberts & Krieger* (Ky.) 105 S. W. 431, 432.

Acts 31st Leg. c. 50, § 1, defining the offense of abandonment after seduction and marriage, is not an "ex post facto law" within Const. art. 1, § 16. *Thacker v. State*, 136 S. W. 1095, 1096, 62 Tex. Cr. R. 294.

#### Procedure

Statutes merely affecting the modes of procedure are not invalid as ex post facto laws, where they do not dispense with any of the substantial protections which the existing law gave. *Commonwealth v. Phelps*, 98 N. E. 349, 350, 210 Mass. 78, 37 L. R. A. (N. S.) 567, Ann. Cas. 1912C, 1119.

Laws 1909, c. 73, prescribing the method of selecting jurors, is not an ex post facto

law, since it applies only to the remedy or method of procedure. *State v. Newcomb*, 109 Pac. 355, 357, 58 Wash. 414.

#### Same—Jurisdiction and venue

Laws 1910, c. 588, passed June 21, 1910, to take effect September 1, 1910, amending Code Cr. Proc. § 39, so as to give the county court of Albany county jurisdiction of crimes punishable with death, merely giving new jurisdiction to an existing court to try past offenses, and not making any changes in rules of evidence or in the punishment prescribed for murder in the first degree, was not an ex post facto law within the inhibition of the United States Constitution as to such an offense committed after enactment of the statute, but before it took effect, so as to deprive such county court of jurisdiction after the statute took effect. *People v. Green*, 94 N. E. 658, 661, 201 N. Y. 172, Ann. Cas. 1912A, 884.

#### Same—Rules of evidence

A law changing the rules of criminal procedure is "ex post facto" when it alters the rules of evidence or other rules of procedure so as to allow a conviction to be had on less testimony than was required by the law in force at the time of the commission of the offense. *State ex rel. Sims v. Caruthers*, 98 Pac. 474, 478, 1 Okl. Cr. 428.

Term "ex post facto law" includes "every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." *Goode v. State*, 39 South. 461, 462, 50 Fla. 45 (citing *Hopt v. Utah*, 4 Sup. Ct. 202, 110 U. S. 574, 28 L. Ed. 262; *Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752; 3 Words and Phrases, p. 252S).

#### EX SHIP

The term "ex ship," as used in a contract for the purchase of a commodity setting the price at so much "ex ship," does not contemplate a shipment by any particular ship, and simply denotes that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing them, and does not constitute a condition of the contract, but is inserted for the benefit of the seller. *Harrison v. Fortlage*, 16 Sup. Ct. 488, 490, 161 U. S. 57, 40 L. Ed. 616.

#### EXACT

See *Erroneously Exacted or Paid*.

The requirement of Act Cal. March 20, 1905 (St. 1905, p. 316, c. 302), that packages of butter between one-half and six pounds in weight offered for sale shall have their "exact weight" marked thereon in letters of specified dimensions, must receive a reason-

able interpretation, and a slight deviation from the precise weight, not willfully or knowingly made, would not be a violation of the statute. *Ex parte Dietrich*, 84 Pac. 770, 771, 149 Cal. 104, 5 L. R. A. (N. S.) 873 (dissenting opinion).

#### EXAMINE—EXAMINATION

See *Audit*; *Cross-Examination*; *During Examination*; *Medical Examination*; *Preliminary Examination*; *Private Examination*; *Separate Examination*.

The word "examination," used in connection with legal proceedings, is commonly understood to mean an "examination" under oath or affirmation. *Edelstein v. United States*, 149 Fed. 636, 640, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236.

Under Rev. St. 1899, § 3246, allowing the sheriff \$1.25 per day for keeping a prisoner "while undergoing an examination preparatory to his commitment," the sheriff is not entitled to that allowance for keeping a prisoner who has been arrested under a capias issued on an information and is in jail awaiting trial. *State ex rel. Million v. Allen*, 86 S. W. 144, 145, 187 Mo. 560.

A fire policy provided that the insurer should not be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination therein provided for. Held, that the "appraisal" and "examination" did not cover acts of the assured's appraiser in demanding of and causing assured to incur trouble and expense in furnishing an estimate of the builder showing the value of the property insured and destroyed by fire. *Scottish Union & National Ins. Co. v. Colvard*, 68 S. E. 1097, 1100, 135 Ga. 188.

Code Civ. Proc. § 872, subd. 4, requires the affidavit for an order for the examination of a party before trial to set forth "that the testimony of such person is material and necessary," etc. Rule 82 of the general rules of practice requires the affidavit to specify the acts and circumstances "which show that the examination of the person is material and necessary." Held, the change of terminology from "testimony" in the section to "examination" in the rule does not change the meaning. *Cherbuliez v. Parsons*, 108 N. Y. Supp. 321, 322, 123 App. Div. 814.

A motion in a divorce action for an order to examine defendant as to his property is for an "examination," and not for a "discovery," under Code Civ. Proc. §§ 803-809, relating to discovery of books and papers. *Bradley v. Bradley*, 122 N. Y. Supp. 626, 627, 137 App. Div. 751.

#### EXAMINATION BEFORE PHYSICIAN

See *Before*.

**EXAMINING COURT**

Code Cr. Proc. 1895, art. 62, defines an "examining court" thus: "When a magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an 'examining court.'" Whenever a justice of the peace sits as an examining court, it has been held his jurisdiction is coextensive with the limits of his county. *Brown v. State*, 118 S. W. 139, 144, 55 Tex. Cr. R. 572.

**EXCAVATION**

Person causing excavation, see Cause (verb).

**EXCEPT**

See Sunday Excepted.

The phrase "except as herein provided," as used in Bankr. Act, § 64, subsec. "a," providing that the court shall order the trustee to pay all taxes due and owing by the bankrupt, and subsection "b," providing that the debts to have priority, except as herein provided, shall be first payment of the actual cost of preserving the estate, the filing fees by creditors, and other specified claims, does not necessarily mean that the taxes are to be paid in preference to anything else, for it may be understood as meaning no more than that the order of priority in subsection "b" is to be the rule. In *re Halsey Electric Generator Co.*, 175 Fed. 825, 833.

Under Laws 1898, c. 182, providing that the common council of the city of Troy shall determine the rules of its own proceedings, and that except as herein provided the majority of all its members shall be a quorum for the transaction of business and that the passage of an ordinance, unless otherwise provided, shall require the affirmative vote of at least a majority of all its members, and under the rules of the council providing that on the appearance of ten members the council shall be called to order by the president, and, if he be absent, by the president pro tempore, nine members of the council composed of seventeen is a quorum, and a majority of such quorum may elect a clerk of the council and of the city; the words "except as herein provided" referring to the whole act. In *re Brearton*, 89 N. Y. Supp. 893, 899, 44 Misc. Rep. 247.

**As accept**

Except as accepted, see Accepted.

Testator left with the custodian of his will an envelope addressed to his wife, which contained a note which had been given by the testator to his wife for money advanced by the wife before her marriage. The envelope also contained a paper reading "Phoebe, according to agreement, you are to burn this note, as I am dead, if you except under my will." Held, that "except" should be con-

sidered as "accept," considering the evident illiteracy of testator and common confusion among his class of the words "except" and "accept." In *re Haskell's Estate*, 61 Atl. 1018, 212 Pa. 469.

**EXCEPTION**

The office of an "exception" in a statute, in general, is to take or exclude from the operation of the statute certain matters which would otherwise be included. *Campbell v. Jackman Bros.*, 118 N. W. 755, 757, 140 Iowa, 475, 27 L. R. A. (N. S.) 288.

Lands granted by Congress to a state and by the state to a railroad company on condition, and which were afterwards resumed by the state for the failure of the company to comply with such condition and reverted to the United States, are not lands "excepted from the operation of the grant," within the meaning of section 5 of the adjustment act of March 3, 1887 (24 Stat. 557, c. 376); and a purchaser from the company acquires no right under said section to purchase the lands from the United States. *Ostrom v. Wood*, 140 Fed. 294, 299.

**Proviso distinguished**

"Provisos" and "exceptions" are similar, being intended to restrain the enacting clause, to except something which would otherwise be in it, or in some manner to modify it; but this is not always necessarily so. The word may, if such be the sense gathered from the act or instrument, simply explain what had previously been stated in general terms, or direct the manner of doing what was allowed by the context to be done generally. Under Ky. St. 1903, § 3457, authorizing a common council of third-class cities to cause streets to be graded, paved, etc., and providing for the payment of the cost out of the city treasury, providing the ordinances and contracts for such work shall specify how the work shall be paid for, the proviso or exception is directory and not mandatory, and hence it is not necessary, to render the city liable, that the ordinances shall specify how payment shall be made. *Terrell v. City of Paducah*, 92 S. W. 310, 312, 122 Ky. 331, 5 L. R. A. (N. S.) 289 (quoting *Suth. St. Const.* § 222).

"'Exception' is defined in Anderson's Dict. as: 'Something withheld, not granted or parted with, the exclusion of the thing, or the thing or matter itself as excluded.' By the Century Dictionary as: 'The act of excepting or leaving out of account; exclusion of the act or excluding from number designated or from a statement or description.' An exception is a proviso that excludes something from a statement or description." *Cassidy v. Royal Exchange Assur. of London*, 59 Atl. 549, 551, 99 Me. 399.

There is some distinction between a "proviso" and an "exception." A "proviso" is properly the statement of something ex-

trinsic of the subject-matter of the covenant, which shall go in discharge of that covenant by way of defeasance; an "exception" is the taking out of a covenant some part of the subject-matter of it. A clause in a lease to furnish a lessee a certain water power, subject "to the interruptions provided for in a certain lease by the Milwaukee & Rock River Canal Company to J. T. Perkins," but which were not set forth in the lease or in the declaration, was a proviso, so that it was not necessary for the lessor to set out either the clause or the lease to which it referred. *La Point v. Cady* (Wis.) 2 Chand. 202, 210 (quoting and adopting 1 Saunde's Prac. & Ev. 393, and cases in the Supreme Court).

"Provisos" and "exceptions" in statutes are similar, being intended to restrain the enacting clause to except something which would otherwise be within it, something ingrafted upon a preceding enactment, intended to take special cases out of a general class, and the general intent and purpose of an enacting clause will be controlled by the particular intent subsequently expressed. *State v. Barrett*, 87 N. E. 7, 9, 172 Ind. 169.

An "exception" exempts something absolutely from the operation of a statute by express words in the enacting clause, while a "proviso" defeats its operation conditionally. *Pabst Brewing Co. v. City of Milwaukee*, 133 N. W. 1112, 1114, 148 Wis. 582.

In the construction of statutes a "proviso" often constitutes an "exception" to the enacting words of the section. Provisos and exceptions are similar and are intended to restrain the enacting clause, to except something which would otherwise be within it or in some manner modified. "The office of a proviso is not to enlarge or extend the act of the section of which it is a part, but rather to put a limitation and a restraint upon the language which the lawmaker has employed." *Laidlaw v. Portland V. & Y. Ry. Co.* 84 Pac. 855, 857, 42 Wash. 292 (quoting *In re Webb* [N. Y.] 24 How. Prac. 247).

#### EXCEPTION (In Deed)

"Exception," as used in the law of conveyances, is defined by Washburn as "the taking of something out of the thing granted which otherwise passes by a deed." It is also defined as a "clause in a deed whereby the feoffer, donor, lessor, etc., doth except something out of that which he had granted before by his deed." The office of an "exception" is to take something out of the thing granted that otherwise would pass. It is thus distinguished from a "reservation," which is a clause whereby the grantor reserves some new thing to himself out of that which he had granted before. An exception must be a portion of the thing granted or described as granted and can be of noth-

ing else and must always be of something which can be enjoyed separately from the thing granted. A provision in a deed that the party of the first part "hereby reserves the coal and other minerals underlying said land" constituted an exception and not a reservation. The title to the coal remained in the grantor and not a mere easement to go upon the land to mine it. *Barrett v. Kansas & T. Coal Co.*, 79 Pac. 150, 151, 70 Kan. 649.

An "exception" is a withdrawal from the operation of the grant of some part of a thing itself. *Dyson v. Bux*, 114 Pac. 1092, 1093, 84 Kan. 596 (quoting and adopting the definition in Devlin, Deeds, § 979; *Read v. Loftus*, 108 Pac. 850, 852, 82 Kan. 492, 495, 31 L. R. A. [N. S.] 457; *Edwards v. Brusha*, 90 Pac. 727, 728, 18 Okl. 234; *Preston v. White*, 50 S. E. 236, 237, 57 W. Va. 278; *Hall v. Hall*, 76 Atl. 705, 706, 106 Me. 389.

"The phrase 'excepting and reserving' is commonly used in deeds and is sometimes held to amount to an exception of part of the property which is the subject of conveyance, and sometimes to a reservation out of the estate conveyed, depending largely upon the intention of the parties, the subject-matter of the grant, whether the thing excepted or reserved is a thing newly created out of the lands and tenements granted, or part of the property in existence and excepted therefrom." *Bardon v. O'Brien*, 120 N. W. 827, 828, 140 Wis. 191, 133 Am. St. Rep. 1066.

If A. owns ten acres of land and conveys it all to B. except one acre, upon which his mansion stands, that is an "exception." *Dozier v. Toalson*, 79 S. W. 420, 422, 180 Mo. 546, 103 Am. St. Rep. 586.

A deed of "lot number sixty-one \* \* \* and the improvements thereon, which consists of one-half (½) each of the north and south walls of building designated as street number two hundred and twenty-five (225)" shows an intention to reserve one-half of the wall. *Dyson v. Bux*, 114 Pac. 1092, 1093, 84 Kan. 596.

A clause in a deed of a small part of a farm "reserving the privilege of a way from the highway past the house to the railroad in my usual place of crossing," the grantor having for many years passed over the granted land in going to and from other parts of the farm, is an "exception" of an existing way which became an easement appurtenant to the other land, and with the other land would pass by descent or assignment. *Dee v. King*, 59 Atl. 839, 842, 77 Vt. 230, 68 L. R. A. 860.

An administrator's deed conveying by metes and bounds all the real estate of which the husband died seised, "except the widow's dower," conveys the reversion of dower. *Starr v. Brewer*, 3 Atl. 479, 58 Vt. 24.

**Reservation distinguished**

A "reservation" is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted and not in esse before; but an "exception" is always a part of the thing granted, or out of the general words or description of the grant. *Hicks v. Phillips*, 142 S. W. 394, 395, 146 Ky. 305; *Hall v. Hall*, 76 Atl. 705, 706, 106 Me. 389; *City Club of Auburn v. McGeer*, 92 N. E. 105, 198 N. Y. 609; *Pitcairn v. Harkness*, 101 Pac. 809, 810, 10 Cal. App. 295 (quoting *Sears v. Ackerman*, 72 Pac. 172, 138 Cal. 586); *Williams v. Jones*, 111 N. W. 505, 506, 507, 131 Wis. 361 (quoting and adopting definition in *Rich v. Zellsdorff*, 22 Wis. 544, 99 Am. Dec. 81); *Brown v. Anderson*, 11 S. W. 607, 608, 88 Ky. 577; *Pritchard v. Lewis*, 104 N. W. 989, 992, 125 Wis. 604, 1 L. R. A. (N. S.) 565, 110 Am. St. Rep. 873 (quoting and approving definition in *Wellman v. Churchill*, 42 Atl. 352, 353, 92 Me. 193); *Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co.*, 13 Fed. 646, 649 (citing *Rich v. Zellsdorff*, 22 Wis. 544, 99 Am. Dec. 81); *Carlson v. Minnesota Land & Colonization Co.*, 129 N. W. 768, 769, 113 Minn. 361; *Sheffield Water Co. v. Elk Tanning Co.*, 74 Atl. 742, 744, 225 Pa. 614; *York Haven Paper Co. v. York Haven Water & Power Co.*, 194 Fed. 255, 267; *Stone v. Stone*, 119 N. W. 712, 714, 141 Iowa, 438, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797; *Bardon v. O'Brien*, 120 N. W. 827, 829, 140 Wis. 191, 133 Am. St. Rep. 1066; *Riesler & Sons v. Wayne Storage Water Power Co.*, 51 Atl. 300, 302, 232 Pa. 282; *Preston v. White*, 50 S. E. 236, 238, 57 W. Va. 278 (citing *Tiedman*, R. Prop. § 843).

The word "excepting," as used in deeds, would, in exact legal phraseology, be construed as retaining in the grantor the fee to the real estate described, instead of merely reserving from the operation of his warranty deed the mere incorporeal hereditament of a right of way; but the term is subject to explanation. It is sometimes used in its strict legal sense of retaining something from the grant, and at others in the sense of the word "reservation," which is the taking back from a grant a right conveyed by it amounting to a mere incorporeal hereditament. *Kansas City, M. & O. Ry. Co. v. Litter*, 79 Pac. 114, 115, 70 Kan. 556.

There is a distinction between an "exception" which is ever a part of the thing granted, and of a thing in esse for which "exceptis," "salvo," "preter," and the like, are apt words, and a "reservation," which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised. In *Sheppard's Touchstone* it is said of the reservation "It must be to the grantor and not to a stranger to the deed." When a covenant operated by way of reservation, and not by way of exception, words of inheritance

were necessary to convey a fee-simple title to an easement, if made prior to the statute which changed the common law. *Dawson v. Western M. R. Co.*, 68 Atl. 301, 305, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

The rule that an "exception" withholds some part of the premises conveyed by the general description, while a "reservation" applies to some right or easement reserved by the grantor, is not arbitrary, and cannot override the real intent of the parties to be gathered from the whole instrument. *Zimmerman v. Kirchner*, 131 N. W. 756, 757, 151 Iowa, 483.

"A marked distinction exists between the terms 'exception' and 'reservation' as used in deeds, the distinction being that a 'reservation' is something taken back from the thing granted, while an 'exception' is some part of the estate not granted at all." The terms are often used indiscriminately, and sometimes in a deed what purports to be a reservation has the force of an exception when such appears to be the clear intention of the parties. A deed from J. to L. of a tract of land, "excepting and reserving" therefrom a strip two rods wide off a certain side of it, "to be used as a right of way," the grantee, however, to have the privilege of fencing said right of way into his inclosure and being required only to maintain a gate at each end for use of the grantor, his heirs and assigns, excepts the fee of the strip, in view of the facts that on the same day J. deeded to P. said strip, describing it as the premises described as right of way two rods wide reserved by the grantor in his deed to L., excepting and reserving all the timber thereon, with the right to the grantor to go on the land and remove it, and the facts that immediately thereafter J., without objection from L., removed from the strip the valuable timber thereon, and that P. thereafter paid the taxes on the strip. *Pritchard v. Lewis*, 104 N. W. 989, 991, 125 Wis. 604, 1 L. R. A. (N. S.) 565, 110 Am. St. Rep. 873.

By the common law the word "heirs" is essential to convey a fee, no matter how plainly the intent to do so may be expressed in other words of perpetuity. But this rule is not applicable to an "exception" of an easement appurtenant to other land of the grantor, which operates to retain in the grantor some portion of his former estate, and whatever is thus excepted or taken out of the grant remains in him as of his former title. An "exception" is of a part of the thing granted and of a thing in being at the time of the grant. A "reservation," however, vests in the grantor some new right or interest that did not exist in him before. It operates by way of an implied grant, and, in the absence of words of inheritance, only an estate for the life of the grantor is created. Whether a given clause creates a "reservation" or

an "exception" is not so much a question of words as of intention to be gathered from all the circumstances of the case, so that the term "except" has been construed to create a reservation and the term "reserve" an exception. "Whether a particular provision is intended to operate as an exception or reservation is to be determined by its character, rather than by the particular words used." The following reservations were held to create exceptions: "Reserving forever a right of way over a street which the grantee is to make, from the northwest corner of said granted lot to the road." "Reserving the passway at grade over said railroad where now made." "Reserving the right to cross the track of said railroad on grade near the westerly line of our said lands at such place as said company can most conveniently provide." "We reserve to ourselves the privilege of crossing and recrossing the said piece of land above described, or any part thereof within said bounds." "Reserving forever for myself the privilege of passing with teams, etc., across the same in suitable places to land I own to the south of the premises." "I do reserve a driveway from the county road on to the east end of said lot, etc., and another driveway on to the west end of said lot." "Reserving a passway from the road" etc. "With the reservation of a road two rods wide over the northerly side of said lot." *Hall v. Hall*, 76 Atl. 705, 706, 707, 106 Me. 389 (citing *Perkins v. Stockwell*, 131 Mass. 529; *Ring v. Walker*, 87 Me. 550, 33 Atl. 174; *Bowen v. Conner*, 6 Cush. (60 Mass.) 132; *White v. New York & N. E. R. Co.*, 30 N. E. 612, 156 Mass. 181; *Hamlin v. New York & N. E. R. Co.*, 36 N. E. 200, 160 Mass. 459; *Chappell v. New York, N. H. & H. R. Co.*, 24 Atl. 997, 62 Conn. 195, 17 L. R. A. 420; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307; *Smith v. Ladd*, 41 Me. 314; *Bangs v. Parker*, 71 Me. 458; *Wellman v. Churchill*, 42 Atl. 352, 92 Me. 193).

The clause in a deed conveying an entire tract of land that "I, the said grantor, reserve a road through said land," was a mere reservation, giving the grantor a way over the lands granted, but not the fee of the way, as in case of an exception; for a "reservation" creates a new right issuing out of the thing granted, and reserving it to the grantor, while an "exception" merely withdraws from the operation of the grant something which would have otherwise passed. *Parker v. Parker*, 138 S. W. 462, 463, 99 Ark. 244.

A recital in a deed: "This conveyance reserves to the parties of the first part and their assigns free access or right of way to or from any lots adjoining either line of said Virginia street, to and over any wharf, which may at any time be upon said street"—in the technical sense of the term, is a "reservation," as distinguished from an "exception," and is therefore in the nature of a grant to

the grantor. *Aden v. Vallejo*, 72 Pac. 905, 906, 139 Cal. 165 (citing *Bouv. Law Dict.*).

A clause in a deed reserving to the grantor the timber, with the right to enter and cut it, is an "exception" of the timber, with sufficient interest in the soil to sustain it. *Bardon v. O'Brien*, 120 N. W. 827, 829, 140 Wis. 191, 133 Am. St. Rep. 1066 (approving definition in *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81).

Where a deed conveyed the entire estate in lands in trust "excepting a certain lot of timber," such timber reserve being made for the express use and benefit of a certain party, there was an "exception" and not a reservation, and such exception was for the benefit of the party named personally, and terminated at his death. *Stone v. Stone*, 119 N. W. 712, 714, 141 Iowa, 438, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797.

#### Reservation synonymous

Technically the words "exception" and "reservation" are different in meaning, but have often been used as synonymous. *Chapman v. Mill Creek Coal & Coke Co.*, 46 S. E. 262, 263, 54 W. Va. 193; *Preston v. White*, 50 S. E. 236, 238, 57 W. Va. 278; *Seligman v. Carr*, 97 Pac. 324, 325, 8 Cal. App. 572.

The terms "reservation" and "exception" in deeds are often used as synonymous, when the thing to be secured to the grantor is a part of the granted premises, and, when so used, they are to be construed accordingly, though an "exception" in its technical meaning is something withheld from a grant which otherwise would pass as a part of it, while a "reservation" is some newly created right which the grantee impliedly conveys to the grantor, but the natural meaning of the word "reservation" is inconsistent with the technical meaning, and means to keep in reserve, to retain, to keep back. *Smith's Ex'r v. Jones*, 84 Atl. 866, 86 Vt. 258.

The technical meaning of the terms "reservation" and "exception" will give way to their ardent intent, though the wrong technical term be used, since they are frequently used interchangeably. *Rieffer & Sons v. Wayne Storage Water Power Co.*, 81 Atl. 300, 302, 232 Pa. 282.

Strictly speaking, "reservation" is something created or reserved out of a thing granted that was not in existence before, while an "exception" must be a part of the thing granted, and, while the distinction between the terms is well established, the words are frequently used synonymously. A provision of the deed reserving to the grantors all the rights, etc., secured under an oil and gas lease executed by them with right to renew or modify the lease to the same extent as though the conveyance had not been executed, and reciting that it was intended to reserve all oil and gas privileges in the premises, constitutes an "exception" and not a "reservation."

*Moore v. Griffin*, 83 Pac. 395, 396, 72 Kan. 164, 4 L. R. A. (N. S.) 477, 7 Ann. Cas. 570.

"Reserving" and "excepting," though strictly distinguishable, are often used interchangeably or indiscriminately, and the use of either is not conclusive, as to the nature of the provision, as constituting a reservation or exception. *Hicks v. Phillips*, 142 S. W. 394, 395, 146 Ky. 305.

An "exception" is a part excepted from the general terms of that which is granted. The words "exception" and "reservation" are often used interchangeably, and the mere fact that what is excepted is mentioned as being reserved will not defeat its operation as an "exception." *Elsa v. Adkins*, 74 N. E. 242, 243, 164 Ind. 580, 108 Am. St. Rep. 320 (citing 13 Cyc. pp. 674, 675; 3 Washb. Real Prop. \*640; *Jones*, Law of Real Prop. in Conveyancing, § 518).

#### EXCEPTION (In Practice)

See Bill of Exceptions; Broadside Exceptions; Peremptory Exception; Saving Exception; Special Exceptions.

"Exceptions" to a guardian's account within Code Civ. Proc. § 1635, providing that, on the hearing of an account, any person interested may appear and file exceptions in writing to the account and contest the same, are not limited to a mere written statement of the points or matters wherein the credits or charges in the account are claimed to be objectionable, but may also include a statement of any affirmative matters of fact not appearing on the face of the account, which it may be claimed require additional charges in favor of the estate or the rejection of credits; the word being properly used with reference to the equity practice of filing exceptions to the report of a master in chancery. *In re Boye's Estate*, 90 Pac. 454, 456, 151 Cal. 143.

An "exception" is an objection taken at the trial to a decision upon a matter of law. *Hayes v. Clifford*, 42 Or. 568, 72 Pac. 1 (citing B. & C. Comp. § 169).

Under Comp. Laws 1907, §§ 3282, 3283, 3304, defining an "exception" as an objection on a matter of law, etc., and providing that on appeal all rulings to which exceptions have been taken are reviewable, misconduct of counsel in making improper remarks to the jury in his argument, to which no objection was made, is not reviewable. *Johnson v. Union Pac. R. Co.*, 100 Pac. 390, 397, 35 Utah, 285.

An "exception" is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury or court, and whether the decision be made during the formation of the jury, or in the admission or rejection of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of

the verdict or decision. *Owens v. United States*, 130 Fed. 279, 284, 286, 64 C. C. A. 525 (quoting and adopting definition in Code Alaska, c. 17, § 164).

The mere uttering of the word "exception" during the examination of a witness calls for no ruling by the court, and where the court makes none there is no ground for complaint. If counsel want evidence excluded, it must be objected to, and, if the objection is overruled, an exception taken. The occasional ejaculation of the word "exception" is in the nature of a running and unfavorable comment on the proceeding and nothing more. *Sheldon v. Wright*, 67 Atl. 807, 809, 80 Vt. 298.

Under B. & C. Comp. § 169, defining an exception as an objection taken at the trial to a decision upon matter of law, an exception must be taken at the trial, in order to obtain appellate review of a ruling on testimony, and the subsequent allowance of such an exception by the trial judge does not cure the omission to take the exception at the proper time. *Annans v. Sewell*, 84 Pac. 395, 47 Or. 372.

Under Burns' Ann. St. 1901, § 637, defining an "exception" as "an objection taken to the decision of the court on a matter of law," no exception can be reserved to the argument of counsel, objection to which can be preserved only by an exception to the ruling of the court refusing to sustain a proper motion to instruct the jury not to consider such argument. *Southern Indiana Ry. Co. v. Fine*, 72 N. E. 589, 591, 163 Ind. 617.

Under Burns' Ann. St. 1908, § 655, providing that an exception is an objection taken to a decision of a court upon a matter of law, a party desiring to object to language of counsel in argument must present the matter to the court by specific motion and reserve an exception to the ruling thereon, and a mere objection and exception is insufficient to present any question for review. *Hohenstein-Harmetz Furniture Co. v. Matthews*, 92 N. E. 196, 198, 46 Ind. App. 616.

Where defendant's exceptions stated that there was no testimony on a particular point "except as above stated," that should be construed to mean except as before stated in the exceptions. *Jewett v. Buck*, 63 Atl. 136, 138, 78 Vt. 353.

The office of an exception is to challenge the correctness of the rulings or decisions of the trial court promptly when made, to the end that the rulings may be corrected by the court itself, if deemed erroneous, and to lay the foundation for their review, if necessary, by the proper appellate tribunal. In the federal courts the taking of an exception immediately on the making of the ruling is indispensable to a review by the appellate court. Board of Com'rs of City and County



of *Denver v. Home Sav. Bank*, 200 Fed. 28, 35, 118 C. C. A. 256.

The purpose of an exception is to advise counsel and the court that the ruling to which it is addressed is objected to, and that the objector will rely on error in the ruling; and under Code, §§ 3750, 3751, providing that no stated form of exception is required, and, when the decision objected to is entered, and the grounds of the exception appear in the entry, or when any error appears of record, the exception may be taken by the party causing to be noted, at the end of the decision or in connection therewith, that he excepts, an exception addressed to a decree need not state the grounds thereof, and when the decision to which the exception relates is entered of record, it is sufficient if the exception is noted at the end thereof. *Warner v. Trustees of Norwegian Cemetery Ass'n*, 117 N. W. 39, 41, 139 Iowa, 115.

#### Objection synonymous

The word "except," as used in Code 1906, § 50, c. 50, subsec. 6, providing that, in an action before a justice, either party may "except" to a pleading of his adversary when it is not sufficiently explicit to be understood, etc., is synonymous with the word "object," and as a demurrer is an objection to a pleading, though not expressly provided for by the statute, it may be interposed to a complaint in an action before a justice, and will be treated as an "exception." *Grant v. Wyatt*, 56 S. E. 187, 61 W. Va. 133.

#### In pleading

As pleading, see Pleading.

An "exception" to all that part of an answer which pleads as damages that the defendant's workmen were delayed, etc., because such damages do not arise out of the contract sued on and are too remote, is, in effect, a general exception. *Gorham v. Dallas, C. & S. W. R. Co.*, 95 S. W. 551, 557, 41 Tex. Civ. App. 615.

An "exception" is broadly defined to be a "means of defense used by the defendant to retard or defeat the demand brought against him." Code Prac. art. 320. A motion to dissolve a preliminary injunction on the ground that the signature of the surety on the bond was affixed by an unauthorized person is in the nature of a peremptory exception relating to form, and should be filed before joinder of issue. *Union Sawmill Co. v. Lake Lumber Co.*, 42 South. 429, 430, 117 La. 930.

#### EXCEPTIONAL CASE

Petitioner having been arrested for violating the Wisconsin Usury Law (St. Wis. 1898, § 1691, as amended by Laws 1905, c. 278, and Laws 1907, c. 412), making the collection of rates of interest in excess of those specified a misdemeanor, applied to a federal court for a writ of habeas corpus on the

ground that the statute was unconstitutional, and alleged that he had no adequate remedy in the state courts because, if, when tried, he was found guilty, the court would immediately impose the penalty of imprisonment, and not a fine, having previously inflicted imprisonment as a penalty in other recent cases, and would not stay execution of the sentence pending appeal, that the appeal would be ineffective because the Wisconsin Supreme Court had already decided the statute constitutional and would adhere to its ruling, and that petitioner could not obtain a decision on appeal to the Supreme Court of the United States from the decision of the state court before the sentence that would be imposed had expired. Held, that such petitioner improperly assumed that his trial in the state court would result in a conviction, and that such court would sentence to imprisonment when it had authority to impose a fine as a penalty and also to order his enlargement pending appeal, and that such allegations were, therefore, insufficient to show that the case was an exceptional one of peculiar urgency sufficient to require the granting of the writ by the federal court. *Ex parte Bartlett*, 197 Fed. 98, 101.

#### EXCEPTIONAL OCCURRENCE

Where a painter was painting the walls of an elevator shaft, the elevators remaining in use, the turning of one of the large wheels was not an "exceptional occurrence" of which he should have been given notice, although it would have been had the elevators been shut down. *Lauter v. Hedden Const. Co.*, 83 Atl. 878, 879, 83 N. J. Law, 617.

#### EXCESS

See To Excess.

Estimated excess of revenue, see Estimated Revenue.

The meaning of the word "excess," in an application for life insurance declaring that the applicant does not use intoxicating liquor to excess but takes a glass of beer occasionally, is largely a matter of opinion and varies between a drink and a drunk, since an occasional glass of beer may mean anything from a glass once a month to one every 15 minutes according to the capacity of the individual, or to the liberality of his views, but where an insurer obtains disclosures suggesting further inquiry on deeming the subject of vital importance, insurer is chargeable with knowledge of its soliciting agent as to the habits of the applicant. *Biermann v. Guaranty Mut. Life Ins. Co.*, 120 N. W. 963, 965, 142 Iowa, 341.

There is no "excess" within the local improvement act requiring the city to return to the property owners the "excess," where a larger sum has been collected from them than is necessary for the construction of the im-

provements, where the provision for interest on assessments is illegal, but such interest is voluntarily paid, and the amount paid by the property owners, including interest, does not exceed what the city agreed to pay the contractor, which was the amount of the assessments with interest thereon. *City of Chicago v. McGovern*, 80 N. E. 895, 897, 226 Ill. 403.

The term "excess," as used in Acts 30th Leg. 1st Called Sess. c. 23, providing for a domestic corporation franchise tax of 50 cents on each \$1,000 of authorized capital stock, providing that if the outstanding stock, plus surplus and undivided profits, exceeds the amount of authorized capital stock, the rate shall be computed on the amount of outstanding stock, plus surplus, etc., but that where the authorized capital exceeds \$1,000,000 the rate shall be 50 cents on each \$1,000 up to \$1,000,000, and 25 cents on each \$1,000 in "excess" of \$1,000,000, is intended to embrace capital, surplus, and undivided profits. *Houston & T. C. R. Co. v. McDonald*, 148 S. W. 287, 288, 105 Tex. 334.

#### EXCESS OF JURISDICTION

"Excess of jurisdiction," as distinguished from absence of jurisdiction, means that an act, though within the general power of the judge, is not authorized and is void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in the case are wanting. *Broom v. Douglass*, 57 South. 860, 864, 175 Ala. 268, 44 L. R. A. (N. S.) 164.

#### EXCESSIVE

An instruction, in an action for injuries to a passenger by the derailment of the train, that the carrier must exercise the utmost caution characteristic of very careful and prudent men, is erroneous as imposing on the carrier too high a degree of care; the word "very" meaning exceedingly, excessively, and the word "excessive" meaning exceeding what is usual or proper. *Parker v. Boston & M. R. R.*, 79 Atl. 865, 872, 84 Vt. 329.

A substantially excessive distress being necessarily an unreasonable one, within Civ. Code 1902, § 2434, providing that a distress for rent shall be reasonable and not too great, and that a landlord who makes unreasonable and excessive distress shall be liable for damages sustained by the tenant by reason of such excessive distress, a charge submitting to the jury the question whether the distress was unreasonable—that is, whether the amount of property seized to pay \$80 was excessive—was not erroneous in not submitting the question whether it was unreasonable and excessive; the word "excessive" being undoubtedly used in the charge in the sense of substantially excessive. *Alexander v. Hill*, 70 S. E. 1009, 1010, 88 S. C. 368.

#### EXCESSIVE FINE

A fine of \$578,853.74 for larceny or conversion of money from the state, and imprisonment in the county jail one day for each \$2 of the fine, which the defendant was unable to pay at the time or during a lifetime of effort, although within the maximum of the statute, was an "excessive fine" within the prohibition of the Constitution. *State v. Ross*, 106 Pac. 1022, 1024, 55 Or. 450, 42 L. R. A. (N. S.) 601, 613.

#### EXCESSIVE PUNISHMENT

See Cruel and Unusual Punishment.

#### EXCESSIVE SPEED

Six knots an hour is an "excess of speed" for a steamship moving in a thick fog in a frequented part of the ocean. In re *Clyde S. S. Co.*, 134 Fed. 95, 98.

#### EXCESSIVE TAX

To entitle a party to an abatement of a part of his tax, it is necessary to show that the tax was "excessive"; that it subjected him to more than his fair share of the public expense. He should show that the tax was "excessive" by proof that the whole or a part of his property was exempt; that he did not own any property in the taxing district, or a less quantity than was taxed; that a greater valuation than that assessed or too large a rate was made use of in computing the tax, or that some mathematical error occurred in the computation, or that the ratio between the true and assessed value of his property was greater than the ratio between the true and the assessed value, of all the other property in the taxing district. *Winnipeg Lake Cotton & Woollen Mfg. Co. v. City of Laconia*, 65 Atl. 378, 380, 74 N. H. 82.

#### EXCESSIVELY BURDENED

A town is "excessively burdened" within "An act in addition to chapter 140 of the Revised Laws" (Acts 1882, No. 16) section 1, when it is required to build a bridge or keep in repair a highway, used by other towns, and it is not able to build such bridge or keep in repair such highway on account of its limited population or other disability and where the other towns are disproportionately benefited. *Town of Sharon v. Town of Stratford*, 56 Vt. 421, 422.

Where a town has voluntarily run into debt by investment in a railroad so that the building of a bridge would be a heavy burden on the town, it cannot be said "to be excessively burdened" within the meaning of Acts 1884, No. 11, relating to maintaining of highways and bridges. *Sheldon v. State*, 7 Atl. 901, 59 Vt. 86.

The term "excessively burdened," within Acts 1882, No. 16, is a relative one, covering a consideration of the complainant town's burdens in connection with the burdens of the other towns benefited by such highway.

A town is not excessively burdened by being required to build and maintain a highway within its limits, unless its municipal burdens would be increased thereby beyond its due measure and proportion in comparison with the municipal burdens and taxation for necessary purposes of such other towns as are deemed to be especially benefited by such highway. *Weybridge v. Town of Addison*, 57 Vt. 569, 572.

## EXCHANGE

See Turf Exchange; With Exchange.  
Sale distinguished, see Sale.  
See, also, Trade.

A "trade" is synonymous with an "exchange," which signifies a transfer of one or more pieces of property for other property. *Colgan v. Farmers' & Mechanics' Bank*, 114 Pac. 460, 464, 59 Or. 469 (citing 3 Words and Phrases, p. 2546).

"Exchange" is a contract by which the parties mutually give, or agree to give, one thing for another; neither thing, or both things, being money only. *Steere & Ballah v. Gingery*, 110 N. W. 774, 776, 21 S. D. 183.

An "exchange of goods" is a commutation, transmutation, or transfer of goods for other goods. Proof that accused furnished prosecutor a quart of whisky under an agreement that he was to return other whisky, shows a barter, or exchange within the statute prohibiting the sale, barter, or exchange of intoxicating liquor, though prosecutor testified that accused loaned him the whisky. *Clark v. State*, 52 South. 893, 894, 167 Ala. 101, 31 L. R. A. (N. S.) 517 (citing 1 Words and Phrases, p. 715; 3 Words and Phrases, p. 2546; 5 Words and Phrases, p. 4196; 7 Words and Phrases, p. 6291).

### Real estate

Where a guardian of infants released their interest in the homestead of their deceased father to the surviving widow for life, in consideration of the release by her of the 40 acres assigned to her as dower during the minority of the infants or either of them, there was a conveyance of interests for interests amounting to an exchange of property, and the transaction was void under the Constitution protecting the homestead of a decedent for the benefit of his widow and minor children. *Gatlin v. Lafon*, 129 S. W. 284, 286, 95 Ark. 256.

### EXCHANGE (In Commercial Law)

See Bill of Exchange; Foreign Bill of Exchange; Inland Bill of Exchange.

The meaning of "exchange and re-exchange" is best indicated by illustration: A purchases a bill of exchange in S. drawn on a house in N. and pays therefor a premium; in event of dishonor of the bill in N., it is obvious that if the holder can only recover of the drawer in S. the amount of the bill he will lose the premium which he paid for

the exchange and suffer without remedy the loss and inconvenience of returning the bill to S. for recourse against the drawer; and, even if no premium has been paid, the holder, who is entitled under the drawer's contract to receive the amount of the bill in N., will not be indemnified if he can only sue for and obtain that amount in S. From these circumstances grew the customary right of the holder of the bill by the law merchant to draw a bill of exchange upon the drawer for the principal amount which should have been received, increased by the cost of protest to the sum which it will cost to replace that principal amount at the place where it should have been paid. This right to recover for re-exchange is therefore based upon the obligation to pay at the place where the bill is payable, and, if the holder of the bill ultimately receives what he is entitled to at the place where the bill is payable with interest and the cost of protest, he is not entitled to receive anything more. Where the payee of a draft payable in New York, but drawn in a foreign country, negotiated it to a broker there, receiving the irredeemable paper currency of that country, and the draft was dishonored, whereby the payee on reimbursing the broker suffered a loss owing to the depreciation of the local currency, the fluctuation was not to be considered in computing re-exchange. Laws 1897, p. 743, c. 612, § 200, provides that a negotiable instrument is discharged by payment in due course by or on behalf of the principal debtor, or by any other act which will discharge a simple contract for the payment of money. A New York corporation gave in a foreign country a draft on itself payable in New York. The payee negotiated it to a local broker, and it was dishonored, whereupon the payee, who had reimbursed the broker, sued on the draft in New York, and was paid the face of the draft, interest, and protest fees. Held, that he was not entitled to recover re-exchange. *Pavenstedt v. New York Life Ins. Co.*, 99 N. Y. Supp. 614, 617, 618, 113 App. Div. 866.

"Exchange bought and paid for" contemplates bills drawn against shipments and purchases by advances made to shippers upon the strength of documents to be furnished by them with the bills to repay the advances so made. *Reynes v. Dumont*, 9 Sup. Ct. 486, 493, 130 U. S. 354, 32 L. Ed. 934.

### EXCHANGE OF PROPERTY

As doing business, see Doing Business.  
As preference, see Preference.

## EXCHANGES

Bucket shop distinguished, see Bucket Shop.

## EXCISE

An "excise tax" is a tax upon a pursuit, trade, or occupation, generally taking the

form of an exaction for a license fee to pursue the particular occupation. *Spokane & Eastern Trust Co. v. Spokane County*, 126 Pac. 54, 55, 70 Wash. 48 (citing 3 Words and Phrases, p. 2548).

The word "excise" is a term of very general signification, and means tribute, custom tax, tollage, or assessment. *Booth's Ex'r v. Commonwealth ex rel. Jefferson County Attorney*, 113 S. W. 61, 65, 130 Ky. 88, 33 L. R. A. (N. S.) 592; *Allen's Ex'rs v. McElroy*, 113 S. W. 66, 130 Ky. 111; *Barret v. Continental Realty Co.*, 113 S. W. 66, 130 Ky. 109; *Opinion of the Justices*, 85 N. E. 545, 550, 196 Mass. 603 (quoting and adopting definition in *President, etc., Portland Bank v. Apthorp*, 12 Mass. 252, 256).

Under Const. pt. 2, c. 1, § 1, art. 4, authorizing the Legislature to impose reasonable excises on any produce, goods, commodities, and merchandise brought into the state, the Legislature may impose an excise tax on sales of certificates of stock of domestic and foreign corporations. *Opinion of the Justices*, 85 N. E. 545, 550, 196 Mass. 603.

"Excises" are taxes laid upon the manufacture, sale, or consumption of commodities, within the country, upon licenses to pursue occupations, and upon corporate privileges. The tax measured by net annual income, imposed by Act Aug. 5, 1909, § 38, upon the carrying on or doing of business in a corporate or quasi corporate capacity, being an "excise," and not a direct tax, is not invalid because not apportioned among the several states according to population. *Flint v. Stone Tracy Co.*, 31 Sup. Ct. 342, 349, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (quoting and adopting definition in *Cooley*, Const. Lim. [7th Ed.] p. 68).

"The designation 'excise tax' does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other." *State of Maine v. Grand Trunk R. Co.*, 12 Sup. Ct. 121, 142 U. S. 217, 35 L. Ed. 994.

## EXCITEMENT

"Excitement" is defined to mean impulsion: agitation; the act of exciting, or the state of having increased action; that which moves, stirs, or induces action; a motive. *Webster's Dictionary*. *Morris v. Territory*, 99 Pac. 760, 768, 1 Okl. Cr. 617.

## EXCLAMATION

Spontaneous exclamation, *see* Spontaneous.

## EXCLUDE

The word "excluded," as used in the statute providing that neither the husband nor the wife shall be "excluded" as witnesses, was used because the common-law rule used that term, and it includes both privilege and disqualification of the witness, and hence the statute changes the common-law rule by making one spouse a competent witness against the other; but this change does not affect the rule against disclosure of marital communications. *Ex parte Beville*, 50 South. 685, 688, 58 Fla. 170, 27 L. R. A. (N. S.) 273, 19 Ann. Cas. 48.

The customary meaning of the word "excluding," in marine insurance, does not differ greatly from the word "prohibiting." Where a policy of marine insurance containing a printed clause which prohibited the vessel from certain waters including the Gulf of Campeachy had written into it the amount of insurance, the name of the vessel, and the terms of the policy, after which was written the words, "excluding the Gulf of Campeachy," it was held that the written words were not for the purpose of qualifying the printed clause, but for calling particular attention to the Gulf of Campeachy, near which the vessel was when insured. *Parker v. China Mut. Ins. Co.*, 41 N. E. 267, 164 Mass. 237.

## EXCLUSION

An agreement by defendant to use plaintiff's electric lights in certain premises "to the 'exclusion' of other electrical illumination" is not an absolute requirement that defendant shall use the electric lights, but only that he shall not use any electric light other than plaintiff's, and defendant is not liable for breach of contract where he removes from premises specified and refuses to use plaintiff's electric light therein. *United States Illuminating Co. v. Flisk*, 29 N. Y. Supp. 154, 155, 78 Hun. 328.

## EXCLUSIVE

*See* Sole and Exclusive.

The word "exclusive" in a contract between a city and a certain person purporting to grant the exclusive privilege of laying and maintaining water pipes in its streets, and by which it agreed to pay certain rentals for hydrants, such contract to continue in force for 20 years, was insufficient to raise the implication that the city by the use of the word thereby agreed to renounce its power to construct the waterworks itself, because such is not the ordinary meaning of the word, and because the word "exclusive," if given its usual interpretation, would render the exclusive feature of the contract void. *Farmers' Loan & Trust Co. v. City of Sioux Falls*, 131 Fed. 890, 899.

"Exclusive" means pertaining to the subject alone, not including, admitting, or per-

taining to another or others; undivided; sole; as an exclusive right or privilege; exclusive jurisdiction. "The word 'exclusive' is derived from 'ex' out, and 'cludere' to shut." Hence an ordinance granting a waterworks company the "exclusive" right to construct and maintain waterworks in and near a certain city for the purpose of supplying streets, squares, and public places does not grant the waterworks company the exclusive right to use the streets in constructing a system for the purpose of supplying the residents of the city. *Mitchell v. Tulsa Water, Light, Heat & Power Co.*, 95 Pac. 961, 969, 21 Okl. 243 (quoting and adopting the definitions in *Cent. Dict.* and *In re Union Ferry Co.*, 98 N. Y. 139).

The words, "exclusive of costs," as used in *Gen. St.* 1901, § 5019, subd. 3, providing for an appeal to the Supreme Court where the amount in controversy exclusive of costs exceeds \$100, mean such costs as are provided for by statute, and which may be computed and taxed by the clerk of court, and do not include an allowance as attorney's fees to the prevailing party, the amount of which cannot be computed but which as to amount must be determined judicially by the court. *Phenix Ins. Co. v. Stahl*, 96 Pac. 854, 78 Kan. 528.

Under a statute prohibiting an appeal from a judgment for the recovery of money, if the value in controversy be less than \$200 exclusive of interest and cost, an appeal will not lie from a judgment involving a balance of the principal, not exceeding \$175, though with accumulated interest the debt exceeded \$200; the expression "exclusive of interest" meaning interest accumulated prior to the judgment. *Cooper v. Patton's Adm'r* (Ky.) 104 S. W. 1026.

#### EXCLUSIVE AGENCY

The words "exclusive agency," as used in an agreement between an owner of land and a broker that the broker should have the "exclusive agency" for the sale of the land for a fixed period at a fixed price, and that the broker should give attention to the sale of the land, have the same examined and advertised, and should report promptly all sales, etc., deprived the owner of the right of selling the premises, and a sale by him of the timber before the expiration of the fixed period was a breach of contract. *Hunter v. Wenatchee Land Co.*, 97 Pac. 494, 496, 50 Wash. 438.

An "exclusive agency" to sell property is not equivalent to an "exclusive right to sell"; and where an exclusive agency only is granted, the owner retains the right to sell the property himself, without being liable to the agent for a commission. *Smith v. Preiss*, 136 N. W. 7, 117 Minn. 392, Ann. Cas. 1913D, 820 (citing *Dole v. Sherwood*, 43 N. W. 569, 41 Minn. 535, 5 L. R. A. 720, 16 Am. St. Rep. 731).

#### EXCLUSIVE CONTROL

See, also, *Exclusive Management and Control*.

The phrase "exclusive control" in *Kansas City* charter and enabling act, giving the city exclusive control over its public highways, when considered in connection with the fact that the Constitution only authorized the people of the city to adopt a charter subordinate to the state law, and there being a state law as to the use of the streets, necessarily meant exclusive as to matters of mere municipal concern, which did not conflict with the state law. *State v. Kessells*, 96 S. W. 494, 496, 120 Mo. App. 233 (quoting and adopting definition in *State ex rel. Garner v. Missouri & K. Tel. Co.*, 88 S. W. 41, 189 Mo. 83).

The word "exclusive," as used in *Acts* 1887, p. 42, § 50, providing that "such city shall have exclusive control over its public highways, streets, avenues, alleys and public places, and shall have 'exclusive' power by ordinance, to vacate or abandon any public highway, street, avenue, alley or public place, or part thereof, any law of this state to the contrary, notwithstanding," is not to be given its unlimited meaning, but must be understood as subject to the control of the state whenever the state chooses to assume control. The constitutional grant of power under which the charter is formed says that it must always be subject to the Constitution and laws of the state, which we interpret to mean that in all matters not appertaining to city government the charter is subordinate to the will of the Legislature. The Legislature, in conferring on the city the exclusive control of its streets, meant exclusive control for the purpose of the city government, not to the exclusion of the state in other matters. *State ex rel. Garner v. Missouri & K. Tel. Co.*, 88 S. W. 41, 43, 189 Mo. 83.

#### EXCLUSIVE ENJOYMENT

The phrase "exclusive enjoyment," as used in *Rev. St.* § 2322, providing that locators of all mining claims, having complied with the laws of the United States and local regulations, shall acquire a possessory title and shall have the "exclusive right of possession and enjoyment" of all the surface included within the lines of their location, means enjoyment of the surface for mining purposes alone, and hence the location of a mining claim within a forest reserve did not operate to withdraw the land embraced therein from the jurisdiction of the Secretary of Agriculture, nor give to locators having acquired a possessory interest only any authority to use the surface for the erection and maintenance of a saloon without a permit from the Secretary of Agriculture. *United States v. Rizinelli*, 182 Fed. 675, 681.

**EXCLUSIVE JURISDICTION**

See, also, Sole and Exclusive.

Where a proceeding in respect to a certain subject-matter can only be brought in one court, that court is said to have exclusive jurisdiction. "Exclusive jurisdiction" is that which gives sole power to try the cause. *Ex parte Wade*, 100 Pac. 35, 38, 2 Okl. Cr. 100 (quoting and adopting definitions in 1 *Rap. & L. Law Dict.* p. 702, and 2 *Bouv. Law Dict.* p. 26).

The word "exclusive," as used in Act April 16, 1873, p. 120, giving the circuit court exclusive original jurisdiction of everything properly pertaining to matters cognizable in courts of probate, means possessed to the exclusion of others. *Watson v. Henderson*, 135 S. W. 461, 462, 98 Ark. 63.

Under Code Cr. Proc. § 39, subd. 1, §§ 56, 57, defining the jurisdiction of courts, and section 252, empowering the grand jury to inquire into all crimes, and Laws 1910, c. 659, § 31, declaring that the Court of Special Sessions shall have in the first instance exclusive jurisdiction to hear misdemeanors, but shall be divested of jurisdiction, if, before the trial the grand jury shall indict the same person for the same offense, the commencement of a prosecution for a misdemeanor in the Special Sessions is not a prerequisite to the right to indict for the same offense, since the word "exclusive" merely defines the jurisdiction of inferior criminal courts, and prevents the subjecting of accused to be twice put in jeopardy for the same offense, in violation of Const. art. 1, § 6. *People v. Wenk*, 127 N. Y. Supp. 702, 703, 71 Misc. Rep. 368.

Kalamazoo Amended Charter provides for the election of but one justice of the municipal court. Chapter 29, § 18, provides that he shall, as against all other justices of the peace of Kalamazoo county, have exclusive jurisdiction of all proceedings within his jurisdiction when both parties thereto shall at the commencement of the proceedings be residents of the city. Section 3 provides that the justice shall be considered the successor in office of all the justices of the peace now in the city as their respective terms of office shall expire. Prior to the amended charter, the city charter provided for four justices of the peace. Held, that "exclusive" jurisdiction of the justice of the municipal court in the specified cases was not suspended until the expiration of the other justices' terms, and his jurisdiction before that time was not concurrent with that of the justices of the peace. *Strifling v. Baden*, 118 N. W. 740, 741, 155 Mich. 49.

In Civ. Code 1895, § 4193, providing that the jurisdiction of the county court extends "into the county, town, district or districts, to all civil cases of contract or tort (save where exclusive jurisdiction is vested in the superior court), the words, "save where exclusive jurisdiction is vested in the superior court,"

refer to the cases enumerated in the Constitution over which that instrument declares the superior court shall have exclusive jurisdiction. *Chambliss v. Hawkins*, 51 S. E. 337, 338, 123 Ga. 361.

**EXCLUSIVE LEGISLATION**

The obvious meaning of the words "exclusive legislation," as used in Const. art. 1, § 8, providing that Congress shall have power to exercise exclusive legislation over all places purchased by consent of the Legislature, in which the same shall be for the erection of forts, magazines, are equivalent to "exclusive jurisdiction." *United States v. Tully*, 140 Fed. 899, 900 (citing *United States v. Cornell*, 25 Fed. Cas. 646).

Under the provision of the federal Constitution declaring that Congress shall have power to exercise "exclusive legislation" in all cases whatsoever over all places purchased by the consent of the Legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards, and other needful buildings, where a purchase of land for any of these purposes is made by the national government and the state Legislature has given its consent to the purchase, the land so purchased by the very terms of the Constitution ipso facto falls within the exclusive legislation of Congress, and the state jurisdiction is completely ousted, as this is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation. *State v. Tully*, 78 Pac. 760, 762, 31 Mont. 365, 3 Ann. Cas. 824.

**EXCLUSIVE LICENSE**

An "exclusive license" by a patentee is one which does not amount to an assignment by reason of something reserved to the patentee, as, where the patentee excepted out of his grant the right to make machines within a certain part of the territory granted. *Bowers v. Atlantic, Gulf & Pacific Co.*, 162 Fed. 895, 899, 901 (quoting and adopting definition in *Hammond v. Hunt*, 11 Fed. Cas. 391).

**EXCLUSIVE MANAGEMENT AND CONTROL**

See, also, Exclusive Control.

By St. 1897, p. 447, c. 274, an appropriation was made for the support and maintenance of certain classes of inmates of the home at Evergreen under the auspices of the Woman's Relief Corps Home Association, which was then a private corporation. The act further provided that the home should be managed by a board of directors, to be appointed by the Governor, who was empowered to fill all vacancies therein and remove any director for cause; that the board should keep accounts of all receipts and expenditures and report annually to the Governor; and that all claims under the appropriation made should be presented and audited as other claims against the state. Held, that such act

made the home a state institution under the exclusive management and control of the state, within the provision of article 4, § 22, Const. Cal., that with certain exceptions no money shall be appropriated or drawn from the state treasury "for the use or benefit of any corporation \* \* \* or any other institution not under the exclusive management and control of the state as a state institution." Board of Directors of Woman's Relief Corps Home Ass'n of California v. Nye, 97 Pac. 208, 209, 8 Cal. App. 527.

### EXCLUSIVE OWNERSHIP

"Exclusive ownership" is necessarily ownership free from any kind of legal or equitable interest in any one else. A philanthropist made a bequest to the various asylums that may have been formed, or may be formed within a year, for the orphans of the late war for the restoration of the Union, providing that for a time the interest only should be used, and that the bequest be so managed as to give the orphans as they become of age a sum of money to fit them out in life and gradually extinguish the fund. The Soldiers' Orphans' Home having been established in Wisconsin, it received over \$25,000 from this bequest. Thereafter another left \$2,000 to the trustees of the home for the benefit of the children. Held, that the state in the administration of the fund occupied the position of a trustee only, the orphans being the beneficiaries, and hence property purchased by the state from the fund for the use of one of such orphans was not exclusively owned by the state so as to be exempt from taxation. Comstock v. Boyle, 128 N. W. 870, 871, 144 Wis. 180.

### EXCLUSIVE POSSESSION

"Exclusive possession" merely means the exclusion of all others from the possession of land and does not require the possessor to exclude all persons from entering on the land. Point Mountain Coal & Lumber Co. v. Holly Lumber Co., 75 S. E. 197, 201, 71 W. Va. 21.

On an issue as to whether defendant had maintained absolute possession of certain coal land under a gift from his father, plaintiff was not prejudiced by the court's failure to use the term "exclusive possession" in a particular part of its charge, where there was nothing in the language used, or in any of the instructions, excluding the idea of the necessity for exclusive possession, and there was no doubt under the charge as a whole that the jury must have understood the necessity for defendant to have maintained an absolute possession in order to have established his claim. Greenwich Coal & Coke Co. v. Learn, 83 Atl. 74, 76, 234 Pa. 180.

In order that an inference of guilt may be drawn from the unexplained possession of goods recently stolen, it must be an "exclusive personal possession" on the part of the accused. But this does not mean that the

goods must be actually in the hands of the accused or on his person; but possession of the requisite character may be established by the fact that the goods were found on premises or in a place of which he was in exclusive occupancy and control. If the place was accessible to others capable of stealing the inference cannot be drawn, although the fact is entitled to consideration in connection with other facts in the case. If stolen goods were found on premises of which accused was the tenant and it was proven that he was on the premises on the morning next after the alleged offense was committed, the jury might infer that they were on the premises with his knowledge and that they were in fact in his possession. If they were found in the joint possession of accused and another indicted with him, the jury might draw from such possession the same inference of guilt as if found in his sole possession. State v. Wright (Del.) 66 Atl. 364, 365, 6 Pennewill, 251.

### EXCLUSIVE POWER

The term "exclusive power," used in a grant to municipalities of "exclusive power" over a subject of police regulation such as the sale of intoxicating liquors necessarily implies full legislative authority. City of Baton Rouge v. Butler, 42 South. 650, 651, 118 La. 73.

The word "exclusive," as used in Const. art. 11, § 2, as amended November 8, 1910, providing that the legislative assembly shall not enact, amend, or repeal any city charter, but granting such power to the legal voters of every city or town, subject to constitutional and criminal law of the state, together with the exclusive power to license, regulate, control, suppress, or prohibit the sale of intoxicating liquors therein, but such municipality shall within its limits be subject to the provisions of the local option law of the state, had not the force usually given to that adjective, and that, as the restriction contained no exception, an employment of the power so conferred was subject to all the consequences that may have resulted from the adoption of the local option law, so that a prohibition order made in the county as a whole could not be modified or vacated, except by subsequent vote of the qualified voters of an incorporated city or town therein cast against prohibition at an election regularly held for that purpose in the municipality. State v. Schluer, 115 Pac. 1057, 1062, 59 Or. 18.

The word "exclusive," as used in an amendment to Const. art. 11, § 2, providing that the exclusive power to license or prohibit the sale of intoxicating liquors within a municipality, is vested in such municipality, subject to the provisions of the local option law of the state, means that a municipality shall, until otherwise ordered, be the sole agent of the state in exercising the police

power, and construed in that way the amendment is valid, as the right of the state to recall the power delegated remains intact, and the amendment does not trench on a republican form of government guaranteed by Const. U. S. art. 4, § 4, nor encroach upon the limitations imposed by the federal Constitution upon the powers of the state, under article 1, § 9. *State v. Hearn*, 117 Pac. 412, 413, 59 Or. 227.

### EXCLUSIVE PRIVILEGE

See, also, Privileges and Immunities; Special Privilege or Immunity.

A contract by a city, granting the "exclusive privilege" of laying water pipes for public use in the highways of the city to K., and containing a provision that it was agreed that the contract should remain in full force for 20 years from a specified date, with the privilege to the city of purchasing the waterworks from K., his successors or assigns, after the expiration of 10 years, etc., did not constitute an implied renunciation of the city's power to construct and maintain waterworks itself, after the expiration of the 20-year period. *City of Sioux Falls v. Farmers' Loan & Trust Co.*, 136 Fed. 721, 728, 69 C. C. A. 373 (citing *Long Island Water Supply Co. v. City of Brooklyn*, 17 Sup. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165; *City of Joplin v. Southwest Missouri Light Co.*, 24 Sup. Ct. 43, 191 U. S. 150, 48 L. Ed. 127; *Helena Waterworks Co. v. Helena*, 25 Sup. Ct. 40, 195 U. S. 383, 49 L. Ed. 245; *Blenville Water Supply Co. v. City of Mobile*, 20 Sup. Ct. 40, 175 U. S. 109, 44 L. Ed. 92; *Id.*, 22 Sup. Ct. 820, 186 U. S. 212, 46 L. Ed. 1132; *Skaneateles Waterworks Co. v. Skaneateles*, 22 Sup. Ct. 400, 184 U. S. 354, 46 L. Ed. 585).

Under old Const. art. 13, § 1, forbidding exclusive and separate privileges except in consideration of public services, an exemption from taxation not in consideration of public services is an "exclusive and separate privilege," and hence invalid. *City of Winchester v. Winchester Waterworks Co.*, 148 S. W. 1, 3, 149 Ky. 177.

### EXCLUSIVE RIGHT

A municipality excludes itself from competition during the period named with the grantee in an ordinance of the "exclusive" right to erect, maintain, and operate waterworks for a definite term, to supply water for public and private use. *City of Vicksburg v. Vicksburg Waterworks Co.*, 26 Sup. Ct. 660, 666, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

Plaintiff contracted to furnish its "ad service," consisting of one Buster Brown cut for each week, to defendant dry goods company, which agreed to pay therefor at the rate of \$3 per week, defendant to have the "exclusive right" to use the same in the city where defendant was located only, and to hold the cuts, etc., subject to plaintiff's or-

der when the contract expired. Held, that the words "exclusive right," as so used, had reference only to the use of the cuts furnished defendant under the contract, and that plaintiff did not thereby contract away its entire service for the city. *Buster Brown Co. v. Valley Dry Goods Co.*, 47 South. 549, 94 Miss. 856.

The "exclusive rights" secured by a patent are the right to make, the right to use, and the right to vend the invention it protects. A grant, transfer, or conveyance of these exclusive rights throughout the United States, or a grant of an undivided part of these exclusive rights, or a grant of these exclusive rights throughout a specified part of the United States, is an assignment of an interest in the patent, by whatever name it may be called. A grant, transfer, or conveyance of any right or interest less than these is a license. *Paulus v. M. M. Buck Mfg. Co.*, 129 Fed. 594, 596, 64 C. C. A. 162 (citing *Waterman v. Mackenzie*, 11 Sup. Ct. 334, 138 U. S. 252, 255, 256, 34 L. Ed. 923; *Union Switch & Signal Co. v. Johnson Railroad Signal Co.*, 61 Fed. 940, 943, 10 C. C. A. 176, 179; *Pickhardt v. Packard*, 22 Fed. 530, 532, 23 Blatchf. 23).

The "exclusive right of a patent," or the franchise which the patent grants, consists altogether in the right to exclude every one from making or using or vending the thing patented, without the permission of the patentee. This is all he obtains by his patent. In other words, the right is the right to prevent every one from making, or using, or selling the thing patented without his consent. Or, to put it differently, it is the right to sue any one who so makes, uses, or sells the thing patented. It is not the right to make, or to use, or sell the thing patented. That he has the right to do irrespective of the statute by virtue of the common law. *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358, 363.

The "exclusive right of possession and enjoyment" given by Rev. St. U. S. § 2322, to the owner of a valid lode location, is not limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location, but extends to all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of the surface lines extended downward vertically. *Nash v. McNamara*, 93 Pac. 405, 408, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

### EXCLUSIVE SALE

The term "exclusive sale," as used in Rev. Laws, c. 56, § 1, relating to the appointment of agents for the exclusive sale of goods, wares, or merchandise, means selling within a prescribed territory to the exclusion of all others, so that in the designated place the purchaser who makes such a contract with the original seller will have the



control of the market for resale. *Commonwealth v. Strauss*, 78 N. E. 136, 191 Mass. 545, 11 L. R. A. (N. S.) 968, 6 Ann. Cas. 842.

### EXCLUSIVE USE

That other persons besides the claimant of a right of way used the way does not prevent the claimant's user from being exclusive, since "exclusive use" means that his right does not depend on a like right in others. *Schmidt v. Brown*, 80 N. E. 1071, 1074, 226 Ill. 590, 11 L. R. A. (N. S.) 457, 117 Am. St. Rep. 261.

The word "exclusive," in an ordinance of a city relating to the exclusive use of streets, is limited in meaning so as not to infringe on the Constitution, where the Constitution provided that no ordinance of the city should be inconsistent with the state law, as a general prohibitory provision coming from an independent superior authority will overcome or control a special provision coming from an inferior authority, for the reason that the inferior has not power and will not be presumed to have intended to put an exception on what is prescribed by the superior. *State v. Kessells*, 96 S. W. 494, 497, 120 Mo. App. 233.

### EXCLUSIVELY

See Occupied Exclusively as a Dwelling.

### EXCLUSIVELY USED

The phrase, "exclusively used," in constitutional and statutory tax exempting provisions, has reference to the primary and inherent use as against a mere secondary and incidental use. *State ex rel. Spillers v. Johnston*, 113 S. W. 1083, 1086, 214 Mo. 656, 21 L. R. A. (N. S.) 171.

#### Church

A building originally built as a dwelling house, which was purchased by a church which used the parlor floor, without any change in the structure of the building, for the services of the church and Sunday school, the pastor or minister in charge living with his family on the second floor, and a woman with her children, who looked after work done on the premises, living on the third floor, was not used "exclusively" as a church within the meaning of the provision of the liquor tax law prohibiting traffic in liquor on the same street and within 200 feet of a building used exclusively as a church. In *re Finley*, 110 N. Y. Supp. 71, 73, 58 Misc. Rep. 639.

#### Educational purposes

"Exclusive educational purposes," when applied to an academy, is broad enough to cover the buildings and grounds which form a part of the foundation, and which are exclusively used for the school life, whether the lads are at study or at recitations, or are eating, reading, sleeping, drilling, or at play. The criterion of whether property is used ex-

clusively for educational purposes, within Laws 1896, p. 797, c. 908, § 4, subd. 7, exempting such property from taxation, is whether it is exclusively devoted to the use of the institution in the mental, moral, and physical training and proper maintenance of those attendant upon it. Sleeping rooms, drill rooms, armories, stables, library buildings, buildings occupied by principals as a residence, recreation halls and dining halls, which constitute a part of the foundation of an academy, and are used in its administration exclusively, are used exclusively for educational purposes, within Laws 1896, p. 797, c. 908, § 4, subd. 7, exempting from taxation property used exclusively for educational purposes. *People ex rel. Board of Trustees of Mt. Pleasant Academy v. Metzger*, 90 N. Y. Supp. 488, 489, 98 App. Div. 237.

Const. 1869, art. 10, § 3, provides that the Legislature may exempt all property used exclusively for state, county, municipal, benevolent, charitable, educational, or religious purposes from taxation. Held, that land rented to a national soldiers' home and to an electric railway company for a right of way by an educational institution, together with houses and lots rented out for a profit, were not exclusively used for educational purposes, and were subject to taxation, though the rentals derived therefrom were devoted to the educational purposes of the institution. *Commonwealth v. Trustees of Hampton Normal & Agricultural Institute*, 56 S. E. 594, 597, 106 Va. 614.

Where a turner society owned a building a portion of which it rented for a saloon and another portion as a barber shop, and on special occasions leased the hall for dances, political meetings, etc., applying the profits to the purposes of the society, the building was not "exclusively used for educational purposes" within the meaning of the statute as to exemptions from taxation, and, being indivisible, was wholly subject to taxation. *Gymnastic Ass'n of the South Side of Milwaukee v. City of Milwaukee*, 109 N. W. 109, 110, 129 Wis. 429.

#### Religious purposes

Property owned by a church, but used primarily for a family residence by the pastor, cannot be held to be used "exclusively for religious purposes," and therefore capable of exemption from taxation within the meaning of the Constitution, even though it brings no pecuniary profit, and the lot is of the ordinary size used for residence purposes, and the pastor devotes his entire time to the work of the church. *People ex rel. Thompson v. First Congregational Church of Oak Park*, 83 N. E. 536, 537, 232 Ill. 158.

Parish houses or priests' houses or residences are not "houses used exclusively for public worship," within Rev. St. 1906, § 2732, exempting such houses from taxation. *Wat-*

terson v. Halliday, 82 N. E. 962, 966, 77 Ohio St. 150, 11 Ann. Cas. 1096.

#### School purposes

A lot leased at an annual rental by the owner of the fee to a school board, to be used for school purposes is, not within Const. art. 10, § 6, and Rev. St. 1899, § 9119, providing that lots in incorporated cities, "used exclusively for school purposes," shall be exempt from taxation. State ex rel. Hammer v. Macgurn, 86 S. W. 138, 139, 187 Mo 238, 2 Ann. Cas. 808.

A house which was built for and had been used as a dwelling house was purchased by a church, but its structure was not changed. The parlor floor was used for services of the church and Sunday school, while the pastor in charge lived with his family on the second floor, keeping house with the usual accommodations and conveniences for that purpose. The third floor was occupied by a woman with her children, who superintended work done on the premises to some extent. Held, that the house was not used exclusively for church purposes within Liquor Tax Law, Laws 1896, p. 66, c. 112, § 24, subd. 2, as amended by Laws 1897, p. 225, c. 312, § 16, forbidding traffic in liquor in any place on the same street and within 200 feet of a building used exclusively as a church or schoolhouse. In re Finley, 110 N. Y. Supp. 71, 73, 58 Misc. Rep. 639.

#### EXCLUSIVENESS OF POSSESSION

See Openness, Notoriety, and Exclusiveness of Possession.

#### EXCUSE

See Lawful Excuse; Without Excuse or Justification; Without Lawful Excuse.

As used in an instruction that malice means the doing of a wrongful act intentionally, without justification or excuse, the language, "without any justification or excuse," not only excludes justifiable and excusable homicide, but homicide extenuated to manslaughter, because done in sudden heat and passion upon sufficient legal provocation. It must not be supposed that the word "excuse" is only applicable to excusable homicide, as homicide in self-defense. It would therefore be wrong to hold that the word "excuse" was intended by the court to be used in the absence of something which renders one wholly excusable or justifiable, but, on the contrary, it should be held to include also any legal extenuation of the offense charged. State v. McDaniel, 47 S. E. 384, 387, 68 S. C. 304, 102 Am. St. Rep. 661.

Matters in "excuse, justification, and avoidance," required by the forcible entry statute to be pleaded, are such as constitute new matter under the general practice act.

Sodini v. Gaber, 111 N. W. 962, 101 Minn. 155.

#### EXCUSABLE HOMICIDE

Homicide is "excusable" when committed by accident and misfortune in lawfully correcting a servant or in doing any other lawful act by lawful means with usual and ordinary caution and without any unlawful intent. Kent v. State, 126 Pac. 1040, 1042, 8 Okl. Cr. 188.

"Excusable homicide" is that committed by misadventure or in self-defense. State v. Watson (Del.) 82 Atl. 1086, 1087.

To constitute "excusable homicide," under Pen. Code, § 266, declaring that a homicide is excusable when committed by accident and misfortune, in the heat of passion, on any sudden and sufficient provocation, or on a sudden combat, provided no undue advantage is taken, nor any dangerous weapon used, the killing must not only be committed by accident and misfortune, but no undue advantage must be taken, nor any dangerous weapon used. State v. Stumbaugh, 132 N. W. 666, 671, 28 S. D. 50.

The taking of human life is excusable when committed by misadventure. "Homicide by misadventure," constituting excusable homicide, is the accidental killing of another where the slayer is doing a lawful act, unaccompanied by any criminally careless or reckless conduct. State v. Blackburn (Del.) 75 Atl. 536, 540, 7 Pennewill, 479.

#### EXCUSABLE NEGLIGENCE

See Inadvertence, Surprise, and Excusable Neglect.

The failure of the wife to examine papers served on her husband while he was sick and incapable of attending to business, and thereby learn that they were a summons and complaint in commencement of an action in which she was a party, is "excusable neglect" within Code Civ. Proc. 1902, § 195, entitling her to have a default therein set aside. Turner v. Bolton, 64 S. E. 412, 413, 82 S. C. 502.

That defendant would have lost his position as an employé of a corporation, had he attended the trial of an action against him which he knew was pending for trial, and which he took no steps to prevent being tried in his absence, was not ground for vacating a judgment entered against him by default on the ground of "inadvertence" and "excusable neglect." Peterson v. Crosier, 81 Pac. 860, 862, 29 Utah, 235.

The term "excusable neglect," as used in Burns' Ann. St. 1908, § 405, providing that the court may relieve against a judgment taken against a party through his excusable neglect, is of very general application, and each case must depend on its own particular facts and circumstances; it not being possi-

ble to fix any general rule by which to determine what neglect is excusable. *First Nat. Bank of Winslow v. Stilwell*, 98 N. E. 151, 152, 50 Ind. App. 226.

The application to open a default judgment foreclosing a tax lien showed that at the time petitioner was served with the summons she was an infant under 15 years of age; that she was unaware of the meaning or effect of a summons, and that it was not explained to her; that she was also ignorant of her rights in the property affected by the suit. It also showed that petitioner was defaulted on the return day; that a guardian ad litem was appointed, who answered for her; and that judgment of foreclosure was rendered, and that petitioner was declared to be barred of any interest in the premises. Held, that a showing was made of excusable neglect for failing to appear and defend within *Burns' Ann. St. 1908, § 405*, authorizing relief from a judgment taken against a party through excusable neglect, and also not only a good, but an absolute, defense, so that the default was properly opened and petitioner allowed to redeem. *Macy v. Lindley* (Ind.) 99 N. E. 790, 792.

#### Negligence of attorney

The neglect of an attorney regularly retained to prepare and serve an answer in the case before the time for answering expires, when occasioned by intense absorption of mind in the conduct of a murder case involving a charge of first-degree murder, is excusable within *Rev. Codes 1905, § 6884*, authorizing the district court in its discretion, upon just terms, within one year after notice thereof, to relieve a party from a judgment taken against him through his "excusable neglect." *Citizens' Nat. Bank of Sisseton, S. D., v. Brandon*, 126 N. W. 102, 104, 19 N. D. 489, 27 L. R. A. (N. S.) 858.

## EXECUTE

See Provisionally Executed; Re-execute.

In the provision of the mulct tax statute (*Acts 25th Gen. Assem. p. 63, c. 62*) requiring the county attorney to see that the provisions of the act are enforced, "to 'enforce' is to 'execute with vigor,' to put in force, compel obedience to, cause to be executed or performed. It has the same meaning in this respect as 'execute.'" *Tennant v. Kuhlemeier*, 120 N. W. 689, 693, 142 Iowa, 241, 19 Ann. Cas. 1026.

The phrase "to 'execute the laws,'" used in a constitutional provision respecting the functions of the governor, contemplates the enforcement of a judicial process; that is, the enforcement of a right or remedy provided by the law and judicially determined and ordered to be enforced, and not an arbitrary enforcement by the executive of what he may consider the law to be. The provisions of *Const. art. 5*, and *Rev. Code 1892, § 2156*,

that the Governor is the chief executive, that he may call out the militia to execute the laws, and that he shall see that the laws are faithfully executed, do not confer on him the right to sue in the name of the state. *Henry v. State*, 39 South. 856, 864, 87 Miss. 1.

The word "executed," in the statute providing that no appeal is effectual unless an undertaking for costs is "executed" by appellant, means executed and served. *Bedford v. Flage*, 126 N. W. 97, 98, 20 N. D. 66.

Under *Code Civ. Proc. § 441*, which provides that an appeal must be taken by serving a written notice on the adverse party, and that the appeal shall be deemed taken by the service of a notice of appeal and perfected on service of the undertaking for costs, and section 445, which provides that to render an appeal effectual for any purpose an undertaking for costs must be executed by the appellant, the appellant, in order to "execute" an undertaking, must do all those things which are necessary to render such undertaking binding as between the parties; to give respondent his statutory time within which to accept his sureties, the undertaking must be executed at the time of notice of appeal; and generally there is no appellate jurisdiction where there has not been a full compliance with the requirements of the statute. *Aldrich v. Public Opinion Pub. Co.*, 132 N. W. 278, 282, 27 S. D. 589 (citing 3 Words and Phrases, p. 2558).

#### Delivery imported

The word "execution," ordinarily used with reference to a deed, legally means not only the signing of the instrument but also includes its delivery, which completes the execution and gives validity to the deed. *Tucker v. Helgren*, 113 N. W. 912, 102 Minn. 382 (citing *State v. Young*, 23 Minn. 551; *Schwab v. Rigby*, 38 N. W. 101, 38 Minn. 395; 3 Words and Phrases, p. 2558).

Though a contract is signed by a party, it is not "executed" until delivered. *American Copying Co. v. Muleski*, 122 S. W. 384, 385, 138 Mo. App. 419.

The "execution" of a deed includes its delivery, which is necessary to divest the grantor of title. *Schaffner v. Voss*, 93 N. E. 235, 237, 46 Ind. App. 551; *Bowers v. Cottrell*, 96 Pac. 936, 939, 15 Idaho, 221.

The word "execution," when applied to the execution of an instrument, includes a delivery of the instrument, and an averment in a pleading that a note was executed necessarily includes an averment that it was delivered. *Embree v. Emmerson*, 74 N. E. 44, 46, 37 Ind. App. 16.

Under the statute, requiring chattel mortgages to be filed within 10 days after execution, filing a mortgage within 10 days of its delivery, though more than 10 days from its date, was sufficient; the term "execution" in-

cluding delivery and acceptance. *Fenby v. Hunt*, 101 Pac. 492, 494, 53 Wash. 127.

Under Code Civ. Proc. § 1933, defining the execution of an instrument, the term "execution," as applied to a mortgage, includes delivery. *Van Valkenburgh v. Oldham*, 108 Pac. 42, 45, 12 Cal. App. 572.

The complaint, in an action on an assignment of the interest of a beneficiary under a testamentary trust, alleged that on a certain day the beneficiary, his wife and children, "executed and delivered" to plaintiff's assignor an assignment in writing, and the answer admitted that on or about the date specified "the instrument therein referred to was delivered to the plaintiff," and defendants' counsel admitted during the trial "the making of a similar instrument" to that alleged to have been executed. Held, that there was no issue as to the due execution of the assignment; the answer having admitted its execution by admitting its delivery, and the "execution" of a document meaning ordinarily completing it in accordance with the various formalities required by law, including its delivery. *Lessler v. De Loynes*, 135 N. Y. Supp. 948, 950, 150 App. Div. 868.

A resolution by corporate directors authorizing the president and secretary to execute and deliver bonds to be issued authorizes the sale of such bonds; the word "sell" being included by implication in the words "execute and deliver," as the word "execute" frequently includes "delivery," and the word "delivery" frequently means the change of title as well as the change of possession of property. *McCormick v. Unity Co.*, 87 N. E. 924, 927, 239 Ill. 306.

The word "execute," as used in reference to a conveyance or other document, may mean as in popular speech, to sign, or to sign and deliver, but in strict legal understanding, when said of a deed or bond, it always means to sign, seal, and deliver. The mere fact that the date written in a deed to the purchaser at a judicial sale was prior to the expiration of the time for redemption is not in itself conclusive proof that it was prematurely executed and does not necessarily make the deed void upon its face, as the date is no part of the substance of the deed and not necessary to be inserted; the real date being the time of its delivery. *David v. Whitehead*, 79 Pac. 19, 20, 13 Wyo. 189.

Under Code Civ. Proc. § 441, which provides that an appeal must be taken by serving a written notice on the adverse party, and that the appeal shall be deemed taken by the service of a notice of appeal and perfected on service of the undertaking for costs, and section 445, which provides that to render an appeal effectual for any purpose an undertaking for costs must be executed by appellant, the execution of the undertaking includes its delivery, or service, which under the statute

is the substitute for delivery, as the term "execute" ordinarily includes delivery, and the words "execute" and "execution" in their proper sense convey the meaning of carrying out some act to its completion, and, to give appellate jurisdiction, it must be served with the notice of appeal. *Aldrich v. Public Opinion Pub. Co.*, 132 N. W. 278, 282, 27 S. D. 589.

An averment that he "executed" the note would include the act of signing and delivering. A petition in an action on a note sufficiently avers its execution by alleging that defendants by their note agreed and promised to pay plaintiffs. *Scott v. Bales (Ky.)* 96 S. W. 528.

If a certificate of acknowledgment is simply that a grantor "executed" a deed, it seems that would imply that he "signed, sealed, and delivered" it. *Elmslie v. Thurman*, 40 South. 67, 68, 87 Miss. 537 (citing *Smith v. Williams*, 38 Miss. 48, 56).

#### Scaled

If a certificate of acknowledgment is simply that a grantor "executed" a deed, it seems that would imply that he signed, sealed, and delivered it. *Elmslie v. Thurman*, 40 South. 67, 68, 87 Miss. 537 (citing *Smith v. Williams*, 38 Miss. 48, 56).

#### Sign synonymous

"Execution" of an instrument implies signing thereof. *Tucker v. Helgren*, 113 N. W. 912, 102 Minn. 382; *David v. Whitehead*, 79 Pac. 19, 20, 13 Wyo. 189; *Scott v. Bales (Ky.)* 96 S. W. 528.

"Execution" and "signing" are not synonymous terms. Execution implies complete execution—signing, sealing, and delivery—whereas signing implies only one of the steps towards execution. *Hayes v. Ammon*, 85 N. Y. Supp. 607, 608, 90 App. Div. 604.

If a certificate of acknowledgment is simply that a grantor "executed" a deed, it seems that it would imply that he signed, sealed, and delivered it. *Elmslie v. Thurman*, 40 South. 67, 68, 87 Miss. 537 (citing *Smith v. Williams*, 38 Miss. 48, 56).

The word "signed" is not synonymous with the word "executed," although the word "executed," in a pleading which expressly avers that the instrument was not delivered, may be synonymous with the word "signed." In an action on a note, an answer admitting that defendant "signed" the note sued on, but averring that thereafter, without his knowledge or consent, the note was materially altered, is insufficient as a statement of a defense, as the averment of the signature is not equivalent to an allegation of execution, which includes delivery, and, for anything in the answer to the contrary, defendant may have consented to the alteration after signature, but before delivery. *Bowen v. Woodfield*, 72 N. E. 162, 163, 33 Ind. App. 687.

While, in strict legal understanding, the verb "to execute" as applied to notes, deeds, or written contracts, includes both signing and delivery, in popular speech it is often limited to the mere act of signing the instrument, and it was in this sense that it was used in an admission by defendant that the notes in question had been executed by the parties they purported to be executed by, both parties having subsequently treated the question of delivery as a controverted issue. *Morris v. Butler*, 122 S. W. 377, 378, 138 Mo. App. 378 (citing 3 Words and Phrases, p. 2558).

Under Rem. & Bal. Code, § 7550, which provides that, on an appeal from a decision of the counsel of a first-class city upon objections to an assessment, "the appellant shall execute and file a sufficient bond," the only interest of the city in the bond is that it shall be saved harmless, and the word "execute" will not be held to necessarily mean "sign," so that an appeal bond, signed by one of several objectors in such a proceeding with a sufficient surety, was sufficient to satisfy the requirement. *Gerlach v. City of Spokane*, 124 Pac. 121, 122, 68 Wash. 589.

"To 'execute' an instrument includes signing it; but the admission by a party whose name is appended to an instrument that he executed it is as binding upon the party as if the person to whom the admission is made had seen him affix his name thereto. Such admission becomes legal evidence of the fact. We therefore conclude that the notary's certificate that the party whose name is affixed acknowledged the execution of the instrument is as good a witness to the signature by mark as if he had written his name at the foot of the document, 'as a witness to her signature by mark.'" *First Nat. Bank of Hailey v. Glenn*, 77 Pac. 623, 626, 10 Idaho, 224, 109 Am. St. Rep. 204.

A certificate of acknowledgment to a petition for a local option election, stating that the signers "executed the above instrument and severally acknowledged the execution of the same," sufficiently shows that the petition was "signed and acknowledged" as required by Liquor Tax Law, § 16; the word "executed" contemplating the completion of the instrument, so that the attestation amounted to an acknowledgment that the petition was "signed." In *re Livingston*, 115 N. Y. Supp. 269, 270, 62 Misc. Rep. 334 (quoting and adopting definition in 1 Bouv. Law Dict. 554).

#### Subscribe synonymous

"Execute" is synonymous with "subscribe." To "subscribe" means to write one's name beneath or at the end of an instrument, and hence Liquor Tax Law (Laws 1896, p. 60, c. 112) § 17, subd. 6, as amended by Laws 1896, p. 220, c. 312, providing that the consent of property owners on an application for a

liquor tax certificate shall be in writing "executed" and acknowledged as deeds entitled to be recorded, was not complied with where the names attached to a consent preceded the consenting clause. In *re Griffin*, 106 N. Y. Supp. 24, 26, 56 Misc. Rep. 21 (citing *Chéney v. Cook*, 7 Wis. 413, 423; *James v. Patten*, 6 N. Y. 9, 12, 55 Am. Dec. 376; *Commonwealth v. Barhight*, 9 Gray [75 Mass.] 113, 114; *Stone v. Marvel*, 45 N. H. 481; *Davis v. Shields* [N. Y.] 26 Wend. 346; *McGivern v. Fleming* [N. Y.] 12 Daly, 289, 290; 7 Words and Phrases, p. 6729).

#### Will—As carry into effect

A wife bequeathed and devised all her property to her four children; the will providing that in case any of the four children should die, leaving no descendants, before the "execution of this, my last will and testament, I direct that my property of every description be divided among my then surviving children." In the same paragraph of the will, speaking of the subject of her gift, testator used the words "at the time of my death." Held, that under the circumstances the word "execution" would be construed to refer to the time when the provisions of the will were actually carried into effect and the estate distributed. In *re Kear*, 117 N. Y. Supp. 667, 668, 133 App. Div. 265.

#### EXECUTE (In Criminal Law)

See Publicly Executed.

#### EXECUTED CONTRACT

The term "executed contract" means something which has been, but is no longer, a contract. *Reed v. Schon*, 83 Pac. 77, 79, 2 Cal. App. 55.

"An 'executed contract' is defined as one in which the object of the contract is performed." *Bastin Tel. Co. v. Richmond Tel. Co.*, 77 S. W. 702, 703, 117 Ky. 122.

A contract is "executed" when all is done that its terms require to be performed, but until full performance the contract is "executory." *Leadbetter v. Hawley*, 117 Pac. 289, 290, 59 Or. 422.

Where parties agree on the terms of a sale of personalty, and annex no conditions to the contract, the contract becomes an "executed" one, and title to the property passes without any formal delivery or payment of money; but when it is contemplated that something be done to complete the sale, such as weighing, selecting, delivering, or some other act, the contract is "executory," and title does not pass until the specific goods are ascertained and appropriated in the mode agreed on. *Hardwick v. American Can Co.*, 88 S. W. 797, 802, 113 Tenn. 657.

If an illegal contract is executory, money paid thereunder may be recovered. The term "executed contract" means the performance of the contract, and not its mere execution. Hence money paid on a contract to

sell a lot and building and stock of drugs, with an agreement that the amount paid should be retained by the seller if the remainder was not paid, may be recovered by the purchaser; no deeds to the property having been executed. *McCall v. Whaley*, 115 S. W. 658, 660, 52 Tex. Civ. App. 646.

Under Civ. Code, § 1698, providing that a written contract may be altered by a contract in writing or by an executed oral agreement, and section 1661, declaring that an executed agreement is one the object of which is fully performed, an oral agreement altering a written contract is not enforceable, unless its terms have been fully performed by both parties. *Pearsall v. Henry*, 95 Pac. 154, 157, 153 Cal. 314.

An oral agreement between the buyer and seller to extend the time of acceptance of an option to purchase to a certain date, made when the option was given, was not an executed contract within Civ. Code, § 1698, providing that a written contract may only be altered by a contract in writing or an executed parol agreement, where the written option was not accepted within a reasonable time, and the seller at the time of the acceptance refused to recognize the existence of the option. *Standard Box Co. v. Mutual Biscuit Co.*, 103 Pac. 938, 941, 10 Cal. App. 746.

Where an oral modification of a written contract provided that defendant was to receive \$21,000 on the sale of land, and plaintiff all that could be procured above that amount, and plaintiff attempted to sell the land in accordance with the agreement, but failed to get an offer as large as \$21,000, so that the deal was declared off, the contract was executed under Civ. Code, § 1661, providing that an executed contract is one the object of which has been fully performed, so as to be taken out of the statute of frauds. *Simmons v. Sweeney*, 109 Pac. 265, 269, 13 Cal. App. 283.

Under Civ. Code, §§ 1661, 1698, defining an "executed contract" as one the object of which is performed, and providing that a contract in writing may be altered only by a contract in writing, or by an oral executed agreement, an oral extension of the payment of a note, made after maturity, but not supported by any consideration, is void, notwithstanding the forbearance to sue during the extension, since the oral extension is not an executed contract, and a guarantor of the payment of the note is not discharged from liability in the absence of estoppel; an "executed contract" being one in which both parties have fully performed the terms of the contract. *Dean v. Sedan Milling Co.*, 124 P. 736, 739, 19 Cal. App. 28.

#### EXECUTED DEED

An "executed" deed is a deed signed, sealed if necessary, acknowledged if necessary,

and delivered. *Creamer v. Bivert*, 113 S. W. 1118, 1122, 214 Mo. 473.

#### EXECUTED TRUST

A voluntary executed trust which is a trust completely created is irrevocable. *Watson v. Payne*, 128 S. W. 238, 240, 143 Mo. App. 721.

Where land was conveyed to a trustee to pay rents, etc., to the beneficiary for life, and to convey to her appointee by will, or, in default of appointment, the land to go to her heirs, the trust was an "executed trust" in the sense that term is used, the trust being completely limited and defined by the instrument creating it, and the rules of property apply, so that the beneficiary could convey her equitable estate and exclude the heirs. *McFall v. Kirkpatrick*, 86 N. E. 139, 146, 236 Ill. 281.

The distinction between a "trust executed" and "executory" is this: A trust executed is where the party is given complete directions for settling his estate, with perfect limitations; an executory trust is where the directions are incomplete, and are rather minutes or instructions for the settlement. *Morris v. Linton*, 104 N. W. 927, 929, 74 Neb. 411 (citing *Neves v. Scott*, 9 How. 211, 13 L. Ed. 102; *McCartney v. Ridgway*, 43 N. E. 826, 160 Ill. 129, 32 L. R. A. 555).

#### EXECUTION

See Due Execution; In Execution; Tax Execution.

Contempt of court is a specific criminal offense, and a fine imposed is a judgment in a criminal case. The adjudication is a conviction, and the commitment in consequence thereof is "execution." *Ex parte Shull*, 121 S. W. 10, 11, 221 Mo. 623, 133 Am. St. Rep. 496 (citing *Church, Hab. Corp.* [2d Ed.] § 308; *In re Kearney*, 7 Wheat. [20 U. S.] 38, 5 L. Ed. 391).

A statute requiring the court upon a plea or verdict of guilty to render judgment and assess punishment or penalty, as required by law, is simply declaratory of the common law, and where judgment and sentence are imposed for a certain term, and from any cause the time elapses without the imprisonment being endured, it would still be a valid, subsisting, unexecuted judgment. The judgment is the penalty of the law as declared by the court, while the direction, with respect to the time of carrying it into effect, is in the nature of an award of execution. Where the penalty is imprisonment imposed, unless remitted by death or some legal authority, the expiration of time without imprisonment is in no sense an "execution of the sentence." *Ex parte Eldridge* (Okla.) 106 Pac. 980, 981, 27 L. R. A. (N. S.) 625 (quoting and adopting definition in *Ex parte Collins*, 97 Pac. 188, 8 Cal. App. 367).

**EXECUTION (Writ of)**

See Body Execution; By Force of the Execution; Exemption (From Execution); General Execution; Seized by Virtue of an Execution; Special Execution; Taken on Execution.

Issue of execution, see Issuance—Issue.

Subject to execution, see Subject To.

Voluntary payment of, see Voluntary Payment.

"Execution of the judgment" we have always understood to be the final step in a suit at law. *Dobbins v. First Nat. Bank*, 112 Ill. 553, 566.

An "execution" is the end of the law. It gives the successful party the fruits of his judgment. *McKinstler v. Sager*, 72 N. E. 854, 860, 163 Ind. 671, 68 L. R. A. 273, 106 Am. St. Rep. 268 (quoting and adopting from *United States v. Nourse*, 9 Pet. 8, 27 [34 U. S.] 9 L. Ed. 31).

"A writ of 'execution' is the process by which a court carries out its judgment. \* \* \* Execution is used to mean a process for the enforcement of the payment of a judgment for money recovered in a civil action out of the property of the judgment debtor." *Smith ex rel. McElhany v. Rogers*, 90 S. W. 1150, 1152, 191 Mo. 334 (quoting and adopting definition in 8 Enc. of Pl. & Pr. p. 311).

The word "execution," as used in Pol. Code 1895, § 891, providing that all laws in reference to a period of limitation as to ordinary "executions" are made applicable to tax *fi. fas.*, is to be interpreted in the sense of judgment. *Georgia R. & Banking Co. v. Wright*, 53 S. E. 251, 263, 124 Ga. 596.

An "execution" is a judicial writ and can be amended by the court, where the rights of third parties have not intervened. *Hamant v. Creamer*, 63 Atl. 736, 739, 101 Me. 222, 8 Ann. Cas. 165.

"An 'execution' is not a cause of action. It pertains to the enforcement of the lien of a judgment." Under a statute providing that a judgment may be enforced by execution at any time within 10 years after its entry, a judgment cannot be properly enforced by execution issued after said time, although the judgment debtor has been continually absent from the state during said time, and the judgment remains in force for that reason. *Weisbecker v. Cahn*, 104 N. W. 513, 514, 14 N. D. 390.

**Attachment distinguished**

"Attachments" may be a species of executions; but "executions" is a broader term, and the less does not include the greater. *J. M. McGuire & Co. v. Barnhill*, 115 S. W. 1144, 1145, 89 Ark. 209.

An attachment has but few of the attributes of an execution; an "execution" "being the judicial process for obtaining the debt

or damages recovered by judgment, and final in its character, while the attachment is but mesne process, liable at any time to be dissolved, and the judgment upon which may or may not affect the property seized." Seamen's wages are protected from seizure after judgment by attachment or proceedings in aid of execution by the provisions of Rev. St. U. S. § 4536 (U. S. Comp. Stat. 1901, p. 3082), that no wages due or accruing to any seaman shall be subject to attachment or arrestment from any court, and declaring that payment of wages to seamen shall be valid, notwithstanding, any previous sale or assignment or any attachment, incumbrance, or arrestment, and that no assignment or sale of wages, made prior to the accruing thereof, shall be binding, except certain authorized advance securities, when construed in the light of other provisions of the same title, enacted to secure to the seamen his remedy in admiralty for the recovery of his wages by condemnation of the ship. Neither the words "attachment" nor "arrestment," as used in Rev. St. U. S. § 4536 (U. S. Comp. Stat. 1901, 3082), providing that no wages due or accruing to a seaman shall be subject to attachment or arrestment from any court, and declaring that payment of wages to seamen shall be valid notwithstanding any previous sale, or assignment, or any attachment, incumbrance, or arrestment, etc., when considered literally, has reference to execution or proceedings in aid of execution to subject property to the payment of judgment, but refers to process of holding property to abide the judgment, but, when liberally construed in the light of other provisions of the statute to effect the protection intended to be secured to seamen, will include proceedings in aid of execution. *Wilder v. Inter-Island Steam Nav. Co.*, 29 Sup. Ct. 58, 61, 211 U. S. 239, 53 L. Ed. 164, 15 Ann. Cas. 127 (citing *Thomson v. Baltimore & S. Steam Co.*, 33 Md. 318).

**Fee bill distinguished**

The process to enforce collection of a referee's fees is not an "execution" but a fee bill. *Manewal v. Proctor*, 87 S. W. 30, 32, 112 Mo. App. 315.

**Final judgment necessary**

The term "execution," as used in Rev. St. 1899, § 3172, providing that every lease on lands for an unexpired term of three years or more shall be subject to execution and sale as real property, is not limited to a writ issued out of a court to enforce what is generally understood to be a final judgment, nor is the term as used in the statute to be restricted to process to collect the amount due on a judgment by levy and sale, but embraces all appropriate means for the execution of judgments and decrees, including a probate order for the sale of a leasehold belonging to a decedent's estate, necessary to pay debts by an administrator. Or-

chard v. Wright-Dalton-Bell-Anchor Store Co., 125 S. W. 486, 493, 225 Mo. 414, 20 Ann. Cas. 1072.

**As a mandate**

See Mandate.

**As proceeding**

See Proceeding.

**Tax warrant**

Though a tax warrant is in the nature of an execution, it is not an "execution," within the law authorizing capital stock of corporations to be taken and sold on execution. *Acme Harvesting Mach. Co. v. Hinkley*, 122 N. W. 482, 483, 23 S. D. 509, 21 Ann. Cas. 743.

**As writ**

See Writ.

**EXECUTION DEBTOR**

The real owner of property procured the holder of the nominal title to convey to a trustee, there being no consideration for the transfer. Subsequently a prior mortgage was foreclosed, and the property sold and possession taken by the purchaser. Held, that the real owner of the land was an "execution debtor" within the meaning of *Burns' Ann. St. 1908*, § 295, subd. 3, and that those claiming under the deed of trust claimed under such owner and not under the trustee, he being a mere volunteer; and hence that a right of action by them to recover possession on the ground of defects in the foreclosure was barred in 10 years, under the provision of that subdivision that actions for the recovery of real property, sold on execution, brought by the execution debtor or any one claiming under him, is barred in 10 years. *Sinclair v. Gunzenhauser (Ind.)* 98 N. E. 37, 54.

**EXECUTION OF A POWER**

A donee of a power to dispose of personalty by will disposed of specified property, consisting of real estate and of specific tangible property, and then gave the rest, residue, and remainder of her estate of which she might die seised, or to which she might be entitled, to persons named. Held, that the donee exercised the power, within *Gen. Laws 1896*, c. 203, § 9, providing that a devise of real estate and a bequest of personal estate shall operate as an "execution of a power" unless a contrary intent appears. *Rhode Island Hospital Trust Co. v. Dunnell*, 83 Atl. 858, 863, 34 R. I. 304.

**EXECUTION SALE**

Three things are necessary to consummate an "execution sale." There must be a bidder, the property must be struck off or knocked down, and the bidder must complete his purchase by complying with the terms of the sale. A sheriff must sell for cash. Where the person to whom the prop-

erty is struck off at execution sale does not at the time pay the amount of his bid, but merely offers to do so, and is told by the sheriff to let it go till the next day, there is no completed sale, so as to entitle him to the property on making tender the next day; the sheriff being authorized to sell only for cash. *Rowe v. Granger*, 103 N. Y. Supp. 439, 440, 118 App. Div. 459.

**EXECUTIVE**

The executive is the power which enforces the laws. In re Appointment of Revisor of Statutes, 124 N. W. 670, 671, 141 Wis. 592, 18 Ann. Cas. 1176.

The president of the board of trustees of a city of the sixth class is the "executive" of the city, within *St. 1901*, p. 27, c. 32, § 2, providing that resolutions of necessity for public improvements involving the creation of municipal indebtedness, and the ordinance calling a special election to obtain the consent of voters, should be approved by the "executive" of the municipality. *City of Redondo Beach v. Barkley*, 90 Pac. 452, 454, 151 Cal. 176.

**EXECUTIVE DUTIES**

An executive duty appertains to the execution of laws as they exist. *Advisory Opinion to the Governor*, 55 South. 460, 461, 61 Fla. 1.

*Laws 1907*, p. 79, c. 79, § 2, authorizing and directing the Governor to contract for the transportation of public officers, imposes on the Governor a duty pertaining exclusively to the fiscal administration of the affairs of the government, and is an executive duty within *Const. art. 40*, styling the Governor the "Supreme Executive Magistrate." In re Opinion of Justices, 68 Atl. 873, 874, 74 N. H. 606.

Executive and administrative duties are such as concern the execution of existing laws. *Brazell v. Zeigler*, 110 Pac. 1052, 1055, 26 Okl. 826.

**EXECUTIVE FUNCTION**

The appointment of a special judge to preside over a special or regular court is not essentially and intrinsically an executive function within the classification of legislative, executive, and judicial powers under *Const. art. 1, § 14*, but may be regulated by statute. *State v. Davis*, 70 S. E. 417, 419, 88 S. C. 204.

The function exercised by voters or a representative body, upon whose approval the inception of a franchise grant by the Legislature is made conditional, is not the exercise of an "executive function." It is the exercise of the function of "referendum." *Duffield v. Ashurst*, 100 Pac. 820, 823, 12 Ariz. 360.



**EXECUTIVE OFFICER****Attorney at law**

Webster, in defining the word "executive," says: "In government 'executive' is distinguished from legislative and judicial; legislative being applied to the organ or organs of government which makes the law, judicial to that which interprets and applies the laws, and 'executive' to that which carries them into effect." An "executive officer" is one in whom resides the power to execute the law. The term "executive officer" is a comprehensive one not limited to the officer in whom the Constitution vested the executive power, but includes the executive department. Judicial power is the power to construe and interpret the Constitution and the laws, and make decrees determining controversies, and is vested in the courts. The executive power is the power to execute the laws, and is vested in the Governor of the state, the administrative officers of the state, counties, townships, towns, and cities. When it becomes necessary to determine a question of fact or law, the act is judicial. When applied to officers the term "judicial" is not used in the sense of ascertaining the truth or administration of justice, but as indicating the exercise of discretion or judgment, as distinguished from what is purely ministerial. A city attorney is an executive or judicial officer, within Comp. Laws § 11312, punishing the receiving of bribes by such officers. *People v. Salisbury* (Mich.) 96 N. W. 938, 939, 940, 941.

**Police officer**

Revised Greater New York charter, as amended, creates the office of police commissioner and authorizes him to appoint three deputies, the first or chief deputy to have charge, in the absence or disability of the commissioner, of the police, and perform all duties of the commissioner, except making appointments and transfers. Section 271 (Laws 1901, p. 116, c. 486) declares that the commissioner shall have control and administration of the police department and force. Section 292 (page 124) declares that he shall be the chief "executive officer" of the police force, and section 306 (page 131) provides that no person in the police force shall be permitted to "join or be or become" a member of any political club or association. Held, that a deputy police commissioner was an "executive officer" of the force, subject to the same disabilities as the commissioner, and hence was legally disqualified to hold the office where, at the time and after his appointment, he was a member of the Tammany Hall general committee, and a district leader thereof. *McAvoy v. Press Pub. Co.*, 99 N. Y. Supp. 1041, 1044, 114 App. Div. 540.

Under Code 1904, p. 1018, cl. 1, § 1017a, providing that officers and privates in the

police force of cities and towns of the commonwealth shall possess such power and authority as now belongs to the office of constable at common law in enforcing the criminal laws of the commonwealth, and the ordinances of the city or town for which they are appointed or elected, and it shall be the duty of policemen to prevent the commission within the city or town of offenses against the laws of the commonwealth and against the ordinances of the city or town, to observe and enforce all such laws and ordinances, to detect and arrest offenders against the same, to preserve the good order of the city or town, and to secure the inhabitants thereof from violence and the property therein from injury, a policeman is not a purely ministerial officer, since a number of the powers enumerated in the statute are of an executive character, and therefore a person bribing a policeman is subject to punishment, under Code § 3744, providing that, if any person give or offer any gift or gratuity to any "executive officer" with intent to influence his act, decision, or judgment on any matter or question which is or may be then pending, or may be brought before him in his official capacity, he shall be punished, etc. *Haynes v. Commonwealth*, 52 S. E. 358, 359, 104 Va. 854.

**EXECUTIVE POWER**

The power to regulate rates delegated by the Legislature to some board is known as "executive power," and is administrative in its character rather than legislative. *State ex rel. Taylor v. Missouri Pac. R. Co.*, 92 Pac. 606, 609, 76 Kan. 487.

The "executive power" includes the power of removal of executive officers. *State ex rel. Davern v. Rose*, 122 N. W. 751, 754, 140 Wis. 360, 28 L. R. A. (N. S.) 194.

Theoretically the "legislative power" is the authority to make, order, and repeal, the "executive power," to administer and enforce, and the "judicial power," to interpret and apply, the laws. *Richardson v. Young*, 125 S. W. 664, 668, 122 Tenn. 471.

The executive power, within Const. art. 3, dividing the powers of government into the legislative, executive, and judicial departments, is the power which compels obedience to the laws and executes them, and the instrumentalities employed for that purpose are officers elected or appointed, charged with the enforcement of the laws. *Witter v. Cook County Com'rs*, 100 N. E. 148, 149, 256 Ill. 616.

**EXECUTOR**

See Independent Executor.

Misconduct of executor, see Misconduct. My executor, see My.

An "executor" is a person appointed to carry the will into effect after the testator's

death, and to dispose of his estate according to its tenor. *Shufeldt v. Hughes*, 104 Pac. 253, 256, 55 Wash. 246.

An "executor" is a trustee required to account for funds coming to his hands. In *re Folwell's Estate*, 62 Atl. 414, 415, 68 N. J. Eq. 728, 2 L. R. A. (N. S.) 1193.

An "executor" is appointed by the testator and derives his authority to act from the will. The granting of letters testamentary by the register of wills is a pro forma act to give effect to the will of testator. The testator's appointment gives the executor a right to administer, of which only his own renunciation or refusal to appear when cited to prove the will and take out letters can deprive him. A decree admitting a will to probate and ordering it to be recorded was conclusive as to the executor's appointment, and the register of wills had no authority to grant letters of administration with the will annexed without citing the executor to either accept or refuse letters testamentary. In *re Miller's Estate*, 65 Atl. 681, 684, 216 Pa. 247.

#### Administrator

"While the words 'executor' and 'administrator' are used somewhat interchangeably, yet the custom in appointing the persons named in a written will to take charge of an estate, or designating such persons as 'executors,' is so nearly uniform, and so generally known, that the use of the designation of the persons as administrators who were appointed in this case is at least some indication of the intention of the probate court to name them as caretakers only of the personal estate." *Osborne v. Atkinson*, 94 Pac. 796, 797, 77 Kan. 435.

Under Code, § 48, par. 21, "the term 'executor' includes administrator, \* \* \* where the subject-matter justifies such use." *Ellyson v. Lord*, 99 N. W. 582, 585, 124 Iowa, 125.

The duties of an executor or administrator are apparently the same. An "executor" is named by the deceased to administer an estate, while an "administrator" is the person provided by the state to act in the event of the deceased not making any nomination, so that the difference between an executor and an administrator is largely one in name only. Where a testator devised real estate only, leaving personal property undisposed of, an administrator should not be appointed to administer the personal estate on the theory that there were no duties for the executor to perform, and that his appointment was therefore a nullity, but the executor so appointed should administer such personal estate. In *re Maccaffil*, 107 N. Y. Supp. 1115, 1117, 57 Misc. Rep. 264.

Under *Sayles' Ann. Civ. St.* 1897, art. 1895, authorizing a testamentary "executor" to apply for probate of a will, one mentioned

in a will as "administrator" for certain purposes connected with the estate was a proper applicant. *Lindemann v. Dobossy* (Tex.) 107 S. W. 111, 112.

#### As officer of court or law

"Administrators" and "executors" are officers of the court appointed to settle decedent's estates. *Daviess County Bank & Trust Co. v. Wright*, 110 S. W. 361, 364, 129 Ky. 21, 17 L. R. A. (N. S.) 1122.

"Administrators pendente lite" may always be appointed when the appointment of an "executor" or a general administrator is delayed for any reason, or the validity of a will is contested. They are officers of the court, called into being to aid the court, in fact, to take the place of the court, to conserve the estate in independent and disinterested hands pending litigation. Any party in interest may apply for their appointment, or the court may appoint on its own motion. *Davenport v. Davenport*, 60 Atl. 379, 68 N. J. Eq. 611, 6 Ann. Cas. 261.

#### As heir

See Heir.

#### As owner

See Owner.

#### As privy

See Privy—Privy.

#### As real party in interest

See Real Party in Interest.

#### As representative

See Legal Representative; Personal Representative; Representative.

#### As successor

See Successor.

#### As trustee

See Trustee.

### EXECUTOR DE SON TORT

An executor in his own wrong is one who wrongfully intermeddles with the goods of the deceased, or does any other act characteristic of the office. *Allen v. Hurst*, 48 S. E. 341, 342, 120 Ga. 763 (citing 1 Wms. Ex'rs, p. 298).

An "executor de son tort" is one who intermeddles with the estate of a decedent after his death, and does wrongfully such acts as a rightful executor might do. Here there was no wrongful interference by the defendant with the estate of his brother after his death. All the estate which he had, or which came into his hands, came to him rightfully, and he simply became a debtor bound to account. He can no more be treated as an executor de son tort than any person who in the lifetime of a decedent has become his debtor for money had and received to and for his use. The plaintiff cannot hold him as an executor de son tort because he assumed to make a settlement with the only child of his brother, and at the same

time repudiate that settlement as wholly unauthorized. *Mills v. Mills*, 21 N. E. 714, 716, 115 N. Y. 80 (citing *Williams*, Ex'rs, 248).

An "executor de son tort" is any person who, without authority, intermeddles with the estate of a decedent by doing such acts as properly belong to the office of an executor or administrator. He can be sued by the legal representative of the decedent, by a creditor of the estate, by a legatee, and, if all the debts are paid, by a distributee, and is liable to the extent of the assets which he has received. "Our statute has abolished the common-law rule which made one, who officiously interfered with the property of a deceased person, an executor de son tort by depriving creditors of the estate and others of the remedy which they anciently possessed of charging the intermeddler as an executor of his own wrong; but the latter is now made responsible only to the legal representative of the decedent for the value of all property taken or removed, and for all injury caused by his interference therewith." *Slate v. Henkle*, 78 Pac. 325, 326, 45 Or. 430.

An executor de son tort is a person who without any authority intermeddles with the estate of a decedent, and does such acts as properly belong to the office of an executor or administrator, thereby becoming a sort of quasi executor, though only for the purpose of being sued or made liable for the assets with which he has intermeddled. *Grace v. Seibert*, 85 N. E. 308, 309, 235 Ill. 190, 22 L. R. A. (N. S.) 301.

#### • EXECUTOR OF

An appeal against a person named, followed by the words "executor of" a deceased party to a suit to recover real estate, is not an appeal against the person named individually; the words "executor of" not being merely descriptive. *Combs v. Combs*, 138 S. W. 629, 630, 144 Ky. 389.

## EXECUTORY

### EXECUTORY CONTRACT

An executory contract is one where it is stipulated on a sufficient consideration that something is to be done or not to be done by one or both of the parties. *Bergere v. Chaves*, 93 Pac. 762, 764, 14 N. M. 352.

A contract is "executed" when all is done that its terms require to be performed, but until full performance the contract is "executory." *Leadbetter v. Hawley*, 117 Pac. 289, 290, 59 Or. 422.

An executory sale differs from an executed one in that the former passes no immediate title, even in the case of a distinct and specified chattel. *Windmuller v. Fleming*, 129 Ill. App. 476, 485.

The distinction between an actual sale and an executory agreement to sell personally is that in the former the subject of the

contract becomes the property of the buyer the moment the contract is concluded, whether actually delivered, or remaining in the seller's possession, while in the latter it remains the property of the seller until the contract is executed. *Idaho Implement Co. v. Lambach*, 101 Pac. 951, 955, 16 Idaho, 497.

A contract for the sale of certain ricks of hay provided that the hay should be baled and weighed, by the vendor; that it should be "sound, sweet, and of good color," "clean, merchantable," "equal in all respects to the samples" upon which the purchase was made, and delivered on board cars at a specified station, payment to be made for each car when loaded. Held, that such provisions, if unqualified, bring the contract within the general rule that where anything remains to be done to ascertain and identify the subject of the sale, or that is necessary to put the property into suitable condition for acceptance by the purchaser, the transaction represents an "executory contract" only. *Prowers v. Nowles*, 94 Pac. 347, 349, 42 Colo. 442.

Under an executory contract for the sale of real estate, by which the purchaser agrees to pay certain purchase money and the vendor to make title when the purchase money is paid, the covenants are mutually dependent, and the agreement is an "executory contract," conferring upon the vendor a lien by contract or reservation, as distinguished from the technical vendor's lien, in which title is conveyed to the purchaser. *Good v. Jarrard*, 76 S. E. 698, 702, 93 S. C. 229, 43 L. R. A. (N. S.) 383.

Plaintiff purchased a buggy and harness of defendant for the gross sum of \$45. The buggy was identified, but defendant, not having the harness in stock, agreed to purchase the same for plaintiff, who testified that he did not want the buggy without the harness and would not have consented to buy the buggy alone. Plaintiff delivered his check to defendant for the purchase price, receiving a memorandum of the sale, but defendant later returned the check and repudiated the contract. Held that, prior to the designation of the harness, the contract was "executory," and that the title to the property had not passed. *Parlin & Orendorff Co. v. Kittrell (Tex.)* 95 S. W. 703, 704.

Where defendants wrote that they had booked plaintiff's order for a car load of corn, the corn to be loaded and sent to destination as promptly as railroad facilities would permit, the contract was an "executory" one, and there was an implied warranty on defendants' part that the corn would be sound and merchantable on arrival at the place of delivery. *Atkins Bros. Co. v. Landa*, 95 S. W. 949, 950, 119 Mo. App. 119 (citing 2 *Mechem*, Sales, § 1340; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Howard v. Hoey* [N. Y.] 23 Wend. 250, 35 Am. Dec. 572; *Murchie v. Cornell*, 29 N. E. 207, 155 Mass. 60, 14

L. R. A. 492, 31 Am. St. Rep. 526; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290).

Where parties agree on the terms of a sale of personalty, and annex no conditions to the contract, the contract becomes an "executed" one, and title to the property passes without any formal delivery or payment of money: but when it is contemplated that something be done to complete the sale, such as weighing, selecting, delivering, or some other act, the contract is "executory," and title does not pass until the specific goods are ascertained and appropriated in the mode agreed on. *Hardwick v. American Can Co.*, 88 S. W. 797, 802, 113 Tenn. 657.

### EXECUTORY DEVISE

An executory devise is such a limitation of a future interest in lands or personal chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. *Stallcup v. Cronley's Trustee*, 78 S. W. 441, 442, 117 Ky. 547.

An "executory devise" of lands is such a disposition of them by will that no estate vests at the death of the deviser, but only on the happening of a future contingency. *Starr v. Minister & Trustees of Starr Methodist Protestant Church*, 76 Atl. 595, 599, 112 Md. 171.

An "executory devise" is a devise over after a devise in fee simple, which was not allowable at common law. *Brigham v. Peter Bent Brigham Hospital*, 134 Fed. 513, 525, 67 C. C. A. 393 (citing 6 Greenl. Cruise, Real Prop. \*366).

Testator gave his residuary estate to trustees to pay the income to his wife until a daughter attained 25 years, when a half should be paid to her, and provided that if the daughter should survive her mother, after attaining the age of 25, "the whole estate should vest in her," and should the wife survive the daughter dying without issue, a half of the estate should be divided equally between grandchildren at the death of the wife, but, should the daughter die leaving issue, the half of the estate should vest in such issue if the wife should be living; if not, the whole should pass to the issue. The daughter at testator's death had no issue. Held, that the gift to the issue was an "executory devise," and issues born after testator's death would take contingent remainders during the daughter's life; the daughter took a vested equitable remainder in fee, subject to be divested by her death before her mother, the quoted words being construed to mean vesting in possession; the gift to the grandchildren was an "executory devise" at the death of the testator, and continued so until the death of the daughter, and on her death, without issue during the life of the wife, the half of the estate vested in the grandchildren then living, subject to

the equitable life interest of the wife. *Storrs v. Burgess*, 67 Atl. 731, 733, 29 R. I. 269.

### As remainder

See Remainder.

### EXECUTORY INSTRUMENT

Releases, being merely declarations or admissions in writing, are not executory instruments, within Code Civ. Proc. § 840, providing that a seal upon an executory instrument is only presumptive evidence of sufficient consideration, and hence the consideration for a release under seal cannot be disproved. *Stiebel v. Grosberg*, 95 N. E. 692, 693, 202 N. Y. 266, 36 L. R. A. (N. S.) 1147, Ann. Cas. 1912D, 1305.

### EXECUTORY LIMITATION

At common law, "in order to constitute an 'executory limitation' there must be no preceding particular estate to give it effect as a remainder, for the rule admits of no exception, being indeed of the essence of the definition that no estate can be construed to be an executory limitation which is capable of taking effect as a remainder." Under Rev. St. 1899, § 4596, providing that an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will, the husband may convey to his wife, through a third person, an estate commencing at his death, and to continue during her life, without creating any particular estate. *O'Day v. Meadows*, 92 S. W. 637, 646, 194 Mo. 588, 112 Am. St. Rep. 542 (quoting and adopting definition in 2 Minor, Inst. p. 270).

### EXECUTORY PROCESS

As suit, see Suit.

### EXECUTORY TRUST

A voluntary executory trust which is a promise to create a trust is not enforceable. *Watson v. Payne*, 128 S. W. 238, 240, 143 Mo. App. 721.

The distinction between a "trust executed" and "executory" is this: A trust executed is where the party is given complete directions for settling his estate, with perfect limitations; an executory trust is where the directions are incomplete, and are rather minutes or instructions for the settlement. *Morris v. Linton*, 104 N. W. 927, 929, 74 Neb. 411 (citing *Neves v. Scott*, 9 How. 211, 13 L. Ed. 102; *McCartney v. Ridgway*, 43 N. E. 826, 160 Ill. 129, 32 L. R. A. 555).

A trust is not "executory" trust because by the terms of the instrument creating it the trustee is directed to do some act with the property. *Miles v. Miles*, 96 Pac. 481, 483, 78 Kan. 382.

The term "executory trust" is usually held to refer to the manner and perfection of creating the trust, rather than to the action of the trustee in administering it. A trust is said to be executed when all its terms and

limitations are so clear and certain that the trustee has nothing to do but to carry out all the provisions of the instrument according to its letter. Where L., the owner of a survey, conveyed it to H., the owner of another survey, and H. executed an instrument by which he conveyed to L. one-third of the proceeds which might be received from the sales of any portion of said surveys, and bound his personal representatives to convey the land remaining unsold at his death to such persons as L. or his heirs might order, the trust created was merely an "executory trust," and not a completed declaration of an express executed trust, against which the statutes of limitations would not run until renunciation by the trustee. *Laguerenne v. Farrar*, 61 S. W. 953, 955, 25 Tex. Civ. App. 404.

## EXEMPLARY DAMAGES

See, also, Punitive Damages; Vindictive Damages.

"Exemplary damages" are only awarded in actions of tort against a telegraph company for failure to properly transmit a message, where the failure was the result of intention or gross negligence. *Western Union Telegraph Co. v. Reeves*, 126 Pac. 216, 219, 34 Okl. 468 (quoting *Atchison, T. & S. F. Ry. Co. v. Chamberlain*, 46 Pac. 499, 4 Okl. 542).

Exemplary damages are such as are in excess of the actual loss, and are allowed where a tort is aggravated by evil, or where the defendant acted willfully or with such gross negligence as to indicate a wanton disregard of the rights of others. The law does not allow such damages for mere negligence, though gross, nor for mistakes that may affect the rights of others, unless some acts indicative of bad motives or intention to oppress or wrongfully harass another is manifest. *Rugg v. Tolman*, 117 Pac. 54, 57, 39 Utah, 295 (citing 3 Words and Phrases, pp. 2577, 2578).

"Exemplary damages" is a sum of money awarded as punishment to defendant for his wanton disregard of the rights of plaintiff. *Crawford v. Eidman*, 129 Fed. 992, 995.

At common law what are called exemplary, punitive, or vindictive "damages," where the injury has been wanton, malicious, gross, or outrageous, may be awarded by the jury. *Jaeger v. Metcalf*, 94 Pac. 1094, 1095, 11 Ariz. 283.

Where personal injuries are inflicted willfully, maliciously, wantonly, or recklessly, the party inflicting the injuries is liable for "exemplary damages" to the party receiving them in the nature of a punishment for the willful and malicious acts, but no such damages are recovered in a statutory action for injuries resulting in death. *Palmmer v. Philadelphia, B. & W. R. Co.*, 66 Atl. 1127, 1130, 218 Pa. 114.

An instruction, in an action for wrongful levy, that an imposition of damages by way of example or punishment, known as "punitive damages," was sometimes, though rarely, given in extreme cases, such as cases of malice or fraud, gross negligence, recklessness, wanton or malicious conduct, violence, malicious abuse of process, wanton malice, and insult or outrage to plaintiff's feelings, but that such cases were extreme and not ordinary cases, that it was not enough to show that the property of one person was levied on instead of the property of another, nor that more goods were levied on than was necessary, but that actual malice, ill will, or the disposition to abuse and injure were the elements which justified the award of punitive damages or damages by way of punishment, and that it should appear very clearly that a case called for such damages before they could be awarded, was not erroneous. *Carey v. D. Wolff & Co.*, 63 Atl. 270, 271, 72 N. J. Law, 510.

In certain cases of tort the expense of litigation in excess of the amount of taxable costs may be awarded as damages in addition to the damages more strictly compensatory, and such damages, sometimes spoken of as "exemplary," cannot exceed the amount of expense in excess of the taxable costs. *Shupack v. Gordon*, 64 Atl. 740, 742, 79 Conn. 298.

A sum assessed by a jury additional to compensation for damages, by way of punishment for wrongdoing, is termed "smart money," or "exemplary," "vindictive," or "punitive" damages. *Farrow v. Hoffecker* (Del.) 79 Atl. 920, 921, 7 Pennewill, 223.

"Exemplary damages" can never be recovered for anything short of gross negligence, and where the negligence of a motorman, resulting in a collision with plaintiff, was simply failure to use ordinary care, an instruction authorizing recovery of exemplary damages was erroneous. *Henderson City R. Co. v. Lockett* (Ky.) 98 S. W. 303, 304.

"Exemplary damages" are in no case a right of plaintiff, but are assessed at the discretion of the jury as a warning to other wrongdoers and for the purpose of punishment; and where a wrongdoer dies before an action is brought to trial, and the action survives against his personal representative, only compensatory damages are recoverable. *Meighan v. Birmingham Terminal Co.*, 51 South. 775, 777, 165 Ala. 591 (citing 1 Sedg. Dam. § 360 et seq.).

Damages in excess of full compensation for actual injuries are variously termed "exemplary," punitive, or vindictive; it is also called smart money. In an action for a violent, unprovoked, and malicious assault, plaintiff is entitled to recover punitive damages. *Hanna v. Sweeney*, 62 Atl. 785, 78 Conn. 492, 4 L. R. A. (N. S.) 907.

**Compensatory damages distinguished**

While the damages, to which a plaintiff may become entitled in an action of tort, to the amount of his expenses in litigation, in addition to his actual damages, are in fact and in effect "compensatory damages" and not punitive, they are in practice variously termed "exemplary," "punitive," "vindictive," or "smart money," and in an action for personal injuries, in which plaintiff was entitled to recover such additional damages, it was not error to refer to them as "exemplary." *Hull v. Douglass*, 64 Atl. 351, 353, 79 Conn. 266.

The term "exemplary damages," as used in Comp. Laws, § 5398, providing that one selling intoxicating liquor to a minor shall be liable for both actual and exemplary damages, does not mean "smart money," but means compensatory damages for wounded pride, mortification, injury to feelings, mental anxiety and the like. *Hink v. Sherman*, 129 N. W. 732, 733, 164 Mich. 352.

**As damages**

See Damage—Damages.

**Persons liable**

"Exemplary or punitive damages" are awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, and can be awarded only against one who has participated in the offense. *Western Union Tel. Co. v. Cashman*, 132 Fed. 805, 807, 65 C. C. A. 607.

In an action against railroad companies, an instruction that, if the acts of the company's agents were wanton or malicious, the jury would be justified in adding to the compensatory damages such an additional amount as would be a lesson to the defendants and prevent a repetition of such conduct or what the law calls "vindictive damages" or "smart money" was erroneous, since the defendants could not be charged with punitive damages for the illegal, wanton, or oppressive conduct of their servants, unless they participated in the wrongful act either expressly or impliedly by conduct authorizing or approving it either before or after it was committed. *Shallcross v. West Jersey & S. R. Co.*, 67 Atl. 931, 75 N. J. Law, 395.

**Punitive or vindictive synonymous**

"Punitive," "vindictive," and "exemplary" damages are all synonymous terms. *Hull v. Douglass*, 64 Atl. 351, 353, 79 Conn. 266; *Hanna v. Sweeney*, 62 Atl. 785, 78 Conn. 492, 4 L. R. A. (N. S.) 907; *Farrow v. Hoffercker* (Del.) 79 Atl. 920, 921, 7 Pennewill, 223.

The word "punitive," as used in the statute allowing a recovery of punitive damages for an assault and battery, means "exemplary." Punitive, vindictive, and exemplary damages are all synonymous terms. *Doerhoefer v. Shewmaker*, 97 S. W. 7, 10,

123 Ky. 646 (citing *Chiles v. Drake*, 2 Metc. [59 Ky.] 146, 74 Am. Dec. 406).

**Smart money synonymous**

"Exemplary," vindictive, or punitive damages are sometimes called "smart money." *Farrow v. Hoffercker* (Del.) 79 Atl. 920, 921, 7 Pennewill, 223; *Hanna v. Sweeney*, 62 Atl. 785, 78 Conn. 492, 4 L. R. A. (N. S.) 907; *Shallcross v. West Jersey & S. R. Co.*, 67 Atl. 931, 75 N. J. Law, 395; *Hull v. Douglass*, 64 Atl. 351, 353, 79 Conn. 266; *Western Union Telegraph Co. v. Reeves*, 126 Pac. 216, 219, 34 Okl. 468.

In actions of tort, the jury, in addition to the sum awarded by way of compensation for the injury, may award "exemplary, punitive, or vindictive damages," sometimes called "smart money." In an action against a master to recover for an illegal arrest caused by his servant, an instruction that the jury had the power, if it thought proper, in addition to compensatory damages, to award punitive damages, without further instructing them that defendant was not liable for such damages unless there was evidence that the acts of the servant were wanton or malicious, and that the master was implicated with the servant therein, or had authorized or ratified such acts, was erroneous. *Craven v. Bloomingdale*, 64 N. E. 169, 171, 171 N. Y. 439.

**EXEMPLIFICATION**

Webster defines "exemplification," when used in a legal sense, to mean: "A copy or transcript attested to be correct by the seal of an officer having custody of the original." An exemplification of a will, as contemplated by a statute declaring that the "exemplifications" of wills under the hand of the judge of probate shall be admissible in evidence, must necessarily mean a copy of the will accompanied by a certificate of the proceedings necessary to be taken in order to authorize the same to be entered of record. This is especially true as respects the order admitting the will to probate. A copy of a will unaccompanied by any of the means of identification to render it competent would not be admissible in a trial affecting the title to land. *Pineland Club v. Robert*, 171 Fed. 341, 344, 345, 96 C. C. A. 233.

**EXEMPLIFIED COPY**

"Exemplified copy," as used in the statute relating to records and judicial proceedings of other states, on proceedings to probate wills which have been admitted in another state, means a duplicate or transcript of the records or proceedings admitting such will to probate, duly authenticated under the seal of that court, and duly certified to by the custodian of such records and proceedings. In *re Box's Will*, 106 N. W. 1063, 1065, 127 Wis. 264.

A document attested by the clerk of a court with its seal and the certificate of its presiding judge, and called an "exemplified copy," which means a true copy, is competent evidence of the judgment described in it, under Act Cong. May 26, 1790 (1 Stat. 122), providing a mode by which the public acts, records, and judicial proceedings in each state shall be authenticated, so as to take effect in every other state, though it may not conform to the mode at common law or in the state where the judgment was rendered. *Taylor v. Carpenter*, 23 Fed. Cas. 744, 746, 2 Woodb. & M. 1, 10 Law Rep. 35.

## EXEMPT—EXEMPTION

See Not Exempt; Privileges and Immunities.

See, also, Privilege.

"'Exemption' is the personal privilege of the party exempted, with which no one else has any concern." The exemption of an elector from service upon a jury is not a disqualification, but a personal privilege which he may waive, and, if he does so, the parties have no ground of complaint. *State v. Stunkle*, 21 Pac. 675, 676, 41 Kan. 456.

A contract by a carrier, limiting its liability for property transported, violated Interstate Commerce Act, § 20, providing that no contract, receipt, rule, or regulation shall exempt any common carrier from liability for loss, damage, or injury to property therein imposed; the words "exempt" and "limit" not having any distinction in meaning in this connection. To limit one's liability to an amount less than he would be liable for except for the contract of limitation is to exempt him from any liability in excess of the amount of the limitation. *Greenwald v. Weir*, 111 N. Y. Supp. 235, 238, 59 Misc. Rep. 431.

"Limit" and "exempt" are words of synonymous meaning. Code 1887, § 1296 (Va. Code 1804, § 1294c, subsec. 25), providing that no agreement by a carrier for "exemption" from liability for injury or loss occasioned by its own neglect shall be valid, prohibits not only contracts exempting the carrier from liability, but also from making contracts limiting liability. *Chesapeake & O. Ry. Co. v. Beasley, Couch & Co.*, 52 S. E. 566, 569, 104 Va. 788, 3 L. R. A. (N. S.) 183.

Public Service Commissions Law, providing that no contract shall "exempt" any carrier from any liability for loss to freight from the time of its delivery for transportation until received at its destination and a reasonable time shall have elapsed after notice to the consignee of the arrival to permit the removal thereof, forming a part of article 2 of the act, relating to railroads, street railroads, and carriers, when considered in connection with section 25 of the article (page 903), providing that the provi-

sions thereof shall apply to the transportation of passengers, freight, or property, and to any carrier performing such service, refers solely to carriage of freight, as distinguished from carriage by express, and a carrier by express may limit its liability to a specified sum, and does not apply to a contract limiting liability, since the word "exempt," which means to free, to clear, to be not liable, to be not subject to, to be released from liability, is not synonymous with the word "limit," which means that which circumscribes or confines, a restriction, to apply a limit to, or to set a limit for. *Baum v. Long Island R. R.*, 108 N. Y. Supp. 1113, 1120, 58 Misc. Rep. 34.

The words "exempted from attachment by law," as used in Pub. St. 1882, c. 237, § 13, mean exempt by statute. In *re Keach*, 14 R. I. 571, 573.

Under Rev. Laws Mass. c. 118, § 73, providing that, if a policy of life insurance is effected in favor of a person other than the insured, the lawful beneficiary other than himself or his legal representatives shall be entitled to the proceeds against his creditors and representatives, and also that a policy "made payable to or for the benefit of a married woman \* \* \* shall inure to her separate use and benefit and to that of her children," a policy payable to the insured at the end of 20 years if living, and in case of his prior death to his wife if living, otherwise to his legal representatives or assigns, is not "exempt" by the law of the state within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 6a, 30 Stat. 548, but on the bankruptcy of the insured passes to his trustee, under section 70a(5), as property which he could have transferred. In *re Loveland*, 192 Fed. 1005, 1006.

## EXEMPTION (From Execution)

See Homestead Exemption; Imperfect Exemption; Personal Exemption.

The words "exempt from execution," as used in Code Civ. Proc. § 690, subd. 18, exempting all moneys, benefits, privileges, etc., growing out of any life insurance, from execution, means exempt from any execution, and the exemption extends to the beneficiary and exempts insurance money received by a surviving wife from liability for her debts. *Holmes v. Marshall*, 79 Pac. 534, 535, 145 Cal. 777, 69 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88.

A printing press and materials necessary for the exercise of the trade of a printer and editor are "exempt" from seizure, under Code Prac. art. 644, exempting the tools and instruments necessary for the exercise of the trade by which the debtor gains a living. *Prather v. Bobo*, 15 La. Ann. 524, 525.

Under the Constitution and statute giving an "exemption from sale," the rights under a sale are to be determined as of the

date of the lien under which the sale is made, so far as the exemption of the property is concerned. If a lien is secured on property of a debtor prior to judgment or sale, all rights at the sale as to such property relate back to the creation of the lien, and, if the property was not exempt when the lien was acquired, no changes by sale thereafter can inure to the benefit of the debtor. *Mahon v. Fansett*, 115 N. W. 79, 81, 17 N. D. 104.

**As contract**

See Contract.

**EXEMPTION (From Taxation)**

A statute provides that, in assessing bank shares, the assessor shall allow all the deductions and "exemptions" granted by law from the value of other taxable property owned by individuals, etc. Held that, if the intent was to allow the valuation of the bank stock to be reduced by deducting from the assets of the bank such securities as were exempt from taxation, the word "exemptions" was inappropriate. *Lippincott v. Lippincott*, 66 Atl. 113, 114, 74 N. J. Law, 439.

**As privilege**

See Privilege.

**EXEMPT FIREMAN**

The character of "exempt fireman" established by section 14 of P. L. 1889, p. 19, as amended by P. L. 1890, p. 44 (2 Gen. St. 1895, p. 1513, § 198), has no other force or office than the fixing of the necessary qualifications for membership in associations formed under the act, and cannot of itself be relied upon, by a person having that character, to bring him within the protection of chapter 212 of Laws of 1911 (P. L. p. 444). *Bowlby v. Board of Chosen Freeholders of Morris County*, 85 Atl. 229, 232, 83 N. J. Law, 346.

**EXERCISE**

See Authority Exercised under the United States; Improvidently Exercised; In the Exercise of Due Care.

**EXERCISED THE RIGHT**

The words "exercised the right," in Rev. Civ. Code, art. 1991, providing that creditors cannot call on a coheir of the debtor to collect, when the debtor has not exercised the right, are in the past tense, and do not mean that the most incomplete attempt at the exercise of the right is to be taken as the equivalent of the actual exercise expressed in the past tense, denoting something completely done and accomplished. *Champagne v. Bloch Bros.*, 46 South. 207, 208, 121 La. 193.

**EXERCISING ANY POWER**

The phrase "exercise or attempt to exercise any power," within Code 1906, c. 32, § 136, relating to proceedings against corpo-

rations, delinquent as to license taxes, should be read as if it said "carry on the business" of the corporation, and "doing business," as found in such statutes, is construed as not extending to the mere act of suits in respect to contracts made or rights acquired while the corporation had power to do business. *Comstock v. J. R. Droney Lumber Co.*, 71 S. E. 255, 256, 69 W. Va. 100.

**EXERCISING CORPORATE FRANCHISE**

"Exercising corporate franchises" and "carrying on business" in a corporate or organized capacity mean the same thing, under Laws 1896, p. 859, c. 908, as amended by Laws 1901, p. 297, c. 118, authorizing an annual state tax on life insurance companies for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within the state. *People ex rel. Provident Sav. Lfme Assur. Soc. v. Miller*, 71 N. E. 930, 932, 179 N. Y. 227.

**EXERCISING SUPERINTENDENCE**

See Superintendence.

**EXERTION**

See Reasonable Exertion.

**EXHAUSTED**

See Debt Incurred after Appropriation Exhausted.

Specific insurance is to be deemed exhausted when all that can be collected has been collected for a loss arising from any of the risks so insured against. A fire insurance policy issued by the A. company provided that the insurance should not attach until all specific insurance was exhausted. Insured also had other insurance on the property destroyed, and other property under policies containing a coinsurance clause; some providing that the companies should not be liable for a greater proportion of the loss than the amount of the policy bore to 90 per cent. of the value of the property insured, and the proportion in the others being that which the amount of the policy bore to the whole value of the property insured. The value of the property insured exceeded the amount of the insurance, and only a portion of the losses sustained could be collected under them. The A. company contended that inasmuch as the policies still attached to other property, and the companies insuring them would be liable thereunder to the full amount insured for other losses that might occur, the insurance had not been exhausted. Held, that there being no agreement that the policy should not attach until the entire amount of the specific insurance had been required for the payment of losses, the other insurance was exhausted within the policy, and that the company was liable up



to the amount insured by it for the balance of the loss. *Cutting v. Atlas Mut. Ins. Co.*, 85 N. E. 174, 175, 199 Mass. 380.

An order for the sale of real estate belonging to the estate of a decedent to pay debts, ordered that the administrator should not sell certain lots until the balance of the estate "has been exhausted." Held that, the administrator having for some six months offered property other than the lots for sale, and not having been able to sell sufficient thereof to raise the sum required, and the statute requiring that any sale by the administrator must be made within six months from the date fixed by him when he will commence receiving bids, it was proper to sell the lots in question; the other property having been "exhausted," within the meaning of the order. *In re Bryant's Estate*, 80 Pac. 555, 556, 38 Wash. 337.

Where a mortgage on property including a debtor's homestead was held fraudulent as to other creditors as to the nonhomestead property and the mortgagee by reason of such holding obtained no benefit therefrom, his remedy against such property was "exhausted" within Code, § 2976, providing that, where a mortgage covers both homestead and nonhomestead property, the homestead can only be resorted to for the payment of a deficiency remaining after exhausting all other property covered, and hence the mortgagee was entitled to enforce his mortgage as to the homestead. *Huttig Mfg. Co. v. Burhans*, 127 N. W. 991, 992, 148 Iowa, 657.

## EXHIBIT

### Claims against decedent

"Present," as used in P. S. 2820, and "exhibit," as used in section 2824, as indicating how a creditor of the estate is to get his claim before the commissioners for allowance, are synonymous; the statute requiring no particular formalities to constitute a sufficient presentation. *Batchelder v. White's Adm'r*, 71 Atl. 1111, 1112, 82 Vt. 132.

Code Civ. Proc. § 1822, relating to an executor's rejection of claims "exhibited to him," and prescribing the limitation of action on such claim, requires that the claim exhibited must be in writing; and, where a claim in writing has been exhibited to the executor, the fact that no inventory has been filed by him and no notice to present claims published is no bar to the running of the statute. *Dawbarn v. Fleischmann*, 130 N. Y. Supp. 397, 401, 146 App. Div. 57.

### Gaming device

Where one is charged with exhibiting for gaming purposes a gaming table, the character of the table that he exhibited is immaterial. One who exhibits a billiard table, and who takes the bets of the players throwing dice, without himself throwing dice, is guilty of "exhibiting a gaming table" within Pen.

Code 1911, art. 553, declaring that any game played for money on a billiard table other than a game of billiards licensed by law is punishable. *Bird v. State (Tex.)* 148 S. W. 738, 741.

## EXHIBITION

See Public Exhibition.

Other exhibition, see Other.

## EXHIBITS

"The office of an 'exhibit' should be limited to the aiding, by amplifying and making more definite and certain, the essential allegations of the complaint." *McPherson v. Hattich*, 85 Pac. 731, 733, 10 Ariz. 104.

An "exhibit" is no part of the petition, even though it is attached and the petition states it is made a part thereof. *Robinson v. Levy*, 117 S. W. 577, 581, 217 Mo. 498 (citing *Vaughan v. Daniels*, 11 S. W. 573, 98 Mo. 230; *Moore v. Dixon*, 50 Mo. 424; *Poulson v. Collier*, 18 Mo. App. 583).

An "exhibit" attached to a pleading is not a part thereof, and an answer, which merely alleges that a matter was attached to the petition as an exhibit, does not make the same a part of the answer. *A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.*, 122 S. W. 362, 365, 143 Mo. App. 42.

## EXIGIBLE BY FORECLOSURE

The words "exigible by foreclosure" include an ordinary suit to foreclose the mortgage as well as executory process, and do not debar the plaintiff from recovering a judgment in personam against the mortgagor on her note due under the terms of the contract. *Robson v. Beasley*, 43 South. 391, 392, 118 La. 738.

## EXILE

"Exile" is defined in Black's Law Dictionary as banishment, and "transportation" as a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in "exile" for a prescribed period. *United States v. Ju Toy*, 25 Sup. Ct. 644, 649, 198 U. S. 253, 49 L. Ed. 1040.

## EXIST

The law "assumes the objectivity of external nature; and, for the purpose of judicial investigation, a thing perceived by the tribunal as existing does 'exist.'" *Moorhead v. Arnold*, 84 Pac. 742, 746, 73 Kan. 132 (quoting and adopting the definition in 2 Wigmore, Ev. p. 1345).

Under Sess. Laws 1903, p. 147, No. 82, providing that, where a corporation shall fail to appoint an agent on whom service of process may be had, any resident may

maintain an action for a judicial dissolution, and, where a petition shows such a situation is existing, the court shall cite the corporation to appear, and, if on hearing it appears such condition "exists," the court shall dissolve the corporation, the word "exists" refers to the time of the hearing and not the time of the institution of the action. *Flowing Wells Co. v. Culin*, 95 Pac. 111, 112, 11 Ariz. 425.

A corporation, upon complying with the regulations of a statute as to the formation of a corporation, has the right to do business; in other words, the "right to be," to "exist." But this right to be or to exist is not an element of property that can be taxed. A corporation might exist for any number of years, but, if it never acquired any property or engaged in any business, its "right to be" would have no taxable value; it would have no cash value or no assessment value. A corporation so formed would likewise have a right to transact business, but, until it acquired property or actually transacted some business, it would have absolutely no value, and hence would not be a subject for taxation. *Commonwealth v. Ledman*, 106 S. W. 247, 251, 127 Ky. 603.

#### EXISTENCE

See Corporate Existence; During Existence; Merchandise Not in Existence; Potential Existence.

#### EXISTING

See Duly Organized and Existing.

#### EXISTING CREDITORS

The term "existing creditors," as used in a statute making certain transfers of property void as against "existing creditors," "has acquired, under our statutes, a definite and well-recognized meaning. It has been so construed as to exclude general pre-existing creditors who have not acquired a lien by attachment or execution levy before being affected with notice, either actual or constructive, of the execution of the mortgage, and to include subsequent creditors who have acquired such lien." *Blackman v. Baxter, Reed & Co. (Iowa)* 100 N. W. 78-80, 70 L. R. A. 250 (dissenting opinion of Judge McClain).

"Existing creditors" are, as those words imply, persons having subsisting obligations against the debtor at the time the fraudulent alienation was made or the secret trust created, although their claims may not have matured or been reduced to judgment until after such conveyance. A contingent liability is as fully protected against fraudulent and voluntary conveyances as a claim certain and absolute, and whoever has a claim or demand arising out of a pre-existing contract, although it may be contingent, is a creditor whose rights are affected by such conveyances, and can avoid them when the contingency happens upon which the claim de-

pends." *Carr v. Davis*, 63 S. E. 326, 328, 64 W. Va. 522, 20 L. R. A. (N. S.) 58, 16 Ann. Cas. 1031 (quoting and adopting definition in 20 Cyc. p. 421).

#### EXISTING DEBT

Code 1907, § 124, provides that, where a new county is formed, the inhabitants cut off from any county are liable for the pro rata amount of the "existing debt" of the counties from which they have been severed. Code 1896, § 1399, relating to the ascertainment and collection of such indebtedness, renders the new county liable therefor and subject to suit upon failure to comply with the section. Held, that the term "existing debts" means anything then owing by the old county, regardless of its assets or ability to pay, and, in the absence of a statutory provision permitting the new county to share in the old county's assets, the new county, while liable for its share of the old county's debt, cannot recover a share of the old county's general fund, in the absence of a showing that it, or a part thereof, had been specifically collected for the payment of the debt or had been applied to a sinking fund for that purpose. *Houston County v. Henry County*, 47 South. 710, 712, 157 Ala. 246.

#### EXISTING DEMAND

Where a vendor, who covenanted against incumbrances, took back a purchase money mortgage, and at the time there was an incumbrance on the premises, the purchaser, until he either paid it or was evicted, did not have an "existing demand" against the vendor on account of such incumbrance, within the meaning of Code Civ. Proc. § 502, subdiv. 1, providing that, in an action on a contract which has been assigned by the party, any demand existing against the assignor at the time of the assignment may be allowed as a counterclaim, and hence, where he did not pay the incumbrance until after the assignment, he had no right of set-off. *D'Amelio v. Abraham*, 105 N. Y. Supp. 1019, 1020, 54 Misc. Rep. 386.

#### EXISTING INDEBTEDNESS

Where a corporation contracted for the purchase at an agreed price of property to be thereafter delivered, the indebtedness therefor was incurred at the time of the contract, and became an existing indebtedness within the meaning of the statute, and the fact that the property was not delivered until after new directors had been elected did not render them personally liable therefor because of the failure of their predecessors to file the required report. *The New York decisions in this respect are not to be followed. Risdon Iron & Locomotive Works v. Von Storch*, 166 Fed. 936, 942.

The liability on contracts made by Greater New York for public improvements, pursuant to section 149 of its charter, under

certification by the comptroller as to the fund applicable thereto, and chargeable to and payable from bonds issued for a term of years pursuant to authority given therefor prior to the execution of the contracts, and payable from future taxation, is an "existing indebtedness" of the city and must be included in determining the amount of its indebtedness within Const. art. 8, § 10. *Levy v. McClellan*, 89 N. E. 569, 573, 196 N. Y. 178.

"Payments falling due upon the rendition of services in the future, though fixed by the terms of an existing contract, do not constitute 'existing indebtedness' within the meaning of Const. art. 11, § 3, which prohibits any municipal corporation from becoming indebted to an amount, 'including existing indebtedness,' exceeding 5 per centum of its taxable property." *Town of Vaughn v. Montreal*, 102 N. W. 561, 124 Wis. 302 (citing *Stedman v. City of Berlin*, 73 N. W. 57, 97 Wis. 505; *Herman v. City of Oconto*, 86 N. W. 681, 110 Wis. 660).

#### EXISTING INSURANCE

Where a carrier's marine policy did not cover any goods or merchandise on which there should be any existing insurance by or on account of the owners thereof, the term "existing insurance" included any other insurance during the continuance of the risk, which was valid and enforceable, and was not limited to insurance by the owner existing at the time the carrier's policy attached. *Lehigh Valley R. Co. v. Providence-Washington Ins. Co.*, 167 Fed. 223, 225.

#### EXISTING LAW

The term "existing law," as used in General Corporation Law, as amended, providing that every corporation as such has power, though not specified in the law under which it is incorporated, to make by-laws, not inconsistent with any "existing law," for the management of its property, regulation of its affairs, etc., has reference, not only to statutes, but as well to decisions of the court as to what powers a corporation may or may not possess, where the subject is not covered by statutory enactment. *Raub v. Gerken*, 111 N. Y. Supp. 319, 321, 127 App. Div. 42.

#### EXISTING LIABILITY

The liability of a principal to indemnify a surety on a bond is an "existing liability at the time the bond is executed," within the rule that a conveyance with intent to defraud creditors is void as to existing obligations. *Graeber v. Sides*, 66 S. E. 600, 601, 151 N. C. 596.

#### EXISTING OBLIGATIONS

The liability of a principal to indemnify a surety on a bond is an existing liability at the time the bond is executed, within the rule that a conveyance with intent to defraud creditors is void as to existing obliga-

tions. *Graeber v. Sides*, 66 S. E. 600, 601, 151 N. C. 596.

#### EXISTING PERSON

A child, unborn at the time of its father's death but later born alive, is to be considered under the laws of this state as an existing person at the time of its father's death, and is therefore a beneficiary and entitled to participate in any damages recovered in an action brought under the statute for wrongfully causing the death of the father. *Herndon v. St. Louis & S. F. R. Co. (Okla.)* 128 Pac. 727, 730.

A child conceived, but not yet born, is to be deemed an "existing person," so far as may be necessary for its interests in the event of its subsequent birth. Where a child is unborn, and its existence is unknown to the defendant in an action by its mother to recover for the wrongful death of her husband, the father of the child, at the time the judgment is rendered in favor of the widow or other heirs, such judgment is a bar to a subsequent action by such unborn child to recover for its father's wrongful death, under Code Civ. Proc. § 377, authorizing such action to be brought either by the heirs or personal representatives of the deceased, notwithstanding Civ. Code, § 29, providing that an unborn child is deemed to be in existence, so far as necessary for its interests, in the event of its subsequent birth. *Daubert v. Western Meat Co.*, 73 Pac. 244, 245, 139 Cal. 480, 96 Am. St. Rep. 154.

#### EXISTING RIGHT OF WAY

"Existing right of way," as used in St. 1892, c. 275, abolishing acquisition of a right of way across railroad tracks and excepting from its provisions "existing rights of way," meant rights of way which, at the time of the statute, had fully ripened into a right by prescription or otherwise and did not include rights, the adverse use of which had begun before passage of the statute, but which had not ripened into title at the time of such passage. *Simpson v. Boston & M. R. R.*, 57 N. E. 674, 675, 176 Mass. 359.

#### EXISTING STREET RAILWAYS

The New Jersey traction companies act of March 14, 1893, authorizing companies incorporated thereunder to acquire and operate actually existing street railways, has reference to street railways actually existing and operated as such, and is not limited to those operated by legal authority. *Jersey City v. North Jersey St. Ry. Co.*, 67 Atl. 113, 114, 74 N. J. Law, 774.

#### EXISTING TENANCIES

The term "existing tenancies," subject to which a deed is taken, includes any tenancy, so as to prevent an action for breach of covenant of warranty, on the ground of its being an incumbrance, where the grantee had knowledge of it, and this was followed by an

attornment and apportionment of the rent at the time of the transfer. *Richardson v. Brower*, 127 Pac. 1008, 1099, 71 Wash. 192.

### EXISTING TERM OF OFFICE

Section 2 of the amendment to the Constitution, which is now designated as article 17, providing that the term of office of a probate judge shall be four years, is not retroactive. Terms of office existing at and before the adoption of the amendment are not restricted or abolished; but "existing terms of office" may be extended by the General Assembly, under authority of section 2 of the amendment, so as to effect the purpose of section 1 of the amendment. "Existing terms of office," as used in such amendment, means terms of office as defined by the Constitution and acts of the General Assembly as they existed at the time of the proposal of the amendment and of its adoption. The expression does not apply to such as might be elected in accordance with section 1 of the amendment, for as to such officers the provisions of such amendment are clearly intended to be self-executing. *State ex rel. Pardee v. Pattison*, 76 N. E. 946, 948, 73 Ohio St. 305.

### EXPANDED METAL

"Expanded metal" may be generally described as metal openwork, held together by uncut portions of the metal, and constructed by making cuts or slashes in metal and then opening them so as to form a series of meshes or latticework. In its simplest form, sheet metal may be expanded by making a series of cuts or slits in the metal in such relation to each other as to break joints, so that the metal, when opened or stretched, will present an open mesh appearance. It may be likened to the familiar woven wire openwork construction, except that the metal is held together by uncut portions thereof, uniting the strands, and the whole forms a solid piece. *Expanded Metal Co. v. Bradford*, 29 Sup. Ct. 652, 214 U. S. 366, 53 L. Ed. 1034.

### EXPANSION TANK

An "expansion tank," in connection with a railway car-heating apparatus, "is a vessel to maintain a reserve supply of water in constant communication with both branches of the circulating system, and it should have a safety valve and means for filling the system with water." *Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co.*, 160 Fed. 476, 481.

### EXPATRIATE

"Expatriation" included not simply the leaving of one's native country, but the becoming naturalized in the country adopted as a future residence." *United States v.*

*Wong Kim Ark*, 18 Sup. Ct. 456, 481, 169 U. S. 649, 42 L. Ed. 890.

### EXPECT

See Reasonably Expected.

"A statement made by one person to another that he 'expects' to do a certain act is a very different thing from making an absolute promise or guaranty that he will perform such act. To expect to do a thing simply means to look forward to doing it with the anticipation, or belief, of its accomplishment. The giving of information by a railroad company to a shipper as to what is the schedule of a particular train, with the statement that the company 'expects' to maintain such schedule, is not the making of any promise other than to perform the duty with respect to such schedule which the law already imposes." *Atlantic Coast Line R. Co. v. Wells*, 60 S. E. 170, 171, 130 Ga. 55.

Where plaintiff wrote defendant railroad that he had a claim against defendant's contractor, and that he would proceed to collect the same if defendant did not settle the account, the words "expects to settle all bills," in a letter from defendant that the railroad company "expects to settle all bills" of the contractor, did not necessarily mean payment. *Cleveland, C., C. & St. L. Ry. Co. v. Shea*, 91 N. E. 1081, 1083, 174 Ind. 303.

In a letter to the representative of a deceased creditor, a discharged bankrupt wrote: "I have paid quite a few of the old losses, expect to pay more, and the next one shall be to the family of my departed friend." And in another letter he held his promise to the creditor good, but did not know when he could do what he wanted to do. Held, that "expect to pay" was nothing more than a mere desire or intention to pay, and that the language was insufficient to revive the debt. *Coe v. Rosene*, 118 Pac. 881, 882, 66 Wash. 73, 38 L. R. A. (N. S.) 577, Ann. Cas. 1913C, 741.

### EXPECTANCY

See Probable Expectancy.

See, also, Expectant Estate.

An "expectancy" is an inchoate gift. *Searcy v. Kelly* (Tex.) 98 S. W. 1080, 1085.

An expectancy or hope is defined as "a mere hope unfounded in any limitation, possession, trust, or legal act whatever, such as the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility. It is a possibility, in the popular sense of the term. But it is less than a possibility in the specific sense of the term 'possibility'; for it is no right at all, in contemplation of law, even by possibility, because in the case of a mere expectancy nothing has been done to create an obligation in any event, and where there has been no obligation there can be no right, for right and

obligation are correlative terms." *McDonald v. Bayard Sav. Bank*, 98 N. W. 1025, 1026, 123 Iowa, 413 (quoting 2 *Fearne, Remainders*, p. 23); *Elliott v. Leslie*, 99 S. W. 619, 621, 124 Ky. 553, 124 Am. St. Rep. 418 (quoting and adopting definition in 2 *Fearne, Rem.* 23).

The interest of a beneficiary in an insurance policy, reserving the right to change the beneficiary or assign the policy, has been defined as an "expectancy" or "an inchoate or unexecuted gift, revocable at any moment by the donor and remaining wholly within his control." *McNeill v. Chinn*, 101 S. W. 465, 467, 45 Tex. Civ. App. 551 (citing *Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 576).

#### As property

See Property.

### EXPECTANCY OF LIFE

The term "expectancy of life" expresses accurately the time which a healthy person may live, as shown by the mortality tables. *Belmer v. Boyne City Tanning Co.*, 125 N. W. 726, 729, 160 Mich. 669.

### EXPECTANT ESTATE

Any interest in remainder, whether absolutely vested or vested subject to being divested or contingent, is an "expectancy." Anticipations not coupled with a legal interest are not deemed "expectant estates." *Robinson v. New York Life Ins. & Trust Co.*, 133 N. Y. S. 257, 262, 75 Misc. Rep. 361.

Where the share of testatrix, in a portion of an estate, was being held by the executors by her permission, subject only to a burden imposed by her own act, in determining the validity of a gift of this fund the rule regarding the transfer of "expectancies" did not apply. *Hobart's Adm'r v. Vail*, 66 Atl. 820, 824, 80 Vt. 152.

The interest of a contingent remainder is not an "expectancy." *McDonald v. Bayard Sav. Bank*, 98 N. W. 1025, 1026, 123 Iowa, 413.

"Estates, as respects the time of their enjoyment, are divided into 'estates in possession' and 'estates in expectancy.' An estate which entitled the owner to immediate possession of the property is an 'estate in possession.' An estate in which the right of possession is postponed to a future time is an 'estate in expectancy.'" *In re Perry*, 96 N. Y. Supp. 879, 884, 48 Misc. Rep. 285 (quoting *Real Property Law*, § 25).

Under 1 Rev. St. (1st Ed.) p. 726, pt. 2, c. 1, tit. 2, § 40, providing that when, in consequence of the valid limitation of an expectant estate, there shall be a valid suspension of the power of alienation or of ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation given, they shall belong to the persons presumptively entitled to the next eventual estate, page 773, § 2, making this rule applicable to future estates in personal property, and page

773, § 8, defining an "estate in expectancy" as where the right to the possession is postponed to a future period, where a testator provided for certain annual payments to his widow and niece, with remainder, on the widow's death, to certain charitable institutions, there was a valid limitation of an expectant estate and a suspension of the absolute ownership entitling the charitable institutions to any undisposed of income. *Matter of Harteau*, 110 N. Y. Supp. 59, 62, 125 App. Div. 710.

"At common law estates in real property, with respect to the time of their enjoyment, were either in 'possession' or 'expectancy.' The person who had the present enjoyment of that out of which the enjoyment arose had an estate in possession. The person whose enjoyment was postponed had an 'estate in expectancy,' which, however, was created at the same time as that upon which it was expectant. Expectant estates were either in remainder, limited to take effect and to be enjoyed after the particular estate, or in reversion; the residue of the estate left in the grantor or his heirs to commence in possession after the determination of the particular estate." *State ex rel. Tozer v. Probate Court of Washington County*, 113 N. W. 888, 893, 102 Minn. 268.

Personal Property Law, § 23, provides that, upon the written consent of all the persons beneficially interested in a trust in personal property, the creator of the trust may revoke it. Section 11 provides that the same rule which regulates future estates in land is applicable to future estates in personal property. *Real Property Law*, §§ 35, 36, provide that an estate in which the right of possession is postponed to a future time is an estate in expectancy, and that all expectant estates except such as are enumerated in this article are abolished, and expectant estates are divided into future estates and reversions. Section 59 provides that an expectant estate is descendible, devisable, and alienable in the same manner as an estate in possession. A trust deed provided that the settlor should receive the income from the trust fund for life, and, if he left surviving a wife and children, the fund should be divided equally between them, but that, if the settlor died without wife or children or issue of children surviving, the income should be paid to the settlor's mother and brother during her life and upon her death the whole to the brother, or, if either the mother or brother died before the death of the settlor, the income should be paid to the survivor during life, and upon termination of the trust the trustee should pay over the principal fund to such persons as at said time might be the settlor's next of kin on his father's side. Held, that a brother and nephew of the settlor's deceased father did not, during the lifetime of the settlor, possess

an estate in "expectancy" within the meaning of section 59, since it was uncertain that they were the persons who would ultimately take the estate, nor were they "beneficially interested" in the estate within the meaning of section 23, as their interest was not devisable, descendible, or alienable, and hence the settlor could revoke the trust without their consent. *Robinson v. New York Life Ins. & Trust Co.*, 133 N. Y. Supp. 257, 261, 75 Misc. Rep. 361.

## EXPECTANT HEIR

"In England, the words 'expectant heir' originally meant just what the expression naturally signifies, an heir expecting an inheritance through intestacy or devise. The doctrine of 'expectant heir' amounted to nothing more than this: That a person should not, at common law, sell that which did not belong to him, either in possession or by vested right, but which he hoped might be acquired either certainly or contingently in the future." *McAdams v. Bailey*, 82 N. E. 1057, 1062, 169 Ind. 518, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240 (quoting from *Whelen v. Phillips*, 25 Atl. 44, 151 Pa. 312).

## EXPECTATION

See Wish and Expectation.

The term "expectation," as used in *Hurd's Rev. St. 1901*, c. 120, § 366, imposing a tax on the transfer of property by will, where one becomes beneficially entitled in possession or expectation to any property or income thereof, is used "not to denote an expectation of becoming vested both with the title and the possession where neither is now vested but to denote a condition where the title is vested and the possession is deferred. The term 'in expectation' is used in contradistinction to 'in possession.' Both contemplate a title vested and indefeasible; but in one instance the right of enjoyment is immediate 'in possession,' in the other it is postponed 'in expectation.' As used in this statute, these words last quoted refer to the future possession of an estate now vested, and which is subject to the immediate enjoyment of another." *People v. McCormick*, 70 N. E. 350, 353, 208 Ill. 437, 64 L. R. A. 775.

## EXPEDIENTE

"Expediente," in Mexican law, means all the papers or documents constituting a grant or title to land from government. *Vanderslice v. Hanks*, 3 Cal. 27, 38.

## EXPEDITION

See Military Expedition.

## EXPEDITIOUSLY

See Immediately and Expeditiously.

## EXPEL

The word "expel" ordinarily means to drive or force out or reject. *Aaron v. Ward*, 121 N. Y. Supp. 673, 676, 136 App. Div. 818.

## EXPENDITURE

See Extraordinary Expenditures.

## EXPENDITURES ACTUALLY MADE

Under a contract stipulating that plaintiff guaranteed the amount of expenditures actually made by it on contracts assumed by defendant without deducting the moneys received on account of contracts designating a sum which defendant agreed to pay to plaintiff, the phrase the "amount of expenditures actually made" included not only the expenditures actually made by plaintiff in part performance of the contract but also those made by it in procuring them. *Berlin Iron Bridge Co. v. American Bridge Co.*, 55 Atl. 573, 576, 76 Conn. 1.

## EXPENSES

See Actual Expense; Actual Traveling Expenses; At the Expense of the Municipal Treasury; Contingent Expenses; Costs and Expenses; Current Expenses; Family Expense; Funeral Expenses; Necessary Expenses; Necessary Traveling Expenses; Operating Expenses; Ordinary Expenses; Proper and Legal Expenses; Put to Expense; Salvage Expenses; Testamentary Expense; Whole Expense.

All expenses, see All.

As costs, see Costs.

Other expenses, see Other.

See, also, Fees.

## Of administration

Where a stipulation provided that expenses of administration should be borne by the life tenant, it did not include costs of an accounting contested only by the remaindermen. *In re Brower*, 130 N. Y. Supp. 191, 193, 194, 71 Misc. Rep. 398.

A claim for legal services in the settlement of the estate of a decedent is a claim of the second class, within *Mills' Ann. St. § 4780*, dividing demands against decedents into four classes, and providing that expenses of administration shall be included in the second class, and the provision of the section requiring claims to be filed within the specified time applies only to the claims of the fourth class. *United States Fidelity & Guaranty Co. v. People*, 98 Pac. 828, 834, 44 Colo. 557.

## For care of sick person

"Given its plainest and most obvious meaning, the phrase 'expenses for the care' of a sick person means only such expenses as pertain to attendance, nursing, board, and treatment, and not to the expense of erecting and furnishing a building in which such

care is furnished." *L. H. Kurtz Co. v. Polk County*, 109 N. W. 612, 613, 136 Iowa, 419.

#### **Caused by contempt**

The term "expenses," as used in a statute providing that, if actual loss to a party in an action is caused by contempt, the court, in addition to fine or imprisonment, may order payment to the party agreed of a sum sufficient to indemnify him and to satisfy his "costs and expenses," is intended to include something more than the costs and disbursements allowed by statute to the prevailing party in ordinary civil actions, and may include such reasonable attorneys' fees as the relator may have paid or obligated himself to pay counsel in order to obtain the benefit of the order which the defendant has violated. *Davidson v. Munsey*, 80 Pac. 743, 745, 29 Utah, 181.

#### **Of collection**

The cost of suit is a part of the "expense of collection," within Laws 1899, p. 177, c. 109, providing that a decree rendered in a suit for the settlement of an indebtedness due from one county to another shall be enforced by an annual tax levy to pay the decree, interest, and expense of collection. *State ex rel. Chicot County v. Desha County*, 99 S. W. 1108, 1109, 82 Ark. 360.

#### **Of completion of work**

In a provision in a contract between a building contractor and a subcontractor that, in case the subcontractor should fail to carry on the work and the owner should be obliged to complete it, the expenses incurred by the owner, and to be deducted from the contract price, should be audited and certified by the architect, the "expenses" provided for included a commission allowed the contractor for his services in making the arrangements and supervising the carrying on of the work after default of the subcontractor. *White v. Abbott*, 74 N. E. 305, 306, 188 Mass. 90.

#### **Of condemnation**

The provisions of Laws 1905, p. 2027, c. 724, as supplemented by Laws 1905, p. 2051, c. 725, for allowance of expenses and disbursements, including witness and counsel fees, constitute "just compensation," so far as the landowner's necessary expenses are concerned; the term "expenses" covering any necessary expense, except those items otherwise provided for in the statute. In *re Board of Water Supply of City of New York*, 116 N. Y. Supp. 642, 645, 62 Misc. Rep. 326.

Laws 1905, p. 2027, c. 724, as amended, being an act to provide for an additional supply of water for the city of New York, provides, by section 32 and section 13 as amended, that in proceedings by the city to procure land an allowance shall be made to parties of "expenses and disbursements, including reasonable compensation for witnesses," and for allowances for counsel fees

not exceeding the limits prescribed by Code Civ. Proc. § 3253. Held, that the words "expenses and disbursements" provided for costs; and hence the general statute (Code Civ. Proc. § 3240) authorizing the court, in its discretion, to allow in a special proceeding the costs of an action, is not applicable, and the statutory costs cannot be allowed. In *re Board of Water Supply of City of New York*, 116 N. Y. Supp. 640, 642, 62 Misc. Rep. 324.

#### **Of court**

The term "expenses of court" does not include the salaries of the judges of the superior courts. *Clark v. Hammond*, 68 S. E. 600, 603, 134 Ga. 792.

Any expense lawfully incurred is an expense of holding court. Expenses of a committee of citizens of a creditor appointed by a grand jury to inspect and examine the offices, papers, books, and records of county officers, and to make a full and complete report of the result of such investigation to the next succeeding grand jury, are expenses of the court, the grand jury being a component part of the court. *Chatham County v. Gaudry*, 47 S. E. 634, 635, 120 Ga. 121.

Const. art. 6, § 1, par. 1, provides that the judicial powers of the state shall be vested in a supreme court, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as may be established by law. Paragraph 5, providing for writs of error, declares that they may be taken from the superior court and from the city courts of Atlanta and Savannah and such other city courts as may be established in other cities. Held, that the power to create local city courts is recognized, and city courts being in existence at the adoption of the Constitution, and salaries of the judges being paid by local taxation, the recognition of such courts embraces the recognition of the organization thereof and manner of payment of the judges' salaries, which are "expenses of court," within Const. art. 7, § 6, par. 2 (Civ. Code, § 5892), providing that the General Assembly shall not have power to delegate to any county the right to levy a tax except for expenses of court, etc., so that Acts 1905, p. 100, providing for levy of a county tax for payment of the salary of a city court judge, is not violative of article 7, § 6, par. 2. *Clark v. Eve*, 68 S. E. 598, 134 Ga. 788.

#### **Of drainage proceedings**

Fees for the services of attorneys and counsel to drainage commissioners in drafting necessary legal papers and counseling them of the manner of discharging their duties in constructing drains under the drainage law constituted "expenses," which the commissioners were entitled to include in an assessment on property benefited. In *re Turrell*, 117 N. Y. Supp. 764, 769, 63 Misc. Rep. 502.

### Of health officer

The word "expenses," in the provision of the act of 1893 (section 2522 Gen. St. 1902) that the necessary expenses of the town health officer shall be paid by the town treasurer upon the approval of his bill by the county health officer, means something due the health officer. *Keefe v. Town of Union*, 56 Atl. 571, 574, 76 Conn. 160 (citing *Heublein v. New Haven*, 54 Atl. 298, 75 Conn. 545, 547).

### Of legal proceeding

An agreement between two parties to share in paying the "cost and expense" of a suit against one of the parties includes the costs taxed against such party as a part of the "expense" of the suit. *Provident Chemical Works v. Hygienic Chemical Co.*, 170 Fed. 523, 525.

An indemnity insurance policy stipulating that insurer's liability for loss to insured is limited to \$5,000, that insurer will pay the "expenses of litigation" in addition to such sum; that, if any suit is brought against insured, insurer will, at its own cost, defend the suit, unless it shall elect to pay insured the indemnity fixed, and that insured, when requested by insurer, shall aid in effecting settlements, but shall not voluntarily assume any liability or interfere in any negotiations for settlement or incur any expense except at his own cost without the consent of insurer previously given, binds insurer to pay \$5,000 and, in addition thereto, the expense that insured has been put to by litigation required by insurer, including costs, damages, and interest on \$5,000, though, as between insurer and insured, the liability does not attach until insured has suffered some loss; the phrase "expenses of litigation" not being confined to the payment of attorney's fees, obtaining witnesses' testimony, securing bonds, and other like expenses incident to such class of actions. *Aetna Life Ins. Co. v. Bowling Green Gaslight Co.*, 150 S. W. 994, 995, 150 Ky. 732, 43 L. R. A. (N. S.) 1128.

### Of medical attendance

In a personal injury action, where plaintiff claimed damages for medical and nurse hire, a question to him as to what expenses he was put to by the injuries for medical attendance, medicines, etc., was not objectionable as requiring testimony of anything but actual expenditures, within the rule forbidding evidence of liability incurred, but not discharged, under an allegation of payment; "expense" meaning the laying out or expending of money or other resources. *Kimic v. San Jose-Los Gatos Interurban Ry. Co.*, 104 Pac. 312, 313, 156 Cal. 273.

Where, in an action for injuries, plaintiff alleged that he had been put to great expense for medical attendance and nursing, and for the purchase of drugs and medicine, to the amount of \$400, the words "put to expense" meant "had incurred or been com-

pelled to incur expense," the word "expense" meaning not only the cost of contemplated services and materials, but also the charges for such as have been performed or furnished, whether paid or not, and hence plaintiff was not limited to recovering "expenses paid," but was entitled to recover for expenses incurred. *Booker v. Southwest Missouri R. Co.*, 128 S. W. 1012, 1018, 144 Mo. App. 273.

### Of mortgage sale

Where a note was given in payment of land, conditioned to be paid if M.'s mortgage on the land was paid or caused to be paid by M., but if M. failed to do so, and T., the maker of the note, was put to expense to protect himself, such "expense" should be deducted from the notes, and M. had also executed a deed of trust on another tract as a protection against liability on the mortgage, any excess in value of the other tract above what T., who purchased at the trustee's sale, gave for it could not be considered to decrease the amount of his expense in protecting himself from the mortgage, which he paid. *Heard v. Thrasher* (Tex.) 71 S. W. 803, 811.

### Of municipal treasury

Under Acts 1900, p. 153, c. 119, providing a scheme for working public roads, requiring all persons to work on the roads or pay a commutation tax and an ad valorem tax on property, that the commutation tax shall be turned over to the treasurer of the municipality, but that the ad valorem tax shall be treated as a general road fund for use anywhere in the county, except that taxes so collected on property within a municipality, the streets of which are worked at the expense of the municipal treasury, shall be divided between the county road fund and the municipal street fund, the streets of a municipality are worked "at the expense of the municipal treasury" only when they are so worked with money collected by taxation, and they are not worked at the expense of the municipal treasury when they are worked with funds made up of commutation taxes collected under an ordinance, fines imposed on street delinquents and for the obstruction of streets. *McComb City v. Pike County*, 38 South. 721, 86 Miss. 647.

### Of prosecutions

Loc. Acts 1901, p. 671, No. 468, § 37, provides that all moneys paid to the justice of the city of Sault Ste. Marie, except jury, officer and witness fees, and fines and costs recovered for violation of laws, shall be for the use of the city, and shall be paid weekly to the city treasurer; also that expenses of prosecutions for violation of penal laws of the state shall be paid by the county. Held, that the justice was not entitled to retain the fees authorized by the general laws of the state to be collected in criminal cases by justices of the peace; they not being "costs,"



nor "expenses," within the statute, in view of section 38, providing that the justice shall receive an annual salary of \$1,500 in full compensation for all services performed by him. *Harrison v. Board of Sup'rs of Chipewa County*, 114 N. W. 851, 852, 151 Mich. 91.

#### Of road or street

The word "expense," as used in Rev. St. c. 53, § 19, providing that a street railroad shall be constructed and maintained as the municipal officers may direct, and, when it shall be necessary to alter the grade of the road, the alteration shall be made at the "expense" of the corporation; will include the damages to landowners which, if paid by the town, are part of the expenses of the alteration and are recoverable by the town from the railroad corporation. *Hurley v. Inhabitants of South Thomaston*, 74 Atl. 734, 736, 105 Me. 301.

The terms "expense" and "whole expense," as used in statutes relieving towns under certain circumstances from the burden of building and keeping in suitable repair for travel all highways and bridges within its limits, mean the same. *Town of Bridge-water v. Grafton County*, 69 Atl. 941, 942, 74 N. H. 549.

Under a statute providing for the apportionment of the "expense of repairing highways" among towns greatly benefited by them, an apportionment may be made on account of future maintenance expenses. *O'Neil v. Town of Walpole*, 66 Atl. 119, 120, 74 N. H. 197.

#### Of sale of land

Defendant entered into a contract with plaintiffs' testator, whereby testator, for the consideration of \$1, was to have a one-fourth interest in the net profits resulting from the sale of certain lands. There was no partnership relation between them. The sale of the lands required several years, and the defendant expended much labor in the sale of the lands and collection of the purchase price therefor, all of which must have been contemplated by the parties at the time of making the contract. The contract provided that defendant be allowed from the money received from the land expenses connected with the sale. Held, that the term "expenses" included all outlays by defendant both of money and labor, and that he was entitled to receive compensation for his services in selling the land. *Rust v. Fitzhugh*, 112 N. W. 508, 513, 132 Wis. 549.

#### On breach of contract

Rev. Codes, § 6054, making the detriment caused by breach of an agreement to convey an estate in realty the price paid, expenses properly incurred in examining title, etc., and allowing expenses incurred in preparing to enter upon the land in case of bad faith, applies to an agreement to convey an equitable estate as well as a legal estate, and hence

would apply to a transfer of land certificates entitling the holder to patent state land. *Ross v. Saylor*, 104 Pac. 864, 868, 39 Mont. 559.

Where plaintiff, after exchanging land with defendant under an agreement to convey, made after defendant had conveyed his interest therein to another, expended a certain sum in removing his family upon it from another state, and other sums for counsel fees and costs in defending an action against him brought by defendant's prior grantee, such sums were "expenses properly incurred in preparing to enter upon the land" within Rev. Codes, § 6054, making such expenses part of the detriment caused by breach of an agreement to convey, made in bad faith. *Id.*

#### EXPENSE FUND

By general acceptance the expression "expense fund" means a fund set apart and dedicated to expense purposes. *Wood & Duvall v. Iowa Building & Loan Ass'n*, 102 N. W. 410, 412, 126 Iowa, 464.

## EXPERIENCE

#### See Skillful and Experienced Men.

"Experience" is knowledge derived from proof furnished by one's own faculties instead of by reason. *Lake Erie & W. R. Co. v. Klinkrath*, 81 N. E. 377, 378, 227 Ill. 439.

The term "experience," as ordinarily understood, means knowledge gained by observation or trial. *Steinwender v. Philadelphia Casualty Co.*, 126 N. Y. Supp. 271, 274, 141 App. Div. 432.

"The word 'experience' means to have practical acquaintance with, which is equivalent to knowledge, and the word 'capacity,' in the sense in which it was used (in an instruction requiring of a boy the exercise of care and prudence equal to his capacity, etc.), means capability or skill, as applied to the business in which he was engaged," and an instruction requiring a finding that plaintiff did not use such care and precaution as a person of his age and experience would have ordinarily used, under the circumstances, as a prerequisite to the finding of contributory negligence was proper, and not objectionable for failure to use the words "capacity," "age," "knowledge" and "experience." *Stanley v. Chicago, M. & St. P. R. Co.*, 87 S. W. 112, 113, 112 Mo. App. 601.

A policy of credit insurance made the "experience" of the insured in dealing with its customers the basis of credit, and then provided that the highest previous indebtedness should be taken as an "experience" which would justify the indemnified in again extending credit to an old customer. Held, that the term "experience" meant a business transaction which was closed, since until the goods for which the credit was extended were paid for, and the transaction closed, the creditor would not be justified in extending

further credit. *Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.*, 118 S. W. 1004, 1006, 133 Ky. 745.

## EXPERIMENT

Where the idea of a machine has been conceived, and the conception carried into effect, by the construction of the machine, which is used or is capable of being used for the purpose for which it was designed, it is no longer an "experiment," but an "invention," and the subsequent abandonment of the use of the machine does not render it an abandoned experiment, nor lessen its effect as an anticipation which will invalidate a subsequent patent to another for substantially the same machine. *Buser v. Novelty Tufting Mach. Co.*, 151 Fed. 478, 492, 81 C. C. A. 16.

### EXPERIMENTAL USE

The use of a machine while it was being perfected, in a room from which the public and all others not engaged in its operation were excluded, changes and improvements being made from time to time, although extending back to more than two years before application was made for a patent, was an experimental and not a public use, and did not invalidate the patent granted therefor, and it is immaterial that the product of such experimental use was sold. *Penn Electrical & Mfg. Co. v. Conroy*, 159 Fed. 943, 947, 87 C. C. A. 149.

## EXPERT

An "expert" witness is a person who possesses peculiar skill and a knowledge upon the subject-matter on which he is called to testify. *State v. Ruthledge*, 79 Pac. 1123, 1124, 37 Wash. 523 (quoting and adopting definition in *Underhill*, Ev. § 185).

An "expert" is one qualified by study or experience, or both, to understand and explain the subject under consideration. *Miera v. Territory*, 81 Pac. 586, 588, 13 N. M. 192.

An "expert" is one possessing in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons. *Ford v. Providence Coal Co.*, 99 S. W. 609, 611, 124 Ky. 517; *Yates v. Garrett (Okl.)*, 92 Pac. 142, 143, 19 Okl. 449.

An "expert" is one having superior knowledge of a subject acquired by professional, scientific, or technical training or by practical experience, which gives him knowledge not had by persons generally so as to enable him to aid the court or jury in determining the matters under consideration. *Ausmus v. People*, 107 Pac. 204, 212, 47 Colo. 167.

An "expert" is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same. A witness whose preliminary examination showed that he cultivated sugar beets in one year and observed their growth in an-

other was competent to state when they should be thinned and how many tons could be raised per acre, since the extent of examination necessary to qualify him was within the discretion of the court. *Farmers' & Traders' Nat. Bank v. Woodell*, 61 Pac. 837, 840, 38 Or. 294 (quoting and adopting definition in *Rogers*, Exp. Test. [2d Ed.] § 1; and citing *Pendleton v. Saunders*, 24 Pac. 506, 19 Or. 9).

"Expert testimony" is the opinion of a witness possessing peculiar knowledge, wisdom, skill, or information regarding a subject-matter under consideration, acquired by study, investigation, observation, practice, or experience, and not likely to be possessed by the ordinary layman or an inexperienced person, who is incapable of understanding the subject without the aid of the opinion of some person who possesses such knowledge or experience; and a person who is competent to give expert testimony is denominated an "expert witness." *McAnany v. Henrich*, 141 S. W. 633, 636, 238 Mo. 103.

"An 'expert' is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons." "This knowledge may be derived from experience, or from study and direct mental application." "Strictly speaking, an 'expert' in any science, art, or trade is one, who, by practice or observation, has become experienced therein." But generally nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession. Knowledge gained by consistent and close study of medical works renders one competent to testify as an "expert" concerning the matters of which he has thus learned. *Macon Ry. & Light Co. v. Mason*, 51 S. E. 569, 571, 123 Ga. 773 (quoting and adopting definition in *Rogers*, Expert Testimony [2d Ed.] § 2).

"An 'expert' is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by an ordinary person. This knowledge may be derived from experience or from study and direct mental application." Where witnesses, in an action to review a tax assessment on the easements held by a gas company in the streets of a city, had been students of taxation and tax laws for many years, had been called upon to value the easements of public service corporations in many cities, and knew the character and extent of the easements of the gas company, they were qualified as "experts" to give their opinions as to the correctness of the assessment in question. *Consolidated Gas Co. of Baltimore City v. City of Baltimore*, 65 Atl. 628, 632, 105 Md. 43, 121 Am. St. Rep. 553.

One who has taken a course of study as electrical engineer, and who was the chief engineer in the construction of a powder plant, and who thereafter for about eight years was

in the practical charge of the electrical machinery of the plant, is qualified to give expert testimony relative to electrical switches and their installation in places where high explosives are kept, though he has worked in no other powder mill; an "expert" being one who is skilled in a particular act, trade, or profession, possessed of peculiar knowledge concerning the same. *Jewell v. Excelsior Powder Mfg. Co.*, 149 S. W. 1045, 1048, 166 Mo. App. 555.

A carpenter of 30 years' standing, who had some experience in setting and repairing plate glass, is properly treated as "an expert" as to the cause of the break of a plate glass window. *Drouin v. Wilson*, 67 Atl. 825, 828, 80 Vt. 335, 13 Ann. Cas. 93.

Machinists of wide experience, who had examined a car and who understood the relations of its parts and the principles on which they worked, were competent to give "expert" evidence on the question of the proper method of fastening a door of the car. *Zarnik v. C. Reiss Coal Co.*, 113 N. W. 752, 756, 133 Wis. 290.

An "expert" as to handwriting is defined to be "any person who has had such experience in the examination of handwriting as to enable him to note and distinguish the characteristics of handwriting." *In re Burbank*, 93 N. Y. Supp. 866, 870, 104 App. Div. 312 (quoting *Greenl. Ev.* § 577).

An "expert" on handwriting is a person accustomed to and skilled in the matter of genuine and spurious handwriting. *Griffin v. Working Woman's Home Ass'n*, 44 South. 605, 607, 151 Ala. 597.

#### EXPERT EVIDENCE OR TESTIMONY

"The scope of 'expert evidence' is not restricted to matters of science or skill, but to any subject in respect to which one may derive, by experience, special and peculiar knowledge." *Zarnik v. C. Reiss Coal Co.*, 113 N. W. 752, 755, 133 Wis. 290.

"Expert evidence" is not confined to matters involving abstruse, scientific conditions. Any subject wherein a person may become specially learned is within the broad field of expert evidence. *Schwantes v. State*, 106 N. W. 237, 247, 127 Wis. 160 (citing *Wharton's Law of Ev.* [3d Ed.] § 444).

The scope of "expert evidence" is not restrained to matters in the field of science, art, or skill, technically speaking, but it extends to every subject in respect to which one may derive, by experience, special and peculiar knowledge. *Hamann v. Milwaukee Bridge Co.*, 106 N. W. 1081, 1086, 127 Wis. 550, 7 Ann. Cas. 458.

All matters of physical facts are not "opinion evidence," in the legal sense of that term. They are not theoretical, nor conclusions drawn by inference, but a statement of facts from personal observation, and hence

also they are not "expert evidence." The exceptions to the rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but it includes the evidence of common observers testifying the result of their observations made at the time in regard to common appearances, facts, and conditions which cannot be reproduced and made palpable to a jury. *Britt v. Carolina Northern R. Co.*, 61 S. E. 601, 603, 148 N. C. 37.

"'Expert testimony' is the evidence of persons who are skilled in some art, science, profession, or business, which skill or knowledge is not common to their fellow men, and which has come to such experts by reason of special study and experience in such art, science, profession, or business." *State v. Collins* (Del.) 62 Atl. 224, 227, 5 Pennewill, 263; *Louft v. C. & J. Pyle Co.* (Del.) 75 Atl. 619, 622, 1 Boyce, 192.

"Expert testimony" is the opinion of a witness possessing peculiar knowledge, wisdom, skill, or information regarding a subject-matter under consideration acquired by study, investigation, observation, practice, or experience, and not likely to be possessed by the ordinary layman or an inexperienced person, who is incapable of understanding the subject without the aid of the opinion of some person who possesses such knowledge or experience; and a person who is competent to give expert testimony is denominated an "expert witness." *McAnany v. Henrici*, 141 S. W. 633, 636, 238 Mo. 103.

Where all the facts on which the opinions of a witness are based are within the knowledge of the witness, and such facts are given to the jury, the explanations are not properly "expert testimony." *Green v. Kansas City S. R. Co.*, 125 S. W. 865, 870, 142 Mo. App. 67.

In an action for injuries to a railroad employé engaged in dumping ballast cars, he claimed that, in attempting to save himself from a fall caused by a jar of the train, he threw one foot back to the platform of the car behind, and that his foot went through a hole mashed through the planks and a part of the sill, down on the drawbar, and was injured. The defect in the platform was denied by defendant, and, in corroboration of plaintiff's testimony, he claimed that the injury showed it was caused by his foot being caught between two uneven surfaces, while defendant claimed that it was crushed between two even surfaces. Held, that evidence of physicians, who examined plaintiff immediately after the injury, that the foot must have been injured by coming in contact with two uneven surfaces was not "expert testimony," but was direct testimony as to how the injury occurred and what caused it, and was therefore inadmissible. *Illinois Cent. R. Co. v. Smith*, 70 N. E. 628, 630, 208 Ill. 608.

## EXPIRE—EXPIRATION

See At the Expiration.

### Of lease

Ordinarily the phrase "expiration of term," in a lease, means end of the term by lapse of the time fixed in the lease for its duration, though it may mean the termination of the lease in any manner, at least in any manner provided for in the lease. *Pringle v. Wilson*, 104 Pac. 316, 318, 156 Cal. 313, 24 L. R. A. (N. S.) 1090.

Under a lease providing that, in case of breach of condition, the landlord may give a five days' notice of intention to determine the lease, and declaring the effect of the notice to be that the lease and the term and interest and all right and claim under the lease shall cease and end, the landlord is entitled, after such breach and notice, to maintain a proceeding under Code Civ. Proc. § 2231, subd. 1, authorizing the dispossession of a tenant who holds over after the expiration of the term, for when the notice has been given, and the premises thereby curtailed, it has "expired," within the meaning of the statute. *Martin v. Crossley*, 91 N. Y. Supp. 712, 714, 46 Misc. Rep. 254.

A statute making a tenant liable for double rents when he willfully holds over "after the 'expiration' of the time" does not apply to a case where the lease was terminated, before the expiration of the time named, for breach of condition. *Walther v. Anderson*, 114 S. W. 414, 417, 52 Tex. Civ. App. 360 (citing *Stuart v. Hamilton*, 66 Ill. 255).

## EXPLAIN

### EXPLANATION

A statement made by prosecutrix, in a rape case, four months after the alleged assault, and not voluntarily, but in response to a demand for explanation of her condition, is not a complaint but a mere "explanation." *State v. Bebb*, 101 N. W. 189, 190, 125 Iowa, 494.

## EXPLICIT NOTICE

Notice to the purchaser of a note may be of two kinds, "explicit notice" of the fraud or illegality, and "implicit" or "general notice." If the purchaser of notes at the time of buying them had notice or knowledge of some illegality or knowledge of some illegality or fraud which vitiated them, though he was not apprised of its nature, this would be such "general notice" as would affect his title. Mere negligence, however gross, not amounting to this willful and fraudulent blindness, will not of itself amount to notice; but the jury may and should consider the fact of such negligence, as it may tend to prove such "general notice." *Mack v. Starr*, 61 Atl. 472, 473, 78 Conn. 184.

## EXPLOITATION

The word "exploitation," which is of somewhat recent importation into the English from the French, has a different meaning from the word "improvement." "Exploitation [Cent. Dict.]: (1) The act or process of exploiting, making use of, or working up; utilization by the application of industry, argument, or other means of turning to account, as the exploitation of a mine or forest, of public opinion, etc. 'Joint-stock companies or associations of capital are now very advantageously employed for the exploitation of different branches of industry.' To exploit: (2) To make complete use of; work up; bring into play; utilize; cultivate." (Recent, from modern French "exploiter.") *Morton Trust Co. v. American Salt Co.*, 149 Fed. 540, 542.

## EXPLORATION

Development equivalent, see Development.

## EXPLOSION

As fire, see Fire.

"The term 'explosion' has no fixed and definite meaning either in ordinary speech or in law. It may be described, in a general way, as sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. It may and does vary in degrees of intensity and in the vehemence of the report, and it is not always due to the presence of fire. Indeed, it may result from decomposition or chemical action." *Vorse v. Jersey Plate Glass Ins. Co.*, 93 N. W. 569, 570, 119 Iowa, 555, 60 L. R. A. 838, 97 Am. St. Rep. 330.

## EXPLOSIVE

See Burglary with Explosives.

Other explosive, see Other.

Rev. Laws, c. 102, § 105, which in other sections regulates the storing of gunpowder and "explosives," excludes gunpowder from the list of explosives. *Flynn v. Butler* (Mass.) 75 N. E. 730, 731.

Where a large metal tube filled with various metals and materials of an explosive and dangerous nature was exposed to the heat of a furnace on plaintiff's premises and actually exploded and injured an employé, such tube and its contents constituted an "explosive," within a warranty in an employer's liability policy insuring plaintiff that no explosives should be used on the premises. *B. Roth Tool Co. v. New Amsterdam Casualty Co.*, 161 Fed. 709, 713, 88 C. C. A. 569.

As materials

See Materials.

**EXPORT—EXPORTATION**

"'Exportation' is defined to be the act of carrying or sending merchandise abroad." *Thompson v. United States*, 12 Sup. Ct. 299, 301, 142 U. S. 471, 35 L. Ed. 1084.

The terms "imports" and "exports" apply only to articles imported from foreign countries, or exported to them. *Red C. Oil Mfg. Co. v. Board of Agriculture*, 172 Fed. 695, 706 (citing *Pittsburgh & S. Coal Co. v. State of Louisiana*, 15 Sup. Ct. 459, 156 U. S. 590, 39 L. Ed. 544).

The action of the province of Quebec in imposing a license fee for cutting wood on public lands, which is reduced when the wood is manufactured into pulp in Canada, is in effect the imposition of an "export duty" on pulp wood exported to the United States, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 187, providing a countervailing duty on wood pulp equal to the amount of export duty imposed on pulp wood by the country of exportation. *Myers v. United States*, 140 Fed. 648, 650, 655.

Joint Congressional Resolution No. 10, March 14, 1912 (37 Stat. 630), provides that, whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to "export," except under such limitations as shall be prescribed by the President, any arms or munitions of war from any place in the United States to such country, until otherwise ordered by the President. Held, that the word "export" was limited to a transportation of arms or munitions of war from any place in the United States to "such country"; and hence a charge that accused, with intent to export munitions of war from the city of El Paso to a place in Mexico, in violation of a proclamation by the President pursuant to such resolution, did make a shipment of cartridges, etc., by transporting them on his person from one point to another in the city of El Paso, did not charge a violation of the resolution. *United States v. Chavez*, 199 Fed. 518, 519 (citing 3 Words & Phrases, pp. 2600-2602).

**EXPORTERS**

The term "marketers" as used in an order for goods, reading: "If reasonable ship to-morrow Thursday four to six loads 'marketers,'" is to be construed as meaning cattle such as the person sending the order would want to sell to the retail trade. The term distinguishes the cattle for that trade from those which are to be exported. "Marketers" are supposed to weigh about 1,200 pounds, and "exporters" about 1,400 pounds. *Western Union Telegraph Co. v. N. Lehman*

& Bro., 67 Atl. 241, 242, 106 Md. 318, 14 Ann. Cas. 736.

**EXPOSE****Expose for sale**

Under Rev. Laws, c. 65, § 13, as amended, making the exposing of goods for sale without a license an offense, the phrase "exposing for sale" is not synonymous with "exposing to view." The offense is committed by a peddler who has with him in his hand a suit case in which he says he has certain goods, which he specifies, and which he states he would like to show a person for the purpose of selling the goods to the person, even though the goods are concealed from view in the suit case. *Commonwealth v. Hana*, 81 N. E. 149, 150, 195 Mass. 262, 11 L. R. A. (N. S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514.

The act of defendant in placing immature veal in an ice box, to which they took prospective customers and exhibited the contents, inducing them to buy, constituted an "exposing for sale" of the veal, within the prohibition of Agricultural Law, § 70e, and acts amendatory thereto. *People v. Dennis*, 114 N. Y. Supp. 7, 9.

Under Cr. Code, 1902, § 501, forbidding sale or "exposing for sale" of goods on Sunday, the automatic vending of wares by a slot machine is forbidden, since the goods in these machines are "exposed to sale" as actually and effectually as if the owner or operator were present, showing the goods and delivering the same on receipt of price. *Cain v. Daly*, 55 S. E. 110, 112, 74 S. C. 480.

A merchant has offered or "exposed for sale" an adulterated or misbranded article of food, in violation of law, by having such article in stock for the purpose of sale, without actually making a sale. *People v. Lewis*, 122 N. Y. Supp. 1025, 1026, 138 App. Div. 673.

**EXPOSING BUILDINGS**

Where an application for insurance on a boat gave 500 feet as the distance from "exposing buildings," while laid up, and the policy stipulated that it was issued on the application, the term "exposing buildings" meant only such buildings as would tend to increase the risk, and might naturally be considered in fixing the rate. *Macatawa Transp. Co. v. Fireman's Fund Ins. Co.*, 134 N. W. 193, 194, 168 Mich. 365, Ann. Cas. 1913C, 69.

**EXPOSURE**

See Dangerous Exposure; Indecent Exposure; Involuntary Exposure; Unnecessary Exposure to Danger; Voluntary Exposure.

**Exposure of child**

The word "expose," as used in the statute making it an offense for any parent, etc.,

to expose a child under six years of age, in a street, field, etc., with intent to abandon it, means to turn or cast out, to place or leave in a probably fatal position, to abandon, and, so construed, the offense can be committed in a street railway shelter or station, as well as in a street or field. *State v. Eckhardt*, 133 S. W. 321, 322, 232 Mo. 49.

#### Exposure of the person

"Indecency," within Pen. Code 1895, § 390, making it a misdemeanor for any person to practice open lewdness or any notorious act of public indecency tending to debauch the morals, has a somewhat narrower meaning than it has in ordinary popular speech, but is broader in meaning than the phrase "exposure of the person," and a public indecency may be committed without any improper exposure of the human body. *Redd v. State*, 67 S. E. 709, 7 Ga. App. 575.

#### Exposure to obvious danger

Stepping from a moving train irrespective of the speed at which it is moving is not as a matter of law an "exposure to obvious danger," within an accident policy relieving insurer from liability for death resulting from exposure to an obvious danger. *Nat. Life & Accident Ins. Co. v. Lokey*, 52 South. 45, 47, 166 Ala. 174.

#### Exposure to unnecessary danger

Voluntary exposure to unnecessary danger, see Voluntary Exposure.

In construing a clause in an accident policy exempting the insurer from liability in a greater sum than \$100 in case insured lost his life from unnecessary exposure to danger or to obvious risk of injury, the court said: "Apart from the adjudications on the question, I should be inclined to the opinion that, as a main purpose in taking a policy of accident insurance is to procure indemnity against the consequences of the insured party's carelessness and oversights, a stipulation against 'exposure to unnecessary danger or to obvious risk of injury' excludes from the force of the policy accidents occasioned by that positive sort of negligence which in personal injury litigation falls within the doctrine of assumed risk, and consists of knowledge of a danger, and willingness to encounter it, but does not exclude such as happen from the mere failure of the insured to shun a danger unknown to him, which might have been known by due care, or what is denominated 'contributory negligence.' This view would require, to bring into operation the minimum indemnity clause of the policy, volition on the part of the insured in needlessly exposing himself to danger as in cases where the word 'voluntary' is used. It seems to me the intention of the contract implies liability for an accident unless there was a voluntary assumption of unnecessary risk—an assumption of the risk, not, of course, in the expectation of being

hurt, which would amount to self-inflicted injury, but in the expectation of encountering the danger and avoiding injury from it." It was held that such a limitation did not apply to a death from a casualty to which insured was exposed in the performance of his duties as a bridgeman. *Jamison v. Continental Casualty Co.*, 78 S. W. 812, 814, 104 Mo. App. 306.

## EXPOSITORY LEGISLATION

The definition of "free pass" in Acts 32d Gen. Assem. c. 112, § 1, prohibiting common carriers from giving free passes, and defining such to be any transportation for any other consideration than money at the rate open to all, is not ineffective as being mere "expository legislation," which has reference to those acts that purport to put a construction upon past enactments without making any amendments thereto. *Schulz v. Parker* (Iowa) 139 N. W. 173, 176.

## EXPRESS

Baggage distinguished, see Baggage.

"Expressed" means stated or declared in direct terms. That which is made definitely known in direct terms and not left to implication. It is a rule that, when a matter or thing is expressed, it ceases to be implied by law. *Bullard v. Smith*, 72 Pac. 761, 767, 28 Mont. 387.

"Express" means "made known distinctly and explicitly, and not left to inference or implication; declared in terms; set forth in words; manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with 'implied'" (citing Black, Law Dict.). "Express" means "stated or declared as opposed to 'implied'; that which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law" (citing Bouv. Law Dict.). "'Express' is defined as directly stated; not implied or left to inference; distinctly and pointedly given; made unambiguous by special intention; clear; plain" (citing Am. & Eng. Enc. Law). "Express" means "directly stated, not implied or left to inference" (citing Webster, Dict.). "Express" means "given in direct terms; not implied; not dubious; clear; definite; explicit; plain; manifest" (citing Worcester, Dict.). "Express" means "clearly made known; distinctly expressed or indicated; unambiguous; explicit; direct; plain. In law, commonly used in contradistinction to 'implied'" (citing Cent. Dict.). *United States v. Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. 84, 92.

"Express" means to utter, to represent and make known, to declare, to cause to appear. "Publish" means to utter, to make known; and the word "express," as applied

to a writing, is practically synonymous with the word "publish." So that an allegation in an accusation that accused "in writing did say and express" an alleged libel was a sufficient allegation of its publication. *Graham v. State*, 65 S. E. 167, 168, 6 Ga. App. 436.

City Charter of St. Louis, art. 3, § 28, provides that no special or general ordinance which is in conflict or inconsistent with general ordinances of prior date shall be valid or effectual until such prior ordinance, or the conflicting parts thereof, are repealed by "express terms." Held, that "express" was used as an antonym for "implied," and as meaning directly; distinctly; not left to inference; exact; precise; and hence did not limit the method of repeal to an express statement that the matter of the prior ordinance was repealed, so long as the provisions of the later ordinance in some manner by reference terminated the operation of the former ordinance. *City of St. Louis v. Kellman*, 139 S. W. 443, 446, 235 Mo. 687.

#### **Expressed in the title**

The word "expressed," as used in the constitutional provision requiring the object of every act to be expressed in the title, is not synonymous with the word "embraced" as used therein, providing what shall be embraced in an act. *Jersey City v. Speer*, 72 Atl. 448, 78 N. J. Law, 34.

#### **EXPRESS AGREEMENT**

See On the Express Agreement.

See, also, Express Contract.

A provision in a lease that in case of fire the landlord would cause the damage to be repaired forthwith was an "express agreement" in writing, within Real Property Law, § 227, providing that if any leased building becomes untenable or unfit for occupancy, without the fault or negligence of the tenant, "and no express agreement to the contrary has been made in writing," the tenant may surrender possession and thereby terminate his liability for rent. *Brewster v. Silverstein*, 133 N. Y. Supp. 473, 474.

#### **EXPRESS AUTHORITY**

The "express authority" of an agent is that which the principal directly grants to him. The express authority of an agent includes by implication, whether the agency be general or special, all such powers as are necessary for the purposes of the agency. *Dispatch Printing Co. v. National Bank of Commerce*, 124 N. W. 236, 239, 109 Minn. 440.

#### **EXPRESS BUSINESS**

As profession, see Profession.

Under St. 1907, p. 957, c. 586, providing for the taxation of express companies, and St. 1906, p. 485, c. 463, pt. 1, § 7, and St. 1908, p. 637, c. 599, defining the authority of the Board of Railroad Commissioners over express companies, and St. 1906, p. 486, c. 463,

pt. 1, § 13, and St. 1906, pp. 564, 567, 580, c. 463, pt. 2, §§ 189, 197, 246, and Rev. Laws, c. 70, § 3, and Rev. Laws, c. 106, § 62, as amended by St. 1906, p. 445, c. 427, and Rev. Laws, c. 95, § 7, and chapter 208, § 26, as amended by St. 1906, p. 223, c. 261, § 1, relating to express companies, the term "express business" is not confined to carriers using railroads and railways; and Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517, providing that no person or corporation not regularly conducting a general "express business," except a railroad corporation or a street railway corporation authorized to carry freight or express, shall receive liquors for transportation for hire for delivery in a city in which licenses of the first five classes are not granted, includes those who carry in their own vehicles, as well as those who go on trains and steamers, but involves the idea of regularity as to route and time. *Commonwealth v. People's Exp. Co.*, 88 N. E. 420, 425, 201 Mass. 564, 131 Am. St. Rep. 416.

#### **EXPRESS COMPANY**

As common carrier, see Common Carrier.

As corporation, see Corporation.

*Burns' Ann. St.* 1901, § 3312a, providing that all "express companies" shall deliver express matter to persons to whom the same is directed, living within the corporate limits of cities having a population of 2,500, applies to all concerns carrying parcels by express, and there is no variance in alleging a carrier to be a corporation, though the proofs show it to be a copartnership. *United States Exp. Co. v. State*, 73 N. E. 101, 103, 164 Ind. 196.

#### **EXPRESS CONFESSION**

A confession may be either express or implied. An "express confession" is where accused plead guilty and directly admits the truth of the accusation in open court, which is called a "plea of guilty," and is equivalent to a conviction. *State v. Branner*, 63 S. E. 169, 170, 149 N. C. 559 (citing 1 Chitty's Cr. Law, 429).

#### **EXPRESS CONSENT**

"Express consent" to the waiver of jury trials in civil actions occurs where, after appearance of the defendant, a written stipulation is entered into and filed, or an oral stipulation is entered on the record. *State ex rel. Clark v. Neterer*, 74 Pac. 668, 670, 33 Wash. 535.

#### **EXPRESS CONTRACT**

Implied contracts compared therewith, see Implied Contract.

See, also, Express Agreement.

A contract is "express" where the agreement is formal and stated either verbally or in writing. *Gillan v. O'Leary*, 108 N. Y. Supp. 1024, 1027, 124 App. Div. 498.

"To establish an 'express contract' there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." *Melick v. Kelley*, 73 N. W. 945, 53 Neb. 509; *Roberts v. Cox*, 136 N. W. 831, 832, 91 Neb. 553.

An "express contract" requires the mutual meeting of the minds and an intention to contract, and is established by a proof of the expression of intention. *Wojahn v. National Union Bank of Oshkosh*, 129 N. W. 1068, 1072, 144 Wis. 646.

A special contract, which is always express is one with peculiar provisions or stipulations not found in the ordinary contract relating to the same subject-matter, and which, if omitted from the ordinary contract, the law will never supply, while an "express contract" is one whose terms are uttered or stated in words or writing, and may or may not be special. *Indianapolis Coal Traction Co. v. Dalton*, 87 N. E. 552, 554, 43 Ind. App. 330.

The terms "express contracts" and "contracts implied in fact" are used to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which the contract is proved, and the same elements are essential in each case. *Fordtran v. Stowers*, 113 S. W. 631, 634, 52 Tex. Civ. App. 226.

A contract is an agreement between two or more persons for a sufficient consideration to do or not to do a certain thing. It is not necessary that it be in writing, and it may be express or implied. It is "express" when the terms of the agreement are stated in so many words, and "implied" where one party receives benefits from the other under such circumstances that the law presumes a promise on the part of the person benefited to pay a reasonable price for the same. *Jones v. Tucker* (Del.) 84 Atl. 1012.

An "express contract" is an agreement the terms of which are openly uttered or expressed by the contracting parties. Plaintiff, having worked for defendant as cotton buyer for four previous seasons, testified that about September 1, 1908, he went to defendant's office and told defendant's president that he wanted to close the arrangement for the coming season, that the president told him that the preceding season had been unfavorable, to which plaintiff replied that it would take about \$100 a month for plaintiff to live, and to this the president replied, "I will take care of you," and that from September 1, 1908, plaintiff held himself in readiness to perform services for defendant company, but bought no cotton for it during that season because he was not directed to do so, and because defendant did not desire to purchase cotton at the prevailing price, and that in December defendant's president asked him to get work elsewhere. Held, that such facts tended to prove an express, and not an implied,

contract of employment, under the rule. *W. A. Arthur Cotton Co. v. Willis* (Tex.) 125 S. W. 584, 586.

### EXPRESS EMANCIPATION

"Emancipation" of a child is the relinquishment by a parent of control and authority over his child, conferring on the child the right to his earnings and extinguishing the parent's legal duty to maintain and support the child. Emancipation is "express" when the parent voluntarily agrees with the child, who is able to take care of and provide for himself, that he may go from home, earn his own living, and control his earnings, or when the father voluntarily transfers the custody and keeping of the child to another. An express emancipation cannot be renounced by the parent. An "implied emancipation" results where the parent, by his acts or conduct, impliedly consents that the minor may leave home and shift for himself; the father, under these circumstances, however, being authorized to renounce the same within a reasonable time. *Rounds Bros. v. McDaniel*, 118 S. W. 956, 958, 133 Ky. 669, 134 Am. St. Rep. 482, 19 Ann. Cas. 326.

### EXPRESS GRANT

The words "express grant," used in enunciating the principle that an easement for light and air can only be acquired by "express grant" and not by user or implication, do not mean that such easement may only be acquired by grant contained in deed of conveyance. *Bryan v. Grosse*, 99 Pac. 499, 501, 155 Cal. 132.

### EXPRESS INVITATION

See License by Express Invitation.

### EXPRESS MALICE

#### In homicide

"Express malice" exists where one person kills another with a sedate, deliberate mind and formed design, which may be manifested by circumstances disclosing the intention or design, such as lying in wait, antecedent menaces or threats, a former grudge, ill will, etc., toward the deceased, preconcerted plans, or the previous procurement or preparation of an instrument or means for slaying or doing great bodily harm to deceased. *State v. Underhill* (Del.) 69 Atl. 880, 882, 6 Pennewill, 491; *Turner v. State*, 108 S. W. 1139, 1141, 1142, 119 Tenn. 663, 15 L. R. A. (N. S.) 988, 123 Am. St. Rep. 758, 14 Ann. Cas. 990 (quoting Whart. Cr. Law, p. 360); *State v. Mills* (Del.) 69 Atl. 841, 842, 6 Pennewill, 497; *State v. Uzzo* (Del.) 65 Atl. 775, 777, 6 Pennewill, 212; *State v. Wilson* (Del.) 62 Atl. 227, 230, 5 Pennewill, 77; *State v. Bell* (Del.) 62 Atl. 147, 148, 5 Pennewill, 192; *State v. Brown* (Del.) 61 Atl. 1077, 1078, 5 Pennewill, 339; *State v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24; *State v. Johns* (Del.) 65 Atl. 763, 764, 6 Pennewill, 174; *State v. Russo* (Del.) 77 Atl. 743, 748, 1 Boyce, 538;



State v. Roberts (Del.) 78 Atl. 305, 310; State v. Tilghman (Del.) 63 Atl. 772, 773; State v. Wiggins (Del.) 76 Atl. 632, 634, 7 Pennewill, 127; State v. Reese (Del.) 79 Atl. 217, 221; State v. Borrelli (Del.) 76 Atl. 605, 606, 1 Boyce, 349; State v. Watson (Del.) 82 Atl. 1086, 1087; State v. Short (Del.) 82 Atl. 239, 241; State v. Brinte (Del.) 58 Atl. 258, 262, 4 Pennewill, 551; Henderson v. State, 48 S. E. 167, 168, 120 Ga. 504; State v. Hliboka, 78 Pac. 965, 31 Mont. 455, 3 Ann. Cas. 934.

"Malice" within the definition of murder in Pen. Code, § 187, is "express" when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. *People v. Frank*, 83 Pac. 578, 579, 2 Cal. App. 283.

"Express malice aforethought" exists only when one person kills another with a sedate, deliberate mind and formed design, evidenced by lying in wait for decedent, or by antecedent menaces or threats that disclose a purpose on the part of the prisoner to commit the act charged, or by a former grudge, ill will, spite, hatred, or malevolence toward decedent, or by any other circumstances disclosing a guilty purpose. *State v. Brooks* (Del.) 84 Atl. 225, 227.

"The 'express malice' which constitutes murder of the first degree is proved by circumstances satisfactorily evidencing a sedate, deliberate purpose and formed design to kill another, such as the deliberate selection and use of a deadly weapon, the preparation and use of poison, and the like." *State v. Di Guglielmo* (Del.) 55 Atl. 350, 351, 4 Pennewill, 336.

An instruction defining "express malice" as that "manifested by external circumstances shown in evidence," instead of in the words of the statute, which defines it as that "manifested by external circumstances capable of proof," was not misleading. *Territory v. Gonzales*, 68 Pac. 925, 929, 11 N. M. 301.

"'Express malice' arises where a person with a deliberate mind and formed design doth kill another, or kills another in the willful perpetration of some unlawful act against the peace." *Turner v. State*, 126 Pac. 452, 456, 8 Okl. Cr. 11 (quoting 4 Blackstone, Comm. 195).

"Express malice" arises in the law of homicide where there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. *People v. Mendenhall*, 67 Pac. 325, 135 Cal. 344.

"Express malice aforethought," essential to murder in the first degree, occurs where one person kills another with a sedate, deliberate mind and formed design; and the length of time that the design existed is immaterial. *State v. Roberts* (Del.) 78 Atl. 305, 310.

"Express malice," or malice in fact, is defined to be a deliberate intention of doing

any bodily harm to another, unauthorized by law, and by no means necessarily involved an intent to take life. The change, therefore, which the statute has effected, by substituting the word "design" in place of "malice," is not to alter the nature or degree of the premeditation requisite to the crime of murder, but to require—what the law did not require—the existence of an actual intention to kill to constitute that crime under the state. *People v. Clark*, 7 N. Y. 385, 393.

"Malice" as an element of murder is "express" where there is positive, direct evidence showing that at the time of the killing it was really entertained. *State v. Lee*, 60 S. E. 524, 525, 79 S. C. 223.

Where, in a prosecution for homicide, the evidence shows a deliberate intention unlawfully to take the life of deceased, the killing is with "express malice." *State v. Fleming*, 106 Pac. 305, 313, 17 Idaho, 471.

By "express malice" is meant a wicked, malignant desire to do another an injury for the sake of the suffering that it will cause him. *McChristal v. Clisbee*, 76 N. E. 511, 190 Mass. 120, 3 L. R. A. (N. S.) 702, 5 Ann. Cas. 769.

"Express malice" is where a man lies in wait or says he is going to kill his fellow man on sight, and he carries that threat into execution. *State v. Reeder*, 51 S. E. 702, 704, 72 S. C. 223.

"'Express malice' may be shown by the acts or conduct of the defendant immediately accompanying the utterance of the words, or by the utterance at other times of other and similar defamatory words having reference to the subject-matter of the words charged." *Lauder v. Jones*, 101 N. W. 907, 915, 13 N. D. 525 (quoting and adopting *Gambrell v. Schooley*, 52 Atl. 500, 508, 95 Md. 260, 63 L. R. A. 427).

To constitute "express malice," it must be shown that accused was of sedate and deliberate mind, that he was sufficiently self-possessed to comprehend the consequences of his acts, that his acts were not the result of a sudden, inconsiderate impulse, and that there was a formed design to kill decedent or inflict on him some serious bodily harm. *Cano v. State*, 111 S. W. 406, 407, 53 Tex. Cr. R. 609.

"Express malice" in murder cases may be proved by a deliberately formed design to kill, by the preparation of the weapon or other means for doing great bodily harm, by circumstances of brutality attending the act or by previous hostility, or threats and declarations of intention to kill or to do serious injury. *Esterline v. State*, 66 Atl. 269, 270, 105 Md. 629.

Pen. Code, § 188, provides that "malice is 'expressed' where there is manifested a

deliberate intention unlawfully to take away the life of a fellow creature." *People v. Mahatch*, 82 Pac. 779, 781, 148 Cal. 200.

"A killing upon 'express malice' can only be consummated when the intent is formed and carried out in a cool and deliberate mind." *Rice v. State*, 103 S. W. 1156, 1172, 51 Tex. Cr. R. 255.

A homicide committed under such circumstances that the law implies malice is not always murder in the first degree, but is such only where there exists at the time on the part of accused a premeditated design to effect the death of the person killed or of any human being. *Hedger v. State*, 128 N. W. 80, 90, 144 Wis. 279.

Where the evidence showed that accused was in need of money, and that he had attempted to collect money from decedent and went to decedent at the time of the killing to collect money from him to inclose in letters written by accused to his creditors, the letters found on accused after the killing were properly received as bearing on the question of deliberation and premeditation. *People v. Lumsden*, 125 N. Y. Supp. 1079, 1087, 141 App. Div. 158.

#### In libel and slander

Civ. Code, § 3294, permits exemplary damages in an action not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied. Held, that the words "express or implied," as used in such section, have reference only to the evidence by which the malice is established, and that such section does not authorize exemplary damages for libel, in the absence of proof of malice in fact, as distinguished from malice in law, consisting of the actual existence of hatred and ill will, actuating the defendant in the publication. *Davis v. Hearst*, 116 Pac. 530, 539, 160 Cal. 143.

"Express malice" in libel is wanton and reckless disregard of the rights of others. *Mann v. Dempster*, 181 Fed. 76, 79, 104 C. C. A. 110.

"Express malice" in publishing a libel is shown by proof that the publication was made wantonly, maliciously, and with intent to injure, degrade, or destroy one's reputation. *Todd v. Every Evening Printing Co.* (Del.) 66 Atl. 97, 99, 6 Pennewill, 233.

Statements, confidential, and privileged if believed by the maker to be true, are not actionable unless "express malice" or malice in fact is shown on his part. This kind of malice, which overcomes and destroys the privilege, is, of course, quite distinct from that which the law in the first instance imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an "indirect and wicked motive which induced the defendant to defame the

plaintiff." *Kersting v. White*, 80 S. W. 730, 734, 107 Mo. App. 265 (quoting and adopting *Hemmens v. Nelson*, 34 N. E. 342, 138 N. Y. 517, 20 L. R. A. 440; citing *Odgers, L. & Sland*. 267).

#### In malicious prosecution

"In actions for malicious prosecution it is necessary to show 'express malice'; that is, intent to injure the plaintiff. \* \* \* The term 'express malice,' used in this connection, means malice towards the particular person who was prosecuted, as distinguished from that malice which the law implies from an act done without legal excuse, which he who does it well knows will in all probability produce injury to some human being, though express ill will to the person injured may be actually disproved." *Freeland v. Southern Ry. Co.*, 50 S. E. 11, 12, 70 S. C. 427.

#### EXPRESS MESSENGER

As passenger, see Passenger.

#### EXPRESS REPEAL

"An 'express or direct repeal' is where the repealed act is specially designated in the repealing act," and where two statutes on the same subject are enacted by the same Legislature on different dates, the presumption is that they are both operative, unless irreconcilable. A former act, if repealed, is repealed only by implication. *Lincoln School Tp. v. American School Furniture Co.*, 68 N. E. 301, 303, 31 Ind. App. 405.

#### EXPRESS TRUST

See Trustee of Express Trust.

Trusts are classified into two general divisions, "direct or express trusts" (that is, those springing from agreement of the parties) and "constructive or implied trusts" (that is, those created by the rules and principles of equity)." *Newman v. Newman*, 55 S. E. 377, 379, 60 W. Va. 371, 7 L. R. A. (N. S.) 370.

"Express trusts" are those which are created by the direct and positive acts of the parties by writing, deed, or will. *Ames v. Howes*, 93 Pac. 35, 36, 13 Idaho, 756 (citing 3 Words and Phrases, p. 2611; *Perry, Trusts*, § 2425); *United States Fidelity & Guaranty Co. v. Smith*, 147 S. W. 54, 55, 103 Ark. 145.

"Express trusts" arise by agreement between the parties expressing the particular trust intended. *Stevens v. Fitzpatrick*, 118 S. W. 51, 55, 218 Mo. 708.

Under our statute an "express trust" must be created or declared in writing. Therefore, where three persons joined in the purchase of a tract of land and title was made to one of them, parol evidence is inadmissible to show that it was the agreement that one of the others was to have the complete title, and that the grantee and the

other purchaser were only to have a home on the land until the happening of a specified contingency. *Wilder v. Wilder*, 75 S. E. 654, 656, 138 Ga. 573.

To constitute an "express trust" there must be some act on the part of the cestui que trust expressive of intent to create a trust and to designate some one as trustee. *McCoy v. McCoy*, 121 Pac. 176, 179, 30 Okl. 379, Ann. Cas. 1913C, 146.

"Express trusts" are those which are created by direct and positive acts of the parties, by some writing, or deed, or will, not that in those cases the language of the instrument need point out the nature, character, and limitations of the trust in direct terms, *ipsissimis verbis*; for it is sufficient that the intention to create it may be fairly collected upon the face of the instrument from the terms used, and the trust can be drawn as if it were *ex visceribus verborum*." *Jones v. Byrne*, 149 Fed. 457, 463.

No particular terms are necessary to create a trust, but the intention of the creator of the trust controls; and where he gives to the person to whom he delivers possession of property power to sell it, receive and invest the proceeds, and power to exercise the usual acts of ownership, with specific directions as to how the property and its income is to be disposed of, a trust is created, though such person is designated in the instrument as attorney, instead of trustee. *Mersereau v. Bennet*, 108 N. Y. Supp. 868, 872, 124 App. Div. 413.

A valid trust in relation to real property can only be created or declared by an instrument in writing or by operation of law, and where there is no instrument in writing, declaring that a trust was executed, no "express trust" was created. *Sanguinetti v. Rossen*, 107 Pac. 560, 562, 12 Cal. App. 623.

Where a son has property deeded to his father, for the father to furnish the money to put up a building thereon, it after that to revert to the son, there is an "express trust," which Rev. St. 1899, § 3416, requires to be proved by a writing, and not a "resulting trust," which section 3417 exempts from such a requirement. An express active trust is one in which, from the express directions of the language creating the trust, or from the very nature of the trust itself, the trustee is charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property. As stated in *Perry, Trusts*, § 24, express trusts are those generally created by instruments that point out directly and expressly the property, persons, and purposes of the trust. No special form of words is necessary to create an "express trust." From these considerations, an "express trust" is one which defines and limits the uses and purposes to which certain property shall be devoted, and defines the duty of the

trustee as to the control, management, and disposition of the same. *Hell v. Hell*, 84 S. W. 45, 47, 184 Mo. 665 (citing 2 Pom. Eq. Jur. p. 987).

Plaintiff and his father and defendant bought land, taking title as tenants in common. To facilitate the division and sale of the land as city lots, defendant conveyed his interest to plaintiff and his father, an agreement accompanying the deed providing that the parties should use their joint efforts to make sales, and that plaintiff and his father should, from the proceeds, reimburse themselves for money they had advanced in making the purchase, pay a balance still due, and that of the remainder defendant should receive one-fourth and plaintiff and his father three-fourths. Held, that plaintiff and his father held the title as trustees of an "express trust." *Sawyer v. Cook*, 74 N. E. 356, 357, 188 Mass. 163.

The distinction between an "express trust" and powers in trust is that in the former the trustee takes the legal title, which, however, does not pass to the trustee of the power. *Train v. Davis*, 98 N. Y. Supp. 816, 821, 49 Misc. Rep. 162.

The rule that no one but a party to a sealed instrument can sue to enforce it will not prevent enforcement of a mortgage in terms to W., but in fact for the benefit of a bank, of which W. was agent, because there was no actual consideration from W., and a seal no longer conclusively imports a consideration. but W., while not the trustee of an "express trust," within Code Civ. Proc. § 449, authorizing the trustee of an express trust, including a person with whom or in whose name a contract is made for the benefit of another to sue without joining the beneficiary, will be treated as such to enable him to maintain an action. *Mutual Life Ins. Co. of New York v. Nicholas*, 128 N. Y. Supp. 902, 906, 144 App. Div. 95.

The creation of an "express trust" must be manifested or proven by a written instrument, and it is elementary that, in the creation of a trust, whether in regard to real or personal property, the acts of the parties in the creation of such trust must be done with that intent. Where one purchasing land, paying therefor, and taking a warranty deed without conditions, executed an instrument whereby he agreed to allow a third person a half of the profits of the sale of land when sold, "being the same land this day bought by me," the instrument did not create a trust binding the purchaser to hold the legal title for the third person for a half interest in the land. *Dexter v. MacDonald*, 95 S. W. 359, 364, 196 Mo. 373 (citing *Woodford v. Stephens*, 51 Mo. 443).

Under Civ. Code 1895, § 3152, "express trusts" are those created and manifested by agreement of the parties. A petition alleging that E., being the owner of land, conveyed

the same to defendant to secure an indebtedness of \$375; that the conveyance was made by a deed absolute on its face, but upon the following trusts and conditions, defendant to hold the title to the property to secure him in the payment of the indebtedness, without interest, and to sell the same after the death of E., and, after deducting from the proceeds of sale the amount of the indebtedness, to pay the balance to the children of E. in equal proportions; that E. died intestate, owing no other debts than that to defendant; that there has been no administration upon E.'s estate; that such estate is of the value of \$3,000; that defendant denies that he holds such property in trust, but claims the absolute title thereto—sets up an "express trust." *Eaton v. Barnes*, 49 S. E. 593, 594, 121 Ga. 548.

### EXPRESS WAIVER

An "express waiver" is a voluntary relinquishment of the right that one party has in his relations to another in the express terms by which it is governed. *Astrich v. German-American Ins. Co.*, 131 Fed. 13, 20, 65 C. C. A. 251.

### EXPRESS WARRANTY

A "warranty" is express where the seller makes some positive representation or affirmation with respect to the article to be sold pending the treaty of sale, upon which it is intended that the buyer shall rely in making the purchase." "A 'warranty' is implied where, from the circumstances surrounding the parties at the time of the sale, or from the nature of the thing sold, it is assumed to be just that the buyer should be protected in addition to the contract of sale by a further implied contract of guaranty on the part of the vendor, and so raises by implication a warranty on the seller's part." *Haines v. Neece*, 92 S. W. 919, 923, 116 Mo. App. 499 (quoting and adopting definition in *Bid. War. Sale Chat.* §§ 2, 3).

A "warranty" is an engagement by which a seller assures to the buyer the existence of some facts affecting the transaction, whether past, present, or future (Civ. Code § 2370). To create an "express warranty," the word "warranty" need not be used, nor are any particular words necessary. Any affirmation, other than mere dealers' talk, made at the time of the sale, as to the quality or condition of the thing sold, will be treated as a warranty, if it was so intended, and the purchaser bought on the good faith of such affirmation. Whether it was so intended and the purchaser acted upon it are questions of fact. *Lander v. Sheehan*, 79 Pac. 406, 408, 32 Mont. 25 (citing *McLennan v. Ohmen*, 17 Pac. 687, 75 Cal. 558).

A provision in a written contract for the sale of jewelry that any of the articles which failed to wear satisfactorily would be replaced by the vendor if returned within five

years, headed with the word "warranty," may not be properly called an "express warranty" in regard to the character, quality, or title of the goods, which would exclude the imprinted "warranty" raised by law, and if the goods were entirely different from those sold, and unsuited for the purpose for which they were sold, the purchaser may set up a breach of implied "warranty." *Elgin Jewelry Co. v. Estes & Dozier*, 50 S. E. 939, 940, 122 Ga. 807 (citing *Black's Law Dict.*).

To constitute a warranty of an article sold, it is not necessary that the term "warranty" be used, and it is sufficient that the terms used import a representation on which the seller intends that the buyer may and does rely that the article shall be of a certain character or fulfill certain conditions, and a warranty thus implied is an "express warranty." *Four Traction Auto Co. v. Hurni* (Iowa) 137 N. W. 1014, 1016.

To constitute an "express warranty," the word "warrant" need not be used, nor are any particular words necessary. Whatever representations are made by the seller at the time of the sale as to the quality of the article is an express warranty. *Cummins v. Ennis* (Del.) 56 Atl. 377, 4 Pennewill. 424 (citing *McLennan v. Ohmen*, 17 Pac. 687, 75 Cal. 558).

To constitute an "express warranty," it is not necessary to use the word "warrant," or any other particular word. Positive affirmation of a material fact as a fact, relied on as such, is sufficient to constitute an "express warranty," and actual intent to warrant is unnecessary. *Cornish v. Friedman*, 126 S. W. 1079, 1082, 94 Ark. 282.

An "express warranty" excludes an implied warranty; and in a suit to recover the purchase price of goods sold under an express warranty, with a plea of partial failure of consideration, the issues presented are whether the goods delivered were of the quality warranted, and, if not, to what extent the purchase price is to be abated. *Springer v. Indianapolis Brewing Co.*, 55 S. E. 53, 55, 126 Ga. 321.

In a case involving the question of whether or not representations made by a seller of goods amounted to a warranty, the court, in passing on the issue raised, said: "Perhaps no subject in the entire domain of law has produced more contrariety of opinion than has the subject of warranty in sales of personal property. Not only have the courts differed in deciding cases, but courts and authors have often failed to discriminate between warranties and deceit or fraudulent representations. As an illustration, it is often said, in considering the subject of 'express warranty,' that it is not necessary that the seller should have intended, by the language used, to warrant the thing sold, and that, in order to create a warranty, the purchaser must be influenced by the statement alleged

to constitute the warranty. Both of these propositions are correct, as applied to a question of fraud, based upon a statement made by the seller, but neither is correct in determining whether or not a statement constitutes an express warranty. Such a warranty is entirely a matter of contract, and the contract which creates it must, like all other contracts, embody the mutual intentions of the parties. Nor is it necessary that the buyer must have been deceived before he can recover for the breach of an express warranty." In a written agreement plaintiff agreed to sell an entire crop of cane, to be grown by him on his plantation for four years, and to cultivate all cane in a good manner, and to deliver it clean for the mill, "said cane to be sound, ripe, and merchantable." Held, that there was an express warranty, and that plaintiff was not entitled to recover the stipulated price for all the cane if it was not sound and merchantable. *Ellis v. Riddick*, 78 S. W. 719, 721, 34 Tex. Civ. App. 256.

The sale of a chattel with any representation or positive affirmation of its quality and condition made with the intention of being relied on, and, in fact, relied upon, is an "express warranty" for the breach of which an action will lie; no special form of words being necessary to create such warranty. A statement by the seller of chattels that his goods are equal in quality to other well-known articles similar in kind is an express warranty. *Wertheimer-Swartz Shoe Co. v. McDonald*, 122 S. W. 5, 9, 138 Mo. App. 328.

#### In insurance

"An 'express warranty' [in insurance] is an agreement expressed in the policy whereby the assured stipulates that certain facts are or shall be true, or certain acts shall be done relative to the risk. It may relate to an existing or past fact, or be promissory and relate to the future." A stipulation in a fire policy that the insurance company should not be liable for loss caused, directly or indirectly, by order of any civil authority, is not a warranty; within Civ. Code Cal. §§ 2607, 2608, providing that a statement in a policy of a matter relating to the thing insured or to the risk as a fact, and a statement which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty, the statute not creating any new definition of warranty in insurance. *Conner v. Manchester Assur. Co.*, 130 Fed. 743, 744, 65 C. C. A. 127, 70 L. R. A. 106 (quoting Phil. Ins. § 754).

#### EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

The rule of "expressio unius est exclusio alterius" operates to exclude all liabilities of indemnitors, except for actual, as distinguished from imputed, wrongdoing, although Rev. Codes Mont. § 6486, imposes responsibility upon all whose actual wrongdoing contributes

to the death of another, whether they be employes or employers, indemnitees or indemnitors. *Northam v. Casualty Co. of America*, 177 Fed. 981, 985.

"The maxim 'expressio unius est exclusio alterius' is not to be applied with the same vigor in construing a state Constitution as a statute. Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned will be considered as inhibiting the powers of the Legislature." *Sumpter v. Duffie*, 97 S. W. 435, 436, 80 Ark. 369 (quoting *State v. Martin*, 30 S. W. 421, 60 Ark. 343, 28 L. R. A. 153).

While the maxim, "expressio unius est exclusio alterius," is not of universal application, it is never more applicable than in the construction and interpretation of statutes. *Whitehead v. Cape Henry Syndicate*, 54 S. E. 306, 308, 105 Va. 436.

#### EXPRESSLY

Webster defines "expressly" to mean "in direct terms." *Norfolk & W. Ry. Co. v. Virginian Ry. Co.*, 66 S. E. 863, 868, 110 Va. 631.

In the rule that in construing a will the intention must be gathered from the language, and that language must either give the thing expressly or by necessary implication, the term "expressly" does not mean that it shall be given by any particular formula of words, but means only that the intent must be shown by expressed language, which language must reach to and include the object of the donation, the person to whom the thing is given, and must also take in by some form of description the thing to be given. *Griffin v. Fairmount Coal Co.*, 53 S. E. 24, 66, 59 W. Va. 480, 2 L. R. A. (N. S.) 1115.

#### EXPROPRIATION

The terms "taking" or "expropriation," as used in Acts 1896, p. 142, No. 96, providing that all claims for damages to the owner caused by the taking or expropriation of land for public works shall be barred by two years' prescription, must be construed as equivalents. *Amet v. Texas & P. Ry. Co.*, 41 South. 721, 722, 117 La. 454.

#### EXTEND—EXTENSION

Good cause for extension of time, see Good Cause.

The word "extend," both by etymology and by common usage, is an exceedingly flexible term, lending itself to a great variety of meanings, which must in each case be gathered from the context, which is owing to the fact that it is essentially a relative term, referring to something already begun; hence, in a concrete sense, it has no persistent meaning, although abstractly it always implies increase or amplification as distinguished from inception; as, for instance, "the extension of

a man's business," or "of his line of credit," or "of the due time of his debts." Extension in space may be in any direction. It is not confined to mere linear prolongation. *Middlesex & S. Traction Co. v. Metlar*, 56 Atl. 142, 143, 70 N. J. Law, 98; *Cooper v. Harmon*, 83 N. E. 704, 170 Ind. 113.

The word "extend" implies something to be extended, and therefore there can be no inference that the Legislature intended by Laws 1902, p. 1748, c. 600, entitled "An act to extend and regulate the liability of employers," to abrogate any right of action existing under the statutes or common law, unless such an intention is clearly to be drawn from the language of the act itself. *Rosin v. Lidgerwood Mfg. Co.*, 86 N. Y. Supp. 49, 51, 89 App. Div. 245.

The term "extension" conveys to the mind an enlargement of the main body; the addition of something of less import than that to which it is attached. *New York Cent. & H. R. R. Co. v. Buffalo & W. Electric Ry. Co.*, 89 N. Y. Supp. 418, 421, 96 App. Div. 471.

The word "extend" means to stretch or stretch out, and a note which may be extended is one on which payment may be lengthened to a date beyond that stated in the instrument. *Rossville State Bank v. Heslet*, 113 Pac. 1052, 84 Kan. 315, 33 L. R. A. (N. S.) 738.

In a note containing a provision that the makers and indorsers "severally waive protest, demand, and notice of protest, and nonpayment in case the note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to the holder," the "extension" meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. Such stipulation does not render the note nonnegotiable on the ground that the time of payment is uncertain. *National Bank of Commerce v. Kenney*, 83 S. W. 368, 371, 98 Tex. 293.

Under Rev. Laws, c. 173, § 56, providing that a case may be entered on the list of those to be tried by jury within such time after the parties are at issue as the court may by general or special order direct, and rule 18 of the superior court, providing that notice of a desire for a jury trial shall be filed not later than 10 days after the time allowed for filing the answer or plea, unless the court by special order shall "extend" the time, it is within the power of the court to make such special order, though the time prescribed by the general order has already expired. *Dolan v. Boott Cotton Mills*, 70 N. E. 1025, 1026, 185 Mass. 576.

The word "extended," as used in an ordinance as follows: "A memorial was pre-

sented by D. in favor of M. in petition of a piece of land containing varas unknown situated west of the lands of R.; and in conformity to petition, it was unanimously ordained that a title be extended to the person interested, conditioned and provided that if no other may show forth a better right,"—was used in the sense of the Spanish word "extender," which means, when used in the connection under consideration, "to commit to writing at length." *Beach v. Gabriel*, 29 Cal. 581, 585 (citing Spanish and Eng. Dict. by Valesquez).

A beneficiary of a transfer in trust, on condition that she shall receive only the income during life unless she shall have a child which shall attain a certain age, takes an estate dependent on conditions whereby it may be "extended or abridged," within Laws 1903, p. 74, c. 44, § 13, subd. 5, as amended providing that such a transfer shall be taxed at the lowest possible rate under the conditions on which it passes at the time of the transfer, and that the tax shall be due and payable forthwith out of the property so transferred. *State v. Pabst*, 121 N. W. 351, 359, 139 Wis. 561.

Ky. St. § 4426a, subd. 9, provides that the county board shall expend taxes collected for certain designated purposes, including the purchase of "necessary supplies" and the "extension of the school term" in the subdistricts; and that upon petition of 10 voters of a subdistrict the board of education shall submit to a vote the question whether an additional tax shall be levied, and when levied it shall be the duty of the sheriff to collect it and hold it, subject to the order of the county board, for the benefit of the subdistrict voting such tax. Held, that such additional tax was to be expended, under the order of the board of education, for the sole use of the subdistrict levying it, and for the purposes enumerated in the statute, and the board has no power to use an additional tax levy for the purpose of transporting children to and from school; such purpose not being mentioned in the statute, and not coming within the terms "necessary supplies" or "extension of school term." *Shanklin v. Boyd*, 142 S. W. 1041, 1043, 146 Ky. 460, 38 L. R. A. (N. S.) 710.

#### As construct

See Construct.

#### New transaction or new terms authorized

Where the provisions of a parent act mark out a line of conduct touching a given matter, a supplemental act extending such provisions is fully satisfied if such provisions are carried forward intact to the date of such supplement; and, if the purpose be to engraft a radically new provision on those of the original act, some other word than "extended" must be employed in the ti-

tle. *Jersey City v. Speer*, 72 Atl. 448, 449, 78 N. J. Law, 34.

#### Renewal distinguished

The words "renew" and "extend" do not always mean the same thing, but in interpreting a stipulation in a lease "granting the privilege of renewing and extending this contract for a period of three years from" the expiration of the term named in the lease, the context of the lease will be construed for the purpose of arriving at the intent of the parties, and the words may be given a similar meaning, if that seems to be what the parties intended. *Hamby & Toomer v. Georgia Iron & Coal Co.*, 56 S. E. 1033, 1037, 127 Ga. 792 (citing 7 Words and Phrases, p. 6086; *Insurance & Law Bldg. Co. v. National Bank of Missouri*, 71 Mo. 58-60; *Jones, Landlord & Tenant*, § 338).

The meaning of the word "renew" is to make over, to re-establish, or to rebuild, and the meaning of "extend" is to prolong, to lengthen out. Where a lease for 10 years provides for an extension of the term for 10 years at the option of the lessee, as distinguished from a renewal of the lease, the lease makes the term 20 years, at the option of the lessee, and his holding over, after the expiration of the 10 years, is a sufficient exercise of the option, so that it is immaterial whether the lessor was insane when he afterwards gave a written extension for the 10 years. *Quinn v. Valiquette*, 68 Atl. 515, 518, 80 Vt. 434, 14 L. R. A. (N. S.) 962.

Where a lease provided that, at the expiration thereof, the tenant should have the privilege of leasing the privileges for a further term of one year, commencing on the day the lease expired, such covenant was a contract for a "renewal," and not an "extension," of the lease, and required notice in order to entitle the lessee to exercise its right. *Gray v. Maler & Zobelein Brewery*, 84 Pac. 280, 282, 2 Cal. App. 653.

The word "renewed" may properly be used to express an agreement on the part of the maker of a note, but is inappropriate to express an agreement on the payee's part to extend to the time of payment. The words, "renewed July 6," indorsed on the back of a note over the signature of the payee, are too indefinite to "extend" time of payment. *Brenneke v. Smallman*, 83 Pac. 302, 304, 2 Cal. App. 306.

Where a lease of street railway property, which was subject to a mortgage securing an issue of bonds, contained a provision requiring the lessee on the maturity of the debt to "provide for the renewal thereof by the issue or renewal of bonds," there was no duty on the lessee to pay and extinguish the bonds at maturity, and its acquisition of them at or near their maturity, through a trustee, with the purpose of having them held by the trustee to protect its lease and its own bonds, with the proceeds of which

they were purchased, and which were secured by a mortgage to the trustee on such lease and other property, did not operate as a payment, but only as an "extension," which was fairly within the provision of the lease for a "renewal." *Farmers' Loan & Trust Co. v. Central Park, N. & E. R. R. Co.*, 193 Fed. 963, 965, 113 C. C. A. 591; *Kentucky Lumber Co. v. Newell (Ky.)* 105 S. W. 972-974 (citing 7 Words and Phrases, p. 6085).

#### Debt

An "extension of time" of payment of a debt after demand therefor, without fixing any definite period, in consideration of the payment of the interest, did not constitute such an "extension of time" of payment as to release one having the rights of a surety. *McCrery v. Nivin (Del.)* 67 Atl. 452, 457.

#### Drain

Comp. Laws, § 4379, provides that where a drain, or any portion thereof, needs cleaning, straightening, deepening, widening, or extending, any five freeholders of the township or townships in which it is situated, one or more of whom shall be owners of land liable to assessments in the cleaning out, etc., may apply in writing to the county drain commissioner, alleging its necessity, provided that whenever any such drain shall need straightening, deepening, widening, or extending the same proceedings shall be had throughout in every respect as are provided in the act for locating and constructing the drain in the first instance. Held, that such section applied to an established drain, the word "extending" meaning the continuation of a ditch or canal already in existence, and not the establishment of a drainage system; and that a single drain could not be extended into a system of drains by laterals and branches, pursuant to a petition under such section. *Corning v. Potter*, 137 N. W. 637, 640, 171 Mich. 690.

#### Electric light works

A provision, in an ordinance granting a franchise to an electric light company, that the city should not require the company to make "extensions," except upon certain conditions, held not to affect the right of a resident in an established service zone to invoke the aid of the courts to compel the company to connect his premises with its line. *State ex rel. Mason v. Consumers' Power Co.*, 137 N. W. 1104, 1108, 119 Minn. 225, 41 L. R. A. (N. S.) 1181.

#### Highway

The Indiana highway laws, providing that, where proceedings are instituted for the location, vacating, or change of a public highway "extending into two or more counties," the county board of commissioners before whom the petition is first filed shall have jurisdiction, authorizes the board to locate a highway on and along the county line and not otherwise "extending" into an-

other county. *Cooper v. Harmon*, 83 N. E. 704, 170 Ind. 113 (quoting *Middlesex & S. Traction Co. v. Metlar*, 56 Atl. 142, 143, 70 N. J. Law, 98, 99).

#### Limits of municipality

Code Supp. 1907, § 2793a, providing that when the corporate limits of any town are extended outside the existing independent school district or districts the boundaries of the independent district shall be correspondingly extended, relates to the enlarging of the boundaries of existing districts, and not to newly created districts; the word "extend" meaning to make larger in space, time, or scope, carry out farther than the original point or limit, enlarge or lengthen the bounds. *Independent School Dist. of Town of Frazer, Boone County, v. Jones*, 120 N. W. 315, 317, 142 Iowa, 8.

#### Mining location

One mining location is an "extension" of another mining location where the former is a coterminous location on the strike of the same lode pertaining to the latter. *Daggett v. Yreka Min. & Mill. Co.*, 86 Pac. 968, 970, 149 Cal. 357.

#### Railroad

The word "extension" is sometimes used as the equivalent to expansion, and when predicated of space may mean lateral, as well as longitudinal, enlargement. A man who says he has extended or intends to extend the boundary of his yard or the limits of his farm may mean an expansion of the area of these properties in any direction; but when a man says he is going to extend his lane, or that his neighbors are going to extend a private road, or that the public authorities are going to extend a boulevard, no one would conceive that he meant that the lane, road, or boulevard was to be widened. When the Legislature authorized the extension of a railroad by 3 Gen. St. 1895, p. 3239, § 132, the word "extension" meant the prolongation of the road from one of its termini. *Metlar v. Middlesex & Somerset Traction Co.*, 63 Atl. 497, 72 N. J. Law, 524.

The term "extension" conveys to the mind an enlargement of the main body, the addition of something of less import than that to which it is attached. Railroad Law (Laws 1890, c. 565, amended by Laws 1892, c. 676), which makes the certificate of the railroad commissioners that public convenience and necessity require the construction of a road an essential prerequisite to its construction, and made applicable to street railroad by Laws 1895, c. 545, but which permits the "extension" of street railroads without obtaining the certificate, must be given a reasonable, rather than a literal, construction in the light of the legislative purpose, which was to restrain the construction of useless railroads, and the construction of a new street railroad without the required certifi-

cate should not be permitted under the pretext that it is an "extension" of an existing line. *N. Y. Cent. & H. R. R. Co. v. Buffalo & N. E. Ry. Co.*, 89 N. Y. Supp. 418, 421, 96 App. Div. 471.

The statute of Ohio, after providing for the granting of an ordinary street railway franchise by public bids for low rates of transportation, authorizes a city to grant any street railway corporation power to extend its track, subject to the provisions of certain laws. In holding that an extension granted under such section was not a new line, but one depending for existence on the original line and expires with the franchise thereof, the court says: "The whole theory of the claim that an extension can live longer than the thing extended is at war with reason and with the nature of things. It is true that in this respect the extension statute has not been considered by the courts. The word 'extension' has not been defined. It has not been judicially declared that an extension cannot live longer than the thing extended. Probably this is so because no contrary contention has ever before been made." *Cleveland Electric Ry. Co. v. City of Cleveland*, 137 Fed. 111, 131.

That the original line of a street railway company was but about 3 miles long, while a proposed additional line is about 15 miles long, is insufficient of itself to constitute such addition a "new road," and not an "extension," within Railroad Law (Laws 1890, p. 1108, c. 565) § 90, permitting a street surface railway company to "extend" its lines without obtaining a certificate of the board of railroad commissioners that public convenience and necessity require the same. *Roberts v. Huntington R. Co.*, 105 N. Y. Supp. 1031, 1033, 56 Misc. Rep. 62.

An ordinance was passed providing that a street railroad company should furnish workmen's tickets at a reduced rate, good over any of its lines in the city, which ordinance was accepted by the railway, and the same ordinance gave the railway a right to extend its tracks to the easterly limits of the city. Subsequently the railway franchise was assigned to a united company, which thereafter purchased a suburban line wholly without the limits of the city. The city then extended its limits to cover a portion of the territory in which the purchased railroad was. Held, that since there were two methods of extending a street railway, one by construction, and the other by purchase under Comp. Laws 1897, § 6448, the purchase of the suburban railway by the united company was an "extension," and hence the company was bound by the ordinance, regardless of the franchise of the suburban railroad. *People v. Detroit United Ry.*, 125 N. W. 700, 162 Mich. 460, 139 Am. St. Rep. 582.



**Term**

An act extending the term of councilmen in one city on its consolidation with another city does not violate the constitutional prohibition against "extending the term" of a public officer. *Petition of City of Pittsburg*, 66 Atl. 348, 353, 217 Pa. 227.

**EXTENDER**

"Extender," in Spanish law, means to commit to writing at length. *Beach v. Gabriel*, 29 Cal. 580, 584.

**EXTEND TO**

"That which 'extends to' does not necessarily include in." *Martin v. Hunter*, 1 Wheat. 304, 374, 4 L. Ed. 97.

**EXTENSION TELEPHONE**

A franchise to a telephone company which fixes the rates for business and office use, for residence, for party line residence service, business extension telephones, and residence extension telephones, and which provides that at such time as the exchange of the company shall have in operation a specified number of telephones in the city it may increase the rates, does not contemplate in counting the telephones that business extension telephones or residence extension telephones shall be counted as telephones, for a "telephone," when technically defined, means only the instrument itself, but, when considered with reference to the use to be made of it, it must be accompanied with the necessary apparatus for the reception and transmission of messages, and an "extension telephone" is an instrument consisting of bell, receiver, and transmitter connected with a telephone which appears numbered on the list, and is used solely through such numbered instrument without any independent connection with the switchboard. *Panhandle Telephone & Telegraph Co. v. City of Amarillo (Tex.)* 142 S. W. 638, 639.

**EXTENSIVE**

"General" is equivalent to "extensive," and is a relative term, the meaning of which must be determined by a process of inclusion and exclusion. *Times Printing Co. v. Star Pub. Co.*, 99 P. 1040, 1042, 51 Wash. 667, 16 Ann. Cas. 414.

**EXTENT**

See Appreciable Extent; Full Extent.

"The word 'extent,' in common parlance, varies somewhat in meaning, according to the subject to which it is applied, and as that changes, it may as well refer to time as to space, or proportion; and more especially so, when applied to interests, as in patents, for a particular term of years." *Wilson v. Rousseau*, 4 How. 646, 698, 11 L. Ed. 1141.

The term "extent" does not ordinarily mean "manner." Hence under Laws 1901,

p. 294, c. 125, § 3, providing that, if any purchaser of public land shall fail to reside upon and improve it in good faith, he shall forfeit it and all payments to the same "extent" as for nonpayment of interest, mere failure to reside on and improve the land, does not work a forfeiture ipso facto, as was held under Laws 1895, p. 67, c. 47, § 11, providing that, if such purchaser shall fail to reside upon and improve in good faith public land purchased by him, he shall forfeit it in the same manner as for nonpayment of interest. *Adams v. Terrell*, 107 S. W. 537, 538, 101 Tex. 331.

The term "extent of injury," within Comp. Laws, § 3173, requiring, as a condition precedent to the right to sue a city for personal injury, the giving of notice of the "extent of such injury," etc., refers to the character of the injury, and not to the amount of the claim. *Ridgeway v. City of Escanaba*, 117 N. W. 550, 551, 154 Mich. 68.

The expression "extent of the work" in Code, § 813, providing that a notice to bidders for a contract for sewer construction shall state as nearly as practicable the extent of the work to be done, means more than a bare statement of the length of the sewer, the size of the pipe, the number of manholes and flush tanks, and includes some definite information, without which an intelligent bid could not be submitted, respecting the condition under which the work is to be done, and the manner in which it will be required to be done. *Bennett v. City of Emmetsburg*, 115 N. W. 582, 586, 138 Iowa, 67.

**EXTENUATE**

As used in an instruction relating to manslaughter, which tells the jury that implied malice would be inferred when the killing took place without any cause which would in law justify, excuse, or extenuate the homicide, the word "extenuate" has the same meaning as "mitigate," and refers to the reduction of the grade of the offense, as well as to a reduction of the punishment. *Connell v. State*, 81 S. W. 748, 748, 46 Tex. Cr. R. 259.

**EXTERIOR BOUNDARIES**

Constitutional Amendment, art. 20, provides that the municipal corporation known as the city of Denver, and all municipal corporations included within its "exterior boundaries" when the amendment takes effect, are hereby consolidated as a single body politic and corporate, by the name of the "City and County of Denver." At the same session at which article 20 was proposed for submission, the General Assembly enacted the Parks bill, establishing the limits of Denver, and describing its boundaries by metes and bounds. After the specific description occurred the following: "Excepting, however, all towns and cities incorporat-

ed under the general laws of the state and situated within said last-mentioned boundaries." Within the exterior boundaries as thus specifically defined lay the city of Denver proper, and on the other boundaries certain other towns. Held, that the excepting clause did not change the exterior boundaries of the city of Denver, but they remained as defined by metes and bounds in the first part of the act, and hence the town of Montclair and the other towns within such boundaries became merged into the city and county of Denver under the constitutional amendment. *Town of Montclair v. Thomas*, 73 Pac. 48, 50, 31 Colo. 327.

## EXTERIOR WALLS

Where in the specifications for the construction of a building it was provided that all "exterior walls" should be faced with a select quality of brick, and expensive brickwork was to be limited to walls exposed to view, and certain walls of the building were exposed to the weather, but not to view; nor were they anywhere specifically mentioned as "exterior walls," but where they were so mentioned were called "inner walls," it was held that they could not be considered "exterior walls" within the meaning of the contract. *Ittper v. St. Louis Exposition & Music Hall Ass'n*, 11 S. W. 58, 59, 97 Mo. 561.

## EXTERNAL

The word "external" means outward, exterior, visible from the outside, and hence capable of being perceived, apparent; and an "external" examination, such as a purchaser of a machine which is to be used in the place where his employes are to work is required to make, is not necessarily limited to the outer surface, as distinguished from the inner surface, of a valve actually exposed or naturally exposable to view in the process of installation. *Petroleum Iron Works Co. v. Boyle*, 179 Fed. 433, 438, 102 C. C. A. 579.

The "external violence" intended by a marine policy, exempting the insurer from liability for loss occasioned by the bursting of the boilers, unless caused by unavoidable external violence, is violence external to the vessel, and not merely external to the boilers. *Quackenboss v. Insurance Co. of North America*, 50 South. 444, 445, 95 Miss. 872.

## EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS

See, also, Accident—Accidental.

In a provision of an accident insurance policy restricting the liability to injuries effected through external, violent, and accidental means, the term "external" refers to the means of the injury and not to the injury itself, and the fact that an injury is accidental and unnatural, naturally imports

an external and violent agency as its cause. *Dezell v. Fidelity & Casualty Co.*, 75 S. W. 1102, 1105, 176 Mo. 253.

Under an accident insurance policy, insuring against loss resulting from bodily injury caused or produced through "external, violent, and accidental means," it is only necessary that the cause of the injury or death should be external to the person, though it acts internally. Proof that the plaintiff suffered lesion of a blood vessel of the lungs while assisting to lift a heavy mail sack, and that such lesion subsequently entirely healed, establishes a prima facie case that the injury was caused by external, violent and accidental means within the terms of the policy. *Young v. Railway Mail Ass'n*, 103 S. W. 557, 559, 563, 126 Mo. App. 325.

## EXTINGUISH—EXTINGUISHMENT

"An 'extinguishment' is a discharge by operation of law." *Woodrough v. Douglas County*, 98 N. W. 1092, 1095, 71 Neb. 354.

### As payment

Giving a check, which is never paid, is not an "extinguishment" of debt, unless shown to have been accepted absolutely as payment. *Sharp v. E. Nathan Mercantile Co.*, 88 S. W. 305, 75 Ark. 556.

Under Civ. Code, § 1500, providing that an obligation for the payment of money is extinguished by a due offer of payment, if the amount is deposited in the name of the creditor with a bank and notice of the deposit is given to the creditor, the fact that, after demand for rent and nonpayment thereof, the tenant deposits the amount of the rent in bank, is not an "extinguishment" of the obligation for rent, in the absence of any offer of payment, or notice of or acquiescence in the deposit by the landlord. *Owen v. Herzikoff*, 84 Pac. 274, 275, 2 Cal. App. 622.

## EXTORT—EXTORTION

"Extortion" is the wrongful exaction of money; an imposition under color of right; or the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. *Dudley v. Stansberry*, 59 South. 379, 380, 5 Ala. App. 491 (citing 3 Words and Phrases, pp. 2622, 2623).

In a prosecution for making threats with intent to "extort" money, it is not necessary for the court to define "extort," since it is a common word, used in the statute in its ordinary sense, and the court may well assume that the jury understands its meaning. *State v. Louanis*, 65 Atl. 532, 534, 79 Vt. 463, 9 Ann. Cas. 194.

"Extort," as used in Code D. C. § 819, providing that "whoever verbally or in writing accuses or threatens to accuse any other person of a crime or any conduct which,

if true, would tend to disgrace such other person, or in any other way subject him to the ridicule or contempt of society, or threaten to expose or publish any of his infirmities or failings with intent to extort from such other person anything of value or any pecuniary advantage whatever, or to compel the person accused or threatened to do or to refrain from doing any act, \* \* \* shall be imprisoned, \* \* \*" means moral compulsion, the result of exposing or threatening to expose the person addressed to the ridicule or contempt of society. An intent by a collector to collect a debt due his principal by posting cards conspicuously on the debtor's door, which opened into a public hall, the cards having printed on them the collector's name and business, and written demands for payment, is an attempt to "extort" money from the debtor. *Slater v. Taylor*, 31 App. D. C. 100, 103.

Under the statute of this state, sections 7080 and 7081, Rev. Codes, "extortion" is the obtaining of property from another with his consent, induced by a wrongful force or fear or under color of official right, and fear such as will constitute extortion may be induced by a threat to accuse the party of the commission of a crime. *Wilbur v. Blanchard*, 126 Pac. 1069, 1072, 22 Idaho, 517.

Under Pen. Code, § 518, declaring that "extortion" is committed only when the property is obtained with the consent of the owner, induced by an unlawful use of force or fear, the unlawful use of force or fear must be the operative or controlling cause which produces the consent, and if some other cause is to some extent the primary and controlling one in inducing the consent, there is no "extortion." *People v. Williams*, 59 Pac. 581, 582, 127 Cal. 212.

For a bricklayers' and plasterers' union to compel a manufacturer of brick to pay a fine for selling brick to a boss mason employing nonunion men, by threatening that unless it was paid they would refuse to handle his brick, was an act of the purest "extortion," using that word in its widest meaning, by means of threats and intimidation, and in the plainest violation of the statute. *March v. Bricklayers' & Plasterers' Union No. 1 of Connecticut*, 63 Atl. 291, 293, 79 Conn. 7, 4 L. R. A. (N. S.) 1198, 118 Am. St. Rep. 127, 6 Ann. Cas. 848.

Penal Law, § 850, defines "extortion" as the obtaining of property from another with his consent, induced by a wrongful use of force or fear, etc., and section 851 provides that threats to do an unlawful injury to person or property may constitute extortion. Held, that one who procured for another, without consideration, a position as a painter, and afterward threatened to have him discharged unless he was paid a certain sum each week out of the painter's wages, was guilty of extortion; the word "property"

in the statute including every species of valuable right, including the right to employment. *People ex rel. Short v. Warden of City Prison*, 130 N. Y. Supp. 698, 700, 145 App. Div. 861.

Rev. Laws, § 5096, defines "extortion" as "the obtaining of property from another with his consent induced by wrongful use of force or fear, or under color of official right" and then proceeds to define in particular what constitutes extortion, and among other things it is declared that "every person who shall induce another by a threat to do an unlawful injury to the person or property of the one threatened, \* \* \* or to accuse him \* \* \* of any crime, or to expose or impute to him \* \* \* any deformity or disgrace, or disclose or to expose any secret affecting him, \* \* \* and every person who shall extort any money or other property from another under circumstances not amounting to robbery, by means of force or any threat hereinbefore mentioned, shall be guilty of extortion." In a prosecution for extortion, charging the defendant with obtaining money from a married man by means of a threat to publicly accuse him of criminal relations with an unmarried woman, the court charged the jury as follows: "Extortion," so far as it is necessary to define it in this case, consists in obtaining the property of another with his consent, induced by the wrongful use of fear. The offense differs from larceny, which is unlawfully obtaining the property of another without the consent of the other, in that the consent of the owner of the property does not constitute a defense to the indictment, but, on the other hand, does constitute an essential element of the offense, if such consent is obtained by the wrongful use of force or fear. Under the statute creating and defining the offense, every person who shall induce another by a threat to accuse him of a crime, or expose or impute to him any deformity or disgrace, or to expose any secret affecting him, to consent to part with his money or property, under circumstances not amounting to robbery, is guilty of extortion. There are three essential elements in the offense: (1) A threat to do one or more of the things mentioned in this statute; (2) the existence of a feeling of fear induced by such threats; and (3) the obtaining of property or money of another with his consent, induced by such fear and threat." The court further charged that, if the jury should find from the testimony that defendant did make a threat to expose the man in question, or to impute disgrace to him concerning his relations with the woman, and that such threat induced a fear in his mind through which he was led to and did part with \$500, then they should find him guilty of the offense charged. The court further stated that, in determining whether or not a threat was made and the money was paid through fear, the question

of the relationship, whether criminal or not, was immaterial, and that the real question for determination was not what the actual relations between the parties were, but did defendant threaten to expose him to disgrace by reason of the improper relations, and did such threat induce him to pay defendant money? Exception was taken to the charge on the ground that the threat to use the knowledge obtained from the relations as evidence in a divorce action is not an unlawful act, and that such declaration was not a threat, within the meaning of the statute, and it was held that this criticism of the charge was entirely unfounded. *State v. Coleman*, 110 N. W. 5, 6, 99 Minn. 487, 116 Am. St. Rep. 441.

Pen. Code, § 633, defines extortion as the obtaining of property from another with his consent, induced by a wrongful use of force or fear. Section 634 declares that fear such as will constitute extortion may be induced by a threat, either to accuse another of any crime or to expose any secret affecting him, and section 638 declares that every person who, with intent to extort any money or property from another, sends any person any threatening letter shall be punished as if the money or property were actually obtained by means of such threat. Held, that the word "wrongful," as used in section 633, relates solely to the method used; and a person may be guilty of extortion under such sections if he obtains money from another by unlawful means, though he does not seek to obtain any benefit for himself, and believes that the money or property obtained in fact belongs to the person for whom it is obtained; the term "extortion" being construed to mean "to obtain from a holder desired possessions or knowledge by force or compulsion; to wrest from another by force, menace, duress," etc. In *re Sherin*, 130 N. W. 761, 767, 27 S. D. 232, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913D, 446.

The replication did not allege "extortion" of the loan to procure plaintiff's assent to the composition within the meaning of Bankr. Act § 29b5, penalizing one who attempts to extort, or extorts money from a person as a consideration for acting or forbearing to act in a bankruptcy proceeding. *Zavello v. J. S. Reeves & Co.*, 54 South. 654, 656, 171 Ala. 401.

Where an attorney for a deserted wife wrote letters to the husband implying that if he did not pay certain money and turn over certain property to the wife, and induce his paramour, with whom, it was claimed, he was living in another state in adultery, to secure the dismissal of certain civil proceedings on a note given by the husband to such paramour, criminal proceedings would be instituted against them, and they would be extradited and tried, such acts constituted "extortion" within Pen. Code, §§ 633, 634, 638, without reference to the justness of the

wife's claim or the attorney's intention, requiring the attorney's suspension from practice. In *re Sherin*, 130 N. W. 761, 767, 27 S. D. 232, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913D, 446.

An information which charges a conspiracy "to commit extortion of and from" a third person, and which alleges that defendants, in pursuance of the conspiracy, extorted a specified sum from the third person, is not bad for failing to use the words "the offense of" or "the crime of," immediately preceding the word "extortion," since the word "extortion" includes the idea of the crime as much so as though the conspiracy were alleged to be to commit a particular crime. *People v. Lamb*, 117 N. W. 539, 153 Mich. 675.

Under Pen. Code, § 518, defining "extortion" as the obtaining of property from another, with his consent, induced by a wrongful use of force, or fear, or under color of official right, and under section 519, providing that fear such as will constitute extortion may be induced by a threat to do an unlawful injury to the property of him threatened, an indictment charging that defendants are guilty "of a felony, to wit, extortion"; that they unlawfully and feloniously extorted from persons named, with their consent \$1,175, by the wrongful use of fear, induced by means or threats to do an unlawful injury to such persons' property; that such persons sold liquors at retail, and were required to obtain a license from a city and county; that the threat was that if such persons did not pay the sums demanded they could not and would not obtain the license; and that defendants would prevent them from obtaining a license and prevent them from selling liquors—is insufficient for failing to show that the specific injury threatened was an unlawful injury. *People v. Schmitz*, 94 Pac. 407, 418, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717.

One attempting to obtain money from another with his consent by the wrongful use of fear, and a verbal threat to publicly accuse him of adultery, is guilty of the felony of an attempt to commit "extortion," defined by Penal Law, §§ 850, 851, as the obtaining of property from another with his consent induced by wrongful use of fear and by a threat to accuse him of any crime, and is not guilty of the misdemeanor denounced by section 857, providing that a person who verbally makes such a threat as would be criminal if made in writing is guilty of a misdemeanor, which applies only to "black-mail," defined by section 856 as the extorting of money from another by any writing threatening to accuse a person of crime, for the threats under sections 850, 851, may be written or verbal. *People ex rel. Perry v. Gillette*, 124 N. Y. Supp. 470, 471, 140 App. Div. 27.

An attorney's charge for professional services is not "extortionate" unless oppressive or illegal. *Grievance Committee v. Ennis*, 80 Atl. 767, 770, 84 Conn. 594.

#### By color of office

The technical legal meaning of "extortion" is the taking of money or anything of value by an officer by color of his office, either when none is due him, or more than is due him, or probably where it is not yet due, or the oppressive misuse of official power by the rejection of money. *Holt v. State*, 74 S. E. 560, 561, 11 Ga. App. 34 (citing 3 Words and Phrases, p. 2626); *Hanley v. State*, 104 N. W. 57, 59, 125 Wis. 396 (citing 4 Blackstone, 141; *Commonwealth v. Mitchell*, 3 Bush [66 Ky.] 25, 96 Am. Dec. 192); *State v. Cooper*, 113 S. W. 1048, 1049, 120 Tenn. 549, 15 Ann. Cas. 1116; *Commonwealth v. Wilson*, 30 Pa. Super. Ct. 26, 30.

The soliciting of a bribe by an officer after making an arrest or a threat to arrest is not "extortion" in a legal sense. *State v. Browning*, 133 N. W. 330, 336, 153 Iowa, 37.

*Ballinger's Ann. Codes & St.* § 7218, punishing any officer corruptly extorting any "greater fees for any services" than by law are allowed or demanding under color of office any promise securing the payment of a "greater sum of money for any service" than he is authorized by law to demand, defines "extortion" as the corrupt exaction of greater fees for official services than are allowed by law, or the taking under color of office of a promise securing the payment of excessive fees, and contemplates an exaction of an excessive amount when the right exists to demand some amount within lawful provisions because of actual services rendered, and the exaction must be for real or pretended official services demanded of one who at least believes himself to be under legal obligations to pay something, and without the right existing on the one hand to demand legal fees for services actually rendered, and without the obligation of another to pay legal fees, there can be no extortion. *State v. Wainright*, 97 Pac. 51, 52, 50 Wash. 225.

For a justice of the peace to demand and receive fees before they are due constitutes "extortion" at common law. Under *Shannon's Code*, §§ 6352, 6353, providing that no officer shall demand or receive fees or other compensation for any service further than expressly provided by law, a justice of the peace, demanding and receiving fees before they are due, is guilty of "extortion," in violation of section 6714, providing that it is extortion by an officer to knowingly demand or receive of another for performing any service or official duty for which a fee or compensation is established by law any greater fee or compensation than legally allowed or provided. *State v. Cooper*, 113 S. W. 1048, 1049, 120 Tenn. 549, 15 Ann. Cas. 1116.

Under *Pen. Code* 1910, § 302, providing that "extortion" shall consist of any public officer unlawfully taking by color of his office from any person any money or thing of value that is not due him, or more than is due, an officer who uses his office to exact money, not due him may be guilty of extortion, though he does not pretend to be executing any process, nor does he extort money upon promise not to execute. *Dean v. State*, 71 S. E. 597, 598, 9 Ga. App. 303.

## EXTRA

The term "extra," in a builder's contract, means something outside of or in addition to that exacted by the contract. *Chicago Lumber & Coal Co. v. Garmer*, 109 N. W. 780, 782, 132 Iowa, 282.

"Extra," as an adjective or a noun, expresses an idea of something beyond, in addition to, or in excess of what is due, usual, or necessary; and, as used in building or similar contracts, it denotes something done or furnished in addition to, or in excess of, the requirement of such contract; something not required in the performance of the contract. *Fullerton v. City of Des Moines* (Iowa) 115 N. W. 607, 611.

## EXTRA BRAKEMAN

An "extra brakeman" is one who has no regular employment, but takes the place of a regular employé when off duty. *Louisville & N. R. Co. v. Mulfinger's Adm'x* (Ky.) 80 S. W. 499.

## EXTRA COMPENSATION

The supervisor's claim for commissions is not a claim for "extra compensation" within the inhibition of *Const. art. 3, § 28*, and *Public Officers Law, § 67*, prohibiting extra compensation to any public officer, since he asks only for the compensation given by the town law (*Consol. Laws, c. 62*). *People ex rel. Studwell v. Archer*, 126 N. Y. Supp. 750, 752, 142 App. Div. 71.

"Extra compensation," within the meaning of article 24 of the Amendments to the Constitution, prohibiting the General Assembly, or any county, city, etc., to grant any extra compensation to any public officer, is a compensation in addition to, in excess of, or larger than the compensation prescribed by law or settled by contract; one the payee is not entitled by law to demand, nor the payer obliged to pay. *McGovern v. Mitchell*, 63 Atl. 433, 441, 78 Conn. 536.

## EXTRA GOOD ORE

The words "extra good ore," in a contract to indemnify for the expense of sinking a mining shaft, if the drill hole was not as represented, the representation being "1 to 8 feet soil and clay, 110 to 117 feet dark flint, with extra good ore," do not refer merely to the quality of the ore, but require a

quantity sufficient to justify mining. *Hall v. Chitwood*, 81 S. W. 208, 209, 106 Mo. App. 568.

### EXTRA OR SPECIAL TERM

Within Rev. St. 1892, § 1373, authorizing the calling of extra or special terms of court an "extraordinary or special term" is merely a term other than a regular spring or fall term, and such a term does not lose its character as such merely because the order calling it designates it an adjourned term, if it appears that it is a term distinct from the regular terms; and hence, where, at the regular spring term in D. county on March 12th, an adjourned term was called for March 23d, and on March 17th, the regular spring term was held in P. county in the same circuit, it was immaterial whether the court had power to adjourn a term to a day subsequent to the convening of the same court in another county, since the so-called adjourned term was an extraordinary or special term within the meaning of the statute. *Peebles v. State*, 35 South. 223, 224, 46 Fla. 101, 4 Ann. Cas. 870.

### EXTRA WORK

The term "extra work," as used in a construction contract providing that no claim for "extra work" shall exist in favor of the contractor, unless the same has been ordered by proper authorities, means only extra work necessitated by a change of plan, and not work which was naturally incident to, though not foreseen by, the contractor at the time the contract was entered into. *People ex rel. McCabe v. Snedeker*, 94 N. Y. Supp. 319, 324, 106 App. Div. 89.

"The question of what constitutes 'extra work' depends, as a general rule, upon the construction of the working contract, and when the construction of an entire work is called for, at a fixed compensation, the hazards of the undertaking are assumed by the contractor, and he cannot recover for increased cost as 'extra work,' upon discovering that he has made a mistake in his estimate of the cost, or that the work is more difficult and expensive than he anticipated." A building contractor cannot recover for "extra work" in the digging of an excavation and the making of a foundation for a building, where the specifications in the contract provided that the ground was to be excavated to a depth to make the cellar seven feet from the cement floor to the first floor joist, the ground removed from the excavation to be graded up around the houses after the walls were up, and the foundation to go to the solid ground, on a showing that because of the character of the ground it was necessary to excavate more than seven feet to secure solid ground for the foundation, to remove an increased amount of earth and rubbish, and to fill in with sand and gravel, since such work was covered by the specifications in the contract.

*Hennessey v. Fleming Bros.*, 90 Pac. 77, 78, 40 Colo. 27.

Where the specifications of a building contract require the contractor to "rub down all brick work on street sides," the contractor cannot claim pay for cleaning street walls with acid as for "extra work"; the work coming within the terms of the contract. *Chamberlain v. Hillbord*, 38 Pac. 437, 438, 26 Or. 428.

Under a building contract stipulating that no extras will be allowed, unless ordered by the superintendent in writing, and unless the cost thereof is agreed on in advance and expressed in writing, a contractor performing "extra work," which is work arising outside and independent of the contract, cannot recover therefor, unless the complaint alleges that the conditions of the contract as to extra work were complied with. *Rebekah Assembly, I. O. O. F., v. Pulse*, 94 N. E. 779, 47 Ind. App. 466.

A contract to construct a public highway provided for the payment of a lump sum, unless changes in the plans increased or decreased the work. The specifications required the contractor to satisfy himself as to the conditions governing the work and the nature and extent of the materials required, and stated that the estimates of the engineer were approximate only. The engineer had estimated the amount of surplus excavation at 8,000 yards, but the excavation amounted to 9,456 yards. Held, that the contractor was not entitled to compensation for the excavation in excess of the estimate of the engineer. Where a construction contract did not require the performance by the contractor of certain work, the work was "extra work," within the provision that no claim should be made for such work, unless performed in pursuance of written orders signed by the engineer in charge of the work. *Molloy v. Village of Briarcliff Manor*, 129 N. Y. Supp. 929, 936, 145 App. Div. 483.

Where a contract of a borough for the construction of a dam classified the work in different items, and approximated the amount thereof and provided that additional work above the estimate should be paid for at the contract price for work of that class, and that "extra work" should be that "for which no price is fixed in the contract and which is not covered by the contract sum or the specifications," that the condition of the ground required the contractor to expend a much larger amount of work of the various kinds itemized in the contract than was estimated, which work cost more than the rate specified in the contract, did not make the additional work "extra work" within the meaning of the contract. *Coryell v. Dubois Borough*, 75 Atl. 25, 26, 226 Pa. 103.

Putting in expansion joints in a wood block pavement is "extra work," within a contract requiring, as a condition to a claim

therefor, or its allowance, that it shall be first authorized in writing, and the price to be paid therefor be agreed on in the same way. *United States Wood Preserving Co. v. City of New York*, 123 N. Y. Supp. 538, 539, 138 App. Div. 841.

### EXTRAS

"Extras," in a contract for the construction of a system of water works, "consist of labor or materials not called for by the original contract." *Casgrain v. Milwaukee*, 51 N. W. 88, 89, 81 Wis. 113.

Ordinarily the word "extras" carries the idea of something beyond, in addition to, or in excess of, what is due usually or necessarily; and in a contract it denotes something done or furnished in addition, or in excess of, the requirements of such contract, something not required in the performance of the contract. Within a contract for paving a street with asphalt, exacting the laying of concrete on the old foundation of a wooden block pavement, to bring the surface to subgrade before the laying of the asphalt, and providing that there should be no compensation for "extras," the laying of the concrete, an essential portion of the work, for which separate bids had been taken, is not an extra. *Fullerton v. City of Des Moines*, 126 N. W. 159, 163, 147 Iowa, 254.

### EXTRACT

An information charging that defendant sold in interstate commerce a liquid labeled "Flavor of Vanilla," which did not contain any extract of vanilla, does not state a case of adulteration or misbranding of vanilla extract in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768; the words "extract" and "flavor" not being synonymous terms. *United States v. St. Louis Coffee & Spice Mills*, 189 Fed. 191, 193.

### EXTRACT OF COFFEE BEAN

Not dutiable as article used as coffee, see Articles Within Tariff Act.

### EXTRACT OF NUTGALLS

"Extract of nutgalls," an article which is made by grinding nutgalls, digesting the powder in water, and filtering to remove impurities, a chemical being added as a preservative without working any chemical change, is not dutiable as tannin or tannic acid, under paragraph 1, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, nor as a chemical compound under paragraph 3, Schedule A, § 1, c. 11, but either directly or by similitude as "drugs, such as \* \* \* nutgalls, \* \* \* advanced in value or condition," under paragraph 20, Schedule A, § 1, c. 11, 30 Stat. 152. *W. N. Procter & Co. v. United States*, 139 Fed. 586, 588; *United States v. W. N. Procter & Co.*, 145 Fed. 126, 127, 76 C. C. A. 96.

### EXTRACTOR

See Hydro Extractor.

## EXTRAJUDICIAL CONFESSIONS

"Extrajudicial confessions" are either direct confessions of guilt, or indirect confessions which may be inferred from the conduct of accused, and from his silent acquiescence in the statements of others respecting himself and made in his presence; but the acquiescence must exhibit some act of the mind and amount to voluntary demeanor or conduct of accused. *State v. Blackburn* (Del.) 75 Atl. 536, 542, 7 Pennewill, 479.

## EXTRALATERAL

See Extraliminal.

## EXTRALIMINAL

"Extraliminal," or "extralateral," with reference to the rights conferred by a lode location, while depending for its existence on something within the boundaries, may, nevertheless, be exercised under certain conditions beyond those boundaries. *Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co.*, 75 Pac. 1070, 1073, 32 Colo. 176, 64 L. R. A. 925.

## EXTRAORDINARY

Difficult and extraordinary, see Difficult.

The word "extraordinary" is defined in the Century Dictionary as follows: "Being beyond or out of the common order or rule; not of the usual, customary, or regular kind; not ordinary. (4) Exceeding the common degree or measure; hence, remarkable; uncommon; rare; wonderful." *United States v. Sheridan-Kirk Contract Co.*, 149 Fed. 809, 814.

"Extraordinary" means exceeding the common degree or measure; remarkable; uncommon; rare; wonderful. *Southern Ry. Co. v. Burgess*, 42 South. 35, 37, 143 Ala. 364 (citing *Gadsden & A. U. Ry. Co. v. Causler*, 12 South. 439, 97 Ala. 235).

## EXTRAORDINARY CARE

See, also, High Care.

In some courts it is held, even as to such exceedingly dangerous appliances as electricity, that "ordinary care" or "reasonable care" is what is required, while in others an "extraordinary degree of care" is required; that is to say, something more than just mere reasonable care. *Winkelman v. Kansas City Electric Light Co.*, 85 S. W. 99, 100, 110 Mo. App. 184.

While "the expression 'extraordinary care' in the view of some courts means no more than that the carrier should use reasonable care, and that this reasonable care is a relative term, having reference to the duties which the carrier has undertaken and to the risks incident to the business," it is not error to instruct that the carrier of passengers is bound to use "extraordinary care" and

caution for the safety of the passenger. *Hutchels v. Cedar Rapids & M. C. R. Co.*, 103 N. W. 779, 780, 128 Iowa, 279 (quoting 3 *Thompson*, § 2746).

The better doctrine is that care or the want of it is not to be measured arbitrarily according to fixed definitions as "slight care," "ordinary care," or "extraordinary care," or "slight negligence," or "gross negligence," although all these phrases are used somewhat loosely by courts and law writers, but it is to be measured by reasonableness, under all the circumstances of the particular inquiry. The only true measure is "reasonable care," and that expression has been declared by the courts in England and elsewhere to be synonymous with "ordinary care." "Reasonable care" is a relative term, and what is reasonable care in a given case depends upon many considerations. What would be reasonable care under some circumstances would clearly be negligence in others. Reasonable care and vigilance vary according to the exigencies which require vigilance and attention. They relate to the work to be done, to the instrumentalities to be used, to the dangers that may result from their use, to the varying duties owed by those who supply or use them; and in all cases reasonable care means such care as reasonable and prudent men used under like circumstances. *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278 (citing *Fletcher v. Boston & M. R. R.*, 1 Allen [83 Mass.] 9, 79 Am. Dec. 695; *Bigelow v. Reed*, 51 Me. 325; *Palmer v. Penobscot Lumbering Ass'n*, 38 Atl. 108, 90 Me. 193; *Sawyer v. J. M. Arnold Shoe Co.*, 38 Atl. 333, 90 Me. 369; *Cayzer v. Taylor*, 10 Gray [76 Mass.] 274, 69 Am. Dec. 317; *Cunningham v. Hall*, 4 Allen [86 Mass.] 268; *Holly v. Boston Gaslight Co.*, 8 Gray [74 Mass.] 123, 69 Am. Dec. 233).

#### EXTRAORDINARY CIRCUMSTANCES

It is an "extraordinary circumstance," excusing failure to have a bill of exceptions allowed and signed during the term at which judgment was rendered, though no extension of time was granted, where the trial judge was unable, because of illness, to settle the bill. *Roberts v. Bennett*, 135 Fed. 748, 749, 68 C. C. A. 386.

#### EXTRAORDINARY DILIGENCE

"'Extraordinary diligence' is that extreme care and caution which prudent and thoughtful persons use in securing and preserving their own property." *Southern R. Co. v. Davis*, 65 S. E. 131, 132, 132 Ga. 812 (quoting definitions in *Civ. Code* 1895, § 2899).

*Civ. Code* 1895, § 2899, defines "extraordinary diligence" as that extreme care and caution which very prudent and thoughtful persons use under like circumstances. Held that, in determining what very prudent and

thoughtful persons would do under certain circumstances, the situation and surrounding facts, including the existence of an emergency if there was one, are to be considered. *Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co.*, 68 S. E. 1039, 135 Ga. 113.

"Extraordinary diligence," according to *Civ. Code* 1895, § 2899, is "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." If at the time of paying the fare, the conductor and passenger stipulate that the latter may be put off at an intermediate point before reaching the destination to which fare was paid, the conductor will be bound to afford the passenger opportunity for leaving the train at that point, and will be bound to extraordinary diligence in seeing that he does not stop the train and induce the passenger to leave at a different place than that named in the stipulation. *Williamson v. Central of Georgia R. Co.*, 56 S. E. 119-121, 127 Ga. 125.

"Extraordinary diligence," as the term is defined and used in this state, means that "extreme care and caution which every prudent person exercises under like circumstances." *Southern Ry. Co. v. Cunningham*, 50 S. E. 979, 981, 123 Ga. 90.

#### EXTRAORDINARY EMERGENCY

The building of a public levee on the Mississippi river in the Eastern district of Louisiana cannot be said to present at all times an "extraordinary emergency," within the meaning of Act Aug. 1, 1892, c. 352, 27 Stat. 340, regulating the hours of labor of laborers and mechanics on public works, and making it unlawful to require or permit such employes to work a longer time except in cases of extraordinary emergency. *United States v. Garbish*, 32 Sup. Ct. 77, 78, 222 U. S. 257, 56 L. Ed. 190.

The term "extraordinary emergency," within *Code*, § 892, limiting to eight hours the daily labor on public works except in case of such emergency, imports a sudden and unexpected happening; an unforeseen occurrence calling for immediate action to avert imminent danger to health, or life, or property; an unusual peril, suddenly creating a situation so different from the usual course in the prosecution of the public work that the court must conclude that Congress contemplated excepting from the operation of the law such an occurrence. *Penn Bridge Co. v. United States*, 29 App. D. C. 452, 459.

An "extraordinary emergency" in connection with the building of a dam across the Ohio river cannot be construed as a continuing emergency, which would suspend the eight-hour law during the entire life of the contract, nor an emergency growing out of the scarcity of labor, nor can it be made to include, not only the time of the happen-



ing of a flood, but also the time required to repair the injuries resulting therefrom; but it is such an unforeseen, sudden, or unexpected emergency as requires immediate action or remedy, and when the emergency passes the privilege ceases. *United States v. Sheridan-Kirk Contract Co.*, 149 Fed. 809, 814.

A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston navy yard, does not create an "extraordinary emergency," within the meaning of the exception in the act of August 1, 1892, forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employes thereon to work more than eight hours each day. *Ellis v. United States*, 27 Sup. Ct. 600, 601, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 589.

#### EXTRAORDINARY EXPENDITURES

Under the section of a city charter providing that, whenever the council shall resolve by a two-thirds vote that an "extraordinary expenditure" for the benefit of the city should be made, the question shall be submitted to the taxpayers at a special election, an expenditure for voting machines is an "extraordinary expenditure." *People ex rel. United States Standard Voting Mach. Co. v. Geneva*, 92 N. Y. Supp. 91, 92, 45 Misc. Rep. 237.

#### EXTRAORDINARY FLOOD

An "extraordinary flood" is one of those unexpected visitations whose coming is not foreseen by the natural course of nature, and whose magnitude and destructiveness could not have been anticipated, and prevented by the exercise of ordinary foresight. *Chicago, R. I. & P. Ry. Co. v. McKone* (Okla.) 127 Pac. 488, 490, 42 L. R. A. (N. S.) 709.

"What was an 'extraordinary flood' was a question of fact, to be determined by the jury from the evidence under proper instruction from the court. Freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years, though at no regular intervals. \* \* \* The degree of care which a party is bound to use in constructing a dam across a stream \* \* \* must be in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient, and it is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, those must likewise be guarded against and the measure of care required in such case must be that which a discreet person would use if the whole risk were his own. \* \* \*"  
*Ohio & M. Ry. Co. v. Thillman*, 32 N. E. 529, 532, 143 Ill. 137, 36 Am. St. Rep. 359 (quoting and adopting *Gould, Wat.* [2d Ed.] § 211c; *Gray v. Harris*, 107 Mass. 492, 9 Am.

*Rep.* 61, and citing *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330; *Illinois Cent. R. Co. v. Bethel*, 11 Ill. App. 17; *Dorman v. Ames*, 12 Minn. 451 [Gil. 347]; *Ohio & M. Ry. Co. v. Ramey*, 28 N. E. 1087, 139 Ill. 9, 32 Am. St. Rep. 176).

Any inaccuracy in charging, in an action for injuries from the overflow of land, that an "extraordinary flood" is one of the heaviest that ever occurred in the locality, is not misleading to the jury, where they are also instructed that if the river overflowed its banks by reason of an extraordinary flood, or freshet, which it was not capable of carrying within its banks, and was not occasioned by the dam of defendants, plaintiffs could not recover, and that defendants would be excused from liability on account of an extraordinary flood which could not be foreseen and guarded against. *Greeley Irr. Co. v. Von Trotha*, 108 Pac. 985, 988, 48 Colo. 12.

An "extraordinary flood" is one of those visitations whose coming is not foreseen by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated and prevented by the exercise of ordinary foresight. *Town of Jefferson v. Hicks*, 102 Pac. 79, 80, 23 Okla. 684, 24 L. R. A. (N. S.) 214.

The word "extraordinary," in an instruction that no liability attaches to one building and maintaining a bridge over a stream for an "extraordinary freshet," must be limited to a freshet so outside of ordinary experience that its occurrence was not reasonably to have been anticipated, and the failure to so state to the jury might lead them to fail to give to the word such meaning. *Broadway Mfg. Co. v. Leavenworth Terminal R. & Bridge Co.*, 106 Pac. 1034, 1035, 81 Kan. 616, 28 L. R. A. (N. S.) 156 (quoting and adopting the definition in 3 Words and Phrases, p. 2628; *Avery v. Vermont Electric Co.*, 54 Atl. 179, 75 Vt. 235, 59 L. R. A. 817, 98 Am. St. Rep. 818; *American Locomotive Co. v. Hoffman*, 54 S. E. 25, 105 Va. 343, 6 L. R. A. (N. S.) 252, 8 Ann. Cas. 773).

#### EXTRAORDINARY OCCURRENCE

Where a painter was painting the walls of an elevator shaft, the elevators remaining in use, the turning of one of the large wheels was not an "extraordinary occurrence" of which he should have been given notice, although it would have been, had the elevators been shut down. *Lauter v. Hedden Const. Co.*, 83 Atl. 878, 879, 83 N. J. Law, 617.

#### EXTRAORDINARY REMEDY

See *Mandamus*; *Prohibition* (Writ of).

#### EXTRAORDINARY RISK

In respect of the assumption by a servant of extraordinary risks, a risk becomes

transformed from an ordinary one into an "extraordinary risk" whenever, among other conditions, the master's negligence contributes an added hazard to the situation in which the servant is placed; the word "extraordinary" not being used to denote magnitude or as a mark of degree, but to indicate that the risk is one which lies outside of the sphere of the normal. *Baer v. Baird Mach. Co.*, 79 Atl. 673, 675, 84 Conn. 269.

### EXTRAORDINARY SERVICES

"Legal services" are "extraordinary services," within Rev. St. 1898, § 3929, providing that an allowance may be made to administrators for all extraordinary services. *Sloan v. Duffy*, 94 N. W. 342, 344, 117 Wis. 480.

Under Code Civ. Proc. § 1618, which declares that in fixing the compensation of an executor or administrator, the court may make "such further allowance" as it may deem just and reasonable "for any 'extraordinary services,'" "extraordinary" means beyond or out of the common order or rule, and where an administrator with the will annexed went out and lived on the ranch which comprised the estate, and made it much more profitable by his management, his services were such as he was not bound to render and should be compensated specially under the statute. In *re Broome's Estate*, 122 Pac. 470, 472, 162 Cal. 258.

Civ. Code 1910, § 4067, providing that, in cases of extraordinary services, extra compensation may be allowed an administrator, applies to a temporary as well as permanent administrator. "Extraordinary services," for which extra compensation may be allowed, do not include voluntary services rendered in procuring a cemetery lot and rendering assistance in connection with funeral of deceased, though the person so acting is afterwards appointed temporary administrator, nor do they include an application to be appointed permanent administrator, which was denied. *Fields v. Case*, 72 S. E. 899, 900, 137 Ga. 147, Ann. Cas. 1913A, 1266.

Code Civ. Proc. § 1616, as amended in 1905, allows executors all necessary expenses of management and settlement of the estate, and authorizes any attorney, who has rendered services to an executor, to apply for an allowance of suitable compensation out of the estate. Section 1619 allows administrators, etc., for fees for their attorneys for ordinary probate proceedings, the same amounts allowed for their own services by section 1618 as amended in 1905, with such further allowance as the court deems reasonable for any extraordinary services, as for litigation necessary for the administrator to prosecute or defend. Petitioners applied for compensation from the estate for their services as attorneys in opposing a contest of two codicils, altering legacies given by the will, and giving some additional ones. Held that, while

counsel fees incurred in opposing a contest may be charged against the estate, if it goes to the parties benefited by the litigation, under the circumstances the estate had no interest therein, and the application was properly denied, such expenses being chargeable to those legatees having a direct interest in supporting the codicils, and services in probating the instruments, such as the order admitting them to probate, etc., were not "extraordinary services," but were services rendered in "conducting the 'ordinary probate proceedings,'" within section 1619, for which compensation was allowable only on final accounting. In *re Hite's Estate*, 101 Pac. 448, 452, 155 Cal. 448.

### EXTRAORDINARY STORM

Within the rule that a municipality is not liable for injuries from insufficiency of its sewage system to carry off the surface water in case of an extraordinary storm, the word "extraordinary" is not used as synonymous with "unprecedented," but with "unusual," that which is rare or uncommon, happens sometimes, but not so often as to be regarded as a common occurrence. *Geuder Paeschke & Frey Co. v. City of Milwaukee*, 133 N. W. 835, 839, 147 Wis. 491.

### EXTREME

Although, from its derivation, the word "extreme" indicates a superlative degree, in actual use it is often employed as the opposite of "moderate," and to indicate a very high degree, or as the equivalent of "excessive," or "very far advanced." In a charge that a man may be in a state of "extreme" bodily or mental weakness and disease, and yet possess sufficient understanding to direct how his property shall be disposed of, the word "extreme" is not used in the superlative meaning, but in the sense of "grievous," "excessive," or "far advanced," and the charge is not an instruction that one may be competent to make a will, though at the very point of mental extinction or dissolution. In *re Nelson's Estate*, 64 Pac. 294, 298, 132 Cal. 182.

### EXTREME ATROCITY OR CRUELTY

The phrase "with extreme atrocity or cruelty," as used in Pub. St. c. 202, § 1, providing that "murder committed with deliberately premeditated malice aforethought, or in the commission of or attempt to commit a crime punishable with death or imprisonment for life, or committed with 'extreme atrocity or cruelty' is murder in the first degree," does not mean that knowledge that the crime was extremely atrocious or cruel is required as an element of the offense. *Commonwealth v. Gilbert*, 42 N. E. 336, 338, 165 Mass. 45.

### EXTREME CRUELTY

Cruelty is a relative term; its existence frequently depends upon the character and

refinement of the parties, and the conclusion to be reached in each case must depend upon its own particular facts. In considering "extreme cruelty" as a ground for divorce, courts have cautiously given it negative rather than affirmative definitions. *Kapp v. District Court of Seventh Judicial Dist.*, 103 Pac. 235, 237, 31 Nev. 444 (citing *Kelly v. Kelly*, 1 Pac. 195, 18 Nev. 55, 51 Am. Rep. 732).

"Extreme cruelty" exists when the conduct of the husband or wife is such that the life or health of the other may be endangered, or when such conduct unjustifiably wounds the mental feelings or so destroys the peace of mind as seriously to impair the health or endanger the life of the other, or is such as utterly destroys the legitimate objects of matrimony; and, when words alone are relied upon, it must appear that they were uttered, not merely as complaints against the real or apparent conduct of the other, but that they were uttered without justifiable cause and to inflict pain. *Rowe v. Rowe*, 115 Pac. 553, 555, 84 Kan. 696.

"Extreme cruelty," as defined in Civ. Code Mont. § 134, relating to divorce, is "the infliction or threats of bodily injury, dangerous to life, or the repeated infliction or threat of grievous bodily injury upon the other party by one party to the marriage, or the repeated publication of false charges against the chastity of the wife by the husband." *Ryan v. Ryan*, 84 Pac. 494, 33 Mont. 406.

A husband, guilty of dishonesty and fraud towards his creditors by issuing to them worthless checks, and guilty of making false representations to his wife as to his debts, but who does not thereby intend to annoy or injure her, is not guilty of such "extreme cruelty" as justifies a divorce to the wife, suffering mentally and physically in consequence of his acts, since such suffering, to justify a divorce, must have been induced by the voluntary and conscious act of the husband, and must result from direct acts of the husband on the mind of the wife; "extreme cruelty" being the infliction of grievous bodily injury or grievous mental suffering by one party to the marriage on the other. *McClenahan v. McClenahan* (Del.) 80 Atl. 677, 679 (citing 3 Words and Phrases, p. 2630).

Wrongful accusations of unchastity by husband may constitute such "extreme cruelty" as to be sufficient ground for divorce. *Wetherington v. Wetherington*, 49 South. 549, 553, 57 Fla. 551.

Evidence held not to justify a divorce under Rev. Codes, § 2649, defining "extreme cruelty as ground for divorce" to be the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage. *Spofford v. Spofford*, 108 Pac. 1054, 1055, 18 Idaho, 115.

#### **As acts tending to injure life, limb, or health**

In divorce actions, "cruelty," "extreme cruelty," "cruel and inhuman treatment," and the like may be established by evidence of any line of misconduct persisted in by the offending party to such an extent as to cause injury to the life, limb, or health of the other, or to threaten or to create a danger of such injury; and it is not necessary that such injury present or threatened, should be the direct result of such misconduct, but it is sufficient if it is produced by grief, worry, or mental anguish occasioned by such misconduct. *Mathewson v. Mathewson*, 69 Atl. 646, 648, 81 Vt. 173, 18 L. R. A. (N. S.) 300.

Any unjustifiable conduct of a husband or wife, which grievously wounds the mental feelings, or utterly destroys the peace of mind, or such as to impair the bodily health or destroys the legitimate objects of matrimony, constitutes "extreme cruelty," as defined in Comp. St., c. 25, § 7, though no physical violence is inflicted or threatened. *Preult v. Preult*, 129 N. W. 175, 176, 88 Neb. 124.

"Extreme cruelty" as a ground for divorce, when there is no actual violence, contemplates treatment, abuse, neglect, or bad conduct, such as damages health, or renders cohabitation intolerable and unsafe, or threats of mistreatment so flagrant as to cause reasonable and abiding apprehension of bodily violence, rendering it impracticable to discharge marital duties. *Hancock v. Hancock*, 45 South. 1020, 1022, 55 Fla. 680, 15 L. R. A. (N. S.) 670 (citing *Palmer v. Palmer*, 7 South. 864, 26 Fla. 215).

#### **Abuse of marital rights**

Where a husband had compelled his wife to submit to two abortions, and insisted that she should submit to a third, and that she should bear no children, as a condition to the continuance of the marital relation, such conduct constituted "extreme cruelty," entitling the wife to a divorce. *Dunn v. Dunn*, 114 N. W. 385, 386, 150 Mich. 476.

#### **Abusive language and threats**

Occasional irritability, fault-finding, and outbursts of temper on the part of one, followed by demonstrative affection and forbearance, with a sincere desire for the love and companionship of the other, do not constitute "extreme cruelty," which is ground for divorce. *Rowe v. Rowe*, 115 Pac. 553, 555, 84 Kan. 696.

#### **Mental suffering**

Under Code, § 94, declaring that "extreme cruelty" may consist of "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage," it is not necessary that there shall be the infliction of bodily injury to constitute extreme cruelty. A course of conduct which entails grievous mental suffering

alone is sufficient. *Avery v. Avery*, 82 Pac. 967, 969, 148 Cal. 239 (citing *Barnes v. Barnes*, 30 Pac. 298, 95 Cal. 171, 16 L. R. A. 660; *Andrews v. Andrews*, 52 Pac. 298, 120 Cal. 187).

"It was formerly thought that to constitute 'extreme cruelty,' such as authorized the granting of a divorce, a physical violence was necessary; but the modern and better construed cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct, which so grievously wounds the mental feelings of the other, or such as in any other manner endangers the life of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statutes, although no physical or personal violence may be inflicted or even threatened." In a suit for divorce, evidence held to show personal indignities, rendering life burdensome within the meaning of the statute. *Sullivan v. Sullivan* (Wash.) 100 Pac. 321, 323 (quoting and adopting definition in *Carpenter v. Carpenter*, 2 Pac. 122, 30 Kan. 712, 46 Am. Rep. 108).

Unjustifiable conduct on the part of a husband which utterly destroys the objects of matrimony may constitute "extreme cruelty," without physical injury. *Mills v. Mills*, 130 N. W. 419, 88 Neb. 596; *Myers v. Myers*, 130 N. W. 254, 255, 88 Neb. 656.

Under a statute defining "extreme cruelty" as the infliction of grievous bodily injury or grievous mental suffering, a divorce may be granted for the infliction of grievous mental suffering, although such suffering produced no bodily injury. *Mahnken v. Mahnken*, 82 N. W. 870, 871, 9 N. D. 188.

"Extreme cruelty" means any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony. *Whitney v. Whitney*, 110 N. W. 555, 556, 78 Neb. 240.

There may be "extreme cruelty," justifying a divorce, without physical injury or violence; and unjustifiable conduct of one of the spouses, which utterly destroys the legitimate ends of matrimony, may constitute such cruelty. That a husband and wife are living apart when false charges of adultery are wantonly made by one spouse against the other does not of itself prevent such charges from constituting extreme cruelty. *Miller v. Miller*, 131 N. W. 203, 204, 89 Neb. 239, 34 L. R. A. (N. S.) 360.

The "extreme cruelty" authorizing a divorce is such conduct by the husband or wife towards the other as will endanger life or health, or will cause a reasonable apprehension of bodily hurt. The injury may be mental, but must be such as to render it impracticable for the complainant to discharge marital duties with reasonable safety, but mere inconvenience or unhappiness is insufficient. *Prall v. Prall*, 50 South. 867, 871, 58 Fla. 496, 26 L. R. A. (N. S.) 577.

Under Civ. Code, § 94, defining "extreme cruelty" justifying a divorce as the wrongful infliction of grievous bodily injury or grievous mental suffering, the wrongful infliction of grievous mental suffering is "extreme cruelty," though no injury to the health of the spouse injured is caused thereby, and a single act of cruelty may be of such a nature, though it consists solely of unfounded charges, as not only to inflict the most grievous mental suffering, but also to render impossible the subsequent living together of husband and wife, justifying a divorce. *MacDonald v. MacDonald*, 102 Pac. 927, 929, 155 Cal. 665, 25 L. R. A. (N. S.) 45.

Rev. Codes 1905, § 4049, designates extreme cruelty as a ground for divorce, and section 4051 defines "extreme cruelty" as the infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other. Held, that grievous mental suffering may constitute extreme cruelty, though not productive of perceptible bodily injury. Whether grievous mental suffering has been inflicted by one spouse upon the other is a question of fact to be determined under the particular circumstances of the case. *Rindlaub v. Rindlaub*, 125 N. W. 479, 483, 19 N. D. 352.

The acts of a wife in objecting to her husband's building a new house, finding fault with him for losing a hitching post, scolding him for coming home late at night, objecting to the kind of work he did and the places where he worked, and insisting on having her own way, the result of which conduct was to deprive the husband of some sleep and cause him worry, did not constitute "extreme or repeated acts of cruelty," within a statute making such acts ground of divorce, and providing that they may consist as well of the infliction of mental suffering as bodily harm. *Geisseman v. Geisseman*, 83 Pac. 635, 636, 34 Colo. 481.

#### EXTREME TECHNICALITY

The expression "extreme technicality" is one which has no fixed and definite meaning. *Vincendeau v. People*, 76 N. E. 675, 678, 219 Ill. 474.

#### EXTREMIS

See Error in *Extremis*.

## EXTREMITIES OF THE BODY

The "extremities of the body" are four in number, and "either" is one indifferently, any one of them; and the permanent paralysis of a hand resulting from a cut on the arm brings the plaintiff suing on the policy within the term "permanent paralysis of either extremities" as expressed in the constitution of the association. *Brotherhood of Locomotive Firemen & Enginemen v. Aday*, 134 S. W. 928, 930, 97 Ark. 425, 34 L. R. A. (N. S.) 126.

## EXTRINSIC OR COLLATERAL FRAUD

"Extrinsic or collateral fraud," as ground for equitable relief against a judgment, is defined to be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*; the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. There is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact, no adversary trial or decision of the issues in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance of the acts of the plaintiffs, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side, these and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a suit may be sustained to

set aside and annul a former judgment or decree and open the case for a new and fair hearing. *Flood v. Templeton*, 92 Pac. 78, 81, 152 Cal. 148, 13 L. R. A. (N. S.) 579 (quoting and adopting *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93).

By "extrinsic or collateral fraud" for which a court of equity will set aside a judgment rendered by a court of competent jurisdiction is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy. *Garrett Biblical Institute v. Minard*, 108 Pac. 80, 81, 82 Kan. 338.

## EYEWITNESS

An "eyewitness" is a person who testifies to what he has seen. Where insured in an accident policy and a young woman were seen rowing in a canoe within five minutes before it capsized, and they were drowned, the canoe being one easily overturned, the circumstances of the accident and injury were established by eyewitnesses, within the meaning of the policy providing that, when the circumstances of an accident and injury are not established by the testimony of an actual "eyewitness," the company's liability shall be limited to one-twentieth of the death benefit. By the terms of the policy, not only the fact of the injury is to be established by an "eyewitness," but also the facts and circumstances of the accident, that is, the operating cause of the injury, or at least to show that at the time of the injury there was an operating cause to which the accident might fairly be charged, and to indicate in a general way the nature of that cause and the manner of its working. *Lewis v. Brotherhood Acc. Co.*, 79 N. E. 802, 805, 194 Mass. 1, 17 L. R. A. (N. S.) 714 (citing *National Acc. Soc. v. Raistin*, 101 Ill. App. 192).

## F

**F. O. B.**

See Prices F. O. B.

See, also, Free on Board.

The phrase "f. o. b." means free on board of vessel, car, or other conveyance which is to transport goods to a buyer. *Rogers v. Union Iron & Foundry Co.*, 150 S. W. 100, 104, 167 Mo. App. 228 (quoting 3 Words and Phrases, p. 2636).

The Appellate Court knows that "f. o. b." used in connection with a shipment of goods, means "free on board." *Kilmer v. Moneyweight Scale Co.*, 76 N. E. 271, 272, 36 Ind. App. 568.

"F. o. b." means free on board and ready to go forward at once. *Aspegren & Co. v. Wallerstein Produce Co.*, 69 S. E. 957, 958, 111 Va. 570.

**FABRICS**

Dutiable, as articles appliqued, see Articles within Tariff Act.

Dutiable as articles of metal thread, see Articles within Tariff Act.

Woven fabrics as article, see Articles within Tariff Act.

**FACE**

See Fair on Its Face.

**Of the enemy**

A soldier who deserted after the signing of the protocol between the United States and Spain, and while a state of peace actually existed, and nothing remained to be done to conclude peace except the settlement of the details of the treaty, is within Act April 11, 1890, c. 78, 26 Stat. 54, providing that no person shall be court-martialed for desertion in time of peace, and not "in the face of an enemy," committed more than two years before his arraignment therefor; said limitation not to begin until the end of his term of enlistment. *In re Cadwallader*, 127 Fed. 881, 883.

**Of the record**

See Apparent on the Face of the Record.

A motion in arrest of judgment in a criminal case must be predicated on some defect which appears on the face of the record or pleadings, under the express provisions of Civ. Code 1895, § 5363, a defect "on the face of the record" existing in a criminal case where there is some inadequacy in the allegations of the indictment, not cured by the verdict, or where the verdict does not conform to the charge in the indictment; and the "face of the record" does not include the charge of the court or the brief of evidence approved and filed as part of the record in a motion

for new trial. *Spence v. State*, 68 S. E. 443, 444, 7 Ga. App. 825.

**FACE TO FACE**

Code Cr. Proc. § 7, giving defendant the right to be confronted with the witnesses against him "in the presence of the court," adds nothing to Const. art. 6, § 7, giving him the right to "meet the witnesses against him 'face to face,'" or Const. U. S. Amend. art. 6, giving him the right to be "confronted with the witnesses against him," which are satisfied by his having an opportunity to cross-examine the witnesses, so as to allow, under an exception to the hearsay rule, admission against him, at the trial on the indictment, of testimony given on the preliminary examination by a witness who has since left the state; and this, though the complaint before the committing magistrate alleged the offense as committed on a day different from that alleged in the indictment, the precise time being immaterial. *State v. Heffernan*, 123 N. W. 87, 89, 24 S. D. 1, 25 L. R. A. (N. S.) 868, 140 Am. St. Rep. 764.

**FACE VALUE**

The "face or prima facie value" of a promissory note at any point of time is the principal, with the interest then accrued. It does not include unearned interest; and this is true, even though the unearned interest has in form been added to the face of the note. *Robertson v. Moses*, 108 N. W. 788, 790, 15 N. D. 351.

The words "face value of this certificate," as used in a benefit certificate providing that one-tenth of the face value of this certificate should be paid to the member if physically disabled on account of old age, meant that the face value was \$2,000, and not one assessment during the month of the member's death. *Hall v. Royal Fraternal Union*, 61 S. E. 977, 982, 130 Ga. 820.

**FACILITIES**

See Equal Facilities; Privileges and Facilities; Public Facilities; Public Service Facilities and Conveniences; Reasonable Facilities; Terminal Facility.

**Of railroads**

In Const. art. 9, § 20, providing that from any action of the Corporation Commission requiring additional facilities an appeal may be taken, the word "facilities" includes a railroad depot. *St. Louis & S. F. R. Co. v. Miller*, 123 Pac. 1047, 1049, 31 Okl. 801.

A siding connection is a "facility for transportation" within Act June 4, 1883 (P. L. 72), providing that any undue or unreasonable discrimination by a railroad company in

facilities for the transportation of freight shall be unlawful. *Mends v. Pennsylvania R. Co.*, 77 Atl. 909, 911, 228 Pa. 575.

Where a railroad company acquired 20 acres of station grounds under the provisions of Act Cong. March 3, 1875, c. 152, 18 Stat. 482, for occupation and use as a common carrier, and such grounds are so situated as to abut upon a navigable lake or body of water, and such company constructs thereon a dock or wharf for use in receiving and discharging freight and passengers from boats and for forwarding through freight and passengers, and the same is in fact used both in carrying on through business and local business, such dock or wharf is a public "facility" for the transportation of freight and passengers within the purview and meaning of section 6, art. 11, of the Constitution, and such railroad company cannot make any undue or unreasonable discrimination between competing boat lines engaged in the same kind or class of business with such railroad company. *Cœur d'Alene & St. Joe Transp. Co. v. Ferrell*, 128 Pac. 565, 567, 22 Idaho, 752, 43 L. R. A. (N. S.) 965.

#### Of schools

Laws Mont. 1897, p. 134, § 1940b, provides that the trustees of any school district may, when advisable, submit to the electors the question whether a tax shall be raised to purchase lots and furnish additional school facilities. "Facility" is not a technical word, but one in common use, and its meaning is to be found in the sense attached to it by approved usage. *Roget's Thesaurus* gives "aid," "assistance," and "help" as equivalents of "facility." Webster, among other definitions of the word, includes "the quality of being easily performed; ease in performance; that which promotes the ease of any action; advantage; valuable aid; assistance." The *Century Dictionary* follows the definitions of Webster, and adds: "The means by which the performance of anything is rendered more easy; convenience." That which aids, assists, or makes more easy the acquisition of knowledge is a convenience and an advantage, and is clearly a "facility." Books, maps, globes, and charts are facilities to the imparting of knowledge. Through them or by means of them information is conveyed to the pupil. But the meaning of the word is not limited to inanimate bodies or things. Men are often facilities. Without a crew to man his vessel, the master of a ship would not have the necessary facilities. A school with a complement of pupils in every room, but lacking teachers, would certainly not have the facilities to carry on educational work. *State ex rel. Knight v. Cave*, 52 Pac. 200, 203, 20 Mont. 468 (citing Pol. Code, § 15; *State v. Johnson*, 51 Pac. 820, 20 Mont. 367).

Failure of the board of education of a township to provide transportation for children living remote from the school is not

such a failure to provide suitable school "facilities," under School Law (P. L. 1904) p. 48, § 126, as to authorize the county superintendent of schools to transmit to the custodian of the school fund an order to withhold from the district all moneys in his hands to the credit of such district received from the state appropriation or the state school tax. *Board of Education of Frelinghuysen Tp. v. Atwood*, 62 Atl. 1130, 1131, 73 N. J. Law, 315.

#### FACILITIES AND ACCOMMODATIONS

Acts 1882, p. 47, No. 36, requiring railroads to give all persons "reasonable and equal terms, \* \* \* facilities and accommodations" for the transportation of freight, etc., must be construed in the light of Acts 1882, p. 47, No. 37, authorizing a railroad corporation to establish rates, etc., and, when so done, it requires a railroad corporation to make rates reasonable and equal as required by the common law, and it is but declaratory of the common law defining the rights and obligations of carriers; the words "facilities and accommodations" relating to the incidents of transportation, and the word "terms" signifying rates. *State v. Central Vermont Ry. Co.*, 81 Vt. 463, 71 Atl. 194, 196, 130 Am. St. Rep. 1065.

#### FACILITIES AND CONVENIENCES

A telephone is a facility and convenience, within Const. art. 9, § 18, empowering the Corporation Commission to require carriers to establish and maintain all such public service "facilities and conveniences" as may be reasonable and just. *Atchison, T. & S. F. Ry. Co. v. State*, 100 Pac. 11, 14, 23 Okl. 210, 21 L. R. A. (N. S.) 908.

#### FACT

See Assumption of Facts; Attorney in Fact; Collateral Facts; Conclusion of Fact; Contract Inferred from Facts; Error of Fact; Established Facts; Evidentiary Fact; Ignorance of Fact; Issue of Fact; Jurisdictional Facts; Material Fact; Matter of Fact; Mistake of Fact; Physical Fact; Presumption of Fact; Question of Fact; Selsin in Fact; Statement of Fact; Stipulated Fact.

"Facts" means pleadable facts. *Calumet Service Co. v. City of Chilton*, 135 N. W. 131, 136, 148 Wis. 334.

Where one of the questions on the report of an action against an insurance company was whether upon the facts the jury would have been warranted in finding a waiver of a stipulation, the word "facts" includes, not only undisputed facts, but also evidence as to the facts in dispute. *Rockwell v. Hamburg-Bremen Fire Ins. Co.*, 98 N. E. 1086, 1087, 212 Mass. 318.

Some latitude must be given to the term "facts" when used in a rule of pleadings,

such as that "facts and not mere conclusions of law are to be pleaded." It must of necessity include many allegations which are mixed conclusions of law and statements of fact; otherwise, pleadings would become intolerably prolix and mere statements of the evidence. Hence it has become a rule of pleading that, while it is not proper to allege a mere conclusion of law, it is proper to plead the fact inferable from other facts, and also anything which according to the common ordinary use of language amounts to a mixed statement of fact and of a legal conclusion. *Jones v. Great Northern Ry. Co.*, 97 N. W. 535, 536, 12 N. D. 343.

The constitutional inhibition against trial judges commenting on "facts" in instructing juries refers only to disputed "facts," and not to those concerning which there is no dispute, or which are admitted. *Lownsdale v. Gray's Harbor Boom Co.*, 78 Pac. 904, 906, 36 Wash. 198.

An information for perjury charging that accused swore to "facts" stated in a complaint is not defective as charging the verification of the statements only; the term "facts" as so used meaning "matter" or "statements." *State v. Luper (Or.)* 95 Pac. 811, 813.

#### FACTS IN ISSUE

"Facts in issue" are those facts upon the existence of which the right or liability asserted depends. *San Antonio Traction Co. v. Higdon (Tex.)* 123 S. W. 732, 734.

It may be stated generally that the ultimate facts upon which the recovery is had—facts which, if found the other way, the recovery must have been different—are "facts in issue." A "fact or matter at issue" is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleading. *Casaday v. Lindstrom*, 75 Pac. 222, 224, 44 Or. 309 (citing *Garwood v. Garwood*, 29 Cal. 514; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Marshall v. Shafter*, 32 Cal. 176, 183).

#### FACTS OF THE CASE

As the term "facts of the case" is equivalent to the proven facts of the case, where accused pleaded not guilty, and not guilty by reason of insanity, an instruction that the jury could not convict defendant unless the hypothesis of his guilt should flow naturally from the facts proven was proper, was therefore erroneously refused. *Odom v. State*, 55 South. 820, 172 Ala. 383.

#### FACTS SHOWN BY THE RECORD

The phrase "facts shown by the record" in rule 15 of the Court of Appeals (67 S. W. 1x), providing that appellant or plaintiff in error shall furnish copies of a brief containing a clear and concise statement of the facts shown by the record, means an abstract of the evidence such as will enable the appellate

court to gain such a view of the evidence as to obviate the necessity of reading the entire evidence as preserved in the bill of exceptions. *Hess v. Corwin*, 84 S. W. 141, 109 Mo. App. 22.

#### FACTION

Webster's Dictionary defines a "faction" as "a party in political society, combined or acting in union, usually applied to a minority, but may be applied to a majority." The Standard Dictionary defines it as "a number of persons combined for a common purpose usually a party within a party." The Century Dictionary states that it is "a party of persons having a common end in view, usually such a party seeking to bring about changes in any association of which they form a part." The word as applied to political parties "suggests a division of the members thereof, and a separate organization of the parts not a mere division of a regularly called convention into two camps, the body of the party not necessarily being divided." *State ex rel. Cook v. Houser*, 100 N. W. 964, 974, 122 Wis. 534.

Where a county committee was not even voted for and made no contest for election as county committeemen at a primary election conducted pursuant to the primary election law, no "faction or section" was created or existed to give the state convention jurisdiction, within the Election Law of 1896, as amended, providing that election officers in the city of New York shall be appointed from lists authenticated and filed by the chairman of the executive committee of the county committee of the party, and that, if more than one list shall be submitted in the name of the same political party, only that list shall be accepted which is authenticated by the officer of the faction or section of the party which was organized as regular by the last preceding state convention of such party. *People ex rel. McCarren v. Dooling*, 112 N. Y. Supp. 71, 75, 128 App. Div. 1.

#### FACTOR

"Factors," by general definition, are agents to whom property is consigned for sale. *In re Gulick*, 186 Fed. 350, 351.

The term "factors" applies to a class of mercantile agents whose sole business is to sell merchandise consigned to them on a commission, called "factorage." *Winslow Bros. & Co. v. Staton*, 63 S. E. 950, 150 N. C. 264.

A "factor" is a commercial agent to whom the possession of personal property is intrusted by or for the owner to be sold, for a compensation, in pursuance of the agent's usual trade or business. *Rowland v. Dolby*, 59 Atl. 666, 667, 100 Md. 272, 3 Ann. Cas. 643.

Under Rev. Codes 1905, § 5801, defining a "factor" as an agent employed to buy or sell



property in his own name and intrusted by his principal with possession thereof, a factor may buy, as well as sell, property the subject of the agency. *Turner v. Crumpton & Crumpton*, 130 N. W. 937, 940, 21 N. D. 294, Ann. Cas. 1913C, 1015.

"A 'factor' is said to be an agent employed to sell or to purchase and sell goods or other personal property intrusted to his possession, \* \* \* for a compensation commonly called 'factorage' or 'commission.'" Although "it must not be understood that a factor is a trustee of an express trust in the strict sense of the term," he is such under Rev. St. 1898, § 2607, and authorized thereby to enforce it in his own name. *Beardsley v. Schmidt*, 98 N. W. 235, 237, 120 Wis. 405, 102 Am. St. Rep. 991 (quoting *McGraft v. Rugee*, 19 N. W. 530, 60 Wis. 406, 50 Am. Rep. 378).

A "factor" has been defined to be an agent employed to sell property intrusted to his possession by and for his principal, for a compensation usually designated a "commission" or sometimes a "factorage." His agency with respect to the particular property is general, unless expressly limited by instructions. *M. M. Walker Co. v. Dubuque Fruit & Produce Co.*, 85 N. W. 614, 615, 113 Iowa, 428, 53 L. R. A. 775 (citing *McGraft v. Rugee*, 19 N. W. 530, 60 Wis. 406, 50 Am. Rep. 378; *Milburn Mfg. Co. v. Peak*, 34 S. W. 102, 89 Tex. 209).

A "factor" is one who sells goods which another person has delivered to him for that purpose and receives compensation for his services by a commission or otherwise. *Ommen v. Talcott*, 188 Fed. 401, 403, 112 C. C. A. 239.

"A 'factor' or 'commission merchant' is one who has the actual or technical possession of goods or wares of another for sale. Thus the property may be in his own warehouses, or he may have a warehouse receipt or bill of lading. The possession of the property is *prima facie* evidence of ownership. Being thus intrusted with possession of it by the owner for the purpose of sale, a factor may sell it in his own name, without disclosing the name of his principal, and he may collect the proceeds and give the purchaser a complete acquittance." *J. M. Robinson, Norton & Co. v. Corsicana Cotton Factory*, 99 S. W. 305, 306, 124 Ky. 435, 8 L. R. A. (N. S.) 474, 14 Ann. Cas. 802.

Where plaintiff, at defendant's request, delivered to it a car of lemons for the purpose of completing a sale already effected by defendant at a stated price, defendant to receive a certain commission on the sale, though it was not, in the transaction, within the technical definition of a "factor," in that the lemons were not first placed in its possession for the purpose of a sale, but were delivered to it for the purpose of completing

a sale already effected, defendant's relation to the plaintiff, after he had delivered them to it, was substantially that of a factor. *Betts v. Southern California Fruit Exch.*, 77 Pac. 993, 994, 144 Cal. 402.

#### Broker distinguished

See Broker.

#### As trustee of express trust

See Trustee of Express Trust.

#### As warehouseman

The word "factor," in Rev. St. 1895, art. 4314, providing that no factor shall employ any person other than a public weigher to weigh produce sold and offered for sale, means a person having possession of merchandise with authority to sell, not including a mere "warehouseman," and that the statute had no application to a "warehouseman" weighing produce merely for sale or to loan money thereon. *Hedgepeth v. Hamilton Warehouse Co.*, 140 S. W. 1084, 1085, 104 Tex. 496; *Hedgepeth v. Same*, 128 S. W. 709 (citing 3 Words and Phrases, p. 2640; 8 Words and Phrases, p. 7392).

#### FACTOR'S LIEN

A "factor's lien" arises by operation of the common law, and is the lien that the factor has on the goods consigned to him while in his possession for all advances to the consignor. It is purely a possessory lien, and is lost by a surrender of possession. *Garrison v. Vermont Mills*, 69 S. E. 743, 744, 154 N. C. 1, 31 L. R. A. (N. S.) 450.

#### FACTORY

See Business and Factory Use; Occupied as Factory; Tenant Factory.

Heydecker's Gen. Laws, p. 2601, c. 32, defines "factory" to include any mill, workshop, or other manufacturing or business establishment where one or more persons are employed at labor. *People v. Williams*, 100 N. Y. Supp. 337, 338, 116 App. Div. 379.

The word "factory," a contraction of "manufactory," means a building appropriated to the manufacture of goods, and it is the appropriation of a building to such manufacture that makes it a factory; and so, under Laws 1897, c. 415, § 82, providing that such fire escapes as the factory inspector may deem necessary shall be provided on every factory of a certain number of stories in height, and section 83, providing that if there are no fire escapes the fire inspector may, by order of the owner, proprietor, or lessee of the factory, require them to be provided, when a lessee renders such a building a factory by installing machinery therein and devoting it to manufacture, he, at least, is under duty to provide it with fire escapes, and so is liable for death of one from fire, due to the absence thereof. *Di Santo v.*

Brooklyn Chair Co., 125 N. Y. Supp. 8, 10, 140 App. Div. 119.

In an action for the death of plaintiff's intestate, the evidence showed that deceased was sent to repair an engine and make a pump work in its detached pumphouse, and that he was killed while so engaged by an unguarded shaft. Held, that an instruction that the pumphouse was in the same class as a "factory," mill, or workshop, and, if the shaft with the key was so situated to be dangerous to workmen, it would be within Rev. Laws 1905, § 1813, requiring it to be guarded, was correct. *Thomas v. Chicago Great Western R. Co.*, 128 N. W. 297, 299, 112 Minn. 360.

A sawmill used for the manufacture of lumber, is a "factory" within the meaning of Laws Or. 1903, p. 79, which prohibits the employment of minors under the age of 16 years in a factory, except on compliance with certain specified conditions. *Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 196 Fed. 340, 344, 116 C. C. A. 160; *Rains v. Stone*, 123 Pac. 871, 872, 87 Kan. 116.

A plant for mixing the materials used in making asphalt pavement, consisting of machinery mounted on an open or flat car, moved from place to place as required, is not a "factory," within the meaning of Laws Wash. 1905, c. 84, as amended providing for the protection and health of employes in factories, mills, and workshops, and requiring the boxing or guarding of machinery and shafting therein, etc. *Casey v. Barber Asphalt Paving Co.*, 192 Fed. 432, 437.

A tugboat used in dredging operations is not a "factory" within the Labor Law, regulating the employment of minors in factories, providing that the term "factory" shall include mills, workshops, and other manufacturing or business establishments, and requiring that shafting, set screws, etc., in factories be properly guarded; the term "factory" being used to designate a structure or plant where something is made or manufactured from raw or partly wrought materials into forms suitable for use. *Shannahan v. Empire Engineering Corp.*, 98 N. E. 9, 10, 204 N. Y. 543, 44 L. R. A. (N. S.) 1185.

Labor Law, § 80, providing that all doors leading in and to any "factory" shall be so constructed as to open outwardly where practicable, and shall not be locked, bolted, or fastened during working hours, is not limited in its operation to the owners of tenant factories, defined by section 94 as buildings, separate parts of which are occupied and used by different persons and one or more of which parts are so used as to constitute a factory, but applies to the owners of a factory occupying one floor of a building. *People v. Harris*, 134 N. Y. Supp. 409, 412, 74 Misc. Rep. 353.

2 Wds. & P. 2D SER.—23

### Commercial ice house

The words "factories and workshops," in Gen. St. p. 2345, § 29, requiring the guarding of belting, shafting, etc., in factories and workshops, import a building in which the machinery is so placed as to be dangerous to operatives, and also imply places where machinery is employed in making or manufacturing something, this being the common meaning of a "factory" or "workshop"; and the statute does not apply to a plant for harvesting ice, which is done by carrying the ice from a lake on a conveyor made of boards fastened to two endless chains and operated by a friction shaft driven by steam power, and stopped or started by a lever attached to the shaft extending from the shafting into a small room adjoining the engine house containing no other mechanical appliances. *Griffith v. Mountain Ice Co.*, 65 Atl. 853, 74 N. J. Law, 272.

### FACTUM

"Factum," as used in the phrase "animus et factum," referring to change of domicile, "is the transfer of the bodily presence." *Pickering v. Winch*, 87 Pac. 763, 767, 48 Or. 500, 9 L. R. A. (N. S.) 1159.

### Of a will

In the probate of a will, nothing is to be determined but what relates to mere "factum of the will." The legal effect of its provisions is not involved in that proceeding. While any clause or portion of the paper writing propounded as a will may be rejected, if it appears it was not inserted by the testator, or that he had revoked it, or that it was not embraced by the execution, since such facts go to the actual making of the instrument, all that is embodied in the writing executed by the testator as an integral part of his intended testamentary disposition is to be accepted by the orphans' court as entering into his will. The validity and legal construction of the provisions are matters for subsequent determination by the appropriate tribunals. *Home for the Aged of Methodist Episcopal Church v. Bantz*, 66 Atl. 701, 703, 106 Md. 147 (citing *Ramsey v. Welby*, 63 Md. 584, 586).

### FAIL

"The word 'fail' imports to become deficient or lacking, to leave unperformed, to omit, to neglect." Under Civ. Code, tit. 13, §§ 23, 166, 167 (Laws 1901), providing that all corporations organized under it should appoint a resident agent, but omitting to provide any penalty for noncompliance therewith, and exempting from such requirements all corporations theretofore organized, unless they elected to come within its provisions, and Laws 1903, p. 147, No. 82, providing that if any corporation, however organized, shall "fail" to appoint a resident agent, it is subject to dissolution, the penalty for a neglect

to appoint a resident agent applies only to corporations organized under the former act or those electing to come under its provisions, since the word "fail" imports "a previously imposed duty, and is applicable only in case of neglect or omission to perform such duty." *Rillito Canal Co. v. Schmidt*, 89 Pac. 523, 525, 11 Ariz. 49 (citing *Bouv. Law Dict.*).

In a provision of an insurance certificate requiring the division of a safety fund if at any time the insurance company should "fail" by reason of insufficient membership or should neglect to pay the maximum indemnity provided for by the terms of any certificate, the word "fail" did not mean a default in any obligation assumed by the insurance company, but referred to insufficiency of the mortuary fund "by reason of insufficient membership" to pay the certificate claims against the company. *Dresser v. Hartford Life Ins. Co.*, 70 Atl. 39, 49, 80 Conn. 681.

#### As refuse or neglect

In an action by a passenger for his expulsion from a railroad train, wherein the defendant's plea averred that, when the conductor demanded of him his ticket or fare, plaintiff "refused" and "willfully failed" to present or tender any ticket or fare, and the conductor thereupon ejected him, and plaintiff's replication alleged that, when the conductor demanded his ticket or fare, he had misplaced his ticket in his clothing, and the conductor ejected him without giving him a reasonable time within which to produce the ticket, as the replication was in the nature of a confession and avoidance, it was insufficient, for, while the word "fail" at times is synonymous with "refuse," the word "refuse" here means to decline to accept, or reject, and the words "willfully fail" mean an intentional neglect, and so it does not show that plaintiff attempted to produce his ticket or notified the conductor that he had one, and requested reasonable time within which to search for his ticket, which was necessary before he could complain of his ejection. *Louisville & N. R. Co. v. Mason*, 58 South. 963, 965, 4 Ala. App. 353 (citing 7 Words and Phrases, p. 631; 8 Words and Phrases, p. 7468).

The words "fail," "refuse," and "neglect," as used in Ky. St. 1903, §§ 795, 797, providing that any railroad company which "shall fail, refuse and neglect to comply with the provisions" of the act shall be guilty of a misdemeanor, are used interchangeably, and mean something more than an unavoidable and accidental violation of the statute. *Chesapeake & O. R. Co. v. Commonwealth*, 84 S. W. 566, 568, 119 Ky. 519.

The word "failed," as used in an instruction that a defendant, after being notified to produce books and papers, has "failed" to do so, is equivalent to "refused." *F. R. Patch Mfg. Co. v. Protection Lodge, No.*

215, *International Ass'n of Machinists*, 60 Atl. 74, 83, 77 Vt. 294.

The terms "refusing" and "failing," as used in Code Pub. Gen. Laws 1904, art. 33, § 24, providing that any person who feels aggrieved by the action of any board of registry in "refusing" to register him as a qualified voter, or in erasing or misspelling his name, or that of any person on the registry, or in registering or "failing" to erase the name of any fictitious, deceased, or disqualified person, etc., have reference to what may be termed negative action in cases that have been specifically brought before the judgment of the board of registry. *Collier v. Carter*, 60 Atl. 104, 105, 100 Md. 381.

In an action for breach of an executory contract to sell land, an allegation that defendant "failed and definitely and specifically refused" to perform the contract presents something more than a mere refusal to perform, and is, as against a demurrer, sufficient to show an unqualified repudiation of the contract. *Matteson v. United States & C. Land Co.*, 115 N. W. 195, 197, 103 Minn. 407.

#### FAIL TO ACCOUNT

The phrase "fail to account," in Code, § 1017, punishing the treasurer of enumerated institutions for his failure to account, does not refer to any failure to pay on demand what is in the hands of the fiduciary, but only requires that he shall render an account or statement of the funds, and an itemized account, if required, in order that it may be known what disposition he has made of the funds intrusted to him. Where the treasurer of an association rendered a statement in writing of his receipts and payments as treasurer, which was extended to the association's officers, he complied with the Code, though he failed to pay over the balance in his hands on demand. *State v. Dunn*, 46 S. E. 949, 950, 134 N. C. 663.

#### FAIL TO ELECT

See, also, Failure to Elect.

Laws 1911, c. 62, § 9, which provides that, if a county board of health shall "fail to elect" a county superintendent within two months of the time fixed for such election, the secretary of the state board shall appoint, gives the power of appointment to the state secretary when the county board of health permits the office to remain vacant for the two months, and the state secretary properly made an appointment where the only appointee named within that time by the county board declined to qualify; the act requiring a choosing and induction into office of the superintendent within that period. *McCullers v. Board of Com'rs of Wake County*, 73 S. E. 816, 818, 158 N. C. 75, Ann. Cas. 1913D, 507.

#### FAILED AND NEGLECTED

A complainant averring that defendant for a valuable consideration agreed to pre-

sent a note and to return it at a certain time in case of nonpayment, and that defendant failed and neglected so to do, is for breach of contract and not for negligence; the term "failed and neglected," as used in the complaint, meaning that defendant "omitted" to perform. *W. H. Kiblinger Co. v. Sauk Bank*, 111 N. W. 709, 131 Wis. 595.

## FAILING

See Party Failing.

## FAILURE

Willful failure, see Willful—Willfully.

"'Failure' covers both intentional and unintentional nonperformance." *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, 391, 90 C. C. A. 364.

As ordinarily defined, a "failure" is a cessation or deficiency of supply, a partial or total deficiency in action, etc. As used in a contract to supply oil, providing that it is to be voidable on a "failure of oil wells," a substantial failure, such as to cause deficiency in supply and render the owner unable to fill his contracts, constituted a "failure of oil wells." *San Jacinto Oil Co. v. Ft. Worth Light & Power Co.*, 93 S. W. 173, 176, 41 Tex. Civ. App. 293.

Under the Mechanic's Lien Law, requiring a notice of a lien to contain the name of the owner against whose interest the lien is claimed, and providing that a "failure" to state the name or a misdescription of the true owner shall not affect the validity of a lien, a notice stating the name of the owner alternatively is sufficient. *Abelman v. Myer*, 106 N. Y. Supp. 978, 979, 122 App. Div. 470.

### As insolvency

Where the undisputed evidence showed that defendant's transferor, a merchant who had purchased a stock of goods on credit, made the transfer to defendant, either for a consideration the greater part of which was a pre-existing debt or for no consideration whatever, for the purpose of defrauding his creditors, the act of such merchant was a "failure" in business within the common acceptance of that term; and in default to recover goods sold on credit by plaintiff to such merchant shortly before the transfer it was not error to assume, in a question propounded by plaintiff to one of his witnesses, that the transferor of the goods had failed in business. *Pelham v. Chattahoochee Grocery Co.*, 47 South. 172, 174, 156 Ala. 500.

### As neglect

The action of the master of a vessel in permitting whale oil, which leaked from barrels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the "management of the vessel," within section 3 of the Harter act, 27 Stat. 445; but injury to other cargo from such oil arose from "failure in proper care of the

cargo," within section 1, for which the vessel was liable. *The Persiana*, 185 Fed. 396, 397, 107 C. C. A. 416.

### As refusal

See Refuse—Refusal.

### Want synonymous

An instruction in an action for personal injuries that, if plaintiff was injured on a certain day, "it then became her duty to use all reasonable care and precaution to minimize the damages that might result, and, if \* \* \* she failed to do this, then you cannot return a verdict for such damages that resulted by her want to exercise such care and precaution," was not so inaptly phrased as to be unintelligible to the jury notwithstanding that the word "want" was ill chosen, it being synonymous with "failure," so that it was error to refuse the charge, if otherwise correct and applicable, on the ground that it was meaningless and misleading. *Tiggerman v. City of Butte*, 119 Pac. 477, 478, 44 Mont. 138.

## FAILURE OF CONSIDERATION

Mere inadequacy in value of the thing bought or paid for is not intended by the legal expression "want or failure of consideration." This only covers total worthlessness to all parties, or subsequent destruction, partial or complete. In *re Simmons' Estate*, 96 N. Y. Supp. 1103, 1105, 48 Misc. Rep. 484 (citing *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Godine v. Kidd*, 19 N. Y. Supp. 335, 64 Hun, 585).

To entitle one to defend against a contract on the ground of "failure of consideration," the evidence must show something more than inadequacy of consideration. *Guss v. Nelson*, 78 Pac. 170, 173, 14 Okl. 296.

The failure of a party to a contract to fulfill his promise to do or refrain from doing some act before the other party is to be obligated to perform is a "failure of consideration," and relieves the other party from performing. *Ward v. Textile Commission Co.*, 123 N. Y. Supp. 918, 920, 139 App. Div. 109.

Where a conditional seller of automobiles resumed possession for the buyer's alleged failure to pay the installments required, but in fact before the buyer was in default under the contract, the seller's act constituted a repudiation of the agreement, amounting to a "failure of consideration," within Civ. Code, § 1689, providing that a party may rescind a contract for failure of consideration either in whole or in part. *Bray v. Lowery*, 124 Pac. 1004, 1005, 163 Cal. 256.

## FAILURE OF PROOF

See Total Failure of Proof.

To constitute a "failure of proof," the allegation must be unproved, not in some particular or particulars only, but in the whole general scope and meaning. *Cleveland, C., C.*

& *St. L. Ry. Co. v. Foland* (Ind.) 88 N. E. 787, 789.

Defendants, desiring to borrow money from plaintiff with which to pay their debts, estimated that they would need \$1,100, and thereby executed a note to plaintiff for that sum, with interest from maturity and two notes for \$44 each, payable in 6 and 12 months after date, representing the interest on the principal sum before maturity. Plaintiff, in fact, advanced only \$1,055, whereupon he credited \$45 on the principal note and \$1.35 on each of the interest notes, so that they would represent the actual transaction. In replevin to recover the chattels mortgaged to secure the note, the petition described the principal note as for \$1,055, payable 12 months after date, and the other two as for \$42.65, payable 6 and 12 months after date, and on the trial plaintiff offered in evidence the notes described with the credits indorsed thereon. Held, that the entry of the credits amounted to an alteration in the terms of the notes before final agreement, and was not a modification thereof, and hence there was no failure of proof within Rev. St. 1909, § 2021, providing that, to constitute a "failure of proof," the allegations of the cause of action must be unproved in its entire scope and meaning, and not in some particular only. *Shantz v. Shriner*, 150 S. W. 727, 729, 167 Mo. App. 635.

#### Variance distinguished

"Speaking technically, there is a well-defined distinction between variance and 'failure of proof'; but in a sense in which the term 'failure of proof' is constantly used—that is, as the equivalent of insufficiency of evidence—there may not be, and frequently is not, any distinction whatever. Text-books and reports speak of variance amounting to a failure of proof when referring to a case in which the evidence, though it may tend to prove a cause of action, wholly fails to prove the cause of the action alleged." Where the evidence tends to establish a cause of action utterly different from that alleged in the complaint, there is such a variance as amounts to a failure of proof, and the question of such variance may be presented on a motion for new trial, under a specification of insufficiency of the evidence to justify the verdict. *Forsell v. Pittsburgh & M. Copper Co.*, 100 Pac. 218, 221, 222, 38 Mont. 403 (citing 1 Elliott, Ev. § 204).

Where the complaint alleged a joint contract with all the defendants, and the evidence disclosed a separate contract with one of them, there was not a "failure of proof," within Rev. Codes, § 6587, providing that, where the allegation of the claim to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not deemed a case of variance, but a "failure of proof." *Logan v. Billings & N. R. Co.*, 107 Pac. 415, 416, 40 Mont. 467.

Where a petition predicated upon an express contract for the exchange of horses, under which plaintiff in a certain event might have back his horse upon returning defendant's, and upon the breach involved in defendant's refusal to give back the horse he had received, avers the happening of the event, the return of defendant's horse, and the refusal of defendant to give back the horse he had received, and that in making the trade plaintiff's horse had been valued by the parties at a certain amount, and there is proof of all the allegations, except that as to the valuation of the horse, there is no "failure of proof," but only a "variance," within the meaning of Rev. St. 1909, § 2021, defining a failure of proof as failure to prove a cause of action alleged in its entire scope and meaning, since the allegation as to valuation is not one pertaining to the cause of action at all, so that an instruction as to reasonable damages, instead of agreed damages, is properly given. *Mekos v. Fricke*, 139 S. W. 1181, 1183, 159 Mo. App. 631.

#### FAILURE TO ACT

In a will appointing testator's brother executor, and, in case of his death, resignation, or "failure to act," appointing his brother-in-law, and, "in case of his failure to act," appointing his son, the phrase quoted included the contingency of the estate not being fully administered by the brother-in-law, and not merely his failure to qualify or act at all. *In re Coudert's Will*, 138 N. Y. Supp. 296, 297, 153 App. Div. 196.

#### FAILURE TO DELIVER

Where a carrier fails to deliver a part of a shipment of freight, and the part not delivered is necessary to make the whole shipment effective, it is a "failure to deliver" the whole. *McKerall & Murchison v. Atlantic Coast Line R. Co.*, 56 S. E. 965, 76 S. C. 338.

#### FAILURE TO ELECT

See, also, Fail to Elect.

"Failure to elect" means that if there is a failure to hold an election, or if, an election being held, there is a failure to make a choice as provided by law, the other provisions of the law as to holding over become effective. *State v. Cahill*, 105 N. W. 691, 692, 131 Iowa, 155.

#### FAILURE TO FILE TRANSCRIPT

Good cause for, see Good Cause.

#### FAIR

See Full and Fair Cash Value; Unfair.

The term "fair," as used in the expression, "every contract must be fair," means free from deceit, fraud, or misrepresentation, or improper advantage taken through confidential relations. *Sheehan v. Erbe*, 79 N. Y. Supp. 43, 45, 77 App. Div. 176.

A newspaper publication, to be privileged as a publication of judicial proceedings, must be "fair"; that is, just, impartial, as to the party complaining, and reasonably correct. *Jones v. Pulitzer Pub. Co.*, 144 S. W. 441, 444, 240 Mo. 200.

The word "fair," when used in submitting a question for special finding to the jury as to whether or not certain ice was "fair merchantable ice for market," is well adapted to convey the idea of mediocrity in quality, or something just above that. *Warner v. Arctic Ice Co.*, 74 Me. 475, 477.

#### FAIR AND HONEST CRITICISM

"Criticism," as distinguished from defamatory statements, is an expression of opinion of facts from which differences of opinion may reasonably arise, and if it sticks to that, it is not defamatory, no matter though it be severe, hostile, rough, caustic, bitter, sarcastic, or satirical, for these are the weapons of "criticism"; and no matter how different the opinion may be to the opinion of others, or of a majority, however great, provided it derives its color from the facts, and the rule that all "fair and honest criticism" on any published book is not libelous, unless the critic goes out of his way to attack the private character of the author, is contradictory, for going out of the way to attack an author's private character is not "fair and honest criticism." It is not criticism at all, for criticism is confined to the expression of opinions on facts about which opinions may in good faith differ. It is only false aspersions or statements of fact that can be defamatory. And they are no part of criticism. Where they begin criticism ends. *MacDonald v. Sun Printing & Publishing Ass'n*, 92 N. Y. Supp. 37, 40, 45 Misc. Rep. 441 (citing *Sickels v. Kling*, 64 N. Y. Supp. 252, 31 Misc. Rep. 287; *Baum v. Clause* [N. Y.] 5 Hill, 199; *Ullrich v. New York Press Co.*, 50 N. Y. Supp. 788, 23 Misc. Rep. 168).

#### FAIR AND JUST

In a suit to set aside a judgment against plaintiff, rendered during his minority, an instruction that if in the former action defendant's agent made an agreement with plaintiff's guardian ad litem by which he was to pay the guardian ad litem a specified amount, and that by reason of such agreement the guardian ad litem failed to present to the court the defense of the infant, and without contest allowed defendant to recover, such judgment was not rendered after a fair and just investigation and trial, was misleading and erroneous, where the guardian ad litem testified that he agreed to the compromise after a full investigation of the infant's rights, by which he was satisfied that his ward could not succeed, and that he was not influenced or controlled by defendant's agent, and it appeared that the court before rendering such judgment heard some evidence, since it is not sufficient to set aside a judg-

ment against an infant that it was not rendered after a fair and just investigation, but it must appear that the infant had a good defense, and the terms "fair and just" may have conveyed to the minds of the jury that fraud or collusion was perpetrated, and that no judgment would be binding on a minor unless all the evidence practicable had been heard by the court. *Johnson v. Johnson*, 85 S. W. 1023, 1025, 38 Tex. Civ. App. 385.

A statute giving a right of action for the benefit of the next of kin for death by wrongful act, and limiting damages to a "fair and just compensation" for the pecuniary injuries resulting from decedent's death to the person for whose benefit the action is brought, means reasonable compensation for the pecuniary injury, considering the capacity and condition of decedent and the age, circumstances, and condition of the next of kin, but not the mental anguish of relatives. *Howey v. New England Nav. Co.*, 76 Atl. 469, 471, 83 Conn. 278.

#### FAIR AND REASONABLE PRICE

A "fair and reasonable price," which a city is obliged to pay for a waterworks system at the termination of a franchise granted to a private company, is what would be "a fair and reasonable price," to any one else. *Galena Water Co. v. City of Galena*, 87 Pac. 735, 737, 74 Kan. 644 (citing *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; *Town of Bristol v. Bristol and Warren Waterworks*, 49 Atl. 974, 23 R. I. 274).

#### FAIR CASH VALUE

The expression "fair cash value" is the equivalent of "true cash value" for the purpose of taxation. *Ankeny v. Blakley*, 74 Pac. 485, 489, 44 Or. 78.

By "fair cash value," in the rule requiring the payment of the fair cash value of property taken under eminent domain, is meant market value; but where the property is in actual use by the owner, and it possesses a peculiar value to him, which will be sacrificed if placed on the general market, he is entitled to this value as just compensation for the taking. *Southern Ry. Co. v. City of Memphis*, 148 S. W. 662, 669, 126 Tenn. 267, 41 L. R. A. (N. S.) 828.

#### FAIR CONSIDERATION

See Present Consideration.

The term "fair consideration," as used in the Bankruptcy Act, providing that all conveyances made by a bankrupt within four months next preceding his bankruptcy, with intent to defraud his creditors, shall be void, except as to purchasers in good faith and for a present, fair consideration, does not make it necessary that the consideration for the transfer should be a just equivalent of the thing bought. The word "fair," as used in the section, signifies no more than honest or free from suspicion. It is evidently not

intended as the equivalent of "adequate," unless the inadequacy is such as to indicate a purpose on the part of the vendor to cheat his creditors; and until one is declared a bankrupt third persons may deal with him as with any other, save that all transfers made by him within four months next preceding his bankruptcy, with intent on his part to hinder, delay, and defraud his creditors, shall be void, except as to good-faith purchasers for a present fair consideration. *Myers v. Fultz*, 100 N. W. 351, 352, 124 Iowa, 437 (citing *Dunlop v. Thomas*, 68 Pac. 909, 28 Wash. 521).

Where an option to purchase realty for \$950 recited a consideration of \$1, the sum, if actually advanced, would be merely nominal, and would not alone constitute a "fair consideration" required for the specific enforcement of such option. *Rude v. Levy*, 98 Pac. 560, 561, 43 Colo. 482, 24 L. R. A. (N. S.) 91, 127 Am. St. Rep. 123.

### FAIR DOUBT

Under the rule that a preliminary injunction should not be granted on an unadjudicated patent if there is "a fair doubt as to invention, anticipation, construction or infringement," the term "fair doubt" does not refer only to the effect produced on the judicial mind by the direct evidence submitted on the motion, but is wide enough to cover a belief that other reachable testimony exists which by reasonable effort the party may adduce. *Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co.*, 198 Fed. 865, 867.

### FAIR MARKET VALUE

See, also, Fair Value.

The "fair market value" of replevied goods, which plaintiff is entitled to recover in an action on a replevin bond, is the highest price which a normal purchaser, not under peculiar compulsion will pay to secure the goods. *Maguire v. Pan-American Amusement Co.*, 97 N. E. 142, 144, 211 Mass. 22.

The "fair market value" of a corporation's assets, for the purpose of determining its solvency when it committed an alleged act of bankruptcy, was the value which the corporation might have realized on them for itself. In *re Marine Iron Works*, 159 Fed. 753, 754.

"Fair market value" of land is the price which it would bring when offered for sale by one who is willing, but not obliged, to sell, and bought by one willing, but not obliged, to buy, and is not the price which property would bring at forced sale, but what it would bring in the hands of a prudent seller, with liberty to fix the time and conditions of selling. In condemnation proceedings, an instruction that "fair market value" meant the price which property would bring when offered for sale by one willing, but not obliged, to sell, and bought by one willing, but not obliged to buy; that it did

not mean the price which property could bring at forced sale, but what it would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale, was not erroneous, because of the statement as to "a prudent seller," etc. *Metropolitan St. Ry. Co. v. Walsh*, 94 S. W. 860, 961, 197 Mo. 392.

An instruction that the jury must find the fair market value of the strip actually taken as a part of the whole tract, and that the "fair market value" of the strip actually taken as a part of the whole tract, and that the "fair market value" is the "full fair market value," defined as such a sum as the property was worth in the market to persons generally who would pay its "just and full value," was not erroneous for using the words "full fair market value" and "just and full value." *American States Security Co. v. Milwaukee Northern Ry. Co.*, 120 N. W. 844, 876, 139 Wis. 199.

### FAIR ON ITS FACE

Within the law of false imprisonment, the term as applied to process of "fair upon its face" does not mean that it shall be perfectly regular and in all respects in accord with proper practice and after the most approved form, but what is intended is that it shall be apparently process lawfully issued and such as the officer might lawfully serve. The true rule on the subject is that a ministerial officer, proceeding regularly and without abusing or exceeding his authority, will be protected in the execution of process committed to him, unless such process is void on its face by reason of apparent want of jurisdiction of the subject-matter or person or precept or by reason of some defect of substance in the language of the writ. The warrant for arrest issued by a United States commissioner is not void, so as to make the marshal serving it liable for false imprisonment, because after his signature is the designation "Commissioner of the Circuit Court of the United States for the Western District of Arkansas," though in the body of the warrant he was designated "commissioner appointed for said district"; the designation after his name being a clerical error, and such office having been abolished. *Douglass v. Stahl*, 72 S. W. 568, 570, 71 Ark. 236 (quoting and adopting definitions Cooley and Freeman, and citing *Savacool v. Boughton* [N. Y.] 5 Wend. 170, 21 Am. Dec. 181, and notes; *Trammell v. Town of Russellville*, 34 Ark. 105, 36 Am. Rep. 1).

By process "fair on its face" is not meant that it shall appear in all respects in accord with proper practice, but it is meant "that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that

nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it." A motion and warrant of arrest, under which a marshal acted, issued by one temporarily in charge of the clerk's office, under instructions given by the deputy in a suit in which the libel disclosed only a personal action for damages, of which there was no suggestion on the face of the writ, which was in the usual form of a motion and warrant of arrest in a suit in rem, and which ran in the name of the President, was addressed to the marshal, commanded him to seize the vessel and to detain it until the further order of the court, bore teste of the judge of the District Court, was sealed with the seal of the court, purported to be signed by the deputy on behalf of the clerk, and was transmitted from the clerk's office to the marshal's office in the usual way, was within the rule. *Bryan v. Ker*, 32 Sup. Ct. 28, 222 U. S. 107, 113, 56 L. Ed. 114.

### FAIR PREPONDERANCE

By the term "fair preponderance" of evidence is meant such evidence as, when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. *Neely v. Detroit Sugar Co.*, 101 N. W. 665, 666, 138 Mich. 469. It is not a technical term, but simply means that evidence which outweighs that which is offered to oppose it. It does not necessarily mean that a greater number of witnesses shall be produced on one side or the other, but that, on the whole evidence, the jury believe the greater probability of the truth to be upon the side of the party having the affirmative of the issue. *Devencenzi v. Cassinelli*, 81 P. 41, 42, 28 Nev. 222 (quoting and adopting definition in *Strand v. Chicago & W. M. Ry. Co.*, 34 N. W. 712, 67 Mich. 380).

The use of the word "fair" in the phrase "the burden of proof is upon plaintiff to satisfy you by a 'fair preponderance' of the evidence" does not render the charge misleading. *Parker v. Fairbanks-Morse Mfg. Co.*, 110 N. W. 409, 411, 130 Wis. 525. And it was not necessarily prejudicial error to instruct that plaintiff was required to establish his case by a "fair preponderance." *Clark v. Thornburg*, 92 N. W. 1056, 1058, 66 Neb. 717.

Where there was a verdict for plaintiff, and the trial judge granted a new trial on the ground that the verdict was against a "fair preponderance" of the evidence, the words "fair preponderance" did not express doubt on the part of the judge as to the weight of the evidence, but is an expression of dissatisfaction with the verdict, in that it fails to administer substantial

justice. *McMahon v. Rhode Island Co.*, 78 A. 1012, 1014, 32 R. I. 237, Ann. Cas. 1912D, 1223.

"Fair," as used in an instruction in an action in ejectment, directing the jury to find for defendant, if plaintiff has failed to prove his title and right of possession by a "fair preponderance" of all the credible evidence, means practically the same as "clear preponderance." *Link v. Campbell*, 100 N. W. 409, 410, 72 Neb. 307 (citing *Altschuler v. Coburn*, 57 N. W. 836, 38 Neb. 881).

The term "fair preponderance" of evidence, used in an instruction, is meaningless. *Hammond, W. & E. C. Electric Ry. Co. v. Antonia*, 83 N. E. 766, 769, 41 Ind. App. 335.

### FAIR PRICE

Where an agreement is that land sold shall be reconveyed for a "fair price," the terms are not so uncertain as not to be enforced, and the court will direct the valuation to be made by a master, and will enforce the execution of the contract. *Van Doren v. Robinson*, 16 N. J. Eq. 256, 260.

### FAIR STATEMENT OF FACTS

See Full and Fair Statement of All the Facts.

### FAIR TRIAL

"A 'fair trial' is a legal trial, or one conducted in all material things in substantial conformity to law." *People v. Wolf*, 76 N. E. 592, 595, 183 N. Y. 464.

A "fair trial" for a criminal offense consists, not alone in an observance of the naked forms of law, but in a recognition and just application of its principles. *State v. Pryor*, 121 Pac. 56, 58, 67 Wash. 216.

A member of the police force of New York City charged with violating a rule forbidding maltreatment, etc., did not have a "fair trial" where the deputy commissioner, while the trial was in progress, announced, basing his statement on what he said was the most reliable information, but not stating the source or naming or calling as a witness his informant, that a witness for accused who had sworn that he was present when the occurrence took place, and that the facts were substantially as accused claimed, was not present, and did not see the event at all. *In re Greenebaum*, 94 N. E. 853, 854, 201 N. Y. 343.

Under a by-law of a labor union, providing that any member, upon being accused of a violation of its laws, should be entitled to due notice and a fair trial, it was unnecessary to determine just what the term "fair trial" meant, or under what circumstances the courts of law could properly ignore the results of a trial held thereunder, on the ground that it was not a fair trial, where the provisions of the by-law relative to due notice were not complied with. *Bren-*



nan v. United Hatters of North America, Local No. 17, 65 Atl. 165, 168, 73 N. J. Law, 729, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698.

### FAIR VALUE

See, also, Fair Market Value.

Allegations as to the "fair value" of the property, do not come within Sess. Laws 1901, p. 238, § 10, requiring all taxable property to be assessed at its "full cash value." *Humbird Lumber Co. v. Thompson*, 83 Pac. 941, 945, 11 Idaho, 614.

Under Bankr. Law, § 1, 30 Stat. 544, providing that a person shall be deemed insolvent when the aggregate of his property, exclusive of any property which he may have transferred, concealed, or removed with intent to defraud his creditors, shall not at a "fair valuation" be sufficient in amount to pay his debts, the present market value of the property would be its "fair valuation," and there is nothing in the section authorizing that value to be ascertained by what a purchaser would give who desired to take advantage of the necessities and embarrassments of the owner in order to procure the property at a price less than its real or market value. A man's property at a fair valuation may amount to sufficient to pay his debts, although he may not be able to realize at once the amount of that valuation. *Swartz v. Frank*, 82 S. W. 60, 62, 183 Mo. 438 (quoting and adopting definition in *Duncan v. Landis*, 106 Fed. 858, 45 C. C. A. 666).

"Fair valuation," within Bankr. Act, § 1, when applied to real property, is such sum as the property will reasonably sell for to a purchaser desiring to buy, the owner wishing to sell, and when applied to merchandise, implements, and other personal property, such sum that may be fairly realized from the sale in bulk or in parcels in the usual and ordinary way of selling such classes of property for cash in the market, and when applied to notes and accounts is the net sum that may be with reasonable diligence realized from the collection thereof within a reasonable time, and not the amounts as shown by their face, unless their face value is the "fair value." *Plymouth Cordage Co. v. Smith*, 90 Pac. 418, 419, 18 Okl. 249, 11 Ann. Cas. 445.

"Fair valuation," in Bankr. Act, § 1, 30 Stat. 544, means such a price as a capable and diligent business man could presently obtain from the property after conferring with those accustomed to buy such property. *Stern v. Paper*, 183 Fed. 228, 231.

In determining whether or not a debtor was "insolvent," within Bankr. Act, § 1, 30 Stat. 544, at the time of the commission of an alleged act of bankruptcy by suffering a creditor to obtain a preference through legal proceedings, the test of a "fair valuation" of his property is its market value at the

time the legal proceedings were taken, where that can be fairly established, and not its value as it may have been affected by such proceedings; and the property to be taken into consideration includes all of his property, whether legally exempt from execution or not, except such as may have been conveyed, concealed, or removed with intent to defraud, hinder, or delay his creditors. In *re Hines*, 144 Fed. 142, 143.

### FAIRLY

"Fairly," in a charge instructing the jury "that, if the evidence introduced by the plaintiff \* \* \* fairly raises a presumption \* \* \* that he was guilty of contributory negligence, then the burden is on him," means "reasonably" or "measurably," rather than "clearly." *Cincinnati Traction Co. v. Johnson*, 32 Ohio Cir. Ct. R. 594, 595.

Under the rule that it is essential, to the existence of a presumption that the bill of exceptions contains all the evidence, that the bill of exceptions should on its face "fairly" purport to state the evidence or its effect, if there is apparent any attempt to state the effect of the evidence given on the trial, that is, all the evidence, it must be held that the bill fairly purports to state all the evidence, and the presumption will obtain, but where by its terms the bill is limited to the statement of only a portion of the material evidence, where it simply states that "testimony given during the trial included the following," it cannot be said that the bill fairly purports to give all the evidence or its effect. *People v. Coulter*, 78 Pac. 348, 353, 145 Cal. 66.

### FAIRNESS

See Intrinsic Fairness and Honesty.

"The 'fairness' of a contract, like its other qualities, must be judged of at the time it is entered into, or at least when the contract becomes absolute, and not by subsequent events." A contract whereby defendant, aided by the advice and co-operation of her husband, who was a lawyer, contracted to sell for \$20,000 all the phosphate rock underlying described land, the right to mine being subject to timber rights, which might prevent plaintiff from mining a large tract of the land until 1923, was not so unfair as to prevent specific performance, though explorations disclosed that on the land there was phosphate rock on which a reasonable royalty would produce \$70,000. *Heyward v. Bradley*, 179 Fed. 325, 331, 102 C. C. A. 509 (quoting and adopting definition in *Fry*, Spec. Perf.).

### FAIR GROUNDS

The words "fair grounds," in Gen. St. 1902, § 1358, declaring a punishment for any one who shall, within one mile of the fair

grounds of any incorporated society, expose for sale, from any wagon or temporary stand, any article of provision without the consent of the society, are used as the equivalent of the words "exhibition or fair," used in the original act (Pub. Acts 1868, p. 147, c. 14), so that the prohibition extends only to a sale while a fair is being held. *State v. Reynolds*, 58 Atl. 755, 756, 77 Conn. 131.

## FAITH

See Bad Faith; Confession of Faith; Full Faith and Credit; Good Faith.

"The basic principle upon which presumptions are built is philosophically related to the doctrine of faith. 'Now faith,' says Paul, 'is the substance of things hoped for, the evidence of things not seen.' Heb. xi, 1, q. v. 'Presumption,' says Matthews (1 Math. Pres. Ev.), 'is a principle of law by which, for the furtherance and support of right, facts not established by positive evidence are inferred from circumstances.' That is, where the thing itself is unseen and unknown, in a close sense, it may yet be deemed seen and known in the light of the knowledge of mankind, based on frequent occurrence, and found from experience to be generally accordant with truth." *Rodan v. St. Louis Transit Co.*, 105 S. W. 1061, 1066, 207 Mo. 392.

Statements of the applicant for insurance that he has never been intoxicated and that his deceased maternal grandmother was never insane are statements of opinion, and, where the applicant in good faith believes them, their falsity will not vitiate the certificate warranting the truth of the answers, and stipulating that he agrees that the literal truth of each shall be a condition precedent to any contract issued on the faith of the answers; the word "faith" meaning a firm conviction of the truth of what is declared by another by way of testimony without other evidence. *Daniel v. Modern Woodmen of America*, 118 S. W. 211, 214, 53 Tex. Civ. App. 570.

## FAITHFUL—FAITHFULLY

The word "faithfully," as used in a statute requiring a commissioner to take depositions to be sworn to execute the commission faithfully, fairly, and impartially, cannot be disregarded, and executing the commission involves more than merely taking the testimony. *Brennan Mfg. Co. v. Adams*, 68 Atl. 765, 76 N. J. Law, 61 (citing *Den ex dem. Perry v. Thompson*, 16 N. J. Law, 72; *Lawrence v. Finch*, 17 N. J. Eq. 234, 239, 240).

## FAKE

In the publication: "Hints to Advertiser. This is from the fake trade journal published at St. Louis"—the word "fake" is used in the sense of "a swindle; a trick; to steal

or filch." *Midland Pub. Co. v. Implement Trade Journal Co.*, 83 S. W. 298, 300, 108 Mo. App. 223 (quoting and adopting definition in Cent. Dict.).

## FALDAS

The "faldas" of the Sierra Nevada does not mean the foothills, but the base or slope of the mountains. *Moore v. Wilkinson*, 13 Cal. 478, 486.

## FALL

The word "fall," as used in a complaint in an action on an accident policy, alleging that insured fell from the cars and received injuries, from which he died, implies the happening by chance of an undesigned and involuntary event, which resulted in bodily injuries effecting the death of the insured through external, violent, and accidental means, within the terms of the policy. *Richards v. Travelers' Ins. Co.*, 100 N. W. 428, 429, 18 S. D. 287, 67 L. R. A. 175.

A "fall," as used in connection with a painter's staging to raise and lower it, consists of four ropes inserted in pulleys, which ropes are attached to a ladder and run from it to the building, where they are connected with a sling by a block and tackle. *Bort v. Quadt*, 96 Pac. 815, 816, 8 Cal. App. 290.

The clause in a fire policy, "If a building or any part thereof 'fall,' except as the result of fire, insurance shall cease, is properly interpreted by the instructions, taken as a whole, that the building must have fallen in whole or part to such an extent that its integrity as a building was destroyed or substantially impaired; that insured could recover if the building was substantially in its entirety, and not materially impaired after the falling of parts shown to have fallen; and that the insured was not entitled to verdict unless the substantial integrity of the building was impaired to such an extent as to render it unsuitable for use as an entire building, or unless the falling of the parts that fell exposed the interior of the building or its contents to the inclemency of the weather, or rendered the building or its contents more easily subject to ignition by fire, and thereby materially impaired the building as a building. *Clayburgh v. Agricultural Ins. Co. of Watertown, N. Y.*, 102 Pac. 812, 155 Cal. 708, 18 Ann. Cas. 579.

## FALSE—FALSELY

In Rev. St. § 5457, providing that every person who falsely makes, forges, or counterfeits, procures to be falsely made, forged, or counterfeited, etc., any coin or bars in resemblance or similitude of the gold or silver coin or bars coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign

gold or silver coin which by law is, or may be, current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell or bring into the United States from any foreign place, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, or who has in his possession any false, forged, or counterfeited coin, with intent to defraud, shall be punished, the adverb "falsely" in the opening line qualifies only the verb "makes," since the verbs "forgeries" and "counterfeits" carry in themselves the idea of falsity, and hence the intent to defraud is only an element of the offense of having in possession with intent to use, etc. *Kaye v. United States*, 177 Fed. 147, 151, 100 C. C. A. 567.

The term "false," as used in Pen. Code, § 118, defining perjury, and providing that every person who, having taken an oath that he will testify truly, willfully and contrary to such oath states as true any material fact which he knows to be "false," is guilty of perjury, means false in fact, as distinguished from legal falsity. *People v. Wong Fook Sam*, 79 Pac. 848, 146 Cal. 114.

An allegation that the "defendants falsely and fraudulently represented to plaintiff with the intent to deceive him" that one of the defendants was about to abandon his barber business sufficiently alleged a present intent by defendant not to perform their promise existing when it was made; the word "false," when applied to representations inducing an act to another's injury, implying a purpose to deceive, and a "false representation" being an untrue representation willfully made to deceive another to his damage. *Salles v. Johnson*, 81 Atl. 974, 976, 85 Conn. 77, Ann. Cas. 1913A, 386.

#### As intentionally untrue

The word "false" has two distinct and well-recognized meanings. It signifies (1) intentionally or knowingly or negligently untrue; and (2) untrue by mistake, accident, or honestly after the exercise of reasonable care. A statement that is false in the former sense is undoubtedly denounced by Act June 10, 1890, c. 407, § 9, 26 Stat. 135, prescribing a punishment for the use of a false statement in an entry of imported goods. *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 966, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185.

"False" means erroneous, untrue, the opposite of correct or true, and, as often used, does not necessarily involve turpitude of mind, but in the more important uses in jurisprudence, and even in its popular application, the word implies something more than a mere untruth, but is an untruth coupled with a lying intent, or intent to deceive, or to perpetrate some treachery or fraud. *Wil-*

*liams v. Territory*, 108 Pac. 243, 244, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032.

The word "false" as used in Bankr. Act 1898, § 14b, 30 Stat. 550, as amended, 32 Stat. 797, with reference to a ground for denying a discharge to a bankrupt, means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive, and such a statement, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue. *Gilpin v. Merchants' Nat. Bank*, 165 F. 607, 611, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023.

In Customs Administrative Act, § 9, providing that, if any person shall make any entry of imported merchandise by fraudulent or false invoice or false statement, or shall be guilty of any guilty act or omission, he shall forfeit the merchandise and be fined or imprisoned, the word "false" implies the necessity of guilty scienter and intent. *United States v. Twenty Boxes of Cheese*, 163 Fed. 369, 371.

#### As untrue

"False," as used in Bankr. Act, § 14, cl. b (3), 30 Stat. 550, as amended by 32 Stat. 797, forbidding the discharge of a bankrupt who has obtained property on credit upon a materially "false" statement, means no more than "not true," though the word is flexible, and sometimes means "incorrect," and sometimes comprehends wickedness or fraud, as in section 29, where the term "false oath" means a corruptly false oath, such as would subject affiant to a prosecution for perjury. In re *Gilpin*, 160 Fed. 171, 183.

#### FALSE AFFIDAVIT

The term "false affidavit" includes one false in recitals of fact, although sworn to by a person really existent under a statute making the presentation of an affidavit in support of a claim against the government a felony, where presented on general intention to defraud by one knowing the same to be false, altered, forged, or counterfeited. Such an affidavit relates to the form of the paper, and it is false, though the officer administering the oath was not qualified, nor the oath administered, nor the paper forged. *Williams v. Territory*, 108 Pac. 243, 244, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032.

Where the statements made in an affidavit in support of a pension claim are true, it is not a "false or fraudulent affidavit," the making of which constitutes a crime, under Rev. St. § 4746, merely because it was not in fact sworn to on the date shown in the notary's certificate. *United States v. Wood*, 127 Fed. 171, 173.

#### FALSE AUDITING AND PAYING OF CLAIMS

To justify the conviction of an officer for falsely auditing and paying claims in viola-

tion of Penal Law (Consol. Laws, c. 40) § 1863, the knowledge of accused must be shown to be knowledge that the claim, when certified to, was false and fraudulent, and there must be clearly inferable a criminal intent to do the wrongful act. The elements of the offense denounced by Penal Law (Consol. Laws, c. 40) § 1863, punishing the "false auditing and paying of claims," are that accused is a public officer of a city, that it is a part of his duty to audit, allow, or pay a claim against the city, and that he knowingly in any way connives at the auditing, allowance, or payment of a false claim. *People v. Gresser*, 124 N. Y. Supp. 581, 584.

### FALSE CERTIFICATE

A "false certificate" of citizenship, within the meaning of Rev. St. §§ 5425, 5427, which made it a criminal offense to knowingly use, or aid and abet another in using, "any false, forged, antedated or counterfeited certificate of citizenship," etc., is not limited to one which is forged, but includes one which is false in its recital of facts. *Dolan v. United States*, 133 Fed. 440, 450, 69 C. C. A. 274.

### FALSE CHECKS

A check is "false" within Pen. Code 1901, § 489, making it a felony to obtain money or property by a false or bogus check, when it is a willfully untrue written order directing a bank to pay money on demand. *Williams v. Territory*, 108 Pac. 243, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032. A check given by a person upon a bank in which he has no funds, and which he has no reason to suppose will be honored, is a "bogus check." *Id.*

### FALSE CLAIM

A "false claim" means a statement or a claim which is not true; but the law did not intend to make a mere mistake, made through error or inadvertence, to be brought within the definition of a false claim as used in the law, if it was believed by the agent to be true. *Bridgeman v. United States*, 140 Fed. 577, 594, 72 C. C. A. 145.

A "false claim," under a statute making it an offense to present a false claim to county or city accounting officers, is a claim presented for more work performed or supplies furnished than was actually performed or furnished. *Brunaugh v. State*, 90 N. E. 1019, 1025, 173 Ind. 483 (citing *United States v. Shapleigh*, 54 Fed. 126, 4 C. C. A. 237).

### FALSE ENTRY

Make false entry, see *Make*.

An entry on the books of a national bank by the cashier as a cash item of a check which actually entered into a transaction of the bank is not making a "false entry," under Rev. St. § 5209, though he knew the check to be worthless and fraudulent, and made the entry with the intent to deceive, as

the entry is a truthful statement of the actual transaction. *United States v. Young*, 128 Fed. 111, 113.

Officers of a national bank may not make a "false entry" in the bank's books with intent to deceive, and escape criminal liability because they go through the idle and deceitful form of making a transaction to which the entry might nominally, but not really, relate. *Billingsley v. United States*, 178 Fed. 653, 663, 101 C. C. A. 465.

A "false entry" is an entry made in such book by an officer of the bank, that is intentionally and knowingly false when made, and made with intent to deceive the officers of the bank or defraud the association. The offense may be committed personally or by direction to another. A simple mistake by an officer in making an entry in one of the company's books, growing out of a clerical error, is not a false entry. *United States v. Wilson*, 176 Fed. 806, 808.

The statute includes a report voluntarily made, as well as one required by law, if the "false entry" was made with the requisite unlawful intent. *Harper v. United States*, 170 Fed. 385, 388, 95 C. C. A. 553.

A national bank, of which defendant was cashier, was in straitened circumstances, so that the president, cashier, and assistant cashier had not drawn their salaries for five months. Each of the officers having overdrawn his individual account with the bank to the amount of their unpaid salaries, the bank examiner required the overdraft to be made good, and the officers induced F., who was solvent, to execute his note to the bank for their accommodation, and this was discounted; the proceeds being credited to the officers' individual accounts. Held, that the note, while accommodation paper so far as the officers of the bank were concerned, was enforceable against the maker by the bank, and hence its inclusion in a report made by the cashier to the Comptroller of the Currency as a loan and discount of the bank did not constitute the making of a "false entry." *Hayes v. United States*, 169 Fed. 101, 103, 94 C. C. A. 449.

Entries in the books of a national bank, which correctly record actual transactions of the bank, although such transactions may have been unauthorized, or even fraudulent, are not "false entries." *Twining v. United States*, 141 Fed. 41, 44, 72 C. C. A. 529.

Under Kirby's Dig. § 1726, making guilty of forgery one who, with intent to defraud, shall "make any false entry" or shall "falsely alter any entry" in the books of account of a banking corporation, an indictment charging that defendant did feloniously alter, etc., the books, etc., and that "said felonious, fraudulent changes," etc., were made, etc., was defective in not charging that the entry was falsely altered; the word "false" distinctly

characterizing a wrongful act known to involve an error or untruth, while the word "fraudulent" relates, not to the act done, but to the intent with which it was done, and the word "falsely" as used in the statute not only imparting an element of fraud or bad faith, but also relating to the act done. *Quertmours v. State*, 127 S. W. 951, 952, 95 Ark. 48.

### FALSE IMPRISONMENT

"False imprisonment" is a wrong akin to that of assault and battery, and consists of imposing, by force or threats, unlawful restraint on a person's freedom of locomotion. It is the unlawful detention of a person against his will. *New York, P. & N. R. Co. v. Waldron*, 82 Atl. 709, 712, 116 Md. 441, 39 L. R. A. (N. S.) 502.

"False imprisonment" is the unlawful detention of the person of another against his will. The gist of the action is the unlawful detention. *Marshall v. Cleaver* (Del.) 56 Atl. 380, 381, 4 Pennewill, 450; *McCaffrey v. Thomas* (Del.) 56 Atl. 382, 383, 4 Pennewill, 437.

"False imprisonment" is defined by Civ. Code 1895, § 3851, to be an unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty. *Michael v. Bacon*, 63 S. E. 228, 5 Ga. App. 331.

"False imprisonment" is the unlawful arrest and detention of the person of another, with or without a warrant or other process, or an unlawful restraint upon his person, or control over the freedom of his movements by force or threat; and every such force, restraint or confinement is unlawful, where it is not authorized by law. *Smith v. Clark*, 106 Pac. 653, 657, 37 Utah, 116, 26 L. R. A. (N. S.) 953, Ann. Cas. 1912B, 1366.

Under Pen. Code 1895, art. 593, relating to circumstances justifying the use of force for the detention of a person against his will, any restraint put upon the actions of another is *prima facie* unlawful and constitutes a "false imprisonment." *Gold v. Campbell*, 117 S. W. 463, 465, 54 Tex. Civ. App. 269.

In an action against a railway company, its local commercial agent, and an officer employed by the company for false imprisonment, evidence that while plaintiff agreed to take a trip with the officer, when the time came for starting he refused to go and was compelled to go, justified a charge that the officer in taking plaintiff on the trip to various stations was falsely imprisoning plaintiff. Where plaintiff was falsely detained against his consent by defendant officer employed by defendant railroad company, he did not have to be under legal arrest to make the officer liable for false imprisonment. If plaintiff voluntarily went on a trip with defendant officer employed by defendant railroad com-

pany, there was no "false imprisonment," since false imprisonment is based on detention of another against his consent and without express authority of law. *Houston & T. C. R. Co. v. Roberson* (Tex.) 138 S. W. 822, 823.

"False imprisonment" is a trespass committed by one man against the person of another by unlawfully arresting him and detaining him without any legal authority." A cause of action for false imprisonment accrues whenever a person is arrested and detained by one not an officer acting without a warrant when no crime has in fact been committed by him, no matter with what good faith the party who caused the arrest acted. *Johnston v. Bruckheimer*, 118 N. Y. Supp. 189, 191, 133 App. Div. 649 (quoting and adopting definition in *Add. Torts*, p. 552).

"False imprisonment" is a "trespass committed against a person by unlawfully arresting and imprisoning without any legal authority." The arrest of the right person by the wrong name, through a misnomer in the process, without an allegation that the true name is unknown, has been held to be false imprisonment. A warrant which is void on its face, because the complaint which is recited in the warrant charges no offense, will afford no protection in an action for false imprisonment. *Gelzenleuchter v. Niemeyer*, 25 N. W. 442, 444, 64 Wis. 316, 54 Am. Rep. 616 (citing *Scheer v. Keown*, 29 Wis. 586).

The gist of an action for "false imprisonment" is an unlawful detention. *Schultz v. Greenwood Cemetery*, 83 N. E. 41, 190 N. Y. 276.

One who without first ascertaining whether a crime has been committed causes another to be arrested acts at his peril. An officer who makes an arrest on the sole authority of a telegram from a private person does so at his peril. *James v. Wilson*, 44 South. 275, 276, 119 La. 491.

### Force required

"To constitute an unlawful imprisonment, where no force is actually employed, the submission must be to a reasonably apprehended force; and the fact that one considers himself restrained in person is not sufficient to constitute a 'false imprisonment,' unless there is in fact a reasonable ground to apprehend a resort to force upon an attempt to assert one's liberty." A mere unasserted purpose to forcibly detain is not sufficient. *Powell v. Champion Fiber Co.*, 63 S. E. 159, 160, 150 N. C. 12.

### Manner or place of imprisonment

To establish "false imprisonment" it is not necessary that the person restrained of his liberty shall be touched or actually arrested. It may be committed by merely operating on the will of the individual by

threats, or by personal violence, or both. It is not necessary that the individual be confined within a prison, or within walls, or that he be assaulted; the offense being complete on the submission of the party, where there is reasonable ground to apprehend that coercive measures will be used if he does not yield. *Martin v. Houck*, 54 S. E. 291, 293, 141 N. C. 317, 7 L. R. A. (N. S.) 576 (citing *Voorhees*, *Arrest*, §§ 274-276).

"False imprisonment" is the unlawful and total restraint of the liberty of the person." The right violated by this tort is "freedom of locomotion. It belongs, historically, to the class of rights known as simple or primary rights (inaccurately called absolute rights) as distinguished from secondary rights, or rights not to be harmed. It is a right in rem; it is available against the community at large. The theory of the law is that one interferes with the freedom of locomotion of the other at his peril. The right of freedom of locomotion is violated when one is wrongfully detained against his will, or is in any way deprived, as distinguished from obstructed or subjected to inconvenience, of his right to come, or go, or stay, when and where he wishes. Some conduct imposing restraint or detention is essential, but any conduct resulting therein is sufficient. It is the unlawful interference with the wish or desire of plaintiff which the law seeks to compensate. Free egress must therefore be impossible; the restraint must be total. There is no legal wrong unless the detention was involuntary. Plaintiff entered upon grounds which were lawfully in possession of schoolboys, who were giving a free picnic, and who had given notice in advance that later in the day a game of base-ball would be played, to which a trifling admission fee would be charged. When the game was about to begin he refused, though repeatedly requested so to do, to pay the fee or go out, and he was thereupon taken by the arm by a citizen, one of the assembled guests or patrons, acting in behalf of the boys, though without special authority, and led in the direction of the gate, always with the privilege of paying and staying, and the alternative of not paying and going. Before reaching the gate he paid the fee, and thereafter stayed and witnessed the game. The restraint imposed was not total, and afforded no grounds of an action in damages for false imprisonment. *Crossett v. Campbell*, 48 South. 141, 143, 122 La. 659, 20 L. R. A. (N. S.) 967, 129 Am. St. Rep. 362 (quoting and adopting definitions in 19 Cyc. pp. 319-323).

Under Pen. Code 1895, art. 618, "false imprisonment" consists of imposing by force or threats an unlawful restraint upon a man's freedom of locomotion, and the wrong may be committed by words alone, or by acts alone, or by both, and by operating on the will of the individual, by personal violence,

or by both. *Gold v. Campbell*, 117 S. W. 463, 465, 54 Tex. Civ. App. 269.

"False imprisonment" is the unlawful restraint of a person, contrary to his will, either with or without process of law. It is the placing of a person, against his will, in a position where he cannot exercise it in going where he may lawfully go, and detaining him at the will of another without lawful authority. It has been said that any deprivation of the liberty of another without his consent, whether by actual violence, threats, or otherwise, constitutes imprisonment within the meaning of the law. Apprehension or fear, by which a person is restrained of his liberty, may consist in his fear of some injury either to his person, reputation, or property. The placing of a person against his will in a position where he cannot exercise it in going where he may lawfully go, and detaining him at the will of another without lawful authority, is "false imprisonment." *C. N. Robinson & Co. v. Green*, 43 South. 797, 799, 148 Ala. 434.

To constitute "false imprisonment," it is not necessary that the individual be actually confined or assaulted, or even that he be touched. The essence of the wrong is that the one complaining has been wrongfully detained against his will. Where a conductor came to where a passenger was after sustaining an injury and informed him that the law required the conductor to obtain from him a written statement, and relying on the truth of the statement of the conductor the passenger consented to remain and made a statement, and was detained thereby from 15 to 20 minutes, a finding that the passenger's detention was unlawful, and that the carrier was liable for the natural and proximate results thereof, was justified. *Whitman v. Atchison, T. & S. F. Ry. Co.*, 116 Pac. 234, 237, 85 Kan. 150, 34 L. R. A. (N. S.) 1029, Ann. Cas. 1912D, 722.

#### Malice or probable cause

A case of "false imprisonment" is made out when it is shown that plaintiff was intentionally detained as a prisoner by defendant without any warrant therefor. He is not required to prove malice or want of probable cause. *Thompson v. Bucholz*, 81 S. W. 490, 491, 107 Mo. App. 121.

The gist of an action for "false imprisonment" is the unlawful detention, and, to recover, it is only necessary to prove the detention and the unlawfulness thereof, and want of probable cause need not be proved. *Wehmeyer v. Mulvihill*, 130 S. W. 681, 683, 150 Mo. App. 197.

"False imprisonment" is treated as a tort and also as a crime. The definition is the same in either case. In our Code (Pen. Code 1895, § 420) it is defined as "the unlawful violation of the personal liberty of another," and neither malice, nor, ordinarily, want of probable cause, is an element of the

right to recover therefor. *Kroeger v. Passmore*, 93 Pac. 805, 807, 36 Mont. 504, 14 L. R. A. (N. S.) 988.

Where plaintiff in a suit on a judgment against petitioner acts maliciously in causing petitioner's arrest, plaintiff is liable in damages for the injury sustained by reason of such "false imprisonment." *Ex parte Morton*, 81 N. E. 869, 870, 196 Mass. 21, 11 L. R. A. (N. S.) 1087.

"The constituent elements of 'false imprisonment' are, first, the detention or restraint; and, second, the unlawfulness of the detention or restraint. Conversely, it has been held that the defendant, in order to escape liability, must either prove that he did not imprison plaintiff, or he must justify the imprisonment. \* \* \* In the action for damages for false imprisonment, the motives of defendant are not material so far as making out the right of action is concerned, though, as is observed in another place, the contrary is true for malicious prosecution. Where, however, a false imprisonment is shown, the motives of defendant may affect the measure of damages." *Southern R. Co. in Kentucky v. Shirley*, 90 S. W. 597, 599, 121 Ky. 863, 12 Ann. Cas. 33 (quoting and adopting definition in 12 Am. & Eng. Enc. Law. [2d Ed.] pp. 724, 733).

#### Malicious prosecution distinguished

There is a well-marked distinction between an action for "false imprisonment" and an action for "malicious prosecution." An action for false imprisonment may be maintained when the imprisonment is without legal authority; but where there is a valid or apparently valid power to arrest, the remedy is by an action for malicious prosecution. The want of lawful authority is an essential element in an action for false imprisonment. Malice and want of probable cause are the essentials in an action for malicious prosecution. *Roberts v. Thomas*, 121 S. W. 961, 962, 135 Ky. 63, 21 Ann. Cas. 456.

The distinction between "false imprisonment" and "malicious prosecution" is "that 'false imprisonment' is some interference with the personal liberty of the plaintiff which is absolutely unlawful and without authority. 'Malicious prosecution' is in procuring the arrest or prosecution under lawful process on the forms of law, but from malicious motives and without probable cause." A presiding judge of an election, who, without authority, arrests and detains a voter, is liable for false imprisonment, though he is a judicial officer and has a judicial discretion within prescribed limits. *Smyth v. State*, 103 S. W. 899, 901, 51 Tex. Cr. R. 408 (quoting and adopting definition in *Herzog v. Graham*, 9 Lea [77 Tenn.] 152).

An amendment of a count of a complaint for "malicious prosecution" by striking out an allegation that plaintiff was arrested on a warrant, and substituting an al-

legation that she was arrested and held without a warrant, changed the cause of action stated, under the law of Alabama, from one in case for "malicious prosecution" to one in trespass for "false imprisonment," and rendered the charge of the court based on the theory that the count was for "malicious prosecution" misleading and erroneous. *Western Union Tel. Co. v. Thompson*, 144 Fed. 578, 580, 75 C. C. A. 334.

"False imprisonment" is distinguished from "malicious prosecution" in that it is, as defined by Pen. Code, § 236, an unlawful violation of another's personal liberty, an unlawful arrest or detention of one without warrant or by an illegal warrant, or a warrant, illegally executed, while if the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is a malicious prosecution. *Donati v. Righetti*, 97 Pac. 1128, 1129, 9 Cal. App. 45.

Where a peace officer arrests a person without process and takes him before a magistrate, before whom he files a written complaint against the prisoner, describing no offense against the law, and after the hearing the person is set at liberty, an action for "malicious prosecution" does not lie, but the party has immediate cause of action for "false imprisonment." *Hackler v. Miller*, 112 N. W. 303, 79 Neb. 206.

"The two actions of false imprisonment and malicious prosecution are quite distinct and different. 'False imprisonment' is the unlawful violation of the personal liberty of another (Pen. Code, § 236); the interference with the liberty of the plaintiff in a way which is absolutely unlawful and without authority. \* \* \* The provocation, motive, and good faith of the defendant in an action for false imprisonment constitute no element in the case. \* \* \* In cases of malicious prosecution it becomes necessary to await the final determination of the action. But the same principle does not apply to an action for false imprisonment, as the former action is based on an illegal arrest, and no matter ex post facto can legalize an action which was illegal at the time it was done." A complaint in an action for false imprisonment, setting up a copy of the affidavit made by defendant on which an order for plaintiff's arrest was obtained, was insufficient on its face to confer jurisdiction of the court granting the order, and alleging arrest and imprisonment on the order, that defendant acted unlawfully and without right or authority, and that plaintiff was injured thereby, as against a general demurrer, states a good cause of action for false imprisonment. *Neves v. Costa*, 89 Pac. 860, 863, 5 Cal. App. 111.

#### Participation by defendant

Where a warrant is sworn out before a magistrate on a sufficient affidavit, a person

arrested by an officer thereunder cannot sue the party making the affidavit for "false imprisonment," though the facts stated in the affidavit are thereafter held not to constitute a crime. *Whaley v. Lawton*, 40 S. E. 128, 129, 62 S. C. 91, 56 L. R. A. 649.

One who merely prefers a criminal charge before a justice of the peace who has jurisdiction over the subject-matter is not liable for "false imprisonment" of accused by reason of acts done under a warrant issued on the charge, since false imprisonment is a trespass committed against the person of another by unlawfully arresting and detaining him without any legal authority or by instigating such unlawful arrest. *McIntosh v. Bullard, Earnheart & Magness*, 129 S. W. 85, 87, 95 Ark. 227.

#### As personal injury

See Personal Injury.

### FALSE MAKING

The phrase "false making," as used in Comp. Laws 1897, § 1168, providing punishment of any person who shall "falsely make" alter, forge, or counterfeit any public record, certificate, return, or attestation, etc., is synonymous with "forging." *Territory v. Gutierrez*, 84 Pac. 525, 527, 13 N. M. 312, 5 L. R. A. (N. S.) 375.

### FALSE OATH

A finding of a special master, directed to take proof and make report on exceptions to a bankrupt's petition for discharge, that in verifying the answer and in giving his testimony the bankrupt made a false oath either in one or the other, is not a finding that the bankrupt made a "false oath" within Bankruptcy Act, § 29, 30 Stat. 553, and it does not justify a refusal to discharge him. In *re Mayer*, 195 Fed. 571, 573.

### FALSE PRETENSE

Cheating by false pretenses, see Cheat. Representation in false pretense, see Representation.

A "false pretense" is a representation of some fact or circumstance, calculated to mislead, which is not true. *State v. Hammelsy*, 96 Pac. 865, 52 Or. 156, 17 L. R. A. (N. S.) 244, 132 Am. St. Rep. 686.

A "false pretense" is a false representation of a subsisting fact, whether by oral or written words or conduct, which is calculated to deceive, intended to deceive, and which does in fact deceive, and by means of which one person obtains value from another without compensation. *State v. Whedbee*, 67 S. E. 60, 62, 152 N. C. 770, 27 L. R. A. (N. S.) 363.

"A 'false pretense' is defined to be a false and fraudulent representation, or statement of a fact, as existing or having taken place, made with knowledge of its falsity, with intent to deceive and defraud, and which is

adapted to induce the person to whom it is made to part with something of value." *State v. Seligman*, 103 N. W. 357, 358, 127 Iowa, 415.

A "false pretense" is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. *Young v. State*, 46 South. 580, 581, 155 Ala. 145.

A "false pretense" is a fraudulent representation of an existing fact or past event, by one who knows it not to be true, of such a nature as to induce the party to whom it is made to part with something of value. *Parker v. State*, 137 S. W. 253, 254, 98 Ark. 575; *Owens v. Same*, 137 S. W. 256, 98 Ark. 609.

"False pretense" is a false and fraudulent representation, or statement of a past and existing fact, made with knowledge of its falsity, and with the intent to deceive and defraud, by reliance upon which representation or statement another is induced to part with money or property of value." Under a statute providing that if any person shall by any false token, with intent to defraud, obtain from another any property or money, he shall be punished, a bank cashier, issuing his personal check and certifying it, when he had no money on deposit, did not violate the statute, where the person receiving the check knew that he had no money on deposit. *State v. Miller*, 85 Pac. 81, 83 (quoting and adopting definition in 8 Cyc. p. 857, and citing the definitions in 2 Whart. Cr. Law [9th Ed.] § 1183, and McClain, Cr. Law, § 684).

A "false pretense" is such a fraudulent representation of a fact, past or existing, by a person knowing it to be untrue, as is adapted to induce the person to whom made to part with something of value. *State v. Hartnett* (Del.) 74 Atl. 82, 83, 7 Pennewill, 204.

The phrase "false pretense," as used in the statute relating to swindling, embraces every false and deceitful pretense made with the intention of swindling. *Doxey v. State*, 84 S. W. 1061, 1063, 47 Tex. Cr. R. 503, 11 Ann. Cas. 830.

Where it is charged that defendant represented that he was owing but little, that he was owing S. for a pair of oxen, and was not owing for any other large debt, etc., such representations, if false, clearly came within the meaning of the term "false pretense," notwithstanding no precise amount of indebtedness is stated, and though the terms "little" and "large" are inserted. Such representations were well calculated to inspire confidence in his ability to pay and to induce the seller to give him credit. *State v. Call*, 48 N. H. 126, 132.

A person who, for the purpose of obtaining goods, falsely represents that he has a contract for the upholstering of certain articles at a certain price, and on the strength



of which representation the goods are given to him, is guilty of obtaining goods by "false pretenses." *Martin v. Commonwealth* (Ky.) 102 S. W. 273, 274.

The assumption of a fictitious name amounts to a "false pretense," within the meaning of V. S. 4960 (P. S. 5776), providing that all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person any goods, etc., with intent to beat or defraud, shall be guilty of felony. *State v. Marshall*, 59 Atl. 916, 917, 77 Vt. 262.

Pen. Code, §§ 528, 531, defining larceny by means of false representations or pretenses, apply alike to all persons, attorneys as well as others, who may obtain money by the use of false and fraudulent representations or pretenses, and that offense is not included in section 148, punishing as a misdemeanor deceit or collusion on the part of an attorney, and willfully delaying his client's suit or receiving money or allowance for or on account of money which he has not laid out or becomes answerable for. *People v. Reavey* (N. Y.) 39 Hun, 364, 365.

Where, in an action for fraud in procuring an application and a note for the first year's premium for a life policy, it appeared that the agents soliciting the insurance represented that the insurer had a certain contract to sell, and that it contained certain provisions that, if plaintiff would give his note for a certain amount, this contract would be delivered to him. The representations constituted "false pretenses," as defined by *Burns' Ann. St.* 1901, § 2352. *Hartford Life Ins. Co. v. Hope*, 81 N. E. 595, 600, 40 Ind. App. 354.

Where S. had W.'s note for \$150, and agreed with him, if he would purchase land of N., he would credit his note for that amount, and W. purchased the land at \$130, but represented to S. that N. had raised the price to \$150, and S. agreed to take it at that price if W. could not get it for less, and N. conveyed the land as S. directed, and S. gave up the note to W., it was held that, though it was a gross fraud, it was not a "false pretense" in the legal sense. *Wallace v. State*, 11 Lea (79 Tenn.) 542.

"False pretenses," within Rev. St. U. S. § 3894, punishing the using of the mails in furtherance of scheme devised to obtain money or property under false pretenses, include only schemes having a similitude to a lottery and other like schemes, particularly described, and do not cover the use of mails to promote other schemes to obtain money or property by means of false pretenses, which is embraced by the provisions of section 5480, making criminal the use of the mails to carry on any scheme or artifice to defraud; and the making of false and fraudulent representations through the mails to prospective buyers of cattle, to promote a

scheme to defraud by inducing them to come and inspect the cattle, after which inferior cattle were to be substituted in place of those inspected and sold, constitutes the offense prohibited by section 5480. *United States v. Stever*, 32 Sup. Ct. 51, 52, 222 U. S. 167, 56 L. Ed. 145.

The crime of larceny by obtaining property by "false pretense" consists in obtaining title to property by a false pretense, or by procuring a contract by false pretense under which one party passes title to the other party. *Commonwealth v. Althaus*, 93 N. E. 202, 205, 207 Mass. 32, 31 L. R. A. (N. S.) 999.

One who presents a claim to the county commissioners for services for which he has already been paid by the county, and obtains a warrant and collects the same, is guilty of obtaining money under "false pretenses," whether the county treasurer and the county board knew of the fraud or not. *State v. Talley*, 57 S. E. 618, 619, 77 S. C. 99, 11 L. R. A. (N. S.) 938, 122 Am. St. Rep. 559.

Where the pretenses which are false are that the defendant was procuring a loan from one R. with which to pay certain notes secured by a real estate mortgage, which had been executed by him, and that he had come to the holder thereof for the purpose and with the intent to pay the notes, coupled with the promise to pay off the notes upon the execution of the release of the mortgage, and the possession of the notes and mortgage being given to him, the pretenses are within the statute. *State v. Cowdin*, 28 Kan. 269, 273.

In extradition proceedings, allegations that accused in a specified county and state on a day named obtained a specified sum of money from one named person as agent of another by false pretenses by drawing and delivering to such person a check for that amount on a bank at a specified place, and procured such person as such agent to cash the check by falsely representing that he was financially responsible, and had funds in or credit with the bank, and that the check would be honored, and that such person was deceived thereby, sufficiently charges the offense of obtaining money on "false pretenses." *Taylor v. Wise* (Iowa) 126 N. W. 1126.

Where a bankrupt's false representations as to his property, alleged to have induced an attorney, to accept his defense on a criminal prosecution, were not made until after the attorney had been employed and had contracted to defend the bankrupt, such representations did not constitute a liability for obtaining property by "false pretenses" or false representations within the bankruptcy act, and hence an action to recover the fees in which false representations were alleged was subject to stay by the court in

bankruptcy. *Gleason v. O'Mara*, 180 Fed. 417, 103 C. C. A. 563.

A judgment obtained by a railroad company against its ticket agent for money collected by him for tickets sold and misappropriated to his own use is not one for a debt which is a liability for obtaining property by "false pretenses or false representations" within the meaning of the bankrupt act, though he made false representations to conceal his conversion of the money, but is one from which he is released by a discharge in bankruptcy. *In re Wenham*, 153 Fed. 910, 911.

A pledgor and pledgee may agree that the securities pledged, in which the pledgor has the general property and the pledgee a special property for the payment of the debt secured, may be sold by the pledgee and the proceeds used by him as owner of the securities, leaving to the pledgor the unsecured personal obligation of the pledgee to account for the value of the securities at the date of payment of the debt; and such agreement is not an incident to the pledge, but is an agreement authorizing the pledgee to end the pledge and the rights of the pledgor in the securities, and hence that such agreement was induced by a false pretense on the part of the pledgee did not render him guilty of obtaining the pledged goods through larceny by "false pretense." Such agreement, where included in and a part of the pledge agreement, must, if possible, be construed as declaring the terms of the pledge, rather than as authorizing the pledgee to end the pledge and the interest of the pledgor, and, to justify the pledgee in selling the securities and accounting for the value thereof at the date of the payment of the debt secured, must give him that right in terms admitting of no doubt. Where special property in a negotiable receipt for corporate bonds passed to accused as pledgee of it to secure a note executed by the pledgor, who did not lose his general property in the receipt, and accused, procuring his special property by a false pretense, sold the receipt wrongfully, without regard to his rights as pledgee, he was not guilty of "larceny by false pretense," under Rev. Laws, c. 208, § 26, since the only effect which the false pretense had was on the possession of the receipt, which passed to accused by the making of the note for which the receipt was delivered as security. *Commonwealth v. Althause*, 93 N. E. 202, 204, 207 Mass. 32, 31 L. R. A. (N. S.) 999.

The phrase "obtaining property by means of false representations and pretenses," in a bail bond conditioned on the principal therein appearing to answer the charge of "obtaining property by means of false representations and pretenses," etc., sufficiently describes the offense charged in Wilson's Rev. & Ann. St. 1903, § 2517, punishing every person who, with intent to cheat or defraud

another, designedly, by color or aid of any false token or writing or other false pretense, obtains the signature of any person to any written instrument, etc. *Territory ex rel. Thacker v. Conner*, 87 Pac. 591, 593, 17 Okl. 135 (citing *Patterson v. State ex rel. Neff*, 12 Ind. 86; *Browder v. State*, 9 Ala. 58; 5 Cyc. p. 98; *United States v. Sauer*, 73 Fed. 671; *State v. Randolph*, 22 Mo. 474; *State v. Rye*, 9 Yerg. [17 Tenn.] 386; *Com. v. Daggett*, 16 Mass. 447; *People v. Rundle* [N. Y.] 6 Hill, 506; *Kerns v. Schoonmaker*, 4 Ohio, 331, 22 Am. Dec. 757; *People v. Gillman*, 26 N. E. 469, 125 N. Y. 372; *Adams v. State*, 48 Ind. 212; *State v. Marshall*, 21 Iowa, 143; *State v. Merrihew*, 47 Iowa, 112, 29 Am. Rep. 464; *State v. Gilmore*, 17 Atl. 316, 81 Me. 405; *Turner v. State*, 41 Tex. 549; *Belt v. Spaulding*, 20 Pac. 827, 17 Or. 130).

#### Constituent elements

To convict one of "false pretenses" the state must prove that accused knowingly made false pretenses with intent to cheat and defraud another, and that by such pretenses he actually defrauded the latter and obtained from it its property. *State v. Briscoe* (Del.) 67 Atl. 154, 156, 6 Pennewill 401.

To constitute the offense of obtaining property by "false pretenses" there must be an intent to defraud, there must be an actual fraud committed, false pretenses must be used for the purpose of perpetrating the fraud, and the fraud must be accomplished by means of the false pretenses made use of for that purpose. *Clawson v. State*, 109 N. W. 578, 580, 129 Wis. 650, 116 Am. St. Rep. 972, 9 Ann. Cas. 968.

A "false pretense" is such a fraudulent representation of a fact by one knowing it to be untrue as is adapted to induce the one to whom it is made to part with something of value. It may consist of any act, word, symbol, or token calculated to deceive another, and knowingly and designedly employed by any person with intent to defraud another of money or other personal property. *State v. Holden* (Del.) 79 Atl. 215, 217, 2 Boyce, 429; *State v. Briscoe* (Del.) 67 Atl. 154, 156, 6 Pennewill, 401 (citing *State v. Lynn* [Del.] 51 Atl. 878, 3 Pennewill, 316).

To constitute "obtaining goods by false pretenses" there must have been false representation of a subsisting fact, calculated and intended to deceive, and which did deceive, and by which one obtained value from another without compensation. *State v. Davis*, 64 S. E. 498, 499, 150 N. C. 851.

Rev. St. 1899, § 1927, provides that every person who, with intent to cheat or defraud another, shall designedly by color of any false token or writing or by any false pretense, obtain the signature of any person to any written instrument, etc., shall be punished. Held that, in order to make out

a case of obtaining an exchange of property by "false pretenses," there must be not only a fraud committed, but an intent to defraud by false pretenses, by which prosecutor was induced to part with his property, but that it was not necessary that it should be alleged or proved that the value of the land conveyed to prosecutor in exchange for his own land was not equal in value to that conveyed by prosecutor to defendant. *State v. Miller*, 111 S. W. 18, 19, 212 Mo. 73.

A representation, to come within Rev. St. 1908, § 1849, denouncing the offense of knowingly and designedly, by any "false pretense," obtaining property from another, must be of some fact, past or present, which is not the case where the property is obtained on promise to deliver a check, and that the check will be paid, though at the time thereof it is the intention of the person so promising to stop payment on the check, as he afterwards does. *People v. Orris*, 121 Pac. 163, 164, 52 Colo. 244, 41 L. R. A. (N. S.) 170.

A "false pretense," such as falls within the statute relating to the offense of obtaining property under false pretenses, is a false representation relating to some existing or past fact, and must actually mislead. To constitute the offense, it is enough if a material part of the pretense be false, that it be made with the intent to defraud, and that it induces the person sought to be wronged to part with his property; and these are inquiries proper for the jury under appropriate instructions from the court. *Wilkerson v. State*, 36 South. 1004, 140 Ala. 155.

The pretenses relied on to constitute the crime of "false pretenses" must relate to a past event or an existing fact, and any representation or assurance or promise in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute. *Cook v. State*, 98 N. W. 810, 811, 71 Neb. 243 (citing Maxwell's Cr. Proc. 129; *Dillingham v. State*, 5 Ohio St. 284).

The essence of the crime of obtaining money or property by "false pretenses" is that the false pretense should be of a past event, or of a fact having a present existence, and not of something to happen in the future, and that the prosecutor believed that the pretense was true, and that, confiding in the truth of the pretense and by reason thereof, he parted with his money or property. *State v. Bohle*, 81 S. W. 179, 180, 182 Mo. 58 (quoting *State v. Evers*, 49 Mo. 545).

Before a person can be convicted of the statutory crime known as "obtaining money under 'false pretenses,'" it must be made to appear that the person did, with intent to defraud, designedly, by color of some false token or writing, or by some false pretens-

es, obtain from another some one or more of the things enumerated in the statute, or something of value not therein specially enumerated. And, of course, an information, in order to state facts sufficient to constitute a crime, must allege the intent to defraud, the design, the means used by which the fraud was practiced, and must describe the articles or thing of value obtained. *State v. Phelps*, 84 Pac. 24, 25, 41 Wash. 470.

The offense consists in intentionally and fraudulently inducing the owner to part with his goods, or other things of value, either by a willful falsehood or by the offender's assuming a character he does not sustain, or by representing himself to be in a situation which he knows he is not in. To constitute the offense, several things must concur. There must be an intent to cheat or defraud some person. For that purpose, some false pretense must be designedly used, and the fraud must be accomplished by means of the false pretense. *Foot v. People* (N. Y.) 17 Hun, 218, 222 (citing *People v. Haynes* [N. Y.] 11 Wend. 558; *People v. Crissie* [N. Y.] 4 Denio, 527).

The gist of the statutory offense of obtaining money or property by "false pretenses" is obtaining money or property from another by deceit, fraudulently and feloniously superinduced by the beneficiary; and, when one by his acts intentionally creates a false belief, with intent to deprive another of his property, and does so, it is immaterial to his guilt whether such belief is induced by words or acts, or both. *State v. Hammelsy*, 96 Pac. 865, 52 Or. 156, 17 L. R. A. (N. S.) 244, 132 Am. St. Rep. 686.

Where one falsely represents a fact to be true, knowing at the time that it is not true, and resorts to the fraudulent representation to obtain money from another, and does so obtain it, he is not only guilty of defrauding another by deceitful means, but of obtaining money under "false pretenses." *Young v. State*, 46 South. 580, 581, 155 Ala. 145.

A "false pretense," to constitute an offense, must relate to a past event or some present existing fact, and not to something to happen in the future. *State v. Briggs*, 86 Pac. 447, 448, 74 Kan. 377, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904 (citing *In re Snyder*, 17 Kan. 546).

The requisites of the offense defined by 2 Rev. St. 677, § 53, do not embrace injurious consequences as an element of the crime further than may be implied by the fact of obtaining money or property by means of "false pretenses" used with intent to cheat and defraud; but false pretenses alleged in an indictment thereunder must be such that they may operate prejudicially, and if it appear that they cannot prejudice the person to whom they are applied no of-

fense is charged. *People v. Cook* (N. Y.) 41 Hun, 67, 69.

The elements of the crime of "false pretenses" are an intent to defraud, an actual fraud committed, false pretenses used for the purpose of perpetrating the fraud, and fraud accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his property. *People v. Cadot*, 71 Pac. 649, 650, 138 Cal. 527 (citing *People v. Wasservogle*, 19 Cal. 270, 77 Cal. 173).

To constitute the offense of "false pretenses" it must appear (1) that there was an intention to defraud; (2) that an actual fraud was committed; (3) that the false pretense was made for the purpose of perpetrating fraud; (4) that it was accomplished by these means. In *re Wolf*, 27 Fed. 606, 613; *People v. Carpenter*, 91 Pac. 809, 810, 6 Cal. App. 231 (quoting *People v. Wasservogle*, 19 Pac. 270, 77 Cal. 173).

To sustain a charge of "obtaining money by 'false pretenses'" by the sale of fraudulent certificates of stock, it is necessary for the prosecution to prove that accused obtained the money, and that he obtained it upon the representation that he was the owner of the stock which he sold, and that such representation as to his ownership was false. *People v. Leavens*, 106 Pac. 1103, 1105, 12 Cal. App. 178.

Where a statement of value is given as an opinion merely, it cannot be regarded as a foundation for an indictment for obtaining money and property by "false pretenses"; but where the statement is made as an existing fact, when accused knows it to be false, and intends it to be an inducement to the other party, and it is so understood and relied on by the other party, it becomes a "false representation" of a material fact, for which the party making the representation is indictable. *Williams v. State*, 83 N. E. 802, 77 Ohio St. 468, 14 L. R. A. (N. S.) 1197.

#### **Deception of ordinarily intelligent person**

"It is the rule in Indiana, and perhaps one or two other states, that a 'false pretense,' to be criminal, must be of such a fact as would tend to deceive a person of ordinary prudence and common intelligence; but the great weight of authority is to the opposite effect. The general rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment or information, and hence sufficient to sustain a conviction." *State v. Phelps*, 84 Pac. 24-26, 41 Wash. 470 (citing 3 Words and Phrases, p. 2664).

A "false pretense," to be indictable, must be calculated to deceive and defraud. Whether the prosecutor could have avoided imposition from the false pretense, if he had exercised ordinary prudence and discretion to

detect its falsity, is not material. As a general rule, if the pretense is not of itself absurd or irrational, or if he had not, at the very time it was made and acted on, the means at hand of detecting its falsehood, and he was really imposed on, his want of prudence is not a defense. The two essentials of the offense are: First, obtaining or attempting to obtain the goods, or other valuable thing; and, second, accomplishing it by some of the means denounced in the statute. The statutes denouncing the offense are designed to furnish protection to those who, from undue confidence in others or inexperience, are liable to become the victims of dishonest and designing dealers, and when all the circumstances evince that the representation was made designedly with the intent to cheat, or was calculated to deceive and capable of defrauding, the person cannot excuse himself by saying that, if the other had been sharp, vigilant, and astute, he could have detected the fraud. The terms "false pretense" and "false representation" have no technical meaning different from that of their common daily acceptance. *State v. Keyes*, 93 S. W. 801, 806, 196 Mo. 136, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23.

As regards the crime of "false pretenses" the court said: "We think that it is generally received, both in England and the United States, as the law that the pretense need not be such an artificial device as will impose on a man of ordinary prudence or caution; that the pretense need not be such as cannot be guarded against by ordinary caution or common prudence." Defendant, who had, for a consideration, assigned his claim against a county, called on the county judge and stated, in answer to a question by the judge, that the sum shown to be due him from the county by the account in the possession of the judge was correct, and the judge paid it. The office of the judge was not far from that of the secretary, who made out the account, and there was telephone communication between the two offices, and the judge could have easily ascertained from the secretary whether the defendant's account was correct, or had been paid. Held, that defendant's representations warranted a conviction for swindling the judge. *Harrison v. State*, 70 S. W. 421, 422, 44 Tex. Cr. R. 243.

An indictment for "false pretenses," charging that defendant represented he was the owner and holder of a first mortgage on certain real property, and that it was the only lien on the property, and that by reason of such representations, which were false, prosecutor was induced to pay defendant \$1,000 for the assignment of the mortgage, etc., sufficiently stated the offense of false pretenses denounced by Pen. Code, § 532, for an indictment for false pretenses need not show that complainant acted as an ordinarily prudent business man; it not being essential to a conviction that the pretenses be such as

would probably deceive a person of ordinary understanding. *People v. Henninger*, 128 Pac. 352, 354, 20 Cal. App. 79.

#### **Defendant must derive benefit**

The crime defined in the statute, punishing "false pretenses," is not that of making a false pretense; but the provision is directed against one who obtains something, or, in other words, who gets possession of something, purposely by effort, that is, by a false pretense. *State v. Lewis*, 26 Kan. 123, 129, 130.

#### **False representation distinguished**

See False Representation.

#### **Fraudulent conveyance distinguished**

The offense, under Kirby's Dig. § 1689, of obtaining personalty by "false pretense," is distinguished from that, under section 1693, of conveying land to defraud prior or subsequent purchasers or creditors, in that the gist of the former offense is obtaining money or property by any false representation of an existing or past fact, whether relating to land or something else, with knowledge of its falsity, while the latter offense may exist under a conveyance to defraud, regardless of representations, and proof necessary to convict under section 1689 would be essentially different from that required under section 1693. *Shelton v. State*, 131 S. W. 871, 873, 96 Ark. 237.

#### **Intent or purpose**

To constitute the offense of "false pretense" under Rev. St. 1899, § 5143, providing that a person who shall designedly, by false pretense, obtain from another any property with intent to defraud the latter, shall be punished, the property must be obtained from the owner by false pretense, and accused must obtain from the owner at least a voidable title to the property, and must intend to defraud the person from whom the property is thus obtained, and, in the absence of an intent to defraud, the offense is not complete, and, though such intent is present, the crime is not complete unless the person from whom the property was obtained was actually defrauded. *Martins v. State*, 98 Pac. 709, 711, 17 Wyo. 319, 22 L. R. A. (N. S.) 645.

Where an indictment for removing merchandise from a public warehouse without paying the duty thereon alleged that the goods had been deposited in Brooklyn in a warehouse under bond, and then alleged that on a given day the importer withdrew them under a false pretense that they were to be exported, the term "false pretense" should be construed to mean at least that the defendant did not mean to export the goods when he removed them. *United States v. Ehrigott*, 182 Fed. 267, 270.

Prosecutor met defendant through a newspaper advertisement, and defendant offered to sell him a half interest in the rooming house department of a brokerage com-

pany for \$200, and represented that he (defendant) needed an assistant, and that the business netted profits of between \$200 and \$300 a month. Prosecutor desired a salary, but thereafter paid defendant \$50, to be kept by him for 30 days; defendant agreeing to return the same to prosecutor at the expiration of such time if he was dissatisfied, which defendant failed to do. Held, that since the ownership of the money so deposited remained in prosecutor, and there was no intent on his part to deliver possession thereof to defendant except temporarily, the latter's offense, if any committed, was larceny, and not obtaining money by "false pretenses." *State v. Anderson*, 84 S. W. 946, 949, 186 Mo. 25 (citing *State v. Vickery*, 19 Tex. 326; 2 Archb. Cr. Pl. 372; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *People v. Morse*, 2 N. E. 45, 99 N. Y. 662).

#### **Larceny distinguished**

The distinction between the crime of larceny and that of cheating by "false pretenses" is this: "If the false pretenses induce the owner to part with his property, intending to transfer both title and possession, the crime is cheating by false pretenses. If, on the other hand, one by fraud, trick, or false pretense induces the owner to part merely with the possession of his property, there being no intent to pass the title, and the party who receives it, took it with intent fraudulently to convert it to his own use, the crime is larceny." *State v. Loser*, 104 N. W. 337, 339, 340, 132 Iowa, 419.

Larceny and "false pretenses" are distinguishable, in that in larceny the owner does not intend to part with his property to accused, though he may intend to part with possession; while in false pretenses he does intend to part with his title. *People v. Gridner*, 110 Pac. 586, 588, 13 Cal. App. 703.

The distinction between "false pretenses" and larceny is that in the former the owner parts with the possession and title of property by reason of false and fraudulent representations knowingly and designedly made, while in the latter the owner of the property stolen must not have intended to part with the title to it. *People v. Proctor*, 82 Pac. 551, 552, 1 Cal. App. 521.

"Where, by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, 'larceny' is established; while the crime is 'false pretenses' if the title, as well as possession, is absolutely parted with." *People v. Delbos*, 81 Pac. 131, 132, 146 Cal. 734 (quoting and adopting definition in *People v. Rae*, 6 Pac. 1, 66 Cal. 425, 56 Am. Rep. 102).

Where possession of personal property is obtained from the owner by fraud, trick, or device, and the owner intends to part with both possession and the title when he surrenders control of the property, the offense is

obtaining property by "false pretenses"; but if the possession is fraudulently secured, and the owner does not intend to part with the title, the offense is "larceny." *Beckwith v. Galice Mines Co.*, 93 Pac. 453, 455, 50 Or. 542, 16 L. R. A. (N. S.) 723.

The crime of obtaining money or goods by "false pretenses" is closely allied to that of larceny, and the common law and statutes defining the crime were undoubtedly designed for the fuller protection of personal property and in aid of the laws against larceny and theft. *State v. Eno*, 109 N. W. 119, 120, 131 Iowa, 619, 9 Ann. Cas. 856 (adopting definition 2 *Brown & Hadley's Com.* 532; 2 *Bishop, Cr. Law*, §§ 476-479).

"If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by 'false pretenses.' But, where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts with the possession and not with the title, the offense is 'larceny.'" Where a person gave money to another as a stakeholder on a bet such delivery having been brought about by fraud and artifice of the stakeholder, who intended to appropriate the money in any event, and who did so, the offense was larceny. *State v. Ryan*, 82 Pac. 703, 106, 47 Or. 338, 1 L. R. A. (N. S.) 862 (quoting and adopting the statement in *People v. Tomlinson*, 36 Pac. 506, 507, 102 Cal. 19, 23).

If the owner of property part, not only with the possession, but with the right of property also, the offense of the party obtaining the property will not be larceny, but will be that of obtaining goods by "false pretenses." *Zink v. People*, 77 N. Y. 114, 128, 33 Am. Rep. 589 (adopting definition in *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474).

One who went to a wholesale cigar store, and, giving an assumed name, falsely represented that he had come to get cigars for a retail dealer, and thereby procured the cigars and converted them to his own use, was guilty of "larceny," since the wholesaler intended to deliver him merely the possession of the goods for the retailer, and not to sell them to him personally, and was not guilty of "obtaining property by impersonating another," within the meaning of *Rev. St. 1899*, § 1930. *State v. Kosky*, 90 S. W. 454, 457, 191 Mo. 1.

Where defendant induced R., who had previously been employed by a dray company authorized to receive goods for a consignee of certain shoes, and who was known to the servants of the carrier holding such goods for delivery, to go to the freight depot of the carrier in Illinois, after his employment by the dray company had terminated, and procure a load of shoes from the carrier, and

R. obtained such shoes and delivered them to a person other than the consignee in Missouri, such act constituted "larceny," and not "false pretenses," and was therefore punishable under *Rev. St. 1899*, § 2362, providing that every person who shall steal the property of another in any other state and shall bring the same into Missouri may be convicted and punished for larceny as though the property was stolen in Missouri. *State v. Mintz*, 88 S. W. 12, 16, 189 Mo. 268.

According to *Pen. Code*, § 528, "larceny" includes every act which was larceny at common law, and in addition such acts as formerly constituted "false pretenses" and "embezzlement." At common law, if a person honestly and in good faith received possession of personal property in trust, and thereafter converted the same to his own use, he was guilty of "embezzlement." If he obtained possession of the property by fraud, the owner intending nevertheless to part with the title as well as the possession, the offense was obtaining property under "false pretenses." If the possession was wrongfully or fraudulently obtained, without the owner's consent, and without color of title, and with a felonious intent of converting the property to the use of the taker or another, the offense was "larceny." *People ex rel. Perkins v. Moss*, 99 N. Y. Supp. 138, 144, 145, 113 App. Div. 329 (citing *People v. Miller*, 62 N. E. 418, 169 N. Y. 350, 88 Am. St. Rep. 546).

Prosecutor applied to defendant for a position, who introduced him to A. to arrange the terms of his employment. A. required prosecutor to deposit \$50 as a guaranty of his honesty, to be returned on termination of his employment; but defendant on the next day told prosecutor that, as \$400 or \$500 would pass through prosecutor's hands every day, he must deposit \$150 more, which he did. Defendant pretended to give him a receipt for this money, which, instead was a bill of sale for a one-half interest in the rooming house business conducted by the concern. Prosecutor worked for \$15 per week for three or four weeks, during which time he drew \$15.75, and, becoming dissatisfied, demanded the return of his money, which defendant refused to pay him, and then prosecutor discovered that his receipt therefor was a bill of sale. Held that, prosecutor never having intended to part with the title to the money so deposited, defendant, having acquired the same by fraud, with the felonious intent to convert it to his own use, was guilty of "larceny," and not "false pretenses." *State v. Buck*, 84 S. W. 951, 952, 186 Mo. 15, 2 Ann. Cas. 1007 (citing *Commonwealth v. Barry*, 124 Mass. 325; *People v. Morse*, 2 N. E. 45, 99 N. Y. 662; *People v. Dumar*, 13 N. E. 325, 106 N. Y. 502; *People v. Miller*, 62 N. E. 418, 169 N. Y. 339, 88 Am. St. Rep. 546; *People v. Gottschalk*, 20 N. Y. Supp. 777, 66 Hun. 64).

**Promise**

A "false pretense" is a misrepresentation as to an existing fact or past event, and not a mere promise to do something in the future or a misrepresentation as to something to take place in the future. *State v. Hollingsworth*, 109 N. W. 1003, 1004, 132 Iowa, 471.

Where, on a trial for the larceny of a negotiable receipt for corporate bonds, delivered to accused as security for a note executed by the pledgor, the pledgor testified that accused stated at the time of the making of the pledge that he would merely use the security as collateral for a loan, and accused sold the security and claimed that he had a right to do so under the agreement, a charge that a representation as to a future transaction in the nature of a promise was not a "false pretense," within the statute punishing larceny by false pretense, and that it was not a false pretense for one to fail to do in the future a thing he had promised to do, unless the promise was made to induce another to do a particular thing, etc., did not fully charge on the issue of a representation of one present intention as to a future act, as distinguished from a promise that a future act should be done; and the court should have charged that the statement by accused, that he would or would not use the receipt in a certain manner, was not a false pretense, and that a representation, as an inducement to the making of a loan, that something thereafter was or was not to be done, was not a false pretense. *Commonwealth v. Althause*, 93 N. E. 202, 206, 207 Mass. 32, 31 L. R. A. (N. S.) 999.

Though a mere "false pretense" to do something resting on a future event is not within Ky. St. § 1208, denouncing false pretenses, yet a promise of future performance, when coupled with a false statement as to a past or existing fact or facts which induces another to rely on the false promise, will, in connection with the false statement as to the existing fact or facts, constitute a false pretense. *McDowell v. Commonwealth*, 123 S. W. 313, 314, 136 Ky. 8.

A "false pretense," within the meaning of Acts 1905, p. 751, c. 169, § 677, prescribing the punishment for obtaining anything of value by color of any false token, or writing, or, under section 678, prescribing the punishment for obtaining property from another by color or aid of a certificate or order for the payment of money when the drawer or maker of the check or order is not entitled to draw on the drawee for the sum specified therein, cannot be predicated on the non-performance of a future promise or the happening of a future event, and therefore a postdated and postpayable check, on the faith of which goods are obtained, cannot be made the basis of a prosecution for false pretenses under those sections. *Brown v. State*, 76 N. E. 881, 106 Ind. 85, 8 Ann. Cas.

1068 (citing 2 Bishop's Cr. Law, § 420; *State v. Magee*, 11 Ind. 155; *Roscoe's Cr. Ev.* 465; *People v. Haynes*, 11 Wend. 557; *People v. Haynes*, 14 Wend. 547; *People v. Thomas*, 3 Hill, 169; *People v. Williams*, 4 Hill, 9; *Fenton v. People*, 4 Hill, 126; *Commonwealth v. Drew*, 19 Pick. 186).

**Reliance on pretense**

To constitute the obtaining of property by "false pretenses," it is not necessary that the owner be induced to part with it solely by pretenses which are false, nor that the pretenses be the paramount cause of delivery to accused; but it is sufficient if they are a part of the moving cause, and if without them the defrauded person would not have parted with his property. *State v. Merry*, 127 N. W. 83, 88, 20 N. D. 337.

In a prosecution for "false pretenses," the state must prove that the representations and pretenses alleged induced the prosecutor to part with his money, or that such representations and pretenses were the main inducement. *People v. Emmons*, 110 Pac. 151, 154, 13 Cal. App. 487.

**Representations as to character or solvency**

Obtaining money as a charity on a false representation as to loss is within Ballinger's Ann. Codes & St. § 7165, making it an offense to obtain money by "false pretenses": the statute making no exception, and the act not being without the spirit of the statute. *State v. Swan*, 104 Pac. 145, 55 Wash. 97, 24 L. R. A. (N. S.) 575, 133 Am. St. Rep. 1024, 19 Ann. Cas. 1129.

**Token or writing**

The obtaining of money or property by means of a check on a bank in which the maker keeps no account was not a cheat at common law prior to 30 Geo. II, c. 24, § 1, making criminal the obtaining of money or property by false pretenses, but after the enactment thereof was indictable as a "false pretense." The offense of obtaining money or property by means of a worthless check may be punished under Pen. Code 1901, § 481, making the obtaining of money under false pretenses a misdemeanor. *Williams v. Territory*, 108 Pac. 243, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032.

A "false pretense," within the meaning of Acts 1905, p. 751, c. 169, § 677, prescribing the punishment for obtaining anything of value by color of any false token, or writing, or, under section 678, prescribing the punishment for obtaining property from another by color or aid of a certificate or order for the payment of money, when the drawer or maker of the check or order is not entitled to draw on the drawee for the sum specified therein, cannot be predicated on the non-performance of a future promise or the happening of a future event, and therefore a postdated and postpayable check, on the

faith of which goods are obtained, cannot be made the basis of a prosecution for false pretenses under those sections. *Brown v. State*, 76 N. E. 881, 166 Ind. 85, 8 Ann. Cas. 1068 (citing 2 Bishop's Cr. Law, § 420; *State v. Magee*, 11 Ind. 154, 155).

Where defendant, as part of a horse trade, agreed to pay prosecutor \$7.50, and for that purpose handed him a \$10 Confederate bill, with the remark, "Give me \$2.50; here is a ten dollar bill," and prosecutor received the same believing it was United States currency, such Confederate bill was a "false token," within Ky. St. 1903, § 1208, providing that if any person by false pretenses, statement, or token, with intent to commit a fraud, obtains from another money, property, or other thing which may be the subject of larceny he shall be fined, etc. A false representation or token is not within the statute unless calculated to deceive persons of ordinary prudence and discretion (see 2 Whart. Cr. Law, 2129; *Commonwealth v. Grady*, 13 Bush [76 Ky.] 285, 26 Am. Rep. 192); but the statute was not designed to protect only the ordinarily wary and prudent, but is aimed at all dishonesty by which even the foolish are led to part with their property. The statute is designed to protect the owner of property against cheats and to punish the cheater. In punishing the wrongdoer his motive and its results are the main subjects of inquiry. Under this statute, the wicked purpose—the fraud—is equivalent to the same ingredients in theft, and the result is the same. It is distinguishable from theft, however, since in theft the owner does not intentionally part with the title and possession of his property, while under this statute he does. Under this statute the pretense or token must be false, and it must be calculated to deceive according to the capacity of the person to whom it is presented to detect its falsity under the circumstances. A token that might be calculated to deceive a blind man, or one in the dark, or a child, would not necessarily be a "false token" when used upon one who could see, or who had mature judgment. *Commonwealth v. Beckett*, 84 S. W. 758, 759, 119 Ky. 817, 68 L. R. A. 638, 115 Am. St. Rep. 285 (citing *State v. Patillo*, 11 N. C. 348; *State v. Stroll* [S. C.] 1 Rich. 244; *State v. Grooms* [S. C.] 5 Strob. 153; *Peckham v. State* [Tex.] 28 S. W. 532; *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515; *People v. Crissie*, 4 Denio, 525; *Commonwealth v. Grady*, 13 Bush, 285, 26 Am. St. Rep. 192; *Commonwealth v. Haughey*, 3 Metc. 223).

#### **Steal importing**

See Steal.

#### **FALSE REPRESENTATION**

See, also, Fraudulent Misrepresentation; Misrepresentation.

Fraud by false representation, see Fraud.

The term "false representations," as used in Pen. Code 1895, § 653, defining acts constituting swindling, is not restricted to the use of words; but they may be made by tokens or symbols, and implied by way of concealment of a part of the truth, or from misleading silence. *Ricks v. State*, 69 S. E. 576, 578, 8 Ga. App. 449.

The concealment or suppression by a party to a contract, with intent to deceive, of a material fact which he is in good faith bound to disclose, amounts to a "false representation." *Barrett v. Lewiston, B. & B. St. Ry. Co.*, 85 A. 306, 308, 110 Me. 24.

"False representation" may be made by presenting that which is true so as to create an impression which is false, and then profiting by the false impression thus created. *Tolley v. Poteet*, 57 S. E. 811, 819, 62 W. Va. 231.

To impose a liability for "false representations" in an action for deceit, the representations must have been made with actual knowledge of their falsity, or, if without knowledge, recklessly and without regard to their truth or falsity. *Vincent v. Corbitt*, 47 South. 641, 642, 94 Miss. 46, 21 L. R. A. (N. S.) 85.

A "false representation," to constitute fraud, must be a representation of alleged existing fact, false in effect, made with intent to deceive, and the person to whom it is made must believe it. Representations by a vendor of lots to an intended purchaser that the lots were situated five to ten minutes from a railroad station, that the lots had some improvements, and that there were cement sidewalks, gas, and water at the property, were material representations of facts, and the purchaser might rely thereon, and sue for their falsity. *Scarsdale Pub. Co. v. Carter*, 116 N. Y. Supp. 731, 735, 63 Misc. Rep. 271.

The federal bankruptcy act, providing that a discharge shall release a bankrupt from all provable debts except liabilities for "obtaining property by false pretenses or false representations," contemplates positive fraud or fraud in fact, involving moral turpitude and intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. A representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. So, where one obtained sheep on a fraudulent representation to the seller that he was to receive that day a check for more than the price of the sheep, and would give it to the seller, and converted the sheep to his own use without paying for them, he "obtained property by false pretenses or false



representations." *Rowell v. Ricker*, 66 Atl. 569, 570, 79 Vt. 552.

The legal tariff rate on coarse salt in bulk between Cuylerville, N. Y., and Chicago, was 10 cents, and the rate on similar salt in sacks 14 cents. Defendants, desiring to ship a car of coarse salt in sacks, loaded the car and filed with the carrier a shipping order, describing the merchandise as "coarse salt," with the words "rate 10 cents," when the true description should have been "coarse salt in sacks, rate 14 cents." Held, that if the carrier was induced to rely on such shipping order as to the character of the commodity and apply the lesser rate, and defendants intentionally concealed or suppressed the true character of the freight, such conduct constituted a "false representation," for which they were subject to prosecution under Interstate Commerce Act Feb. 4, 1887, c. 104, § 10, 24 Stat. 382, as amended by Act June 18, 1910, c. 309, § 10, par. 3, 36 Stat. 549, providing that, if any person obtains the transportation of goods at a less rate than the legal rate by false representations of the contents of the package, he shall be guilty of a misdemeanor. *United States v. Sterling Salt Co.*, 200 Fed. 593, 597.

#### False pretense distinguished

Where a statement of value is given as an opinion merely, it cannot be regarded as a foundation for an indictment for obtaining money and property by "false pretenses"; but where the statement is made as an existing fact, when accused knows it to be false and intends it to be an inducement to the other party, and it is so understood and relied on by the other party, it becomes a "false representation" of a material fact, for which the party making the representation is indictable; and whether a representation of value is intended as an expression of opinion, or whether it is made as a statement of an existing fact, which the speaker intends to be an inducement to the other party, is a question of fact for the jury. *Williams v. State*, 83 N. E. 802, 77 Ohio St. 468, 14 L. R. A. (N. S.) 1197.

A "false pretense" may consist in any act, word, symbol, or token calculated to deceive another, and knowingly and designedly employed by any person with intent to defraud another of money or any personal property. A representation that is false is synonymous with a false pretense, and hence the term "false representations," in Pen. Code 1895, § 658, defining acts constituting cheating or swindling, is not necessarily restricted to the use of words written or spoken. *Ricks v. State*, 69 S. E. 576, 578, 8 Ga. App. 449 (quoting and adopting the definition in 3 Words and Phrases, p. 2668).

#### Intent

Equity will grant relief for "false representations" of defendant, on which plaintiff

acted, though defendant supposed they were true. Where plaintiff is induced by "false representations" of defendant that the title to certain property was good to purchase the property, equity will relieve plaintiff, although the false representations were not made knowingly. *Welse v. Grove*, 99 N. W. 191, 192, 123 Iowa, 585.

A "false representation," to be actionable, must not only mislead, but must be made fraudulently, and with that intent, and one is not liable for a false representation who honestly believed it when made; but he is liable if he knew it to be false, or, knowing nothing about it, asserted it to be true. *First Nat. Bank of Newark v. People's Nat. Bank of Springfield*, 132 S. W. 1008, 1009, 97 Ark. 15.

An allegation that the "defendants falsely and fraudulently represented to plaintiff with the intent to deceive him" that one of the defendants was about to abandon his barber business sufficiently alleged a present intent by defendant not to perform their promise existing when it was made; the word "false," when applied to representations inducing an act to another's injury, implying a purpose to deceive, and a "false representation" being an untrue representation willfully made to deceive another to his damage. *Sallies v. Johnson*, 81 Atl. 974, 976, 85 Conn. 77, Ann. Cas. 1913A, 386.

In order to be "false" so as to bar a discharge, the "representations" made by a bankrupt to obtain credit must have been willfully or intentionally misleading. In *re Kyte*, 174 Fed. 867, 871.

#### Opinion

The same statements may be regarded as "false representations" or mere expressions of opinion, according to the circumstances of the particular case. An opinion falsely expressed, with intent to deceive, and which does deceive, is an actionable false representation. A party having superior knowledge of the property sold, and giving a false opinion in regard to a matter of fact, with intent to affect the price to be paid, is guilty of fraud. *Schneider v. Schneider*, 98 N. W. 159, 163, 125 Iowa, 1.

False statements as to the value of land, and that fences thereon are good, made to induce an exchange for other land, is an "opinion" and not actionable as a "false representation." *Else v. Freeman*, 83 Pac. 409, 72 Kan. 666.

Statements by a vendor of land and another to a purchaser, who personally examined the land and dealt with the vendor at arm's length, that there were 240 acres under cultivation, that there were 25 or 30 acres more that could be put into cultivation, and not to exceed 50 or 60 acres of waste land out of the 320 acres in the tract, were mere statements of opinion, and not "repre-

sentations of fact," on which a charge of fraud could be based. *Van Horn v. O'Connor*, 85 Pac. 260, 261, 42 Wash. 513.

Where one, in order to induce another to exchange a stock of goods for land, without examining the land, represented that it was worth a certain sum per acre, this was a representation of fact, and not a mere "opinion," and, being knowingly false and relied on, was actionable. *Mattauch v. Walsh Bros. & Miller*, 113 N. W. 818, 819, 136 Iowa, 225.

Mere expressions of opinion by a seller as to the value of property are not actionable, being regarded as "trader's talk," which every man of intelligence receives cum grano salis. *Freeman v. Evans*, 159 Fed. 26, 32, 86 C. C. A. 216.

A mere expression of opinion, or "trade talk," cannot be construed into a "false representation." Representations that an engine sold had been formerly used, rebuilt, and was practically as good as new, and that it would steam well and was of sufficient power to drive defendant's threshing machine, were mere expressions of opinion, or "trade talk," other than the representation that it had been rebuilt. *Gaar, Scott & Co. v. Halverson*, 105 N. W. 108, 128 Iowa, 603.

Where, in an action for damages for "false representations" inducing plaintiff to purchase certain corporate stock, plaintiff testified that defendant repeatedly told him that the corporation was perfectly solvent, owned a large amount of property, and had paid dividends of 20 per cent. out of the net earnings for several years, evidence of a further statement that the stock was a splendid investment was admissible, and not objectionable, on the ground that such statement was a mere expression of "opinion," when taken in connection with the other statements. *Collins v. Chipman*, 95 S. W. 668, 670, 41 Tex. Civ. App. 563.

A statement by one seeking employment, to his prospective employer, that he could induce certain persons to give their patronage to the employer if he was employed, is only an expression of "opinion," and will not support a charge of "fraudulent misrepresentation," on which to base an avoidance of a contract of employment entered into in reliance thereon. *Weik v. Williamson Gunning Advertising Co.*, 84 S. W. 144, 148, 109 Mo. App. 6 (citing *Wade v. Ringo*, 25 S. W. 901, 122 Mo. loc. cit. 326; *McFarland v. Missouri Pac. Ry. Co.*, 28 S. W. 590, 125 Mo. 253; *Chase v. Rusk*, 90 Mo. App. loc. cit. 29).

#### **Puffing**

"Puffing" mining claims does not amount to such a "false representation" as will authorize the setting aside of a sale of mining stock, where the parties are compos mentis

and deal at arm's length. *Burwash v. Bal-lou*, 82 N. E. 355, 356, 230 Ill. 34, 15 L. R. A. (N. S.) 409; *Id.*, 132 Ill. App. 71.

#### **FALSE RETURN OF PROCESS**

As injury to property, see *Injury to Property*.

#### **FALSE STATEMENT**

See *Materially False Statement*; *Obtaining Credit on False Statement*.

In law to "know" is to possess information. *Bouv. Law Dict.*, verbo "knowingly." Hence one who states a fact without possessing information does not know the fact, and makes a "false statement." Statements not known to be true by the person making them are in law false. *United States v. Bradford*, 148 Fed. 413, 424 (citing *Lynch v. Mercantile Trust Co.*, 18 Fed. 486).

The word "false," as used in Customs Administration Act, § 9, 26 Stat. 135, prescribing punishment by forfeiture, fine, and imprisonment for the use of a "false statement" in making an entry of imported goods, means more than incorrect or erroneous, and implies statements knowingly or negligently untrue. *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 966, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185.

"False," as used in Bankr. Act July 1, 1898, c. 541, § 14, cl. b (3), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, forbidding the discharge of a bankrupt who has obtained property on credit upon a materially "false statement," means no more than "not true," though the word is flexible, and sometimes means "incorrect," and sometimes comprehends wickedness or fraud, as in section 29, where the term "false oath" means a corruptly false oath, such as would subject affiant to a prosecution for perjury. *In re Gilpin*, 160 Fed. 171, 183.

#### **Of existing fact**

Where defendant, convicted of grand larceny by false representations, was shown to have falsely stated that he had an order from a well-known mercantile corporation for a large number of garments, and that he desired to purchase goods from which to manufacture them, by which he induced their delivery, it was a "false statement of an existing fact," and not a warranty as to his financial standing, and was criminal, though not in writing and signed by the party to be charged thereby, as required by Pen. Code, § 544, providing that false pretenses relating to the purchaser's financial ability must be in writing. *People v. Rothstein*, 72 N. E. 999, 180 N. Y. 148, 1 Ann. Cas. 978.

#### **FALSE SWEARING**

"False swearing" may be predicated on a promissory oath. Where the managers

of an election at the beginning of the day take the usual oath to conduct the election honestly and according to law, and thereupon, having held the election, knowingly and willfully certify false returns, the official oath and the election papers being transmitted by law together to the designated officials, the election managers so falsifying their returns are subject to indictment for false swearing. *Norton v. State*, 63 S. E. 662, 664, 5 Ga. App. 586.

Any "false swearing" as to anything past or present makes one guilty of "false swearing," without regard to its materiality. *Wilson v. State*, 93 S. W. 547, 49 Tex. Cr. R. 496.

"False swearing" is defined as follows: One who takes an oath before a person authorized to administer an oath upon a matter of public interest is guilty of swearing. It would have been perjury if taken in judicial proceedings, as where a person makes an affidavit under the English Bill of Sale Act. It is less than perjury, and is an indictable offense. It is also defined as an oath taken before a competent officer in a proceeding which is not judicial, but may affect judicial right, and as swearing corruptly. A law denouncing "false swearing" does not necessarily cover perjury. *State v. Coleman*, 42 South. 471, 472, 117 La. 973, 8 Ann. Cas. 890 (citing *Bouv. Law Dict.*; *Black, Law Dict.*; 2 Bish. p. 1029, § 14; 2 McClain, 852; Whart. § 1269; 2 Russell, 603; 19 Cyc. p. 448).

"In order to constitute the crime of 'false swearing,' the oath need not be taken, or the false statement made, in a matter judicially pending, or to a matter material to any point in question. It is only necessary that the false statement should have been willfully made, with a knowledge of its falsity, on a subject in reference to which appellant might have been legally sworn, and that the oath was administered by an officer authorized to administer it." *Stamper v. Commonwealth (Ky.)* 100 S. W. 286, 287.

Under the Texas law the crime of "false swearing," as distinguished from perjury, can only be committed by a false oath to the voluntary declaration or affidavit, "not required by law or made in the course of a judicial proceeding." *Pierce v. Creedy*, 23 Sup. Ct. 714, 719, 210 U. S. 387, 52 L. Ed. 1113 (citing *Pen. Code Tex. art. 209*).

Where a policy of insurance provides that it shall be void in case "of fraud or false swearing" by the insured, the use of the words "false swearing," in connection with the word "fraud," plainly indicates that either fraud or false swearing was designed to have the effect of defeating the policy, regardless of the ultimate effect of the false swearing upon either party to the contract. False swearing, when knowingly and willfully done, with intent to defraud the insur-

er, avoids the policy, regardless of the ultimate effect of such false swearing, and it is very plain that the word "fraud" was used in connection with the words "false swearing," so as to cover frauds otherwise than by false swearing. It is clear that, if the words "false swearing" be given their plain ordinary meaning, they cannot be held to mean that it was only "false swearing" which worked an advantage to the insured to the prejudice or injury of the insurer in the adjustment and payment of the loss that can avoid the policy. If the plaintiffs knowingly and willfully, with intent to defraud the defendants, swore falsely in making the proofs of loss, such act amounted to a fraud upon the defendants, which avoided the policies, irrespective of the ultimate effect upon the defendants. If the false swearing must secure an advantage to the insured in the adjustment and payment of the loss, to the prejudice or injury of the insurer, in order to avoid the policies, the purpose of this provision would in many cases be nullified, because the insured, after swearing falsely to proofs of loss in order to recover more than his honest loss, could escape the consequences of his act in case of discovery of such false swearing before payment by the insurer. Such a construction would defeat the object of this wholesome provision, designed to prevent fraud and false swearing, and is wholly inconsistent with its purpose and policy. *Meyer v. Home Ins. Co.*, 106 N. W. 1087, 1088, 127 Wis. 293.

#### FALSE TOKEN

See False Pretense.

#### FALSE WRITING

Make false writing, see Make.

#### FALSELY TO MAINTAIN PLEAS

The phrase "falsely to maintain pleas," contained in 33 Edw. I, St. 2, making it a conspiracy to confer together to falsely maintain pleas, does not mean the setting up of a false defense. "The evident intent of the statute was to include within the definition those who combine for the purpose of perverting or obstructing justice." *State v. Bacon*, 61 Atl. 653, 655, 656, 27 R. I. 252.

#### FALSIFY—FALSIFICATION

See, also, Surcharge.

To surcharge or "falsify" is to allege an omission in an account or deny the correctness of some or all of the items rendered. One who objects to a stated account must surcharge or falsify it, and an account rendered by an administrator is a stated account. *Tate v. Gairdner*, 46 S. E. 73, 74, 119 Ga. 133.

*Pen. Code*, §§ 113, 114, punishing "falsifying" any record in any public office, do not make a fraudulent purpose an ingredient of the offense, and a falsification of a public record willfully and knowingly made

is an offense without regard to any purpose to defraud. *People v. Tomalty*, 111 Pac. 513, 515, 14 Cal. App. 224.

To publish of a public official that he was a "falsifier of public documents" is libelous per se, as the word "falsifier," as so used, carried with it the ordinary meaning of "one who falsifies or deceives; a liar." *Tawney v. Simonson, Whitcomb & Hurley Co.*, 124 N. W. 229, 232, 109 Minn. 341, 27 L. R. A. (N. S.) 1035.

#### FALSUS IN UNO, FALSUS IN OMNIBUS

"Falsus in uno, falsus in omnibus," is but a legal maxim, not an inflexible rule of evidence, and in practice its application is delegated to the jury under appropriate instructions. After defendant had published a libelous article charging plaintiff with being a political coworker with B., plaintiff wrote a letter to defendant, purporting to contain a truthful statement of his political activities, and an argument that he was not guilty of the charge made in the publications. The letter contained a statement that plaintiff had refused to consent to the placing of the names of Democratic nominees for the Supreme Court on the Public Ownership ticket, because they had declared the Constitution itself unconstitutional in order to nail up the ballot boxes, and thus cover evidence of frauds in the municipal election. It was held that the falsity of such charge did not render the entire letter false as a matter of law, under the maxim "falsus in uno, falsus in omnibus"; the question whether the letter or the libel spoke the truth in regard to the matters in controversy being for the jury. *Meriwether v. Publishers: George Knapp & Co.*, 97 S. W. 257, 266, 267, 120 Mo. App. 354.

The maxim of "falsus in uno, falsus in omnibus," is not a mandatory rule of evidence, but rather a permissible inference that the jury may or may not draw when convinced that an attempt has been made by a witness to mislead them in some material respect. Where a party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him for the charge of deliberate falsehood; and the courts of justice, under such circumstances, are bound, upon principles of law and morality and justice to apply the maxim, "falsus in uno, falsus in omnibus." *Addis v. Rushmore*, 85 Atl. 1036, 74 N. J. Law, 649.

The doctrine, "falsus in uno, falsus in omnibus," always dangerous in trials, should never be so broad as to apply where the false testimony was not willfully false. The fact that a witness has sworn falsely to a mate-

rial fact is not enough to render the doctrine applicable, unless he did it willfully, knowingly, or corruptly. An instruction that, if a witness has sworn falsely to any material matter, the jury may disregard his testimony, is erroneous for failing to state that the false swearing must have been willful, since the doctrine, "falsus in uno, falsus in omnibus," always dangerous in trials, should never be so broad as to leave out the fact of willfulness. *Bell v. State*, 43 South. 84, 85, 90 Miss. 104 (citing *Sardis & D. R. Co. v. McCoy*, 37 South. 706, 85 Miss. 392).

The doctrine, "falsus in uno, falsus in omnibus," is only applied as a rule of law to a witness who has knowingly and willfully sworn falsely as to some fact material to the issue. An instruction that, if the jury believed that any witness had knowingly sworn falsely on any material point, or had knowingly "belittled any material fact" in the case, they might properly disregard all the testimony of such witness, except so far as corroborated by other credible evidence, was erroneous. *Chicago & S. L. R. Co. v. Kline*, 77 N. E. 229, 230, 220 Ill. 334 (citing *Chicago City Ry. Co. v. Allen*, 48 N. E. 414, 169 Ill. 287).

The usual and approved language in which the doctrine of "falsus in uno, falsus in omnibus," is stated is that, "if a witness testifies willfully falsely as to any material matter in the trial of a case, the jury may, if they see fit, but are not bound to, reject all of such witness' evidence not corroborated by some other credible evidence." Hence this doctrine was not clearly stated in an instruction that "if you find that the testimony of any witness has, when you consider the whole evidence, been impeached, then you may reject the testimony of such witness entirely if you see fit, unless it is corroborated by some testimony, or by some evidence which you believe to be true." *Miller v. State*, 119 N. W. 850, 860, 139 Wis. 57.

The rule, "falsus in uno, falsus in omnibus," does not mean that a witness' entire testimony must necessarily be disregarded or disbelieved because there may be found falsehood in certain parts of it. The rule merely means that, where the witness is found to have sworn falsely in a certain material part of his testimony, his entire testimony may for that reason be rejected. But no one will attempt to challenge the right of a jury or a judge trying the facts to believe and credit certain parts of the testimony of a witness who has been shown to have sworn falsely as to certain other material parts thereof. However, this rule is one which cannot well be invoked in a court of appeal on a review of the facts. *Brandt v. Krogh*, 111 Pac. 275, 279, 14 Cal. App. 39.

"The maxim, 'falsus in uno, falsus in omnibus,' applies only where a witness has knowingly and willfully testified falsely as to matters of fact." An instruction that, if a witness had at another time and place made statements material to the issue in the case at variance with his testimony while on the witness stand, the jury were at liberty to disregard the whole of such witness' testimony, except in so far as he was corroborated by other credible evidence, was erroneous, since it allowed them to reject the entire testimony of a material witness without even finding any of it false, whereas, before they could do so, they must have found some of it false and knowingly and willfully false. *Nielsen v. Cedar County*, 98 N. W. 1090, 1092, 5 Neb. (Unof.) 430 (quoting and adopting definition in *Omaha & R. V. R. Co. v. Krayenbuhl*, 67 N. W. 477, 48 Neb. 553).

The rule, "falsus in uno, falsus in omnibus," does not apply for the purpose of determining the weight to be given to the testimony of a witness where some of his testimony has been corroborated. *Jewell v. Kelley*, 118 N. W. 987, 989, 155 Mich. 301.

Where the evidence of witnesses is in irreconcilable conflict, and the difference is unexplainable on the theory of mistake, libellant's testimony in important particulars being completely discredited, the maxim, "falsus in uno, falsus in omnibus," should be applied. *The Helen W. Martin*, 180 Fed. 317.

"Where a party swears falsely to a fact in respect to which he cannot be presumed likely to mistake, courts are bound to apply the maxim, 'falsus in uno, falsus in omnibus,' and to give no credit to any fact depending upon his testimony alone." *Titterington v. State*, 106 N. W. 421, 422, 75 Neb. 153 (quoting *Dell v. Oppenheimer*, 4 N. W. 51, 9 Neb. 454; citing *Young v. Pritchett*, 6 N. W. 414, 10 Neb. 357; *Frelberg v. Treitschke*, 55 N. W. 273, 36 Neb. 880; *Johnson v. State*, 51 N. W. 835, 34 Neb. 261).

While the maxim, "falsus in uno, falsus in omnibus," is not adopted as a rule of law, the jury may entirely disregard the testimony of any witness considered willfully false in any particular, and the court could so instruct. *Ducharme v. Holyoke St. R. Co.*, 89 N. E. 561, 564, 203 Mass. 384.

Where evidence invokes an application of the rule, "falsus in uno," etc., the trial court's exercise of discretion in applying the rule will not be disturbed. *Pratt v. Welcome*, 92 Pac. 500, 501, 6 Cal. App. 475.

To authorize the application of the maxim, "falsus in uno, falsus in omnibus," it is not sufficient that the testimony of the witness is in some particular simply untrue, or that he even willfully swore falsely to an immaterial fact. It must appear that

he has willfully and knowingly sworn falsely to a material fact. *Boykin v. State*, 38 South. 725, 728, 86 Miss. 481.

A variant statement made by one in an answer in a former suit, though not between the same parties as in the present suit, may be used to impeach him as a witness, and the principle touching credit of witnesses applies: "Falsus in uno, falsus in omnibus." In which instance is he telling the truth? A court cannot act on his evidence in this case, when under oath on a former occasion the witness made statements flatly contradictory to his evidence in this case as to the same vital points on which this case rests. *Hudkins v. Crim*, 61 S. E. 166, 170, 64 W. Va. 225.

Under B. & C. Comp. § 857, subd. 3, requiring the court to instruct that a witness false in one part of his testimony is to be distrusted in all others, an instruction that a witness may be false intentionally or by mistake, and that a mistaken witness is a false witness, etc., was erroneous, since there must be a state of facts from which the jury may be authorized to believe and they must believe the evidence willfully false in some particular before they may discredit the whole of the witness' testimony; the maxim, "falsus in uno, falsus in omnibus" applying only when truth is intentionally disregarded, and not when by defect of memory it is innocently departed from. *Simpson v. Miller*, 110 Pac. 485, 57 Or. 61, 29 L. R. A. (N. S.) 680, Ann. Cas. 1912D, 1349.

The word "false," as used in L. O. L. § 868, subd. 3, providing that a witness false in one part of his testimony is to be distrusted in another, is not the equivalent of "mistaken"; and hence an instruction in the language of the statute is not erroneous for refusal to add "willfully" before "false." *State v. Meyers*, 117 Pac. 818, 821, 59 Or. 537 (quoting 2 Words and Phrases, p. 1655).

## FAME

See Common Fame.

## FAMILIAR

"Familiar," as used in a verification of an answer by defendant's attorney, stating that affiant is "familiar with all statements" in the answer, and "the facts in the case as claimed by defendant," signifies that the attorney is well acquainted with, or has knowledge of, the statements in the answer, and with the facts as claimed by defendant; the word being defined as: "Having an intimate knowledge; well knowing; well acquainted." "Closely acquainted with or intimate; \* \* \* having an intimate knowledge of; \* \* \* well known; well understood." "Having intimate knowledge; well acquainted; thoroughly versed"—so that his competency to verify sufficiently appears. *Turner v. Loomis*, 125 N. W. 662, 664, 146 Iowa, 655.

## FAMILY

See Head of a Family; Immediate Family; Person of the Family.

Member of family, see Member.

See, also, Household.

A "family" is a collective body of persons living in one house, and under one manager. It consists of those who live with the pater familias. The word is often used interchangeably with "household." *Pearre v. Smith*, 73 Atl. 141, 142, 110 Md. 531; *Birch v. Birch*, 86 S. W. 1106, 1108, 112 Mo. App. 157 (*Duncan v. Frank*, 8 Mo. App. 286; *Ridenour-Baker Grocery Co. v. Monroe*, 43 S. W. 633, 142 Mo. 165; *Leake v. Lucas*, 91 N. W. 374, 93 N. W. 1019, 65 Neb. 359, 62 L. R. A. 190; *Pearson v. Miller*, 14 South. 731, 71 Miss. 379, 42 Am. St. Rep. 470; *Bair v. Robinson*, 108 Pa. 247, 56 Am. Rep. 198; *Menefee v. Chesley*, 66 N. W. 1038, 98 Iowa, 55; *Neasham v. McNair*, 72 N. W. 773, 103 Iowa, 695, 38 L. R. A. 847, 64 Am. St. Rep. 202; *Forbes v. Groves*, 115 S. W. 451, 452, 134 Mo. App. 729; *Perkins v. Morgan*, 85 Pac. 640, 641, 36 Colo. 360; *In re Bishop's Estate*, 106 N. W. 637, 638, 130 Iowa, 250; *Robbins v. Bangor Ry. & Electric Co.*, 62 Atl. 136, 141, 100 Me. 496, 1 L. R. A. (N. S.) 963 (citing 3 Words and Phrases, p. 2673, and cases cited); *Gilman v. Matthews*, 77 Pac. 366, 369, 20 Colo. App. 170 (citing *Webst. Dict.*; *Schlesinger v. Keifer*, 30 Ill. App. 253; *Hudson v. King*, 23 Ill. App. 120; *Kelly v. Canon*, 41 Pac. 833, 6 Colo. App. 465; *Straight v. McKay*, 60 Pac. 1106, 15 Colo. App. 60); *Hart v. Goldsmith*, 51 Conn. 479, 480; *Forlaw v. Augusta Naval Stores Co.*, 52 S. E. 898, 902, 124 Ga. 261 (citing *Goode v. State*, 16 Tex. App. 414; *Bones v. State*, 23 South. 485, 117 Ala. 146); *In re Finklea*, 153 Fed. 492, 493 (citing *Fant v. Gist*, 15 S. E. 721, 36 S. C. 576; *Cooper v. Cooper*, 24 Ohio St. 488).

The word "family" in a will is one of flexible meaning and will be construed differently as the circumstances require, in order that the apparent meaning in which it is used in any given case may be carried into effect. *Farnam v. Farnam*, 77 Atl. 70, 72, 83 Conn. 369.

The word "family" in its most usual signification is the group comprising the husband and wife and their dependent children. In a broader sense it consists of a person acting as head or manager with others living with and depending upon him and occupying the same home. *Floyd County v. Wolfe*, 117 N. W. 32, 33, 138 Iowa, 749.

The word "family," within Rev. Laws 1905, § 235, declaring that, if a man has his family living in one place and he does business in another, the former shall be considered his residence, etc., is any group of persons constituting a distinct domestic body. *State ex rel. Young v. Hays*, 117 N. W. 615, 616, 105 Minn. 399.

The word "family," as used in Const. art. 16, § 50, and in the statute exempting the homestead from forced sale in the lifetime of the husband or head of the family, has a broader signification and includes a greater variety of persons than the words "widow and minor children and unmarried daughters remaining with the family," for whose benefit the homestead is required to be set apart by Rev. St. 1895, arts. 2046, 2049, on the death of a husband leaving a widow, minor children, and unmarried daughters remaining with the family. *Wilkins v. Briggs*, 107 S. W. 135, 138, 48 Tex. Civ. App. 596.

"Family," as used in the statute providing for service of a summons by leaving a copy at defendant's usual place of abode with some person of his family, may be defined as "a collective body of persons who live in one house, under one head or manager, including parents, children, and servants, and, as the case may be, lodgers or boarders" (quoting 3 Words and Phrases Judicially Defined, p. 2673), and where the relation between the person to whom the papers are delivered and the other persons of the household is of a permanent and domestic character, and not merely temporary, he is a person of the family on whom constructive service of process against another member may be made. *Colter v. Luke*, 108 S. W. 608, 609, 129 Mo. App. 702.

The word "family," as used in the section of the Code defining "domicile," conveys the idea of the unity of the household in which are gathered the members of the family as one collective body under the management of the head thereof, or to which the head of the family, though called away by the demands of business at times, constantly returns or expects to return. *Forlaw v. Augusta Naval Stores Co.*, 52 S. E. 898, 901, 124 Ga. 261.

"The word 'family' is an expression of great flexibility. It is applied in many ways. It may mean the husband and the wife having no children and living alone together, or it may mean children, or wife and children or blood relatives, or any group constituting a distinct domestic or social body. Thus it may include the husband, wife, father, mother, son, daughter, brother, and sister of another." *Klee v. Klee*, 93 N. Y. Supp. 588, 590, 47 Misc. Rep. 101 (quoting and adopting definition in *Carmichael v. Northwestern Mut. Ben. Ass'n*, 16 N. W. 871, 51 Mich. 494).

Where a testator whose family consisted of himself, his wife, brother and B., a young girl whom he had taken to live in the family, directed that his executor should take proper care of B., supplying her with comfortable wearing apparel, food, etc., as long as she remained "a member of my family, or until she became twenty-one years of age," he used the term "my family" to describe an entity dif-

ferent from and independent of the units of which it was composed, and B.'s right to care and support was not terminated by the death of either the wife or the brother. *Miller v. Miller*, 39 S. E. 597, 599, 99 Va. 662, 86 Am. St. Rep. 919.

**As determined by dependent condition**

Where it appears that a grandmother has kept her grandchild since infancy, maintaining her in her own home, and there is evidence that the parents are unable to support the child, the two constitute a family within the meaning of the homestead exemption. *First Nat. Bank v. Sokolski* (Tex.) 131 S. W. 818, 821.

A "family" has been defined as "a collective body of persons, who live in one house, under one head or manager." A person furnishing a home for himself, his mother, two minor brothers, and an invalid sister, and furnishing the groceries and money for their support, is the head of a "family," within the statute, fixing the amount of wages which shall be exempt. *Jarboe v. Jarboe*, 79 S. W. 1162, 1163, 106 Mo. App. 459.

**As determined by obligation to support**

The word "family" in the exemption law implies a collection of persons of which the debtor is the head, and while one may be a member of his family though residing apart from him, especially the debtor's wife and minor children, the debtor's mother, residing apart from him and not shown to be a poor person unable to maintain herself by work, is not a member of his family, so as to exempt money due him for services from execution. *Lawson v. Lawson*, 111 Pac. 354, 355, 158 Cal. 446.

Though a mother not living with her son is not strictly a member of his family, where she is in poor health, destitute, is supported by him, as the law requires, and resides within the state, she is a member of his family, within the statute exempting a debtor's earnings when necessary for the use of his "family." *Lawson v. Lawson*, 115 Pac. 461, 462, 15 Cal. App. 496.

To constitute one or more persons, with another, living together in the same house, a "family," it must appear that they are being supported by that other in whole or in part, and are dependent on him therefor, and further that he is under a natural or moral obligation to render such support. *Sheehy v. Scott*, 104 N. W. 1139, 1140, 128 Iowa, 551, 4 L. R. A. (N. S.) 365 (citing *Fox v. Waterloo Nat. Bank*, 102 N. W. 424, 126 Iowa, 481).

Where such a social status exists between brother and sister that a moral, if not a legal, obligation rests on the brother to support and take care of the sister, and there is a corresponding state of dependence on her part for such support and care, a family relation exists, within the statute exempting homesteads. *H. P. Drought & Co. v. Stall-*

*worth*, 100 S. W. 188, 189, 45 Tex. Civ. App. 159.

An adult son, for whose support his father is not legally liable, and who does not reside with his father, is not a member of his father's "family," within the meaning of Code Civ. Proc. N. Y. §§ 1879, 2463, which exempt the earnings of a debtor for 60 days, where they are "necessary for the use of a family wholly or partly supported by his labor"; and the payment by a father from his earnings to a son living separate from him of \$600, when the father was in fact insolvent, and knew such fact, or at least that his solvency was doubtful, was a transfer with intent to hinder and delay creditors, which constituted an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (1) 30 Stat. 546. *In re Condon*, 198 Fed. 947, 948.

**As determined by relationship**

Where a statute authorizes the incorporation of mutual benefit associations for the payment of death benefits, according to by-laws adopted, "to the husband, wife, father, mother, son, daughter, brother, sister and legal representatives of such member," and the certificates of an association incorporated thereunder provide for the payment of benefits "to the family, orphans, or dependents as such member may direct," the word "family" refers to the persons designated in the statute, and includes the mother of a member with whom such member was living. *Klee v. Klee*, 93 N. Y. Supp. 588, 589, 47 Misc. Rep. 101.

An averment that accused sent a threatening letter to F. and the members of her family, to wit, her granddaughter and her son-in-law, without further stating the relation between F. and the other two, is sufficient to support an indictment under Act No. 110 of 1908, providing a punishment for sending letters to another for the purpose of extorting money, threatening to kill, kidnap, etc., him or any member of his family; the act specifically providing that the term "family" shall include the lineal and collateral relatives, to and including the third degree. *State v. Allen*, 56 South. 655, 658, 129 La. 733.

The word "family," used in the constitution of a benefit association to designate the class to which the beneficiaries must belong, includes the following persons, who are entitled to take as a general rule in the order named: The wife and unmarried children, or, if no unmarried children, the wife alone, or, if no wife, the unmarried children alone, or, if no wife and no unmarried children, persons related by consanguinity or affinity, living with the member in the same household, or, if none, any person so related on whom the member is dependent, or any person so related, dependent on, and supported by the member, or, if none, the married children, irrespective of dependency, or, if none, father, mother, brothers, and sisters, irrespective of

actual household connection and dependence. *Starnes v. Atlanta Police Relief Ass'n*, 58 S. E. 481, 484, 2 Ga. App. 237.

The relation of brother and sisters alone would not make them decedents' "family" or of his family within the meaning of beneficiary certificates of insurance or articles of incorporation. *Walker v. Peters*, 124 S. W. 35, 36, 139 Mo. App. 681.

The word "family" in the charter of a mutual benefit society, like "relative," has a very extensive scope and has been held to include relatives and connections both by blood and marriage. The charter of a beneficial association provided that its object was to establish a benefit fund for the families or dependents of members as they shall direct, and a by-law declared that on the death of one or more beneficiaries prior to the death of the member, if no change of beneficiary should have been made, the share or shares to which such beneficiaries would have been entitled shall be paid to the beneficiary's legal representative, to be distributed to his or her heirs at law. Held, that where a member of such order died after the death of his wife, who was named as his beneficiary, without appointing a new beneficiary, the heirs of the wife at the time of the member's death were entitled to the fund. *Anderson v. Supreme Council Catholic Benevolent Legion*, 60 Atl. 759, 69 N. J. Eq. 176.

#### As determined by residence together

Where a member of a fraternal beneficiary society lived in the home of friends, and none of them were dependent on such member; and, while he paid no board, they expected to be compensated therefor at his death, it was held that the wife of the person in whose home the member lived was not a member of his "family," within the statute providing that the payment of death benefits shall be to the family, etc., of the member. *Supreme Commandery, U. O. G. O., v. Donaghey*, 72 Atl. 419, 75 N. H. 197.

#### Brothers and sisters

"Family," as used in Civ. Code, § 230, providing for the legitimation of a bastard by "receiving it \* \* \* with the consent of his wife, if he is married, into his family," means no more than that the father must have a home, a settled place of habitation of which he is the head, into which he must receive the child, with the consent of his wife, if he be married; and brothers and sisters, who never live with him, are no part of his family. In *re Gird's Estate*, 108 Pac. 499, 504, 157 Cal. 534, 137 Am. St. Rep. 131.

The term "family," as defined by the Supreme Court of South Carolina, "is a collective body of persons who live in one home, under one head or manager." The head of the family is not necessarily the father of children. The word has a sort of flexible meaning, yet in construing the homestead law, while there is no well-defined rule

that is applicable to every case, and however flexible the term, it is not dependent upon the mere will or caprice of the debtor. A single man, living alone, and whose parents are living, is not the head of a family and entitled to exemptions because he pays the board and expenses of a sister at school. In *re McGowan*, 170 Fed. 493, 494.

Under Code Miss. 1906, § 2147, giving a debtor, who is a citizen householder and having a "family," certain exemptions, a resident bankrupt, who was a widower, is not entitled to exemptions by reason of the fact that he contributes to some extent to the support of two sisters who do not reside with him. In *re Rainwater*, 191 Fed. 738, 740.

#### Children

The word "family" may include an entire household, all descended from a common stock, their husbands and wives, but does not include the child of a son who was born and always resided in a distant state. *Brett v. Donaghe's Guardian*, 45 S. E. 324, 325, 101 Va. 786.

Where the will made a bequest to a son for certain specific purposes, and provided that the balance, if any, and the son's share of the residuary estate, should be held in trust for the benefit of the son and "his family," it was held that, unaided by the context, the words "his family" should be construed as "his children." *Moredock v. Moredock*, 179 Fed. 163, 171.

The word "family," in the statute providing that property exempt under the homestead exemption law shall be for the use and benefit of the family of the debtor from whose estate the property has been exempted in homestead proceedings, includes children born afterwards to husband and wife as well as those in esse and designated in such proceedings. *Hughes v. Purcell*, 68 S. E. 1111, 135 Ga. 174.

A testator bequeathed to one of his daughters a piece of property, to be appraised. The will deprived her of power to sell such property, except for reinvestment in other property suitable for a home for herself and family, and to be used for that purpose, and stated that testator's purpose was to provide a home for his daughter and her family as long as she lived. The will also gave a sum of money equal to the amount at which such house and lot should be appraised, to be invested by the executor for a home for another daughter, to be held in the same manner, for the same purpose, and under the same limitations as provided about the house and lot devised to the first-named daughter. It is held that, though the children of the second daughter were not expressly mentioned in the will, the word "family," as used in the limitation which applies alike to both daughters, includes the children, who therefore have an interest in the fund bequeathed to the daughter for the purpose of securing



a home, which she has no authority to apply for any other purpose. *Coleman v. Grimes* (Ky.) 110 S. W. 349, 350.

#### Same—Adult children

The term "family" in the charter of a beneficial association authorizing a member to designate, as the beneficiary, a person of his "immediate family," or, in default of such family, one of his blood relatives, includes a daughter of insured living with him as a member of the same household, with him as its head, though she be of age so that he is not legally bound to support her and she is not under his legal control. He may designate her as the beneficiary, though she left his home, intending to make a living for herself, and though he left a widow and minor children, who were at his death a part of his household, dependent on him. The primary meaning of the word "family," as used in our language to specify a definite group of persons, is "the collective body of persons who form one household under one head and one domestic government, including parents, children, and servants" (quoting and adopting definition in *Century Dict.*). In construing a writing in which the word "family" is used, this primary meaning should be assumed in determining the expressed intention of the writer unless there is something in the context to show that it is used in some other meaning. The same person may be either a member of the "immediate family" of the insured or one of his "blood relatives." Both groups are composed of persons of the same "family" with the member; in the former reference being had to the primary meaning of "family" as denoting members of one household, gathered around one head, and in the latter to "family" as denoting individuals related through descent from one stock. "Family" is frequently used to denote those connected by the tie of common descent as well as that of a common household. The words "immediate family" are used in this connection to indicate a group of persons, of which the insured is one, connected as one "family" and from which is excluded any member who has become separated from the group as constituting one household, and "immediate family" certainly includes all persons bound together by the ties of relationship and parents and children living together as members of one household under one head. *Dalton v. Knights of Columbus*, 67 Atl. 510, 511, 512, 80 Conn. 212, 125 Am. St. Rep. 116, 11 Ann. Cas. 568 (citing *Town of Cheshire v. Town of Burlington*, 31 Conn. 326, 329; *Hart v. Goldsmith*, 51 Conn. 479, 480; *Wood v. Wood*, 28 Atl. 520, 63 Conn. 324, 327; *Crosgrove v. Crosgrove*, 38 Atl. 219, 69 Conn. 416, 422; *Knights of Columbus v. Rowe*, 40 Atl. 451, 70 Conn. 545, 550; *Hoadly v. Wood*, 42 Atl. 263, 71 Conn. 452, 456).

The word "family," in the statute as to allowances on the administration of estates,

includes such persons as constituted the family of the deceased at the time of his death, whether servants or children who had attained their majority. *Gillett v. Gillett*, 69 N. E. 942, 945, 207 Ill. 136.

#### Husband or wife as member

The word "family" has its root in the Oscan word "famul," which signifies a slave. Much of this primary meaning was applicable to the status of married women at the common law with reference to property. If a husband and wife occupy land belonging to him as a homestead, she is a "family" of the owner. *Cross v. Benson*, 75 Pac. 558, 560, 68 Kan. 495, 64 L. R. A. 560.

A widow, who continues to occupy the homestead, and whose children have all arrived at majority and moved away, is the "family of the owner," within the constitutional provision exempting as a homestead the residence occupied by the family of the owner. *Aultman, Miller & Co. v. Price*, 75 Pac. 1019, 68 Kan. 640.

The provision of the Constitution that "a homestead \* \* \* occupied as a residence by the 'family of the owner' \* \* \* shall not be alienated without the joint consent of husband and wife, when that relation exists," clearly implies that it was not intended that the family, as a family, or any member thereof except the ostensible owner, should be considered as an "owner." "The family" and "the owner" are clearly contradistinguished by the Constitution. *Vining v. Willis*, 20 Pac. 232, 234, 40 Kan. 609.

#### Kindred or next of kin

In a bequest of personalty, the word "family" is synonymous with "kindred," those related by blood who are entitled as next of kin under the statute of distribution. *Jacobs v. Prescott*, 65 Atl. 761, 762, 102 Me. 63.

#### One person

A woman occupying a dwelling house is a "family," within *Mansf. Dig. Ark. § 1800* (*Ind. T. Ann. St. 1899, § 1143*), punishing the disturbance of the peace of any town, neighborhood, or "family"; and an indictment alleging the disturbance of the peace of an individual is insufficient, without alleging that the individual constituted a "family." *Miles v. United States*, 103 S. W. 598, 599, 7 Ind. T. 11.

The term "family" implies dependence, and any number of persons more than one living together under the same roof with some one of their number as head, who controls the affairs of the household, and upon whom the others, or some of them, are by reason of legal or moral obligation dependent, constitute a family, and the person in control the "head of a family," and hence a widow who purchased land and resided thereon alone with no one depending upon her was not the "head of a family" within the

statute exempting the homestead from forced sale. *Elliott v. Thomas*, 143 S. W. 563, 564, 161 Mo. App. 441.

The word "family" denotes a household consisting of more than one person, but a homestead once acquired by one having a family remains to him for his own benefit while occupied as such, though death has taken the rest of the family. *Weaver v. First Nat. Bank of Chicago*, 94 Pac. 273, 277, 76 Kan. 540, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155.

#### Same—Husband or wife alone

A wife, who has separated from her husband, constitutes his "family," within the meaning of testamentary provisions for the benefit of himself and family, contained in his father's will, made before the separation, when there are no children, and the husband receives an income from such estate, payable to the benefit of himself and family, but contributes none of it for his wife's support. *Oberndorf v. Farmers' Loan & Trust Co.*, 129 N. Y. Supp. 814, 815, 71 Misc. Rep. 64.

However protracted the abandonment of a wife by her husband may be, they still constitute in law a "family," so far as the homestead is concerned, where there has been no severance of the domestic relation. *Stephens v. Stephens*, 85 S. W. 1093, 1094, 139 Ky. 810 (quoting language of *Baum v. Turner*, 76 S. W. 129, 139 Ky. 597).

The duty of a husband toward his children, notwithstanding a divorce awarding to the wife the custody of the children, constitutes the husband and his children, when living together, a family, entitled to a homestead exemption, and, until the children are actually taken from the husband, he, with them, constitute a family. *Sykes v. Speer* (Tex.) 112 S. W. 422, 426.

Though, when material was furnished for defendant's premises, a suit by him against his wife for divorce for desertion was pending, and a decree for him was subsequently rendered, his status was such as to entitle him to claim a homestead; he being then a married man, the head of a family, consisting of his wife and minor children, and the required elements of a family, constituted of himself and his minor children, existing after the divorce. *Dinwiddle v. Tims*, 114 S. W. 400, 52 Tex. Civ. App. 72.

#### Same—Surviving spouse

A single person is not a "family," and therefore cannot claim a homestead unless continuing in possession as surviving spouse. *Sheehy v. Scott*, 104 N. W. 1139, 1140, 128 Iowa, 551, 4 L. R. A. (N. S.) 365 (citing *Fulberton v. Sherrill*, 87 N. W. 419, 114 Iowa, 511; *Emerson v. Leonard*, 65 N. W. 153, 96 Iowa, 311, 59 Am. St. Rep. 372).

After the death of the children without issue and the sale of the testator's dwell-

ing house, the widow cannot be regarded as constituting the "family" for whose support the testator made provision in his will. *Metcalf v. Union Trust Co. of New York*, 73 N. E. 498, 503, 181 N. Y. 39.

The fourth clause of a will gave the remainder of testatrix's real estate to the wives of her three sons and to her fourth son, share and share alike, the indebtedness of a certain firm to be deducted from the shares given to the wives of the three sons, and the property so given to the wives to be for the education of their children and the support of "their families." After the death of testatrix, one of the married sons died, leaving no children, and his widow remarried. Held, that such wife was no longer a member of the "family" of the deceased husband, and she took the entire interest in the estate devised to her subject to a particular charge, which trust having been accomplished the trust terminated, and she was entitled to have the property turned over to her. *Stone v. McLain*, 68 Atl. 375, 378, 102 Me. 168.

#### Parents

"The Century Dictionary defines 'family' to mean: The collective body of persons who form one household under one head and one domestic government, including parents, children, and servants, and, as sometimes used, even lodgers or boarders. Parents with their children, whether they dwell together or not; in a more general sense, any group of persons closely related by blood, as parents, children, uncles, aunts, and cousins; oftener used in a restricted sense only of a group of parents and children founded upon the principals of monogamy. In the most general sense those who descend from a common progenitor." A minor unless married has no "family" of his own, strictly speaking, but is a member of his father's family, and in that sense every member of the father's family is also a member of the family of the others comprising the household, and hence under Act July 9, 1901, authorizing a summons to be served by handing a copy to an adult member of defendant's family at his dwelling house, service on a minor was good where the copy of the writ was delivered to his father at the dwelling house where defendant resided with his father. *Yerkes v. Stetson*, 61 Atl. 113, 114, 211 Pa. 556.

#### Surviving husband or wife and children

Under Code Iowa, § 2972, providing that the "homestead of every family, whether owned by the husband or wife, is exempt from judicial sale," it is not essential to the exemption that there should be one who is the head of the "family" or members who are dependent, and upon the death of a father and mother so long as their children, or any number of them, continue to reside

on the homestead property as members of the same family the homestead character continues or a new family is created which is entitled to homestead rights in the property, and in either case it cannot be sold to satisfy the debts of any one of the heirs contracted after the decease of their parents, whether such heirs are members of the family or not. In *re Rafferty*, 112 Fed. 512, 513.

Rev. St. § 3061, provides that a year's allowance of \$300 shall be made to the widow of a deceased person and \$100 in addition thereto for every member of the family beside the widow; and section 3062 defines "family" as every person to whom the deceased or widow stood in place of a parent, who was residing with the deceased at his death, whose age did not then exceed 15 years. Held that, where the widow refused to assume the control and maintenance of two stepchildren under 15 years of age for a year after the death of her husband, she was only entitled to an allowance of \$300; the allowance for the children being payable to their guardian. In *re Stewart*, 52 S. E. 255, 256, 140 N. C. 28 (citing *Hollomon v. Hollomon*, 34 S. E. 99, 125 N. C. 29).

#### **Unmarried man with mistress and children**

"While the law will not recognize as a 'family' entitled to the homestead exemption in this state, a man and a woman living together in adultery, yet it has been held that there rests on the father of illegitimate children a natural obligation to support them, and they, living with him, constitute such a 'family' as may assert homestead rights." *Rutherford v. Mothershed*, 92 S. W. 1021, 1023, 42 Tex. Civ. App. 360 (citing and adopting *Lane v. Phillips*, 6 S. W. 610, 69 Tex. 240, 5 Am. St. Rep. 41).

Where a woman and her putative husband were living together illegally at the time he bought certain property, they did not constitute a "family" within the meaning of the homestead law, so as to permit such property being declared homestead property, and a conveyance of the land by him was not void because she did not join therein. *Middleton v. Johnston* (Tex.) 110 S. W. 789, 790.

#### **As relating to time of death**

The term "family," as used in Code Civ. Proc. Cal. § 1469, providing under certain circumstances for the distribution of an entire decedent's estate for the use and support of his family, only includes the widow and those children living as members of the decedent's family immediately before and at the time of his death, and does not include a widow who had abandoned her husband and was not living with him at the time of his death. In *re Miller's Estate*, 111 Pac. 255, 257, 158 Cal. 420; In *re Bose's Estate*, 111 Pac. 258, 158 Cal. 428.

A stepfather who was not a member of his stepdaughter's family at the time of her death, though at a previous time he had boarded with her for a time, was not a member of her "family," within *Hurd's Rev. St. Ill. 1903*, c. 73, § 1, and the provisions of a benefit certificate issued to her permitting the payment of the death benefit to a member of the "family" of the member of the beneficial association. *Supreme Lodge, Order of Mutual Protection, v. Dewey*, 106 N. W. 140, 142, 142 Mich. 666, 3 L. R. A. (N. S.) 334, 113 Am. St. Rep. 596, 7 Ann. Cas. 681.

Under St. 1876, p. 22, c. 16, incorporating a relief association "for the purpose of assisting the families of deceased members of said association," and a by-law of the association providing that on the death of a member there shall be paid to such member of his family as he shall have designated to receive it \$1,000, and that each member on joining shall designate some member of his family to whom it shall be paid, provided that he may change such designation, by transferring it to another member of his family, and that, if a member at his death shall have failed to make such designation, the money shall be paid to his widow, the person designated must be a member of his family at his death, so that, his children who were designated having married and moved from his house, his widow, who was a member of his family at his death, is entitled to the money; his children having ceased to be members of his "family." *Spear v. Boston Police Relief Ass'n*, 81 N. E. 196, 197, 195 Mass. 351 (citing *Elsev v. Odd Fellows' Mut. Relief Ass'n*, 7 N. E. 844, 142 Mass. 224; *Marsh v. Supreme Council A. L. H.*, 21 N. E. 1070, 149 Mass. 512, 4 L. R. A. 382; *Dodge v. Boston & P. R. Corp.*, 28 N. E. 243, 154 Mass. 229-301, 13 L. R. A. 318; *Phelps v. Phelps*, 10 N. E. 452, 143 Mass. 570-574; *Smith v. Boston & Maine Railroad Relief Ass'n*, 46 N. E. 626, 168 Mass. 213).

#### **As too indefinite to describe parties**

The word "family" is too indefinite to describe a party to a contract, and hence an allegation that defendant let certain premises to plaintiff and his family did not describe the parties to the contract with sufficient certainty. *Davis v. Smith*, 58 Atl. 630, 632, 26 R. I. 129, 66 L. R. A. 478, 106 Am. St. Rep. 691, 3 Ann. Cas. 832

#### **FAMILY ALLOWANCE**

As proceeding, see *Proceeding*.

#### **FAMILY ARRANGEMENT**

A "family arrangement" means practically a family association, under a common roof, by a common fireside, in a common lodging and at a common table. Such arrangement for pupils and head masters of a private boarding school is a mere incident to the school use of the building and does not

destroy the tax exemption. *State ex rel. Spillers v. Johnston*, 113 S. W. 1083, 1086, 214 Mo. 656, 21 L. R. A. (N. S.) 171.

### FAMILY ARTICLE

"A carriage is peculiarly a 'family' or household article. It contributes, in a large degree, to the health, convenience, comfort, and welfare of the household or of the family." *Arthur v. Morgan*, 5 Sup. Ct. 241, 112 U. S. 495, 500, 28 L. Ed. 825.

### FAMILY EXPENSE

"Family expenses," within a statute making such expenses chargeable upon the property of both husband and wife, includes supplies used in part for domestic servants. *Perkins v. Morgan*, 85 Pac. 640, 641, 36 Colo. 360.

"Family expenses," within Code, § 8165, making such expenses chargeable on the property of both husband and wife, or either of them, includes the purchase price of a heating stove, wringer, coal oil and can, buggy and carriage kept for the use of the family. *McDaniels v. McClure*, 120 N. W. 1031, 1032, 142 Iowa, 370, 134 Am. St. Rep. 424.

The phrase "expenses of the family," as used in 3 Mills' Ann. St. 1891 (2d Ed.) § 3021a, providing that the expenses of the family are chargeable on the property of both husband and wife, is not limited to necessities, and what shall be included in the term must be determined by the facts of each case, subject to the limitations that the articles must have been purchased for and used in or by the family or some member thereof. *Gilman v. Matthews*, 77 Pac. 366, 20 Colo. App. 170.

#### Carriage

"Family expenses," within Rev. St. 1908, § 3021, making such expenses chargeable on the property of both husband and wife, includes a purchase by a husband of a buggy for family use while he and his wife are living together, though on one occasion he did not permit her to use the buggy, and though about a year after the purchase they separated. *Houck v. La Junta Hardware Co.*, 114 Pac. 645, 50 Colo. 228, 32 L. R. A. (N. S.) 939.

#### Medical attendance or service

"Family expenses," within Ballinger's Ann. Codes & St. § 4508, making such expenses chargeable on the property of both husband and wife, or either of them, includes ordinary medical aid and advice for the wife. *Russell v. Graumann*, 82 Pac. 998, 999, 40 Wash. 667, 5 Ann. Cas. 830.

### FAMILY MEDICINES

"The expression 'family medicines' is synonymous with such expressions as 'domestic remedies,' 'household remedies,' etc., found in the statute of other states and

common in general parlance. It includes such things as camphor, quinine, paregoric, spirits of turpentine, castor oil, and salt peter, epsom salts, etc., but not a preparation containing sulphuric acid." *Lewis v. Brannen*, 65 S. E. 189, 190, 6 Ga. App. 419.

### FAMILY SETTLEMENT

An agreement on the part of a brother of a deceased person with another brother and sister to refrain from contesting the will of decedent in consideration of the promise of the latter, beneficiaries named in the will, to pay to him a certain sum of money, is not, on the facts stated in the opinion, a "family settlement," within the meaning of the law upon that subject. *Montgomery v. Grenier*, 136 N. W. 9, 10, 117 Minn. 416.

### FANCIFUL

A trade-name may be such as indicates the purpose of the association or may be arbitrary or fanciful, such fanciful or arbitrary words or phrases, as applied to an association organized for legitimate purposes, constituting a valid trade-name, and such words or phrases are deemed "arbitrary" or "fanciful" when they do not by their usual and ordinary meaning denote the purposes of the association, but come to indicate their purpose by application and association. *Creswill v. Grand Lodge K. P. of Georgia*, 67 S. E. 188, 191, 133 Ga. 837, 134 Am. St. Rep. 231, 18 Ann. Cas. 453.

### FANCY

#### FANCY STATIONERY

"The term 'fancy stationery' covers a miscellaneous assembly of leather and other goods, such as pocketbooks, bags, card cases, and many kindred articles, which cannot be classified." *Crook v. Commissioners' Court of Calhoun County*, 39 South. 383, 144 Ala. 505 (quoting and adopting definition in 9 Americanized Enc. Brit. p. 5555).

### FANS

The phrase "fans of all kinds," in the Tariff Act does not include so-called fans consisting of unsubstantial paper novelties in the shape of fans. *R. F. Downing & Co. v. United States*, 141 Fed. 490.

The phrase "fans of all kinds," in the Tariff Act, does not include everything which may be called a fan, and to an exceedingly limited extent used as a fan. So-called cigar fans and firecracker fans, consisting of small folding fans closing into cases representing cigars, etc., are dutiable as "toys." *Morimura Bros. v. United States*, 175 Fed. 887, 889.

Embroidered fans are within the term "fans of all kinds," in the Tariff Act, and not within the term "embroidered wearing apparel." *United States v. Quong Lee & Co.*, 173 Fed. 819, 820.

**FANTAIL**

"Fantail" is a process of floating boats. It differs from the ordinary process in that instead of pulling at right angles with the canal, by means of numerous small pockets at short intervals along the canal in such way that the territory covered from each pocket has the shape of a parallelogram, the pull boat operates at varying angles from one large pocket, and the territory covered has the shape of an open fan. *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 41 South. 332, 342, 117 La. 1.

**FAR**

See *As Far As*

**FARE**

See *Passenger Paying Fare*.

As provisions, see *Provisions*.

Increase of rate of fare, see *Increase*.

Refusal to pay fare, see *Refuse—Refusal*.

A charge to a passenger of 10 cents in addition to the usual fare, making the total 3 cents over the lawful rate of fare, is "fare," within Railroad Law, § 58, providing a penalty for asking and receiving more than the lawful rate of fare, though the amount was repayable on presentation by the passenger of a slip given him on making the payment. *Hogan v. Long Island R. Co.*, 126 N. Y. Supp. 449, 450, 142 App. Div. 29.

The purchase of a ticket by a passenger is not the payment of a fare. Payment of fares is made to the conductor alone, whether such fare be paid by cash or by ticket. A fare is a payment that is made when the right of carriage is claimed. As defined by Webster's International Dictionary the word "fare" originally meant "journey," and such is still its connotation. When a ticket is accepted by the conductor, it becomes a fare, but not before. *Shelton v. Erie R. Co.*, 66 Atl. 403, 407, 73 N. J. Law, 558, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883.

**FARM**

See *Being Upon Farms; On the Farm; State Farm*.

My farm, see *My*.

The terms "farm" and "lot" in the tax law are to be understood in their ordinary and popular sense. A tract of land, 18,000 acres of which are in one town and 14,000 in another, the entire tract being mountainous, woody, covered with lakes, containing a number of buildings, some of which were in each town and used for residences, hunting lodges, servants' residences, and in the manufacture on a large scale of maple sugar and lumber, is not a "farm or lot" within the Tax Law, providing that, if a farm or lot

is divided by a line between two tax districts, and the owner resides thereon, it shall be assessed to him in the district in which he lives. *People ex rel. Low v. Wilson*, 98 N. Y. Supp. 1080, 1081, 113 App. Div. 1.

**As cultivated land**

A tract or lot of land consisting of between five and six acres and devoted to agricultural purposes, and which the tenant was required by his contract to keep manured, is a "farm." *Kroeger v. Bohrer*, 91 S. W. 159, 161, 116 Mo. App. 208 (citing *Pepper v. O'Dowd*, 39 Wis. loc. cit. 547; *State v. Kennerly*, 4 S. E. 47, 98 N. C. loc. cit. 659; *In re Drake*, 114 Fed. 231; *Kendall v. Miller* [N. Y.] 47 How. Prac. loc. cit. 448; *Webst. Dict.*).

The word "farm" has been defined as a tract of land under one control or forming a single property devoted to agriculture, stock raising, dairy produce, or some allied industry, and again as a tract of ground cultivated or designed for cultivation by a farmer, and again as a piece of ground devoted by its owner to agriculture, and again as a body of land, usually under one ownership, devoted to agriculture, either to the raising of crops, or pasture, or both. The term will not apply to a narrow strip of unplatted land about 550 feet long lying in a city and never used for agricultural purposes. *Williams v. Chicago & N. W. Ry. Co.*, 81 N. E. 1133, 1135, 228 Ill. 593 (citing *Standard Dict.*; *Webster's Dict.*; *People ex rel. Rogers v. Caldwell*, 32 N. E. 691, 693, 142 Ill. 434, 441).

**Detached parcels**

Where an owner of land, situated in different counties and consisting of separate tracts, resided on one tract, but farmed all the tracts, and one of the tracts was in another county with separate farm buildings, the personal property on the latter tract was taxable in the county in which it was located, under the rule that personal property must be assessed in the district where the owner resides, except when the owner of personalty connected with a farm does not reside thereon, in which case the same must be assessed in the district where the farm is situated; the fact that different tracts of land owned by the same person are managed as parts of one system for farm purposes not making the tracts a single "farm." *People v. Scheifley*, 96 N. E. 890, 891, 252 Ill. 486.

**FARM CROSSINGS**

A farm crossing is a crossing used in connection with land employed for agricultural purposes. *Williams v. Chicago & N. W. Ry. Co.*, 132 Ill. App. 274, 277; *Id.*, 81 N. E. 1133, 1135, 228 Ill. 593.

The "farm crossings" required to be constructed by law (P. S. 4450), providing that a railroad company shall construct and maintain farm crossings and cattle guards at all farm and road crossings sufficient to turn cattle, are surface crossings. *Libby v. Cana-*

dian Pac. Ry. Co., 73 Atl. 593, 594, 82 Vt. 316.

Where a railroad company covenanted to provide suitable farm crossings, and the successors in title of the original covenantee for many years used one of such crossings to reach a village, post office, and station, in which use the company acquiesced, it could not abolish the crossing on the ground that it ceased to be used as a "farm crossing." *Kraeer v. Pennsylvania R. Co.*, 67 Atl. 871, 872, 218 Pa. 569.

In a conveyance of land to a railroad company, the grantee agreed to make and maintain the necessary fences on both sides of the tract conveyed, and to provide the grantor with a suitable and convenient road crossing. At the time of the conveyance, the land was farm land, and the road crossing connected the portions of the farm severed by the railroad. Fences were built with sliding bars at the road crossing, and both parties acquiesced in this arrangement for many years. Held that the crossing was a "farm crossing" only. *Speer v. Erie R. Co.*, 65 Atl. 1024, 1025, 72 N. J. Eq. 411.

The words "farm crossings" in St. 1898, § 1810, requiring the maintenance by railroads of suitable farm crossings for the use of the occupants of lands adjoining, are descriptive of the kinds of crossings required, as distinguished from highway crossings, and are not limited to crossings for the use of occupants of adjoining farm lands; and hence, where a railroad passed through land on which was situated a plant for the making of bricks from clay taken from the land, the railroad was required to make a suitable and convenient crossing so as to enable the use of the clay on both sides of the railroad right of way. *Manitowoc Clay Product Co. v. Manitowoc, G. B. & N. W. Ry. Co.*, 115 N. W. 390, 393, 135 Wis. 94.

#### FARM ENGINE

See Steam Farm Engine.

#### FARM HAND

As domestic servant, see Domestic Servant—Domestics.

#### FARM LABORER

A woman, doing ordinary housework and cooking for laborers on a farm is not a "farm laborer," within Rev. Codes 1905, § 6277, giving a lien for the wages of a farm laborer. *Lowe v. Abrahamson*, 119 N. W. 241, 242, 18 N. D. 182, 19 L. R. A. (N. S.) 1039, 20 Ann. Cas. 355.

##### Foreman

A foreman performing manual labor on a farm is a "farm laborer," within Rev. Laws, c. 106, § 79, providing that sections 71 and 78, defining the liability of employers, shall not apply to injuries to farm laborers by fellow employes. *Rowley v. Ellis*, 83 N. E. 1103, 1104, 197 Mass. 391.

#### FARM PRODUCT

Beef from slaughtered animals raised and slaughtered on the farm is the "product of the farm," and may be sold within city limits without a license. In re Snyder, 79 Pac. 819, 822, 10 Idaho, 682, 68 L. R. A. 708.

#### FARMER

Association of farmers as partnership, see Partnership.

See, also, Farming.

A "farmer," as the term is usually understood, is one who directs the business of a farm and works at farm labor. *Foglesong v. Modern Brotherhood of America*, 97 S. W. 240, 241, 121 Mo. App. 548.

A statement of claim which describes a person as one who "owned and resided on a farm" contains a sufficient foundation for the assumption that such a person is a "farmer," within the meaning of the Bankrupt Act. *Miller v. Jackson*, 34 Pa. Super. Ct. 31, 39.

##### As chief occupation

Where a man has for years made farming his principal occupation, and intends to do so in the near future, the mere fact that he may not be so engaged, and his team, wagon, and harness not be used in farming when levied upon, does not deprive him of his exemption right as a "farmer." *State ex rel. McKee v. McNeill*, 107 Pac. 1028, 1029, 58 Wash. 47, 137 Am. St. Rep. 1038.

A woman who is a wife may be a "farmer." If she owns or hires a farm and is engaged in running it, she is a "farmer" within the meaning of the Bankrupt Act, but the mere fact that she actually owns a farm does not make her a "farmer." The word "farmer" is synonymous with agriculturist, husbandman, cultivator, or tiller of the soil. The Century Dictionary says a "farmer" is one who cultivates a farm either as owner or lessee; in general one who tills the soil. A "farmer" is one who resides on a farm with his family, cultivating such farm, and mainly deriving his support from it, though he is also the publisher of a weekly newspaper and the proprietor of patent medicines (citing *McCue v. Tunstead*, 4 Pac. 510, 65 Cal. 506). A "farmer" is one who is devoted to the tillage of the soil, and persons who follow this occupation may call themselves horticulturists, viticulturists, or gardeners, but they are "farmers." In re Johnson, 149 Fed. 864, 867.

##### As merchant

See Merchant.

##### As peddler

See Peddler.

##### Tiller

The term "farmer" is not synonymous with a tiller of the soil. To constitute one a farmer, it is not essential that he in person till the soil or that his operations should

be limited to agricultural planting, sowing, and cultivation of the soil. *Bank of Dearborn v. Matney*, 132 Fed. 75, 76.

### FARMERESS

The Century Dictionary has the word "farmeress" defined as a woman who farms; a farmer's wife. In *re Johnson*, 149 Fed. 864, 867.

### FARMING

The term "farming" does not include the development, by artesian wellboring, of a sufficient supply of water with which to irrigate land absolutely unfit for agricultural purposes unless artificial irrigation can be had. Such land is not "suitable for cultivation" within the meaning of the Constitution. *Robinson v. Eberhart*, 83 Pac. 453, 454, 148 Cal. 495.

"Farming" includes the cultivation and fertilization of the soil, as well as caring for and harvesting the crops. *Corey v. Struve*, 116 Pac. 975, 978, 16 Cal. App. 310.

A farmer does not cease to be "engaged principally in farming," within the meaning of the Bankrupt Act (30 Stat. 547), because he establishes a dairy as one of the branches of his industry, to utilize the products of his farm and convert them to profitable uses, nor because he may sell the products of his dairy at retail. *Gregg v. Mitchell*, 106 Fed. 725, 727, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 16 Ann. Cas. 510.

The terms "farming" and "tilling of the soil," as used in Bankrupt Act (30 Stat. 544), providing that any natural person, except a wage earner or a person engaged chiefly in farming and the tilling of the soil, etc., may be adjudged an involuntary bankrupt, are more or less closely allied. The term "farming" is doubtless employed in the act, as a generic term, in a comprehensive sense. It is reasonable to conclude that the term was not limited merely to the production of grains and grasses, and the like. The farmer may cultivate all or a part of his land. He may be general or special. He may devote his cultivation to the production of corn, or wheat, or oats, or rye, or grasses, whichever in his judgment may be the more useful or profitable. He may include with those breeding, feeding, and rearing of live stock, embracing cattle, horses, mules, sheep, and hogs, for domestic use and for market; and, if he find it more profitable to feed his agricultural products to his live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purposes to what he may breed or rear upon his farm. For this purpose he may rely entirely upon the purchase of his live stock from his neighbors or on the markets, and utilize his farm products in feeding and fattening such feeders for market. *Bank of Dearborn v. Matney*, 132 Fed. 75, 76. See,

also, In *re Dwyer*, 184 Fed. 880, 881, 107 C. C. A. 204.

Where an alleged bankrupt for three years resided on a farm of 300 acres, which he had bought but on which he had paid little, and he farmed less than 100 acres himself, but expended large sums in the purchase of high-bred cattle, which he kept on the farm for a time, and then sold them at auction sales, and in such business became largely indebted, his farming debts being merely nominal, he was not "engaged chiefly in farming" within the national bankruptcy act, and was subject to proceedings in involuntary bankruptcy. In *re Brown*, 132 Fed. 706, 707.

"Where one's occupation or business which is of principal concern to him, not ephemeral, but of some degree of permanency, and on which he mainly relies for his livelihood and financial welfare, be other than farming, he is not a person chiefly engaged in farming." A man whose products from land cultivated by him amount to not more than \$1,500 to \$1,800 per year, while during the same time he expends in the purchase of live stock, and feed for the same, something near \$15,000 per year, and who has become indebted, mainly through his live stock transactions, to the amount of more than \$50,000, is not "chiefly engaged in farming," within the meaning of the bankruptcy act, and is not exempt from proceedings in involuntary bankruptcy. *Bank of Dearborn v. Matney*, 132 Fed. 75, 82 (quoting *Wulbern v. Drake*, 120 Fed. 495, 56 C. C. A. 643).

"In *Wulbern v. Drake*, 120 Fed. 493-495, 56 C. C. A. 643, it was held that the words in the bankruptcy act, 'a person engaged chiefly in farming or the tillage of the soil,' mean the business of cultivating land or employing it for the purpose of husbandry. In *Re Drake*, 114 Fed. 229-231, it was said, the meaning of these words being under consideration: 'Nor will it profit to trace historically the meaning of the word "farming." In its purely agricultural sense, its use is comparatively modern. Within the purview of this statute it is understood to mean the business of cultivating land or employing it for purposes of husbandry; and a farm is a tract devoted to cultivation under a single control, whether it be large or small, isolated, or made up of many parcels. For a long time after the words began to be used in an agricultural sense they were applied to lands held on lease, and "demise, lease, and to farm let" are still the operative words of a lease, but they are, in modern use, applied without respect to nature of tenure. *Robinson Crusoe* says, "I farmed upon my own land." So it appears that the words have been used in their present sense for nearly 200 years. Under the proofs in this case the defendant had the direction and control of the farming operations upon all the land

described, and was "engaged in farming," and I am of opinion that these words cannot be given the restricted meaning which would take out of the protection of the statute only those engaged in actual labor upon the farm." In re Johnson, 149 Fed. 864, 868.

An alleged bankrupt had for some years conducted a law and collection office; his principal business in connection therewith being the making of collections, and the renting of property for others, and collecting the rents therefor. During the two years prior to the filing of the petition his total earnings from such business did not exceed \$450, and were little, if any, above his expenses. He owned a farm of 470 acres, which was improved and rented until about a year prior to the filing of the petition; he being, however, a partner in the stock thereon and consulted in regard to its management. At this time the lease expired, and he thereafter conducted the farm himself, being at the place a considerable portion of the time and moving his family there some time before the commission of the alleged acts of bankruptcy. The gross income from the farm during that season, which was not a favorable one, was about \$1,800. His indebtedness arose principally out of his purchase and operation of the farm. Held, that from the time of his assuming the conduct of the farm he was engaged chiefly in farming, and was not subject to be adjudged an involuntary bankrupt. In re Hoy, 137 Fed. 175, 178.

#### FARMING TOOLS AND UTENSILS

A steam engine used in connection with a pump for irrigation, with a thresher, and with machinery for cultivating a crop of rice, and not shown to have been used for any other purpose than the cultivation and harvesting of such crop, is a "farming utensil" within Civ. Code, art. 3259, on which the privilege of the vendor is superior to that of the lessor of the land, and this, whether the engine was bought as part of the pump or of the thresher, or at another time and from another source. Lahn & Co. v. Carr, 45 South. 707, 709, 120 La. 797.

#### Threshing machine

A steam thresher for harvesting a rice crop is a "farming utensil" within Civ. Code, art. 3259, making the vendor's privilege superior to the privilege of the lessor for rent. The word "utensils" more especially means an implement or vessel for domestic or farming use. See Stand. Dict. As used in the Code, "utensils" is a translation of "ustensiles," used in article 2102 of the Code Napoleon. This word, in France, has been held to include a "machine a battre," or threshing machine. In French jurisprudence the word is used as synonymous with "agricultural instruments," whatever may be their nature. It has been held in other states of the Union that "mowers" and "combined

harvesters" used by debtors for necessary farm work are within the meaning of the term "farming utensils or implements," as used in exemption laws. Laporte v. Libby, 38 South. 457, 458, 114 La. 570.

#### FARO

As banking game, see Banking Game.

#### FAST

See As Fast As; Mighty Fast; Very Fast.

#### FAST MAIL

A "fast mail" in railroad parlance is a train which stops only at the more important stations at long intervals of time and space, and which maintains, and presumably is under contract with the United States government to maintain, a great rate of speed. Hicks v. Union Pac. R. Co., 107 N. W. 798, 800, 76 Neb. 496.

#### FASTEN AND SECURE

The term "fasten and secure," in an instruction as to the care required in confining cars on a siding to prevent their escape to the main track, does not imply that they are to be anchored by means of chains, but refers to the use of the ordinary appliances consisting of brakes and blocks. Jones v. Kansas City, Ft. S. & M. R. Co., 77 S. W. 890, 897, 178 Mo. 528, 101 Am. St. Rep. 434.

#### FATAL

"Fatal" has been defined as causing death; deadly or mortal. Boyer v. State, 121 N. W. 445, 446, 84 Neb. 407.

#### FATHER

See Come by the Father; Reputed Father; Stepfather.

The right granted by Rev. Civ. Code, art. 2315, to the surviving father or mother to recover damages for the death of their son, is a right granted to the actual father or mother, and not to an adopting parent. Mount v. Tremont Lumber Co., 46 South. 103, 121 La. 64, 126 Am. St. Rep. 312, 15 Ann. Cas. 148.

A statute referring to a father or mother does not in the absence of special statement, include a natural father or mother. Landry v. American Creosote Works, 43 South. 1013, 1017, 119 La. 231, 11 L. R. A. (N. S.) 387.

#### Mother

The word "father," as used in section 21 of the act concerning wills, by virtue of the provisions of Rev. St. 1874, p. 833, relative to statutes, includes "mother." Walker v. Hyland, 56 Atl. 268, 271, 70 N. J. Law, 69.

#### As next of kin

See Next of Kin.



# FAULT

See Free from Fault; Without Fault.

"Fault," as used in the statute giving a wife, who, without her fault, is living apart from her husband, a remedy in equity for support and maintenance, means a voluntary consenting to the separation, or such failure of duty or misconduct on her part as materially contributes to a disruption of the marital relation. *Harding v. Harding*, 25 Sup. Ct. 679, 682, 198 U. S. 317, 49 L. Ed. 1066 (citing *Johnson v. Johnson*, 125 Ill. 510, 18 N. E. 891).

"Fault," as used in the statute prescribing the grounds for a divorce, means more than a mere wrong in the sense of an error or a deviation from the rules of propriety, but embraces also any defect or blemish or impairment of excellence preventing the full consummation of the marriage relation. *Mutter v. Mutter*, 97 S. W. 393, 394, 123 Ky. 754, 124 Am. St. Rep. 381.

Where a horse killed on a government transport was in charge of the agents of the government and not of the owner, the loss was not caused by his "fault or negligence," within the meaning of the statute providing for payment. *Hardie v. United States*, 39 Ct. Cl. 250, 252.

## As negligence

"Fault" being synonymous with "negligence," it was not error to charge that the doing of an act by the plaintiff which materially contributed to his injury would not constitute contributory negligence, unless the jury found "that he was in fault in doing such act." *Indiana Union Traction Co. v. Long*, 96 N. E. 604, 607, 176 Ind. 532 (citing 3 Words and Phrases, pp. 2703, 2704).

"Fault," in legal literature, is the equivalent of "negligence," and it is so used in a statute giving an action for damage to person or property by a dog where the damage was not occasioned through "fault" of the person injured. *Garland v. Hewes*, 64 Atl. 914, 915, 101 Me. 549.

The use of the word "fault," in an instruction that want of ordinary care was not a contributing cause unless there was a proximate connection between the injury and the want of care; "that is, it must appear that there was such a relation between plaintiff's fault and the injury that it was a natural result thereof," is not erroneous, as it evidently refers to "want of ordinary care." *Sorensen v. J. I. Case Threshing Mach. Co.*, 109 N. W. 84, 86, 129 Wis. 366.

The negligent failure of the master of a vessel to make proper use of the ventilating apparatus during the course of a five months' voyage, by reason of which, and the presence in the cargo of a large quantity of coke, the wicker or straw coverings on a large number of wine bottles were sweated and ruined,

was not a fault or error in the management of the vessel, within the meaning of *Harter Act* Feb. 13, 1893, c. 105, § 3, 27 Stat. 445, but "negligence, fault, or failure in proper \* \* \* care of \* \* \* merchandise or property" within section 1, for which the owner of the vessel is liable. *The Jean Bart*, 197 Fed. 1002, 1005.

## Minerals

A "fault," as the word is used in coal mining, "refers to interruptions in the continuity of the coal deposit caused by displacements in the formation or by a pinching together of the overlying and underlying rock strata." *Wilson v. Big Joe Block Coal Co.*, 112 N. W. 89, 90, 134 Iowa, 594.

# FAVOR

See Challenge to the Favor; In His Favor.

Under Gen. St. 1902, § 806, authorizing the "party in whose favor the verdict was rendered" to appeal from the decision setting it aside as against the evidence, defendant may appeal from the decision setting aside the verdict as awarding inadequate damages. *Steinert v. Whitcomb*, 79 Atl. 675, 677, 84 Conn. 262.

# FEAR

See Putting In Fear; Reasonable Fear.

The expression, "fears of a reasonably courageous man," in a charge on self-defense, is identical in meaning with the expression, "fears of a reasonable man," in Pen. Code 1910, § 71. *Cochran v. State*, 72 S. E. 281, 282, 9 Ga. App. 824.

The words "fears or hopes," in an instruction that in passing on the credibility of witnesses the jury may consider their "motives, fears, or hopes," express an amplification of the word "motives," but add nothing to its meaning. *People v. Glass*, 112 Pac. 281, 292, 158 Cal. 650.

# FEATHER

Boas, made by stringing dressed feathers on a cord, are subject to the classification of "feathers \* \* \* dressed," etc., under *Tariff Act*, 30 Stat. 191. *Legg v. United States*, 163 Fed. 1006, 1007, 90 C. C. A. 176; *Id.*, 154 Fed. 558.

Crude ostrich feathers, which in that condition are never used for ornamental purposes, but need to be dressed before becoming suitable for such use, are dutiable as "feathers \* \* \* crude," and not as "ornamental feathers," under the *Tariff Act*, 30 Stat. 191. *Brodie v. United States*, 135 Fed. 914, 915; *Spero v. Same*, 135 Fed. 915, 916.

Millinery articles, made almost wholly of feathers, but containing a small quantity of wire, which was an important feature of

their construction, are dutiable as "articles in part of metal," under the Tariff Act, rather than as "feathers advanced or manufactured." *United States v. Berlinger, Brown & Meyer*, 167 Fed. 800, 93 C. C. A. 190.

### FEATHER RAILS

The term is applied to the rails of a short detached movable railway track made to fit over and connect with the regular track. *Burke v. St. Louis S. W. R. Co.*, 97 S. W. 981, 120 Mo. App. 683.

### FEATHERBONE

The term "featherbone" has become the name of the article produced from the quills of feathers and used as a substitute for whalebone. The patentee of a new product used as a substitute for whalebone, and made from the quills of feathers, gave the same in the specification the generic name of "featherbone," by which name it was referred to by him in subsequent patents and became generally known; the word being so defined subsequently in dictionaries, both American and foreign, and used in foreign tariff laws, etc. On the expiration of the original patent the public had the right, not only to make the article, but to sell it by the name "featherbone," and such name could not be monopolized by the patentee as a trade mark for his own manufacture. *Warren Featherbone Co. v. American Featherbone Co.*, 141 Fed. 513, 516, 72 C. C. A. 571 (citing *Cent. Dict.*; *Stand. Dict.*; *Murray's Eng. Dict.*).

## FEDERAL

### FEDERAL CORPORATION

Where an act of Congress extended over a territory certain state laws relating to corporations making such laws a part of the act as though incorporated therein in *hæc verba*, it was held that a private corporation organized in the territory under such laws prior to statehood was not a federal corporation in the sense of being incorporated under a federal law so as to authorize it to remove actions against it in the state courts after the territory became a state. *Boyd v. Great Western Coal & Coke Co.*, 189 Fed. 115, 118.

### FEDERAL CONSTITUTION

State constitution distinguished, see *State Constitution*.

### FEDERAL QUESTION

Suit arising under the laws of the United States, see *Arise—Arising*.

A "federal question" is involved in a case presenting a question under a treaty, a federal statute, or a provision of the federal Constitution. *White Swan Mines Co. v. Balliet*, 134 Fed. 1004, 1005.

Whether or not legislative power is unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of Safety

Appliance Act, providing that only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the Association and declared by the Commission, is a federal question within jurisdiction of the Supreme Court of the United States. *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 28 Sup. Ct. 616, 617, 210 U. S. 281, 52 L. Ed. 1061.

A statement of claim which seeks to recover damages for acts of defendant done in his capacity as judge of a state court does not raise a "federal question," and, where there is no diversity of citizenship, a Circuit Court of the United States is without jurisdiction, and it is its duty, on motion therefor, to dismiss the suit. *Kinney v. Mitchell*, 138 Fed. 270, 271.

A "federal question" which will confer jurisdiction upon a United States court, either by original process or by removal, must be a question of law as stated by the plaintiff in his complaint, and not a question of fact. Where the facts only are in dispute, and the federal law governing the case is uncontroverted, the United States court cannot take jurisdiction. When a legal question arising under the Constitution or a law or a treaty of the United States is decided by the Supreme Court, it ceases to be a federal question. *Myrtle v. Nevada, C. & O. R. Co.*, 137 Fed. 193, 195 (citing *State of Kansas v. Bradley*, 26 Fed. 289; *Austin v. Gagan*, 39 Fed. 626, 5 L. R. A. 476; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 85 Fed. 367, 29 C. C. A. 462; *California Oil & Gas Co. v. Miller*, 96 Fed. 12; *Peabody Gold Min. Co. v. Gold Hill Min. Co.*, 97 Fed. 657, 660).

A claim by a railway in a state court of immunity from liability for the negligent killing of an employé in the territory of New Mexico because of noncompliance with the requirements of a statute of that territory governing actions for personal injuries received therein presents a federal question, which, when adversely adjudicated, confers jurisdiction on the federal Supreme Court. *El Paso & N. E. Ry. Co. v. Gutierrez*, 30 Sup. Ct. 21, 23, 215 U. S. 87, 54 L. Ed. 106.

That defendants are receivers of a railroad appointed by a federal court does not make a suit against them one involving a federal question within the removal act (25 Stat. 433). *Dale v. Smith*, 182 Fed. 360, 362.

The adequacy of the local facilities existing at a station at which a through interstate railroad train is required to stop by an order made under state authority, though not inherently a "federal question," may be considered by the federal Supreme Court on writ of error to a state court in so far as the existence of such adequate local facilities is involved in the determination of the federal question as to whether the order does or does not directly regulate interstate commerce.

Atlantic Coast Line R. Co. v. Wharton, 28 Sup. Ct. 121, 123, 207 U. S. 328, 52 L. Ed. 230.

The claim that the action of a state board of equalization in making an assessment for a tax pursuant to the command of a writ of mandamus was the action of the state, and, if carried out, would violate the federal Constitution by taking property without due process of law, and denying the equal protection of the laws, constitutes a "federal question" within the original jurisdiction of a federal Circuit Court. *Raymond v. Chicago Union Traction Co.*, 28 Sup. Ct. 7, 12, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; *Same v. Chicago Edison Co.*, 28 Sup. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

When a state court decides that a particular formality was or was not essential under the state statute relating to taxation, the decision presents no "federal question" provided the statute as thus construed does not violate the federal Constitution by depriving one of property without due process of law. *French v. Taylor*, 26 Sup. Ct. 76, 78, 199 U. S. 274, 50 L. Ed. 189.

The judgment of a state court denying the right of possession of real property under a title founded on an act of Congress, which rests upon the ground that the title of the adverse party under a tax deed was made good by prescription under the state Constitution, involves no "federal question" which will sustain a writ of error from the Supreme Court of the United States. *Corkran Oil & Development Co. v. Arnaudet*, 26 Sup. Ct. 41, 45, 199 U. S. 182, 50 L. Ed. 148.

A decision of a state court enforcing the exclusive common-law performing rights of the owners of an unprinted and unpublished play as against the owner of a copyrighted adaptation substantially identical with the original play, who stood upon his copyright, denies a federal right specially set up and claimed, within the meaning of the statute governing writs of error from the federal Supreme Court to state courts. *Feris v. Frohman*, 32 Sup. Ct. 263, 264, 223 U. S. 424, 56 L. Ed. 492.

#### FEDERALIST (The)

"The opinion of The Federalist has always been considered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the Constitution put it very much in their power to explain the view with which it was framed. These essays have been published while the Constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more

consideration where they frankly avow that the power objected to is given, and defend it." *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, 418, 5 L. Ed. 257.

#### FEE

See Base Fee; Conditional Fee; Qualified Fee; Take a Fee; Title in Fee.

The "fee" is the greatest interest that can be granted in real estate. It includes the right of possession and the right to use for any purpose which may be lawful. Where an owner of a pond, or a part thereof and of lands surrounding it, executed to the owner of a millsite on the river which flowed through the waters of the pond, a deed of "all the land that will be overflowed by raising the water level twelve feet only for the purpose of being flowed," and thereafter gave another deed to the same grantee containing the same description and provisions except that it gave the right to raise the water eight instead of twelve feet, the conveyances were for flowage purposes only, leaving the title to the land in the owner. *In re Brookfield*, 68 N. E. 138, 140, 176 N. Y. 138.

"In common speech the non-mineral portion of land, the portion which covers and envelops the minerals, is called the 'surface' or the 'land,' and the proprietor of land who divests himself of title to the minerals which it contains is still spoken of as the 'owner' of the 'fee' or of the 'surface' or of the 'land.'" In Laws 1897, providing that where the "fee to the surface" of any land is in any person and the right or title to any minerals therein is in another person, the right to such minerals shall be valued and listed separately from the fee to the land, and the land itself and the right to the minerals therein shall be separately taxed to the owners thereof respectively, the "fee to the surface" and "the fee of said lands" are set in opposition to the right or title to any minerals therein. The law has no application except when the right or title to minerals has been severed from the right or title to the remainder of the land. *Kansas Nat. Gas Co. v. Board of Com'rs of Neosho County*, 89 Pac. 750, 751, 75 Kan. 335.

An "estate in fee" may not be an estate in fee simple properly speaking—a pure inheritance, free from any and every qualification or condition. Estates in fee are not thus restricted in their nature. Every estate which may pass to heirs general by descent and continue forever is a fee; the owner having the entire property in himself. Such an estate may be a pure fee simple; or it may be a qualified, base, or determinable fee. The latter is an estate which may continue forever, and is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent, though the object on which it rests for perpetuity may be transitory or perishable,

yet such an estate is deemed a fee, because, as is said, it has a possibility of enduring forever. The material difference between a fee simple and other fees is "that the former estate will, the latter may, continue forever." All fees liable to be defeated by an executory devise are determinable fees, and continue descendible inheritances until they are discharged from the determinable quality annexed to them, either by the happening of the event or a release. Ed. died in 1798, having by his last will and testament devised a farm to his son M., his heirs and assigns forever, and another farm to his son J., in like manner. The will contained this clause: "It is my will, and I do order and appoint, that if either of my sons should depart this life without lawful issue, his share or part shall go to the survivor." In 1801, the sheriff sold all the estate which M. then had in his share, by virtue of a *fi. fa.* against him; and J. died in 1813, leaving M. surviving. Held, that the estate devised to M. was a base, qualified, or determinable fee, which became a fee simple on the death of J., and belonged to W. *Waldron v. Gianini* (N. Y.) 6 Hill, 601, 604, 605 (citing 4 Kent's Comm. [5th Ed.] 5, 9; 2 Bl. Comm. 104, 106, 109; 1 Cruise's Dig. 68, §§ 42-86; 1 Prest. Est. 429-431).

Under the rule that an estate in fee conditional cannot be created by implication, a devise to a child, followed by a provision that on his death without bodily heirs the property shall be divided among the surviving heirs of the testator, is a "devise in fee," and is not converted into a fee conditional because of the absence of express words vesting an estate in the bodily heirs. *Barber v. Crawford*, 67 S. E. 7, 9, 85 S. C. 54.

The word "heirs" is not necessary to create an estate in fee. *Tone v. Tillamook City*, 114 Pac. 938, 939, 58 Or. 382.

#### As fee simple or fee simple absolute

A "fee" is the largest possible estate which a man can have being an absolute estate. *Biggerstaff v. Van Pelt*, 69 N. E. 804, 806, 207 Ill. 611.

"Fee" originally signified the right of the tenant to the use of the land held of a superior, but this meaning passed into the modern signification of an estate of inheritance. *Cummings v. Cummings*, 75 Atl. 210, 211, 76 N. J. Eq. 568.

#### As applied to easement or franchise

There is no substantial difference between a qualified "fee" in trust for street uses and an easement for street uses, and in either case the municipal corporation has possession and control of the street for street uses and for nothing further. In re *City of New York*, 91 N. Y. Supp. 894, 895, 45 Misc. Rep. 162.

The term "fee" in the statute providing that all streets and other public places designated as for public use on the plat of a

city shall be deemed to be public property, and the fee thereof be vested in the city, is not used according to its technical legal meaning, but as vesting in the city a complete, perpetual, and continuous title to the places designated as streets so long as it uses them for the purpose intended. *City of Leadville v. Bohn Mining Co.*, 86 Pac. 1038, 1040, 37 Colo. 248, 8 L. R. A. (N. S.) 422, 11 Ann. Cas. 443.

The word "fee," as used in the eminent domain statute, providing that the condemning corporation shall become seised in "fee" or shall have the exclusive right, title, and possession of the land required to be taken, and may take possession of and use the same for the purposes of a ditch, means only such estate or interest, as is reasonably necessary to accomplish the purpose in view, and where the corporation only asks for a right of way it acquires merely a right of way or easement and not an absolute fee. *Smith Canal or Ditch Co. v. Colorado Ice & Storage Co.*, 82 Pac. 940, 943, 34 Colo. 485, 3 L. R. A. (N. S.) 1148.

#### Estate as importing

See Estate.

#### Premises or property including

See Premises; Property.

#### FEE BILL

Execution distinguished, see Execution (Writ of).

#### FEE SIMPLE

See Forever in Fee Simple; Ownership in Fee Simple.

A "fee-simple estate" is so called because it is clear of any condition or restriction as to particular heirs. It is the largest estate and most extensive interest that can be enjoyed in land, being an absolute estate in perpetuity. It is a pure fee; an absolute estate of inheritance; that which a person holds inheritable to him and his heirs general, forever. Where the estate given in the opening sentence of an item of a will is one in fee simple, the further statement that it is to be "possessed absolutely" neither qualifies nor enlarges the estate granted. *Frank v. Frank*, 111 S. W. 1119, 1121, 120 Tenn. 569 (citing 16 Cyc. p. 602; *Haynes v. Bourn*, 42 Vt. 686; *Friedman v. Steiner*, 107 Ill. 125).

Generally the words "fee simple" mean an absolute estate of inheritance, but not necessarily so. A title in fee simple determinable is in a qualified sense a fee simple; and, where the language in a will is followed by a clearly expressed qualification, it must be held that the testator used the first words in that sense. *Orr v. Yates*, 70 N. E. 731, 735, 209 Ill. 222.

"Ownership in fee simple implies something more than being the holder of the naked legal title to land. It implies an inde-

feasible legal title—the entire title and estate in land.” *United States v. Hyde*, 132 Fed. 545, 550.

The phrase “seised in fee simple,” in Act Cong. May 2, 1890, c. 182, 26 Stat. 91, § 20, providing that no person who shall at the time be “seised in fee simple” of 160 acres of land in any state or territory shall be entitled to enter land in the territory of Oklahoma, designates the highest character of estate known to the law and must be given its settled meaning. Congress only intends to withhold the right to enter public lands from such otherwise qualified persons as are “seised in fee simple” of other lands to the extent of 160 acres. *Gourley v. Countryman*, 90 Pac. 427, 430, 18 Okl. 220.

In an equitable action for dower, an allegation in the bill that complainant’s husband was, during his lifetime and their intermarriage, seised and possessed of the land in fee simple, is sufficient as against the objection that the words “fee simple” do not describe an estate which will support dower, since a widow is entitled to dower in lands owned by her husband in “fee simple”; a “fee simple” estate being the largest possible estate in land, even without the employment of the word “absolute.” *Sprague v. Stevens*, 79 Atl. 972, 978, 32 R. I. 361.

Where the granting clause of a deed conveyed the land to the grantee and her children, the natural offspring of her body, thus creating at common law an estate tail, which, by Kirby’s Dig. § 735, vests in the first taker a life estate, with remainder in fee to those to whom it would first pass after termination of the life estate, the use in the habendum clause of the words “to hers and their own proper use, benefit and behoof forever” will not enlarge the estate of the immediate grantee into a fee simple, the word “heirs” being necessary to convey a fee simple by deed, and hence the habendum clause merely referred to estate in fee which the heirs of the immediate grantee would take. *Dempsey v. Davis*, 136 S. W. 975, 977, 98 Ark. 570.

Under a deed to a man and his wife “for their joint lives and the life of the survivor of them,” and “to their joint heirs,” the first takers take a joint estate in fee simple, to the exclusion of their heirs; especially where the grantors covenant to give the grantees any further deed necessary to secure to them a good and sufficient title in fee simple. *Waller v. Pollitt*, 64 Atl. 1040, 1041, 104 Md. 172.

The phrase “fee simple” means an absolute title or estate in lands wholly unqualified by any reversion, reservation, condition, or limitation or possibility of any such thing, present or future, or precedent or subsequent, and it follows of necessity that, when a grant is made expressly pursuant to and in compliance with an act of the Legislature

requiring the creation of such a title or estate as a condition to its validity for any purpose, the grantor is estopped to allege anything in contravention of the legislative intent or in diminution of the estate described by the statute. *State v. Alter*, 114 N. W. 293, 294, 80 Neb. 405.

#### As fee simple absolute

“Fee simple” and “fee simple absolute” are equivalent terms and well-defined legal expressions, and an estate in “fee simple” is the greatest that one can possess. When the pleader said that plaintiff was the owner in “fee simple,” it implied an unlimited estate of inheritance. *Parker v. Conrad*, 85 Pac. 810, 74 Kan. 111.

#### As applied to easement

“The word ‘fees,’ as used in the fee and salary act of 1895, must be construed as fixing a compensation to be paid by individuals for official services rendered, and by which a certain fund is created, out of which the salary, as provided, by law, for the officer rendering the service, is to be paid.” The sheriff is entitled to retain as his own property the fees fixed by law for prisoners committed and discharged. *Starr v. Board of Com’rs of Delaware County*, 76 N. E. 1025, 1027, 79 N. E. 390, 40 Ind. App. 7.

“Fee simple,” as used in an act incorporating a toll road company and authorizing it to receive land for a right of way by gift, purchase, or otherwise, and also to take land acquired by condemnation proceedings, and providing that the judgment should vest in the corporation a fee-simple title to the strip condemned, does not contemplate that the corporation shall own such toll road in fee, but it only acquires an easement over the same during the term of its corporate existence. *State ex rel. Hines v. Cape Girardeau & Jackson Gravel Road Co.*, 105 S. W. 761, 766, 207 Mo. 85 (citing *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *State ex rel. Hines v. Scott County Macadamized Road Co.*, 105 S. W. 752, 207 Mo. 54, 13 Ann. Cas. 656; *Venable v. Wabash West. Ry. Co.*, 20 S. W. 493, 112 Mo. 103, 18 L. R. A. 68; *Chouteau v. Missouri Pac. Ry. Co.*, 22 S. W. 458, 30 S. W. 299, 122 Mo. 385; *Boyce v. Missouri Pac. Ry. Co.*, 68 S. W. 920, 168 Mo. 589 et seq., 53 L. R. A. 442).

#### FEE SIMPLE ABSOLUTE

“Fee simple absolute” is the broadest term describing title to real estate, and the whole title is included in the term. *Seton v. City of New York*, 114 N. Y. Supp. 565, 569, 130 App. Div. 148.

#### FEE-SIMPLE OWNER

As owner, see Owner.

#### FEE TAIL

While under the statute de donis a “fee tail” may be created by implication, it was

not so created by a will giving land to testator's sons, their heirs and assigns forever, with a provision that if either of them should die without issue testator's surviving heirs should take the property. *Gannon v. Albright*, 81 S. W. 1162, 1165, 183 Mo. 238, 67 L. R. A. 97, 105 Am. St. Rep. 471.

## **FEEBLE CHURCHES**

A devise of a fourth of testator's estate remaining after the death of his wife to the feeble Congregational churches of the state designates the particular object and purpose of the gift, and the failure to name the particular churches does not render the devise invalid; but the state must see that the gift is divided among such churches as come within the class described, by reason of their inability to sustain themselves financially. *French v. Lawrence*, 81 Atl. 705, 706, 76 N. H. 234.

## **FEED**

See Oat Feed.

As materials, see Materials.

The word "feed," adopted by a corporation as descriptive of its business, signifies food for cattle, and characterizes the business in which the corporation was to be engaged. *Atlas Feed Products Co. v. City of New Orleans*, 37 South. 531, 533, 113 La. 611.

## **FEED LUBRICATOR**

See Force Feed Lubricator.

## **FEED ROLL**

A feed roll, or automatic feeder, used in connection with a ripsaw, is a toothed appliance, something like a saw, but working in front of the saw proper, and feeding the board to it automatically, and tending to prevent the board from being thrown against the sawyer by the hold its teeth take. *Dean v. St. Louis Woodenware Works*, 80 S. W. 292, 294, 106 Mo. App. 167.

## **FEEDER**

See Press Feeder.

As applied to cattle, "feeders" are such as are not ready for slaughter but required fattening to place them in condition for consumption. *McGraw v. O'Neill*, 101 S. W. 132, 135, 123 Mo. App. 691.

## **FEEDING AND WATERING**

The duty of "feeding and watering" live stock imposed by the contract of shipment does not include the duty to shower them to protect them from excessive heat. The phrase has reference alone to the ordinary sustenance the animals require in the course of transportation. *Peck v. Chicago Great Western R. Co.*, 115 N. W. 1113, 1114, 138 Iowa, 187, 16 L. R. A. (N. S.) 883, 128 Am. St. Rep. 185; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 488, 92 Am. Dec. 85.

## **FEEDING STUFF**

See Concentrated Commercial Feeding Stuff.

## **FEEES**

See Attorneys' Fees; Counsel Fee; Docket Fee; Entrance Fees; Illegal Fee; License Fee; Reasonable Attorney's Fee.

A "fee" is a payment for services done or to be done, usually for professional or special services; the amount being sometimes fixed by law or custom and sometimes optional. *Board of Com'rs of Teller County v. Trowbridge*, 95 Pac. 554, 555, 42 Colo. 449.

"Fees" are sums fixed by law, while "allowances" are those made under the discretion of court, and not fixed. *Nease v. Smith*, 73 S. E. 910, 913, 70 W. Va. 325.

"Fees" are the amount paid for a privilege, and are not an obligation, but the payment is voluntary. *Thompson v. Wyandauch Club*, 127 N. Y. Supp. 195, 200, 70 Misc. Rep. 299.

Fee and Salary Law 1895, providing that for each retail liquor license \$4 shall be paid by the licensee, and for taking, approving, indexing, and recording the bond, \$1, was not impliedly repealed by Act March 4, 1911, providing that the license fee prescribed by that act shall be the only fee required for the issuing of licenses, the term "fees" as used in the latter act not being intended to mean compensation for services of officers as in the fee and salary act, but an amount paid for the privilege of carrying on the business of a retail liquor dealer. *Beard v. State*, 95 N. E. 1103, 1104, 176 Ind. 353.

*Under Burns' Ann. St. 1908*, § 7335, which provides that a sheriff shall tax and charge the fees provided by law on account of services performed by him, the fees and amounts so charged to be designated "sheriff's costs," which shall be the property of the county, and section 240 which provides that words and phrases used in a statute shall be taken in their plain, ordinary, or usual sense, but that technical words and phrases shall be understood according to their technical import unless such a construction would be repugnant to the legislative intent or to the context of the statute, the amounts charged and collected by a sheriff as statutory mileage in the service of writs, summonses, notices, etc., are to be considered as fees provided by law on account of service in the discharge of official duties, and not as a reimbursement to him for expenses incidentally incurred in the service of such writs, so that when collected they belong to the county, and not to the sheriff personally. *Roberts v. Board of Com'rs of Brown County (Ind.)* 99 N. E. 1015.

## **Commissions**

"The terms 'fees,' 'compensations,' and 'commissions,' are distinguishable in mean-

ing." *Harrington v. Bayles*, 82 N. Y. Supp. 379, 388, 40 Misc. Rep. 388 (citing *Delavan v. Payn* [N. Y.] 8 Paige, 459; *Guinivan v. Carroll*, 4 N. Y. Law Bul. 6; *Innes v. Purcell* [N. Y.] 2 Thomp. & C. 539; *Hobart v. Hobart*, 86 N. Y. 636; *Race v. Gilbert*, 6 N. E. 592, 102 N. Y. 298).

#### **As compensation for all services**

A county clerk is required to account for, as "fees," the salary allowed him by the county board under Comp. St. 1901, c. 28, § 14. *Holcombe v. Dawson County*, 95 N. W. 835, 1 Neb. (Unof.) 743.

The unexpended balance of the fund collected by the state superintendent from applicants for teachers' certificates are "fees and profits" arising from his office within the meaning of the state Constitution, requiring the same to be paid into the state treasury, although his expenditure of the entire fund for office assistants authorized by statute was avoided by his own performance of official duty. *State v. Stockwell*, 134 N. W. 767, 780, 23 N. D. 70.

In Acts 25th Leg. Ex. Sess, c. 5, § 10, fixing the maximum amount of fees of all kinds that may be retained by any officer as compensation for his services, the phrase "fees of all kinds," as applied to the clerk of the county court, embraces every kind of compensation allowed by law to him, unless excepted by some provision of the act. *Navarro County v. Howard* (Tex.) 129 S. W. 857, 859.

Though a townsite trustee became such by virtue of his office as district judge, the compensation allowed under the statute for his services as trustee is not a fee or perquisite of the office of district judge within Const. art. 6, § 10, forbidding a judicial officer, other than justices of the peace or city recorders, from receiving to his own use any fees or perquisites of office. *State ex rel. Jennett v. Stevens*, 116 Pac. 601, 604, 34 Nev. 128.

Under the fee and salary law fees for all services performed by county officers for which a charge is authorized by statute and designated as a fee are the property of the county, and must be collected by the officer and paid into the county treasury, unless the act expressly provides that the same shall belong to the officer; the term "fees" signifying compensation for particular acts or services rendered by proper officers in the line of their duties to be paid by the persons obtaining the benefit of the services or at whose instance they were performed. *State ex rel. Board of Com'rs of Hamilton County v. Carey* (Ind.) 84 N. E. 761, 762.

The surplus remaining in a sheriff's hands of moneys paid to him from the county treasury for the victualing of prisoners confined in the jail under Gen. St. p. 1446, relating to fees, and allowing a sheriff a per diem "fee" of ten cents "for victualing a

prisoner," unless such fee was increased or diminished by the Board of Freeholders under authority conferred by P. L. 1876, p. 230, relating to county jails, which surplus belonged to the sheriff and constituted a part of his compensation as jail keeper, is a "fee or compensation" within Laws 1905, c. 6, § 4 (Pamph. Laws, p. 19), providing for the payment of a salary to the sheriffs of counties of the first class in full compensation for all services rendered by them, and "in lieu of all fees and other compensation heretofore provided," and therefore belongs to the county. Board of Chosen Freeholders of Hudson County v. Kaiser, 69 Atl. 25, 27, 75 N. J. Law, 9.

#### **Costs distinguished**

The terms "fees" and "costs" are often used interchangeably as having the same application; but accurately speaking the term "fees" is applicable to the items chargeable between an officer and a person whom he serves, while the term "cost" has reference to the expenses of litigation as between litigants. *Bohart v. Anderson*, 103 Pac. 742, 744, 24 Okl. 82, 20 Ann. Cas. 142.

Loc. Acts 1901, p. 671, No. 468, § 37, provides that all moneys paid to the justice of the city of Sault Ste. Marie, except jury, officer, and witness fees and fines and costs recovered for violation of law, shall be for the use of the city; also that expenses of prosecution for violation of penal laws of the state shall be paid by the county. Held, that the justice was not entitled to retain the fees authorized by the general laws of the state to be collected in criminal cases by justices of the peace; they not being "costs" nor expenses within the statute. *Harrison v. Board of Sup'rs of Chippewa County*, 114 N. W. 851, 852, 151 Mich. 91.

"Costs" are the expenses incurred by the parties in the prosecution or defense of a suit, whereas "fees" are compensation to an officer for services rendered in the progress of a cause. In *re Terry*, 123 N. Y. Supp. 258, 260, 67 Misc. Rep. 514.

As between a party to a suit and the officer or witness, the charges allowed are usually denominated "fees"; but as between the parties to the suit these charges are usually called costs. *City of Carterville v. Cardwell*, 132 S. W. 745, 746, 152 Mo. App. 32.

#### **As disbursements or expenses**

Expenses incurred by an officer under the statute in caring for animals impounded are not "fees" within the rules governing the right of a de facto officer to fees. *White v. Town of Clarksville*, 87 S. W. 630, 631, 75 Ark. 340.

#### **Mileage**

Code, § 511, fixes the mileage of sheriffs for serving civil process, and Code Supp. 1902, § 510a, authorizes retention by the sheriff of all such mileage collected, but declares that all "fees" earned and uncollected at the

end of each year shall belong to the county. Held, that mileage charges were "fees" within the latter section, and, when uncollected at the end of the year, in which the services were rendered, belonged to the county. *Cremer v. Wapello County*, 117 N. W. 954, 139 Iowa, 580.

#### Per diem

The county clerk is entitled to retain the per diem allowed by Acts 1895, p. 336, c. 145, § 114, for attending sessions of court, such per diem not being referred to in Acts 1895, p. 355, c. 145, § 124, providing for the payment by the clerk to the treasurer of the amount of "fees" collected. *State ex rel. Board of Com'rs of Tippecanoe County v. Flynn*, 69 N. E. 159, 166, 169, 161 Ind. 554.

#### Salary and wages distinguished

The word "salary" imports a specific contract for a specific sum for a specified period of time, while "fees" are compensation for particular acts, and "wages" are compensation for services by the day or week. *Blick v. Mercantile Trust & Deposit Co. of Baltimore*, 77 Atl. 844, 846, 113 Md. 487 (quoting 7 Words and Phrases, pp. 6287-6291).

The word "fees," as used in a section of the statute providing that if a prosecuting attorney is sick or absent the court shall appoint some person to discharge the duties of the office, and declaring that the appointee shall possess the same powers and receive the same fees as the proper officer would if present, is not synonymous with "salary," and such section has no application to counties in which the prosecuting attorney receives an annual salary, and is required to account for all fees received by him by virtue of his office. *State ex rel. Harrison v. Patterson*, 132 S. W. 1183, 1185, 152 Mo. App. 264.

A clerk of the district court was given a stated salary, together with fees paid in civil actions by the litigants and in nearly all criminal actions by the county. When a demand for fees was presented to the board of supervisors, it was necessary to check every item and deduct erroneous charges, and extrinsic evidence was sometimes necessary to determine the correctness of particular items. Held, that a claim of such clerk against a county for fees in actions brought for the collection of delinquent taxes was not a claim for a "salary" within Civ. Code 1901, par. 989, requiring the presentation of claims against the county within six months, but providing that this requirement shall not apply to claims for official salaries made demand against the county by some express provision of law; the words "salary" and "fees" having their ordinary signification, the distinction between which is that a salary is a fixed compensation for regular work, while fees are compensation for particular services rendered at irregular periods, payable at the time the services are render-

ed. *Cochise County v. Wilcox (Ariz.)* 127 Pac. 758, 759.

Const. art. 4, § 28, requires the subjects of each bill to be clearly expressed in its title. Under "An act to repeal section 3240, chapter 27, article 1 of the Revised Statutes of 1899 relating to fees and to enact a new section in lieu thereof to be known as section 3240," the Legislature enacted what is now Rev. St. 1909, § 10,695, requiring each probate judge to keep an account of fees collected, and whenever such fees in any one year deducting expenses shall exceed the annual compensation provided by law for a judge of the circuit court with jurisdiction in the county to pay such excess less 10 per cent. into the treasury of the county. Held that as the section repealed fixed the fees of probate judges, the title was broad enough to give notice of the subject of section 10,695, and that, as "salaries are the form of compensation prescribed for paying public officers for their services, the subject of salaries was also germane to the subject of fees expressed in the title. *State ex rel. Buchanan County v. Imel*, 146 S. W. 783, 785, 242 Mo. 293.

## FEET

See Second Feet.

As deadly weapon, see Deadly Weapon.

## FEIGNED ISSUE

A "feigned issue" is one submitted to the jury in an equity case for the assistance and advice of the court. *Nashville Ry. & Light Co. v. Bunn*, 168 Fed. 862, 864, 94 C. C. A. 274.

## FELLOW SERVANT

See, also, "Association Theory; Superintendence; Superintendent; Superior or Servant Rule; Vice Principal.

Fellow servants are those who are serving and controlled by the same master in a common employment. *Harris v. Det Farenede Dampskibsselskab*, 70 Atl. 155, 156, 75 N. J. Law, 861.

The presumption is that all who enter the service of a common master, and engage in a common service or in the same general undertaking, are "fellow servants." *Weeks v. Scharer*, 129 Fed. 333, 335, 64 C. C. A. 11.

The true test of "fellow service" is community in that which is the test of service—which is subjection to control and direction by the same common master in the same common pursuit. *Prather v. Richmond & D. R. Co.*, 9 S. E. 530, 531, 80 Ga. 427, 12 Am. St. Rep. 263 (citing 3 Wood, Ry. Law, § 388).

Whether a workman is the fellow servant of another workman depends upon the character of the act performed, which may



be a question for the jury. *Kronzer v. Spencer-Kellogg Co.*, 124 N. W. 6, 7, 109 Minn. 392.

It is not the grade, or title, or the position in the service, that determines whether a person is a fellow servant or a vice principal of the master, but it is the duty which the servant performs towards the other servants. *Moore v. Dublin Cotton Mills*, 56 S. E. 839, 843, 127 Ga. 609, 10 L. R. A. (N. S.) 772 (citing 2 Labatt's Mas. & Ser. § 508 et seq.; 6 Cur. Law, 555 et seq.; 8 Words and Phrases, p. 7313, "Vice Principal").

The fellow-servant act (Priv. Laws 1897, p. 83, c. 56) applies to a corporation engaged in manufacturing, in aid of which it owns and operates a railroad. *Bird v. United States Leather Co.*, 55 S. E. 727, 728, 143 N. C. 283.

All persons who are in the employment of the same master engaged in the same common enterprise, and are employed to perform duties and services tending to accomplish the same general purpose, are "fellow servants." *Missouri, K. & T. R. Co. v. Hendricks*, 108 S. W. 745, 746, 750, 49 Tex. Civ. App. 314.

"All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are 'fellow servants,' and take the risk of each other's negligence." *Southern Ry. Co. v. Smith*, 59 S. E. 372, 374, 107 Va. 553.

All serving the same master, deriving authority and compensation from the same source, and engaged in the same general business, though in different grades, are fellow servants, taking the risk of the others' negligence, except when one of them stands as the representative of the master as to a duty incumbent on the master toward the others. *Leach v. Martin*, 71 S. E. 170, 171, 69 W. Va. 219.

Where two persons are both engaged in the common service of a master, in conducting and carrying on the same general business, and neither is in any sense under the control or direction of the other, they are fellow servants. *Sauls v. Chicago, R. I. & T. R. Co.*, 81 S. W. 89, 90, 36 Tex. Civ. App. 155.

"Fellow servants" may be said to be persons who are engaged in a common employment in the service of the same master, as distinguished from a vice principal, who is a servant representing the master in the discharge of those personal or absolute duties which every master owes his servant. *Hollweg v. Bell Telephone Co.*, 93 S. W. 262, 264, 195 Mo. 149.

An employ   engaged in painting iron columns for shipment, necessitating his going on a car where they were being loaded to paint parts which had rested on the floor,

was a fellow servant of employ  s engaged in loading them; they all being employed by the same master, on the same definite object, at the same time, and under immediate direction of the same foreman. *American Bridge Co. v. Valente* (Del.) 73 Atl. 400, 402, 7 Pennewill, 370, Ann. Cas. 1912D, 69.

All who serve the same master, work under the same control, derive authority and compensation from the same source, and who are engaged in the same general business, although it may be in different grades or departments, are "fellow servants"; each taking the risk of the other's negligence. Where the members of a theatrical company engaged in a charivari on the last evening of their closing performance, and while the members were on the stage threw missiles at them, resulting in injury to one of their number, they were fellow servants for whose acts the master was not liable. *Novelty Theater Co. v. Whitcomb*, 106 Pac. 1012, 1014, 47 Colo. 110, 37 L. R. A. (N. S.) 514 (citing 28 Cyc. p. 1282).

Employ  s of a common master, engaged in labor for the furtherance of the general purpose of the business in which they contract to serve are "fellow servants" within the purview of Civ. Code, § 2610, providing that, "except in the case of railroad companies, the master is not liable to the servant for injuries arising from the negligence or misconduct of other servants about the same business." Under this rule, a teamster employed to assist in hauling a boiler from his employer's furnace plant to its coal mines, to be used there, was a fellow servant of the engineer and fireman of a locomotive operated in the employer's yards in connection with the furnace plant, and could not, therefore, recover for injuries sustained by the alleged negligence of the engineer and fireman. *Georgia Coal & Iron Co. v. Bradford*, 62 S. E. 193, 195, 131 Ga. 289, 127 Am. St. Rep. 228.

Comp. Laws 1907, § 1343, provides that all employ  s who, while at work, are in the same grade of service, and are working together at the same time and place and to a common purpose, neither of such persons being intrusted with any superintendence over his fellow employ  s, are fellow servants. Held that, where the facts are undisputed, whether coemploy  s are fellow servants under the statute is a question of law for the court; but if they are in dispute, or conflicting inferences may be drawn therefrom, the court should construe the several clauses of the statute defining the relation, and charge that if the jury find the facts to be as stated they must find for or against the relation, as the hypothesized facts establish. *Shepherd v. Denver & R. G. R. Co.* (Utah) 126 Pac. 692, 695.

A "fellow servant," for whose negligence resulting in injury to another servant the

master is not liable, is one who is engaged in the same general undertaking with the injured servant, though they are not engaged in the same portion or particular work; it being sufficient that they are employed by the same master and engaged in the same common enterprise and employed to perform duties tending to accomplish the same general purpose. *Mollhoff v. Chicago, R. I. & P. R. Co.*, 82 Pac. 733, 734, 15 Okl. 540.

One employed to shovel from between construction cars dirt pushed there from such cars by the plow attached to the engine by a cable, is a "fellow servant" of the engineer as to an injury received by the engine starting while the employé was assisting in replacing the plow in position. *Bradford Construction Co. v. Heslin*, 42 South. 174, 183, 88 Miss. 314, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077.

Where a hod carrier employed by the day, after finishing his day's work, went to a shed on the premises to get his coat which he had left there, and thence went to the employer's office for a key, and while a watchman was unlocking the shed for him was injured by a blast negligently fired by another employé, he was the employer's servant, and hence a "fellow servant" of the one by whose negligence he was injured, so that he could not recover. *Willmarth v. Cardoza*, 176 Fed. 1, 2, 99 C. C. A. 475, 27 L. R. A. (N. S.) 376.

The engineer in charge of the engine operating tram cars on a tramway by means of a cable, and an employé charged with the duty of inspecting and keeping the tramway in repair and oiling machinery used in the operation of tram cars, are "fellow servants"; the employé, in the performance of his duty, being frequently at the engine house, and having opportunity to observe the attention the engineer gave to his work and the manner of his performing it. *Larson v. Kleburtz*, 128 Pac. 216, 218, 71 Wash. 231.

Plaintiff's intestate, a minor, in defendant's employ, was killed between cars as he was crossing one of defendant's tracks in the factory yard, in the course of his employment. The cars on each side of the path used by intestate were a short distance apart, and defendant's yard foreman let down other cars against one of the cars divided by the crossing, and decedent, who was not seen by either the foreman or another employé, was caught between such cars. Held, that the foreman was decedent's fellow servant, for whose negligence, if any, defendant was not liable. *Schwind v. Floriston Pulp & Paper Co.*, 89 Pac. 1066, 1068, 5 Cal. App. 197.

#### Association promotive of caution

The servants of a common master, whose usual duties bring them into habitual association, so that they have opportunity and power to influence each other to the exer-

cise of caution, are fellow servants within the law. *Illinois Terminal R. Co. v. Chapin*, 128 Ill. App. 170, 173.

To create the relation of fellow servants, the servants must be directly co-operating with each other in the same work, or their duties must be such as to bring them into habitual association, so as to afford them the power and opportunity of exercising a mutual influence on each other promotive of proper caution. *Bennett v. Chicago City Ry. Co.*, 90 N. E. 735, 243 Ill. 420; *Linquist v. Hodges*, 152 Ill. App. 491, 498.

All persons engaged in the business of a common master and so related that each in the exercise of ordinary sagacity ought to foresee, on accepting his employment, that he would be exposed to injury in the event of negligence on the part of the others, and they to injury from his, are "fellow servants." *Kniceley v. West Virginia Midland R. Co.*, 61 S. E. 811, 814, 64 W. Va. 278, 17 L. R. A. (N. S.) 370.

Limited by the departmental doctrine, those are "fellow servants" who are in the employ of a common master to the end of a common undertaking and are so associated and related in the performance of the work that they can observe and influence each other's work, and report any delinquency to a correcting power. *Oker v. Hill-O'Meara Const. Co.*, 138 S. W. 84, 85, 158 Mo. App. 213.

Persons employed by the same master to accomplish one common object, and so related in their labors and service as ordinarily to be exposed to injuries caused by each other's negligence, are "fellow servants." *Kenefick-Hammond Co. v. Rohr*, 91 S. W. 179, 180, 77 Ark. 290 (quoting and adopting *St. Louis, A. & T. Ry. Co. v. Triplett*, 15 S. W. 831, 832, 54 Ark. 289, 296, 11 L. R. A. 773).

The employés of a common master, to be "fellow servants" so as to exempt the master from liability for injuries to one from the negligence of the other, must be directly co-operating with each other in a particular service, as distinct from indirect co-operation in the general service of the master, or their usual duties must bring them into habitual association so that they may exercise a mutual influence on each other promotive of proper caution. *Lyons v. Joseph T. Ryerson & Son*, 90 N. E. 288, 290, 242 Ill. 409.

Whenever co-employés under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employé must know he is exposed to the risk of being injured by the negligence of another, they are "fellow servants." *Donnelly v. Cudahy Packing Co.*, 75 Pac. 1017, 1018, 68 Kan. 653.

The servants of the same master to be fellow servants so as to exempt the master

from liability on account of injuries sustained by one, resulting from the negligence of the other, must be directly co-operating with each other in a particular business, that is to say, the same line of employment, or their usual duties must bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. *Gathman v. City of Chicago*, 127 Ill. App. 150, 153.

To create the relation of "fellow servants," the servants must be directly co-operating with each other in a particular work, or their usual duties must be such as to bring them into habitual association so as to afford them the power and opportunity of exercising a mutual influence on each other promotive of proper caution, and, where they are engaged in different lines of employment and their usual duties bring them into habitual association, the association must be sufficiently personal to furnish an opportunity and power to exercise an influence on each other promotive of proper caution. *Thompson v. Northern Hotel Co.*, 99 N. E. 878, 882, 256 Ill. 77.

In order to constitute co-employees fellow servants, so as to exempt the master from liability for the negligence of one resulting in injury to the other, they must be directly co-operating with each other in the particular business, in the same line of employment, as distinguished from indirectly co-operating, or co-operating in the general business or employment of the master. It is not sufficient that they are employed by the same master, and their duties must be such as to bring them into habitual association with each other, so that they may exercise a mutual influence on each other promotive of proper caution. *Illinois Steel Co. v. Ziemkowski*, 77 N. E. 190, 192, 220 Ill. 324, 4 L. R. A. (N. S.) 1161.

The rule exempting a master from liability for injuries from negligence of a fellow servant applies only in cases where the two servants are so associated and related in their work that they can observe and influence each other's conduct and report delinquencies to a common correcting power; otherwise they are not "fellow servants" within any fair meaning of the rule. *Koerner v. St. Louis Car Co.*, 107 S. W. 481, 484, 209 Mo. 141, 17 L. R. A. (N. S.) 292.

Since a convict hired out by the state was under no express or implied obligation to assume the risk of negligence of his employer's servants, he was not a "fellow servant" of any of them. *Sloss-Sheffield Steel & Iron Co. v. Long*, 53 South. 910, 169 Ala. 337, Ann. Cas. 1912B, 564.

To create the relation of "fellow servants," the employees must be directly co-operating with each other in a particular work at the time of the injury, or their usual du-

ties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each on the other, promotive of their mutual safety. *Indiana, I. & I. R. Co. v. Otstot*, 72 N. E. 387, 390, 212 Ill. 429.

To create that relation between servants, they must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them to such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety. The crews of separate trains hauling freight in opposite directions on the same division of a double track railroad are not "fellow servants" as a matter of law. *Aldrich v. Illinois Cent. R. Co.*, 89 N. E. 702, 703, 241 Ill. 402, 132 Am. St. Rep. 220 (quoting and adopting *Indiana, I. & I. R. Co. v. Otstot*, 212 Ill. 429, 72 N. E. 387).

"Fellow servants" is defined to be "persons employed by the same master to accomplish one common object and so related in their labors performed in the service of the master as ordinarily to be exposed to injuries caused by each other's negligence." An employé whose duties were to inspect cars in the yards, and, when found slightly out of repair, to repair them on a track set aside for that purpose, is a fellow servant of a brakeman and his crew employed to switch cars from one track to another in the yards and no recovery can be had for injuries to one from the negligence of the others. *Snellen v. Kansas City Southern Ry. Co.*, 102 S. W. 193, 82 Ark. 334 (citing *Railway Co. v. Rice*, 51 Ark. 467, 11 S. W. 699; *St. L., I. M. & So. Ry. Co. v. Gaines*, 46 Ark. 555; *Railway Co. v. Shackelford*, 42 Ark. 417; *Railway Co. v. Triplett*, 54 Ark. 299, 15 S. W. 831, 16 S. W. 266; *St. L. & S. W. Ry. Co. v. Henson*, 61 Ark. 302, 32 S. W. 1079; *Railway Co. v. Brown*, 67 Ark. 295, 54 S. W. 865; *Kenefick-Hammond Co. v. Rohr*, 77 Ark. 290, 91 S. W. 179).

The general rule of the master's liability in case of injury to an employé through the negligence of a fellow servant is not changed by Rev. St. Utah, 1898, § 1343, defining "fellow servants" as "all persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and working together at the same time and place to a common purpose, neither of such persons being intrusted by such employer with any superintendency or control over his fellow employes," except in relation to the matter of superintendency; the statute not requiring, by the provision that they must be "working together," that the servants should be doing the same kind of work, or engaged in aiding each other in the same detail of labor, but only that they shall be working to a common purpose and sufficiently

near each other to arouse in the one a reasonable appreciation of probable danger from the neglect of the other. The exception to the general rule of the master's liability in case of injury to an employé through the negligence of a fellow servant is based on the doctrine of assumption of risk, which extends to the risk of injury from negligence of other servants of the same master whose service is so related to his own that negligence on their part in the natural and expected course of events may injure him, notwithstanding a complete performance by the master of his nonassignable duties, and his assumption is as broad as his reasonable anticipation of danger. Under such rule a laborer engaged in the construction of a roadbed of a railroad and a brakeman on a construction train hauling gravel for such roadbed are "fellow servants." *Lukic v. Southern Pac. Co.*, 160 Fed. 135.

A skilled workman employed in a separate room from a common laborer is not the fellow servant of such common laborer where they were not at the time of the accident in a position to exercise an influence over each other promotive of caution for their common safety. *E. Schneider & Co. v. Carlin*, 120 Ill. App. 538, 540.

An instruction that if plaintiff, a trackman, and a brakeman were engaged in a common employment, and were so situated as to have opportunities to use precautions against each other's negligence they were "fellow servants," and, if the accident happened through the negligence of a fellow servant, the master would not be liable, correctly stated the rule for determining who are "fellow servants." *Hale v. Crown Columbia Pulp & Paper Co.*, 105 Pac. 480, 482, 56 Wash. 236.

A brewery maintained brewing and bottling departments under separate foremen, and the brewers and bottlers worked under different contracts of employment, made in their behalf by their respective unions. A shipping clerk, supervising the loading of cars, selected men from the two departments to load cars under his supervision. Held, that the men, while loading cars, were "fellow servants," within the rule that fellow servants are those who are so related in their work that they may observe and have an influence over each other's conduct and report delinquencies to the master. *Brandt v. Kansas City Breweries Co.*, 141 S. W. 444, 445, 159 Mo. App. 568.

An employé in a steel manufactory whose duties were to superintend and direct other employés in the process of converting iron into steel and to give warning when a blast or heat was about to be blown was not a "fellow servant" of another employé not under the former's immediate control, whose duties were confined strictly to taking care of stoppers used in the vessels in which the steel was blown, within the rule exempting an em-

ployer from liability for injuries to an employé resulting from the negligence of another employé. *Illinois Steel Co. v. Ziemkowski*, 77 N. E. 190, 192, 220 Ill. 324, 4 L. R. A. (N. S.) 1161.

#### Common master

It is essential to the relation of "fellow servants" that they should be servants of the same master; mere co-operation or community of labor and ultimate purpose being insufficient, unless they are under the control of a common master. *United States Board & Paper Co. v. Landers (Ind.)* 92 N. E. 203, 204.

Employment in the service of a common master is not alone sufficient to make two men fellow servants, but there must be some consociation in the same department or line of employment. *Nocita v. Omaha & C. B. St. Ry. Co.*, 131 N. W. 214, 216, 89 Neb. 209.

A servant of a contractor erecting a building and a servant of an independent contractor are not fellow servants. *Buchanan & Gilder v. Murayda (Tex.)* 124 S. W. 973, 976.

"Servants of an independent contractor and servants of a principal by whom the contractor is employed are not 'fellow servants,' although they work side by side in a common employment, if they are not under the control of a common master. *Lookout Mountain Iron Co. v. Lea*, 39 South. 1017, 1019, 144 Ala. 169.

The relation of fellow servants may exist between the employés of different masters where the employés of one of such masters have been loaned to the other and all are under the direction and control of a single master. *Pioneer Fire-Proofing Co. v. Clifford*, 125 Ill. App. 352, 356.

Persons employed by different masters, though engaged in a common work, are not ordinarily fellow servants. Where the servant of one master has an interest in the work in any proper capacity, and at the request or with the consent of another's servants undertakes to assist in the work, he does not do so at his own risk, and, if he is injured by their carelessness, their master is responsible. *Kelly v. Tyra*, 114 N. W. 750, 751, 115 N. W. 636, 103 Minn. 176, 17 L. R. A. (N. S.) 334.

Servants in the hire of a general employer and servants of his subcontractor or an independent contractor are not fellow servants, unless the circumstances show that the servant submitted himself to the control of another person than his proper master, and consented to accept that person as his master for the purpose of a common employment. "One who, in the performance of his own interests or those of his master, assists servants of another in the performance of their work, is not a 'fellow servant' of such servants, nor a 'volunteer,' but occupies a third position, viz., that of a 'licensee with an interest.'" *Kelly v. Tyra*, 114 N. W. 750, 753,

103 Minn. 176, 17 L. R. A. (N. S.) 334 (quoting and adopting the definition in *Ryan v. John O'Brien Boiler Works*, 68 Mo. App. 148, 151).

A mine manager is the servant of the operator and not of the state, and the operator or owner is liable for his willful failure to perform the duties prescribed by statute. *Donk Bros. Coal & Coke Co. v. Lucas*, 127 Ill. App. 61, 62; *Same v. Lucas*, 80 N. E. 560, 226 Ill. 23.

Where a blower works company contracted to erect a shavings or sawdust blower in the mill of a lumber company, and the lumber company directed plaintiff and certain other of its employes to assist in constructing a scaffold and in placing a portion of the blower in position, plaintiff was prima facie a "fellow servant" of the employes of the blower company and of the lumber company engaged in the construction of the scaffold. *Hoveland v. National Blower Works*, 114 N. W. 795, 797, 134 Wis. 342, 14 L. R. A. (N. S.) 1254.

Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it is liable for any injury to its own employe caused by negligence of the employes of the lumber company in loading the car. *Britt v. Carolina Northern R. Co.*, 56 S. E. 910, 914, 144 N. C. 242.

The cars of a railroad company were operated on a siding constructed for the sole use of a coal company by the employes of the railroad, and an employe of the coal company was killed by the negligence of the trainmen while he was repairing a railroad company's car on the siding of the coal company. Held, that he was a fellow servant of the trainmen, within Act April 4, 1868 (P. L. 58). *Miller v. Northern Cent. Ry. Co.*, 64 Atl. 924, 216 Pa. 105.

One not in the employment of a railroad company, but using its facilities under a contract between the railroad company and his employer, the Pullman Car Company, which simply permits his carriage for and in connection with the business of his employer conducted on the railroad, is not a "passenger," but a fellow servant, under Act April 4, 1868 (P. L. 58), of the trainmen. *Lewis v. Pennsylvania R. Co.*, 69 Atl. 821, 822, 220 Pa. 317, 18 L. R. A. (N. S.) 279, 13 Ann. Cas. 1142.

Where a railroad company and a news company enter into a contract by which an agent of the news company, employed to sell papers and fruit on trains, is permitted to ride thereon, he is employed on the train, and not a passenger, within Act April 4, 1868, § 1 (P. L. 58), and when killed by the negligence of an employe of the railroad company, no recovery can be had for his death. *Smallwood v. Baltimore & O. R. Co.*, 64 Atl. 732, 215 Pa. 540, 7 Ann. Cas. 525.

The act of a switchman of a union depot company in throwing a switch for a railway

company's train is the act of the depot company; and, where it is the servant of the railway company, the latter is liable for negligence resulting in injury to its employe. A switchman employed by a union depot company is not a fellow servant of a switchman employed by a railroad company running trains to the depot, within the common-law rule that a master is not liable for injury received through a fellow servant's negligence. *Floody v. Chicago, St. P., M. & O. Ry. Co.*, 123 N. W. 815, 816, 109 Minn. 228, 134 Am. St. Rep. 771, 18 Ann. Cas. 274.

A railroad company is liable to its servants for negligence of employes of a union depot company whose duty it is to operate the switches in the depot yards, as, for the occasion, the servants of the depot company became the servants of the railroad company. *Floody v. Great Northern Ry. Co.*, 112 N. W. 875, 877, 102 Minn. 81, 13 L. R. A. (N. S.) 1196.

The employe of a railroad company, while working under an independent contractor in installing a new electric signal system, in order to learn such system, is a "fellow servant" of the employes of such contractor. *Wirth v. General Railway Signal Co.*, 121 N. Y. Supp. 66, 67, 136 App. Div. 536.

The servants of a railroad operating its cars on the tracks of another under a contract between the roads are not, in the absence of any contractual provisions showing operation of trains, "fellow servants" of the employes of the road owning the tracks. *Chicago Terminal Transfer R. Co. v. Vandenberg*, 73 N. E. 990, 993, 164 Ind. 470.

An arrangement between two railroad companies whereby both use the tracks owned by one of them, the train employes of both, when running on the tracks, being subject to the train and signal rules and orders of the company owning the tracks, does not make the employes of the owner and licensee fellow servants, so as to bring them under the rule of law applicable to such relation. *Jennings v. Philadelphia, B. & W. Ry. Co.*, 29 App. D. C. 219, 232.

Plaintiff was the driver of one of several teams owned by his father, who hauled steel plates for defendant as an independent contractor. The driver of another wagon had placed the same to receive plates which were lowered by two overhead cranes, and requested plaintiff to superintend the placing of the plates in position on his wagon. Plaintiff directed the cranes to be moved slightly ahead, when defendant's servant in charge of one of the cranes moved it forward before the other crane was started, which resulted in plaintiff's injury. Held, that plaintiff was not a "fellow servant" for the time being of the crane operator. *Otis Steel Co. v. Wingle*, 152 Fed. 914, 915, 82 C. C. A. 62.

When plaintiff was employed at the time of his injury by a lighterage company, trans-

porting sugar to the dock of defendant sugar refining company, operated by steam, and an engineer furnished by it was used by the lighterage company, which paid the refining company an agreed price per hour for such use, and plaintiff was injured by the negligence of such engineer, though the refining company was in a measure interested in the work, the engineer, under such circumstances, was plaintiff's "fellow servant," for whose negligence the refining company was not liable. *Quinn v. National Sugar Refining Co.*, 92 N. Y. Supp. 95, 96, 102 App. Div. 47 (citing *Breslin v. Sparks*, 89 N. Y. Supp. 627, 97 App. Div. 69; *Wyllie v. Palmer*, 33 N. E. 381, 137 N. Y. 248, 258, 19 L. R. A. 285; *Higgins v. Western Union Tel. Co.*, 50 N. E. 500, 156 N. Y. 75, 66 Am. St. Rep. 537).

The tracks of a street railway company at the place of an accident were the property of a traction company, but in joint use by it and defendant street railroad, under a traffic agreement, which provided that the cars of defendant were to be cleaned and repaired by the traction company. Two cars of defendant had been delivered to the traction company, which dismantled one of them, attached it by chains to the other, and started it towards the car barn for repairs. The coupling chains broke, and the dismantled car ran down a grade until it collided with a car of defendant, in which deceased was a passenger. The workmen who were to repair and clean the cars were employed and controlled by the traction company, and defendant paid on the basis of an account kept of their wages. Held, that such workmen were not coemployees of defendant. *Beckman v. Meadville & C. S. St. Ry. Co.*, 67 Atl. 983; 985, 219 Pa. 26.

The C. Railroad, by which decedent was employed as engineer, used the tracks of defendant company for a certain distance entering Philadelphia, and decedent, on approaching the junction with a fast freight, found the tower signal turned against him. He waited six minutes, when a white light was displayed from the tower, signaling his train to proceed, which signal indicated that decedent had the right of way, and that the track to the south was unobstructed. When decedent's train arrived at a point somewhat south of the signal station, it struck the engine and tender of a local freight train belonging to defendant company, which was crossing from the south to the north-bound track, and the engineer of such freight testified that, in violation of the rules, he had been on the south-bound track after cars, without having a man out either ahead or behind his train to guard against accidents. Held, that neither the operatives of defendant's train nor the signalman in the tower, all of whom were employed and paid by defendant company, could be regarded as decedent's fellow servants. *Baker v. Philadelphia & R. Ry. Co.*, 149 Fed. 882, 884.

"The most usual requirement to constitute the relation of fellow servants is that the servants are in the employ of a common master. To this there seems to have grown the exception arising from the lending, between employers of the servants of one to the other. In the latter case, where the servant is temporarily loaned by the master to another for some special service, and the servant for the time becomes wholly subject to the direction and control of the person to whom loaned and for whom the special service is performed and is wholly freed during such time from the direction of his master, he becomes the servant, for the time, of the person to whom loaned or hired, and during such time may bear the relation of fellow servant to the other servants of the master to whom he is thus loaned." Servants in charge of a caboose, the negligent switching of which in the yards of another company killed a switchman employed by such other company, are not rendered fellow servants of the switchman by the mere fact that the yardmaster of the company owning the yard directed on what tracks the cars of outside companies might be operated. *Pittsburgh, C., C. & St. L. Ry. Co. v. Bovard*, 79 N. E. 128, 130, 223 Ill. 176 (citing *Grace & Hyde Co. v. Probst*, 70 N. E. 12, 208 Ill. 147).

#### Control and direction of work of men

An employé authorized to control workmen is not a fellow servant of the other employés in respect to his commands. *Casey v. Kelly-Atkinson Const. Co.*, 88 N. E. 982, 985, 240 Ill. 416.

Where one servant is put under the control of another servant of a common master and is injured through the negligence of his superior while acting in the common service, the master is liable. *Bell v. Rocheford*, 110 N. W. 646, 648, 78 Neb. 304, 126 Am. St. Rep. 595.

All who enter the employment of a common master to accomplish a common undertaking are prima facie "fellow servants," although their grades of service are different, and some direct and supervise the men subject to their command and their work, while others perform the labor. *Westinghouse, Church, Kerr & Co. v. Callaghan*, 155 Fed. 397, 399, 83 C. C. A. 669, 19 L. R. A. (N. S.) 361.

A common-law master was not responsible to a servant for the negligent acts of another servant exercising superintendence in the management and detail of the work; such person being deemed a "fellow servant." *Chisholm v. Manhattan Ry. Co.*, 101 N. Y. Supp. 622, 625, 116 App. Div. 320.

A foreman directing an employé to work in a particular place is not a "fellow servant" of the employé. *Commerce Milling & Grain Co. v. Gowan (Tex.)* 104 S. W. 916, 919.

A servant engaged in the excavation of a trench and the foreman directing the work are "fellow servants" in a common employment. *Rocco v. F. A. Gillespie Co.*, 64 Atl. 117, 118, 73 N. J. Law, 591.

A superintendent and painter employed under him are "fellow servants" at common law. *Kennedy v. New York Tel. Co.*, 110 N. Y. Supp. 887, 890, 125 App. Div. 846.

A statement does not show that an employé was other than a "fellow servant" when it shows no more than that he was foreman of a gang and does not disclose that he has power either to employ or discharge. *Pipkin v. Hayward Lumber Co. (Tex.)* 96 S. W. 635, 636.

The negligent failure of a section foreman to inform one of his sectionmen of a scheduled train which afterwards struck such sectionman was the act of a "fellow servant." *House v. Lehigh Val. R. Co.*, 113 N. Y. Supp. 155, 156, 128 App. Div. 756.

A laborer working in discharging a vessel is not the fellow workman of the one who has charge of the laborers, and who is to see to the unloading of the ship. *Ingham v. John B. Honor Co.*, 37 South. 963, 964, 113 La. 1040.

An employé who improvises a machine to do the work of defendant and employs men to assist him in running it and has the power to discharge such men is not a "fellow servant" of the men working under him. *Louisville & N. R. Co. v. Lille*, 45 South. 699, 701, 154 Ala. 556.

A foreman, who worked with his men, and who was not at the head of a department, but was simply over two or three men, and who was intrusted with no function which belonged to the master, but was superintending and assisting the men in the loading, weighing, and handling of cars, and who had a man over him, was a "fellow servant" with the men whom he was superintending. *Dill v. Marmon*, 73 N. E. 67, 73, 164 Ind. 507, 69 L. R. A. 163.

A foreman in the employ of an electric illuminating company having charge of the electricians and wiremen, and himself under the orders of a superintendent, was a "fellow servant" of such electricians, for whose negligence, resulting in injury to an electrician, the company was not liable. *Guest v. Edison Illuminating Co.*, 114 N. W. 226, 227, 150 Mich. 438.

An instruction that plaintiff and a hostler were "fellow servants" unless they had control over each other in the way of employing each other" was properly refused as embodying an improper definition of the term "fellow servant." *Fordyce v. Key*, 84 S. W. 797, 798, 74 Ark. 19 (citing Kirby's Dig. §§ 6658, 6659; *St. Louis, I. M. & S. Ry. Co. v. Thurmond*, 68 S. W. 488, 70 Ark. 411; Kan-

*sas City, Ft. S. & M. Ry. Co. v. Becker*, 39 S. W. 358, 63 Ark. 477).

A servant whose duty it is to pour vitriol from a bottle into a vat in a bleaching department of a manufacturing plant is the fellow servant of the superintendent of such department. *Bryant v. Gaffney Mfg. Co.*, 56 S. E. 9, 10, 75 S. C. 487.

In an action for personal injuries to an employé, action of foreman in directing the engineer to start the machinery by which plaintiff was injured held that of a fellow servant, for which a defendant was not liable. *Berneche v. Hilliard*, 112 N. W. 392, 393, 101 Minn. 366.

Where a foreman had general charge of a mine, including the particular work in which plaintiff, a miner, was engaged when injured, and hired the miners and told them what to do and where to work, he was a vice principal, and not a fellow servant of plaintiff. *Vasby v. United States Gypsum Co.*, 128 Pac. 606, 607, 46 Mont. 411.

The one in immediate charge of the work of loading lumber on a vessel from a dock, with power to hire and discharge the hands, is not a fellow servant of a laborer placing the lumber in a sling to be hoisted, but a vice principal. *Schroeder v. Brown & McCabe*, 116 Pac. 335, 336, 59 Or. 81.

A servant placed in entire charge of a distinct branch of the master's business, not merely to superintend it but to control it, with no one else to exercise any discretion or oversight, is a vice principal of the master and not a fellow workman of another servant. *Groves v. McNeil*, 75 Atl. 600, 601, 226 Pa. 345.

Where the master has conferred upon a member of a class of workmen carrying on a particular branch of his business authority to control or direct the movements of men under his charge, while in the exercise of such authority the relation of fellow servants does not exist. *East St. Louis Connecting Ry. Co. v. Meeker*, 82 N. E. 202, 205, 229 Ill. 98; *Chicago Terminal Transfer R. Co. v. Reddick*, 82 N. E. 598, 599, 230 Ill. 105.

Mere supervision, and nothing more, by one of a number of servants, over the work in which they are engaged, will not necessarily raise the employé from the position of a fellow servant to that of a vice principal; but supervision, coupled with the discharge of other duties in connection therewith, may have this effect. *Moore v. Dublin Cotton Mills*, 56 S. E. 839, 842, 127 Ga. 609, 10 L. R. A. (N. S.) 772 (citing *Bloyd v. St. Louis & S. F. Ry. Co.*, 22 S. W. 1089, 58 Ark. 66, 41 Am St. Rep. 85).

The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master has the power to control and direct the actions of the others with respect

to such employment will not of itself render the master liable for the negligence of the governing servant resulting in an injury to one of the others, without regard to other circumstances; if the negligence complained of consists of some act done or omitted by one having such authority which relates to his duty as a collaborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. *Anderson v. Higgins*, 122 Ill. App. 454, 457.

One having the general control and supervision of railroad repair work and giving general directions respecting the movements of work trains is a vice principal, and not a "fellow servant," of the laborers employed to do repair work. *Jachetta v. San Pedro, L. A. & S. L. R. Co.*, 105 Pac. 100, 103, 36 Utah, 470.

A flagman who had been instructed to obey the orders of conductors and engineers while the conductors are in charge of trains, while obeying the orders of such conductors is a fellow servant of the engineers. *Lyon v. Charleston & W. C. Ry.*, 58 S. E. 12, 15, 77 S. C. 328; *Id.*, 56 S. E. 18, 20.

An employé operating a machine with the assistance of co-employés, with incidental authority to supervise the work of the assistants, is a fellow servant with the assistants, and the employer is not liable for injuries to the assistants resulting from the employé's negligence. *Bovi v. Hess*, 107 N. Y. Supp. 1001, 1006, 123 App. Div. 389.

Where a telegraph company employed a gang of men to clear its right of way, the foreman thereof was a "fellow servant" with the men who were subject to his orders, so that the company was not liable to one of the men, injured while obeying the orders of the foreman, if he had been selected with due care. *Brabham v. American Telephone & Telegraph Co.*, 50 S. E. 716, 717, 71 S. C. 53.

Where an oil company established a boiler repair shop and intrusted its sole charge to a superintendent, who hired and discharged workmen and gave orders in relation to the work, the superintendent was a vice principal, not a "fellow servant" of the workmen in the repair shop. *Green v. Washington Oil Co.*, 64 Atl. 877, 878, 216 Pa. 35.

An employé directing a gang engaged in loading iron rails on a flat car and controlling the manner of performing the work is a vice principal and not a fellow servant, though he has no power to employ or discharge the men. *Chicago, R. I. & P. Ry. Co. v. Rathneau*, 80 N. E. 119, 120, 225 Ill. 278; *Id.*, 124 Ill. App. 427.

Where an employer places a foreman in charge of the construction of a building, with authority to control and direct the workmen,

who are instructed to obey his orders, and a workman receives injury while obeying the foreman's order, the foreman's negligence is the employer's. *McCracken v. Lantry-Sharpe Contracting Co.*, 101 S. W. 520, 45 Tex. Civ. App. 485.

Where plaintiff and two others in defendant's employ were engaged in repairing a broken belt, and plaintiff was injured by the negligence of one of them in failing to properly adjust a clamp, they were all "fellow servants," for whose negligence the master was not liable, though one of them had general control as foreman. *Standard Pottery Co. v. Moudy*, 73 N. E. 188, 191, 35 Ind. App. 427.

The foreman of a crew building a trestle for a logging railway is not such a fellow servant of an ordinary workman thereon as to preclude recovery for injuries resulting from the foreman's negligence, since the foreman is a vice principal of the master. *Cook v. Chehalis River Lumber Co.*, 94 Pac. 189, 191, 48 Wash. 619.

Where defendant's foreman, in entire charge of the lowering of a telephone pole by which plaintiff was injured, stood at the foot of the pole and gave orders at every step in the proceedings, which plaintiff was bound to obey, the foreman was not plaintiff's "fellow servant." *Sandquist v. Independent Telephone Co.*, 80 Pac. 539, 540, 38 Wash. 313.

A yard foreman, who had no authority over a yard engineer except to direct him when and where to move his engine, and who did not have the right of employment or discharge of the engineer, was not a vice principal as to the latter, but a "fellow servant." *Southern Ry. Co. v. Smith*, 59 S. E. 372, 374, 107 Va. 553.

An assistant general manager of a corporation, who has general authority in the conduct of its business and the direction of its work, is a "vice principal," and not a "fellow servant" engaged in the actual operation of the business, although he has no power to employ and discharge such inferior servants. *Abilene Cotton Oil Co. v. Anderson*, 91 S. W. 607, 608, 41 Tex. Civ. App. 342.

Where employés are engaged in assisting one another in a common task, the fact that one takes the lead in directing the work because of age, experience, or common consent, does not change the relation of "fellow servants" and make the one so directing a vice principal. *Frengen v. Stone & Webster Engineering Corp.*, 119 Pac. 193, 195, 66 Wash. 204.

It is not the law in the state of Wyoming that "persons employed in the same general work" of the master are "fellow servants," and on principle, and by the weight of authority, persons engaged in the service



of the master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not "fellow servants" with the subordinate employes, but are "vice principals." *Johnson v. Union Pac. Coal Co.*, 76 Pac. 1089, 1097, 28 Utah, 46, 87 L. R. A. 506.

Where, in an action for injuries received by an employé while breaking stone in a quarry, by the explosion of dynamite left in a stone, it was shown that prior to the accident the person in charge of the work for the master examined the stone, assured the employé that it was free from dynamite, and directed him where to strike, such person was not, as a matter of law, the employé's "fellow servant." *Di Stefano v. Peekskill Lighting & R. Co.*, 95 N. Y. Supp. 179, 182, 107 App. Div. 293.

If a master confers upon one member of a crew authority to control and direct the movements of the other members of the crew, then, in exercising such authority, that member is not a "fellow servant" of the others. *Chicago, R. I. & P. Ry. Co. v. Strong*, 81 N. E. 1011, 1012, 228 Ill. 281 (citing *Chicago & A. R. Co. v. May*, 108 Ill. 238; *Illinois Southern Ry. Co. v. Marshall*, 71 N. E. 597, 210 Ill. 562, 66 L. R. A. 297).

One who, under a contract, provides all labor and materials to complete the grading and ballasting of a railroad bed and has the management and control of the men employed in the work "subject to the direction and acceptance of the engineer" is not a "fellow servant" of the men employed under him. *Hooe v. Boston & N. St. Ry. Co.*, 72 N. E. 341, 187 Mass. 67.

Plaintiff was ordered by a straw boss to throw a block under a casting which they were raising. Plaintiff did not like to do so for fear the hook would slip. The straw boss said: "He hold this time. He take the risk"—and, while plaintiff was obeying the order, the casting fell. Held, that plaintiff and the straw boss were "fellow servants." *Pasco v. Minneapolis Steel & Machinery Co.*, 117 N. W. 479, 480, 105 Minn. 132, 18 L. R. A. (N. S.) 153.

A foreman of a railroad construction gang employed in unloading cinders from cars and preparing the roadbed had power to hire and discharge the laborers and direct their movements. He had also power to direct the movements of a train crew employed in placing the cars where they were to be unloaded. Held, that the foreman was not a "fellow servant" of a member of the gang, but was the employer's vice principal. *Chicago & E. I. R. Co. v. Kimmel*, 77 N. E. 936, 937, 221 Ill. 547.

Where plaintiff employed to operate a candy-cutting machine obtained the candy to be passed through the machine from his foreman, who had no authority to hire or dis-

charge his co-employes, he was plaintiff's fellow servant, so that plaintiff could not recover for the foreman's negligence in furnishing him candy which was not sufficiently cooled to be cut in safety by the machine. *National Candy Co. v. Miller*, 160 Fed. 51, 55, 87 C. C. A. 207.

Where defendant directed plaintiff, a boy 14 years of age, to work opposite the operator of a trip hammer to keep the dies clean, but without warning or instruction, and plaintiff was justified in believing that he was to obey the orders of the hammer operator, by whose negligence he was injured in assisting him at his direction in the removal of a die, plaintiff and the operator were not "fellow servants." *B. F. Avery & Sons v. Cottrill's Guardian* (Ky.) 107 S. W. 332, 333.

Where a helper in a machine shop required to obey the foreman of the shop was directed by the foreman to aid the operator of a turning lathe in placing pieces of iron on the machine, and the operator directed the helper what to do, the foreman, in sending the helper to the operator, put him under the direction of the operator, and they were not "fellow servants" under Rev. St. 1895, arts. 4560f, 4560g, defining vice principals and "fellow servants," and the master was liable for the negligence of the operator to the same extent as if the foreman had given the directions. *Sherman v. Texas & N. O. R. Co.*, 91 S. W. 561, 562, 99 Tex. 571.

Where an employé in a railroad shop was required by the foreman to assist the machinist in charge of the drilling press in the drilling of a hole in a vise, and the machinist directed the employé what to do, the employé and the machinist were not "fellow servants," and the employé was not responsible for the negligence of the machinist. *Texas & P. R. Co. v. Johnson* (Tex.) 99 S. W. 738, 740.

In an action for injuries to an employé in a railroad switchyard by the alleged negligence of his foreman in permitting a car to be switched onto a track on which plaintiff was working, without providing for a signal or warning plaintiff, etc., there could be no recovery at common law, plaintiff and the foreman being "fellow servants." *Chicago & E. R. Co. v. Lain* (Ind.) 79 N. E. 547, 548.

Plaintiff and P. were common day laborers in defendant's employ. P., at the direction of his superior, neither of whom were authorized to employ or discharge plaintiff, called him to assist in holding a chisel which was being driven into a piece of timber. The chisel was insecurely fastened, so that, when plaintiff pulled down on it as he was directed to do, it flew out, and he fell, and was injured. Held, that P. was plaintiff's fellow servant, and that plaintiff could not recover for his negligence, if any, in setting the

chisel. *Vilter Mfg. Co. v. Kent*, 105 S. W. 525, 526, 47 Tex. Civ. App. 462.

Under Kirby's Dig. § 6858, making all persons in railroad service intrusted with superintendence of other persons "vice principals," and not "fellow servants," and section 6859, making all persons engaged in the common service of a railroad, and who, while so engaged, are working together to a common purpose, neither of such persons being intrusted with superintendence, fellow servants, the foreman of a gang of section hands, having control of their actions, is not a fellow servant of the section hands. *St. Louis, I. M. & S. R. Co. v. Harmon*, 109 S. W. 295, 297, 85 Ark. 503.

Plaintiff, a brakeman on a train consisting of an engine and dump cars used by defendants in construction work in the state of Washington, was injured by the derailment of the train. One of the charges of negligence was that the engineer operated the train at an excessive rate of speed, thus causing the accident. It is held, under the law of Washington, as proved by the decisions of the highest court of that state received in evidence at the trial, the engineer and plaintiff were not fellow servants, if the engineer was in control of the train and vested with authority to control the movements and its rate of speed. *Walson v. McGregor*, 139 N. W. 353, 354, 120 Minn. 233.

Where a master sent a competent foreman with a sufficient number of men to string wires upon poles, and the master had made provisions whereby any one of them might turn off the current from neighboring electric light wires, and it had been agreed between the servants that the foreman should perform such duty, his failure to do so or to give warning, whereby one of them was injured, was the negligence of a fellow servant. *Anglin v. American Construction & Trading Co.*, 96 N. Y. Supp. 49, 109 App. Div. 237.

Plaintiff, employed as a laborer in the construction of a roadbed, was injured while assisting his foreman to put a charge of powder into a rock under the direction of a "walking boss." The foreman superintended the work of the men in his gang, and had power to hire and discharge them, and it was the duty of the "walking boss" to go from place to place on the road to see that the foremen of the several gangs and the men under them properly prosecuted their work. Held, that the foreman and "walking boss" were not "fellow servants" of plaintiff. *Pitts & Hankins v. Wells (Ky.)* 101 S. W. 1192, 1193.

Plaintiff's intestate, a minor, in defendant's employ, was killed between cars as he was crossing one of defendant's tracks in the factory yard, in the course of his employment. The cars on each side of the path used by intestate were a short distance apart, and defendant's yard foreman let down other cars against one of the cars divided by the cross-

ing, and decedent, who was not seen by either the foreman or another employé, was caught between such cars. Held, that the foreman was decedent's "fellow servant," for whose negligence, if any, defendant was not liable. *Schwind v. Floriston Pulp & Paper Co.*, 89 Pac. 1066, 1068, 5 Cal. App. 197.

Plaintiff, with other laborers, was engaged in moving bones from the pressroom in defendant's packing house to a dump, with trucks passing over a gangway six feet wide and five feet above the surface. A foreman was placed over the men, whose duty it was to receive orders from the superintendent each day and direct the work. Plaintiff and another laborer were pushing one of the trucks along the gangway when it became stalled. The foreman ordered them to hurry, and exclaimed, "Pull it up," at the same time seizing one of the wheels and giving it a jerk which caused the shafts to turn, suddenly striking plaintiff and knocking him from the gangway and injuring him. Held that, though the foreman was negligent, yet the negligence was that of a fellow servant, and plaintiff could not recover. *Lunn v. Morris & Co.*, 105 Pac. 15, 16, 81 Kan. 94.

Plaintiff, employed by a railroad company, was charged with the duty of cleaning out the office of the master mechanic, and of removing ashes from a building containing an engine used to move cars on a turntable. While plaintiff was loading ashes on a car on a turntable, as was his custom, the engineer and his assistant caused the car to be moved, whereby plaintiff who had not been given proper warning by the others was injured. Plaintiff was under the general control of the engineer, and the engineer was a subforeman under the master mechanic and the general foreman of the repair shops and yard. His duties consisted mainly in operating the turntable. Held, that the parties were "fellow servants" at the time of the accident. *Peterson v. New York, N. H. & H. R. Co.*, 59 Atl. 502, 504, 77 Conn. 351.

A plumber, employed to fit and repair pipes in a blacksmith shop, without power to hire or discharge his helper, who is hired by the employer and directed by him to serve as helper and obey the directions of the plumber, is a fellow servant of the helper and not a superintendent within Employers' Liability Act, making an employer liable for injury to an employé caused by the negligence of an employé intrusted with superintendence, etc., and the employer, having supplied suitable appliances, is not liable for injuries to the helper in consequence of the plumber selecting defective appliances. *McConnell v. Morse Iron Works & Dry Dock Co.*, 80 N. E. 190, 191, 187 N. Y. 341, 10 L. R. A. (N. S.) 419, 10 Ann. Cas. 205.

Where a member of a gang of laborers is injured by the negligence of the foreman, such foreman will be held a fellow servant

with the injured person, even though he has power to oversee the man and direct the work immediately in his charge, unless his authority in that regard is entire and absolute. To constitute the foreman of a gang of laborers a vice principal, for whose negligence the master will be liable for personal injuries to an employé subject to his control, the master must confer on him the absolute management, exercising no discretion as to the conduct of his business except in providing safe tools, a safe place to work, safe materials to work on, competent fellow servants and, where necessary, proper rules and regulations for conducting the same. *E. Van Winkle Gin & Machine Co. v. Brooks*, 116 Pac. 908, 909, 29 Okl. 351.

To facilitate the work of removing old ties from an elevated structure, the foreman of a track gang directed employés to go down into the street and as the ties were thrown down to remove them; and directed other employés to station themselves near the place to warn the public, and he himself stationed himself where he could see when the ties were to be thrown. The foreman gave a signal that all was clear as each tie was thrown down; and an employé while in the act of removing a tie was struck by a tie which was thrown on the signal of the foreman that all was clear. Held, that such facts were insufficient to place on defendant any common-law liability for the negligence of the foreman. *Larson v. Brooklyn Heights R. Co.*, 119 N. Y. Supp. 545, 546, 134 App. Div. 679.

Defendant had established an elaborate organization in its factory, and appointed a superintendent and assistant superintendent, on duty day and night. It had also employed J., whose duty it was to put on all belts that came off and mend them when they broke, and if a belt came off it was the duty of the foreman of the department to notify the assistant superintendent or the belt man, whereupon the machinery would be stopped until the belt could be replaced. W., a machine operator in the same line of employment as plaintiff replaced a belt on plaintiff's machine on two occasions, and the second time, directing plaintiff that if it came off again to put it on himself. It came off the third time, and plaintiff, in endeavoring to replace it, was injured. Held, that W. was a fellow servant of plaintiff, and had no authority on behalf of defendant to direct him to replace the belt. *Safety Insulated Wire & Cable Co. v. Matthews*, 151 Fed. 761, 762, 81 C. C. A. 385.

Under Laws 1902, p. 1748, c. 600, making the master liable for death of an employé caused by the negligence of any person in the service of the employer intrusted with or exercising superintendence, whose sole or principal duty is that of superintendence, etc., as supplemented by Laws 1906, p. 1682, c. 657, declaring that persons having authority of superintendence, control, or command of

other persons in the employment of a railroad or with authority to direct or control any other employé in the performance of his duty, etc., are vice principals, and not "fellow servants," the foreman of a railroad section crew in the performance of his duty to warn a member of the crew of the danger from an approaching express train was a vice principal, and not a "fellow servant." *La Placa v. Lake Shore & M. S. Ry. Co.*, 111 N. Y. Supp. 797, 799, 127 App. Div. 843.

Plaintiff and D. were employed by defendant in dismantling heavy machinery in the World's Fair Buildings. D. was foreman under a superintendent who was under a manager there. The day before the accident a heavy wooden frame 25 feet high had been erected and temporarily fastened in place with guy ropes under the direction of D. to be used to lift and move the heavy parts of an engine. On the day of the accident plaintiff and four other men were working under D. to permanently secure this frame in place. D. directed plaintiff to go upon the frame, and, after he had climbed there for the purpose of moving one of the ropes which held this frame in place so that they could use it at another place as a permanent guy rope, D. untied it below, and the frame fell and injured plaintiff. Held, D. was not a "vice principal" but was a "fellow servant" of plaintiff, and defendant was not liable for his negligence. *Westinghouse, Church, Kerr & Co. v. Callaghan*, 155 Fed. 397, 401, 83 C. C. A. 669, 19 L. R. A. (N. S.) 361.

Laws 1906, p. 1682, c. 657, as amended so as to provide that in all actions against a railroad corporation for personal injury, or death resulting from personal injury, while in the employment of such corporation, arising from its negligence or that of any of its officers or employés, it shall be held that persons in the service of any such railroad corporation, who are intrusted with the authority to direct or control any other employé in the performance of duty of such employé, or who have as a part of their duty for the time being physical control or direction of the movement of a signal, switch, locomotive engine, car, train, or telegraph office, are vice principals of such corporation, and are not "fellow servants" of such injured or deceased employés, is not unconstitutional, and does not create a new cause of action, but merely declares what may be regarded as prima facie evidence, and as such a rule of evidence is valid. *Schradin v. New York Cent. & H. R. R. Co.*, 103 N. Y. Supp. 73, 74.

Where plaintiff, a machinist, was employed by defendant to assist in cleaning the sheaves and cables of the elevators in defendant's building, on the day he was injured he had undertaken to do such work in company with O., who was second assistant to the engineer, and plaintiff claimed that he was told by the chief engineer to assist O., and

that he acted under O.'s orders, and was injured because of his negligence in telling plaintiff to go ahead with the work without giving warning to the men in charge of the elevator, plaintiff being subsequently injured by the starting of the elevator, plaintiff and O. were "fellow servants"; the mere fact that O. was directed to stand guard and give directions when to proceed with the work being insufficient to constitute his acts "acts of superintendence" within Employer's Liability Act, Laws 1902, p. 1748, c. 600, making the master liable for injuries to a servant by the negligence of a person exercising acts of superintendence, or acting with superintendence with the consent of the employer, etc. *Falk v. Havemeyer*, 108 N. Y. Supp. 140, 142, 123 App. Div. 657 (citing *McConnell v. Morse Iron Works & Dry Dock Co.*, 80 N. E. 190, 187 N. Y. 341, 10 L. R. A. [N. S.] 419, 10 Ann. Cas. 205; *McLaughlin v. Interurban St. R. Co.*, 91 N. Y. Supp. 883, 101 App. Div. 134; *Quinlan v. Lackawanna Steel Co.*, 94 N. Y. Supp. 942, 107 App. Div. 176).

The responsibility of the master is not determined by the difference in rank between the servant injured and the one in fault, or by the fact that the negligent servant is foreman or in control of others, but upon the nature of the act complained of, whether it is an act of service or an attempted performance of a nondelegable duty of the master. Plaintiff was injured by an explosion of gas while cleaning a hydraulic main in defendant gas company's plant under the direction of defendant's foreman. Defendant had provided valves for shutting off the gas from its mains while they were being cleaned, and it does not appear that the act of shutting off the gas or of airing the mains required any special skill. Held, that the negligence of the foreman in failing to shut off the gas from the main or to air it before it was cleaned was not negligence in the performance by him of a nondelegable duty owed by defendant to plaintiff, but such action was purely an act of service, which defendant could properly delegate, and for the negligent performance of which defendant was not liable. Nor can plaintiff recover on the ground that defendant had failed to provide a safe place for him to work, since defendant provided proper appliances for securing plaintiff's safety, and the place was rendered unsafe only by the neglect of the foreman to properly use these appliances; the operation of the appliances being a duty defendant could delegate to an employ. *Tilley v. Rockingham County Light & Power Co.*, 67 Atl. 946, 947, 74 N. H. 316 (citing *Hilton v. Fitchburg R. Co.*, 59 Atl. 625, 73 N. H. 116, 119, 68 L. R. A. 428; *McLaine v. Head & Dowst Co.*, 52 Atl. 545, 71 N. H. 294, 58 L. R. A. 462, 93 Am. St. Rep. 522; *Galvin v. Pierce*, 54 Atl. 1014, 72 N. H. 79; *Wallace v. Boston & M. R. R.*, 57 Atl. 913, 72 N. H. 504).

### Dependence on relation to each other

In Missouri, those only are "fellow servants" who, under the direction and management of the master in person, or some servant placed by him over them, are engaged in the performance of the same common work, with no dependency on or relation to each other except the bare fact that they work together without rank, the test not being that all work for the same person or company; but they must be engaged in the same common employment and under the same common master. *McMurray v. St. Louis, I. M. & S. R. Co.*, 125 S. W. 751, 761, 225 Mo. 272.

Where a master confers authority upon one of his employes to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master and not a mere "fellow servant." Those under the direction and management of a master or of a servant placed over them by him and engaged in the same common work, without dependence upon or relation to each other, are "fellow servants." *Burkard v. A. Leschen & Sons Rope Co.*, 117 S. W. 35, 41, 217 Mo. 466 (quoting *City of La Salle v. Kostka*, 60 N. E. 72, 190 Ill. 130; *Sambos v. Cleveland, C. & St. L. R. Co.*, 114 S. W. 569, 134 Mo. App. 460).

### Different departments of service

The doctrine of distinct departments is not limited to railroad cases alone. *Koerner v. St. Louis Car Co.*, 107 S. W. 481, 484, 209 Mo. 141, 17 L. R. A. (N. S.) 292.

A servant is entitled to recover from the master for injuries caused by the negligence of a collaborer engaged in a different line of work. *Broadway Coal Mining Co. v. Davis (Ky.)* 122 S. W. 228, 230.

The homogeneous business of a master cannot be divided into distinct and separate departments by the testimony to that effect of his servants, the nature of the business alone separating it into departments. *Westinghouse, Church, Kerr & Co. v. Callaghan*, 155 Fed. 397, 399, 83 C. C. A. 669, 19 L. R. A. (N. S.) 361.

Under Civ. Code, § 2320, declaring that masters are liable for damages occasioned by their servants in the exercise of the functions in which they are employed, the master is answerable for damages by his servants and overseers to another servant engaged in a different department of the same business. *Payne v. Georgetown Lumber Co.*, 42 South. 475, 477, 117 La. 983.

An employe whose duty it is to fire a steam shovel used in the construction of a railroad is not a fellow servant of employes

engaged in operating a train on the railroad. *Oliver v. Roach* (Ky.) 102 S. W. 274, 275.

A coal trimmer, working in a vessel which was being loaded with coal, was a "fellow servant" with a "wheelman," whose duty it was to empty the coal into a barrow, and, when full, to run the barrow over a hatch and dump the coal. *Griffin v. Curran*, 80 N. E. 509, 510, 194 Mass. 359.

Under the statutes of Arkansas in force in November, 1905, a brakeman and a car inspector were not "fellow servants." *St. Louis, I. M. & S. R. Co. v. Holmes*, 114 S. W. 221, 222, 88 Ark. 181 (citing *Kansas City, Ft. S. & M. R. Co. v. Becker*, 53 S. W. 406, 67 Ark. 1, 46 L. R. A. 814, 77 Am. St. Rep. 78; *St. Louis, I. M. & S. R. Co. v. Dupree*, 105 S. W. 878, 84 Ark. 377, 120 Am. St. Rep. 74).

An employé, engaged as a carpenter in repairing cars for a railroad company, is a "fellow servant" with the engineer of the locomotive belonging to the same railroad company, who is engaged in driving cars upon the railroad of such company. *Unfried v. Baltimore & O. R. Co.*, 12 S. E. 512, 515, 517, 34 W. Va. 260.

Plaintiff, who was employed in defendant's machine shop and injured, while cleaning a reservoir, by falling tools which were being used by carpenters on the roof thereof, the latter being under a different foreman, was nevertheless a "fellow servant" of the carpenters. *Taylor v. Washington Mill Co.*, 97 Pac. 243, 244, 50 Wash. 306.

A brakeman and a station porter are not "fellow servants," within the meaning of the statute providing that all persons engaged in the common service of a railway corporation and working together at the same time and place to a common purpose of the same grade are fellow servants. *Gulf, C. & S. F. R. Co. v. Elmore*, 79 S. W. 891, 894, 35 Tex. Civ. App. 56.

A fireman employed on a locomotive, and engaged in the movement of a train, is not a "fellow servant" with the superintendent of construction and the foreman of a bridge gang, who are present and engaged in supervising and directing the work on the bridge, being engaged in separate departments of work. *McCabe & Steen Cons. Co. v. Wilson*, 28 Sup. Ct. 558, 560, 209 U. S. 275, 52 L. Ed. 788.

A member of a car repairing gang working under a foreman was not a fellow servant with a construction train crew working under a separate foreman, neither foreman having any authority and control over the other crew. *McMurray v. St. Louis, I. M. & S. R. Co.*, 125 S. W. 751, 762, 225 Mo. 272.

Where a painter, working on a car under the direction of a paint foreman having authority to hire and discharge men and

direct their work, was injured through the negligence of a switchman working under the direction of the general superintendent of the whole carworks, in which from 1,000 to 2,500 men were employed, the painter was not a fellow servant of the switchman. *Koerner v. St. Louis Car Co.*, 107 S. W. 481, 485, 209 Mo. 141, 17 L. R. A. (N. S.) 292.

A draftsman in the employ of the engineering department of a railroad is a fellow servant with the man running the elevator in the building in which the draftsman works. *Fouquet v. New York Cent. & H. R. R. Co.*, 103 N. Y. Supp. 1105, 1107, 53 Misc. Rep. 121.

A carpenter constructing a building and a man operating a freight elevator in a retail store are engaged in different departments of labor, and are not "fellow servants," under Civ. Code, § 1970, as amended by St. 1907, c. 97, limiting the fellow-servant rule to cases of servants of the same master engaged in the same department of labor. *Morgan v. J. W. Robinson Co.*, 107 Pac. 695, 698, 157 Cal. 348.

An architectural draughtsman provided by his employer with a room in its building is a fellow servant of one employed by the same company as operator of an elevator in the building used by all the employés therein, as affecting liability for injury to the draughtsman caused by the operator's negligence. *Fouquet v. New York Cent. & H. R. R. Co.*, 108 N. Y. S. 525, 526, 123 App. Div. 804 (citing *Ross v. New York Cent. & H. R. R. Co.* [N. Y.] 5 Hun, 488; *McDonald v. Simpson-Crawford Co.*, 100 N. Y. Supp. 269, 114 App. Div. 859; *Wright v. New York Cent. R. Co.*, 25 N. Y. 564; *Vick v. New York Cent. & H. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Spees v. Boggs*, 47 Atl. 875, 198 Pa. 112, 52 L. R. A. 933, 82 Am. St. Rep. 792).

A car inspector and an engine foreman in charge of a switch engine, not working together for a common purpose, but engaged in different departments of the service, are not fellow servants within Kirby's Dig. §§ 6658-6660, providing that all persons engaged in the common service of a railroad, and who are working together to a common purpose, are fellow servants, etc. *St. Louis, I. M. & S. Ry. Co. v. Dupree*, 105 S. W. 878, 879, 84 Ark. 377, 120 Am. St. Rep. 74.

Under Const. art. 9, § 15, providing that an employé of a railroad company shall have the same right to recover for injuries received from the negligence of employés as is allowed to persons not employés when the injury results from the negligence of a fellow servant engaged in another department of labor, a watchman at a railroad crossing is engaged in another department of labor from his fellow servants running a train across the crossing. *Betchman v. Seaboard Air Line Ry.*, 55 S. E. 140, 141, 75 S. C. 68.

Under Kirby's Dig. § 6659, making all persons engaged in the common service of a railroad, and who, while so engaged, are working together to a common purpose, neither of such persons being intrusted with superintendence, "fellow servants," provided that servants are not thereby made fellow servants with other servants engaged in any other department or service of the railroad, members of a train crew are not fellow servants of section hands being carried to work. *St. Louis, I. M. & S. Ry. Co. v. Harmon*, 109 S. W. 295, 297, 85 Ark. 503.

Where a shoveler employed in a phosphate mill, and the men who were pushing a car, were working in different departments of the mill under different foremen, neither of whom had power to hire laborers, provide machinery or the place of labor, or to do any duty imposed by law on the master, the employes pushing the car and the shoveler were "fellow servants," for whose negligence the employer was not liable. The change in the fellow servant's law made by the Constitution of 1895 affects only the employes of railroad corporations. *Wilson v. Virginia-Carolina Chemical Co.*, 58 S. E. 1019, 1020, 78 S. C. 381.

"The doctrine that the employes of a railroad company, engaged in different departments of the company's service, are not 'fellow servants,' and do not assume the risks incident to the negligence of each other, while not recognized in the courts of the United States, is well established in Tennessee," and a foreman of the water supply of a division of a railroad, whose duties relate to the physical condition of the water tanks located along the line, is not a "fellow servant" of an engineer of a detached engine, on which he is riding in the performance of his duties, but with the operation of which he has nothing to do, and hence does not assume the risk of the engineer's negligence. *Stuber v. Louisville & N. R. Co.*, 87 S. W. 411, 414, 113 Tenn. 305.

The term "fellow servant" can properly be used in more than one sense. Its general sense is exceedingly broad. One's fellow man would include all men, and one's fellow servant would include all servants of the same master. But "fellow servant," as applied to the liability of a master, is a technical expression, which makes it necessary to limit or restrict its meaning so that it may be confined within the reason for its adoption as a rule of law. Its adoption and enforcement arises from public policy; some have said a mistaken policy. But it was thought that, if a servant knew he was without a remedy if he was injured by the negligence of his fellow servant, he would keep watch on such fellow and report his delinquency to a correcting power, who could discipline him. Guided by the reason for the rule, it seems to us it should be applied, and applied

only in those cases where the servant injured and the one inflicting the injuries are so associated and related in their work that they can observe and have an influence over each other's conduct, and can report delinquences to a common correcting power or head. In short, they should be fellow servants in fact, and not simply in dialectic theory. If in separate and distinct departments, so that the circumstances just stated do not and cannot exist, then they are not fellow servants within any just or fair meaning of the rule. A switchman, under the control of the railroad company's trainmaster, and a car repairer, in the mechanical department of the railroad company under the general management of its master mechanic, were in different departments of service, and were therefore not fellow servants at common law. *Kelly v. Union Pac. Ry. Co.*, 125 S. W. 818, 821, 141 Mo. App. 490 (quoting and adopting definition in *Koerner v. St. Louis Car Co.*, 107 S. W. 481, 209 Mo. 141, 17 L. R. A. [N. S.] 292; *Parker v. Hannibal & St. J. R. Co.*, 19 S. W. 1119, 109 Mo. 362, 18 L. R. A. 802).

#### Dual capacity

Where a vice principal does the work of an ordinary laborer, and is negligent therein, his employer is not liable for injuries to another employe from such negligence. *Miller v. American Bridge Co.*, 85 Atl. 1109, 1110, 216 Pa. 559.

One may act as foreman and still be the "fellow servant" of whom he directs, and it is necessary to look beyond the description of the person to determine the ground of liability. *Doyle v. Melendy*, 75 Atl. 881, 885, 83 Vt. 339.

It is the act itself that characterized the performer as a "vice principal" or a "fellow servant," and not the title of the actor or the fact that he does superior duties. *Chicago, I. & L. Ry. Co. v. Barker*, 83 N. E. 369, 374, 169 Ind. 670, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375.

If one who is a vice principal in a general sense undertakes the performance of a duty which usually belongs to a fellow servant, he is, as respects that particular act, a "fellow servant" and not a vice principal. *Roebeling Const. Co. v. Thompson*, 82 N. E. 196, 197, 229 Ill. 42 (citing *Chicago & A. R. Co. v. May*, 108 Ill. 288; *Gall v. Beckstein*, 50 N. E. 711, 173 Ill. 187; *Baier v. Selke*, 71 N. E. 1074, 211 Ill. 512, 103 Am. St. Rep. 208).

In so far as a "working foreman" is performing the work of a laborer, he is, under the laws of Illinois, the fellow servant of another laborer, so the master is not liable for his negligence in such respect causing injury to the other laborer. *Bokamp v. Chicago & A. Ry. Co.*, 100 S. W. 689, 691, 123 Mo. App. 270.

One is a "vice principal" who is employed to hire, direct, and discharge employes or

to whom the employer has delegated a duty owing to workmen, though otherwise he may be a fellow servant; it being the authority given in a particular matter, and not the grade of service, which determines the issue of vice principal or fellow servant. *Lantry-Sharpe Contracting Co. v. McCracken* (Tex.) 134 S. W. 363, 364.

One may be a vice principal as to certain acts and a fellow servant as to others, and a foreman in giving commands to his men is a vice principal, but, where he joins the men in doing the common labor which they are doing, he is, as to such work, a fellow servant. *Chenoweth v. Burr*, 89 N. E. 1008, 1010, 242 Ill. 312.

Although another employé of the same master was called a manager, yet where the only duty which he was shown to perform was to help plaintiff to load logs on a wagon, and it was alleged that he was so engaged at the time of the injury, his action in this regard was that of a "fellow servant." *Van Dyke v. Menlo Fruit Co.*, 59 S. E. 215, 129 Ga. 532.

A foreman under whom workmen are employed is a "fellow servant" with the workmen, when engaged in accomplishing with them the common task or object, but, when discharging or assuming to discharge the duties toward the workmen which the law imposes on the principal, is a vice principal. *Crist v. Wichita Gas, Electric Light & Power Co.*, 83 Pac. 199, 201, 72 Kan. 135.

Under the modern rule of the federal courts the theory of vice principal as determining the liability of a master to a servant for the negligence of another employé has been largely discarded, and the distinction between negligence which is to be imputed to the master and that which is to be considered as merely and solely the negligence of a fellow servant turns rather on the character of the act than on the relation of the employés to each other. *Peters v. George*, 154 Fed. 634, 639, 83 C. C. A. 408 (citing *Chicago, M. & St. P. R. Co. v. Ross*, 5 Sup. Ct. 184, 112 U. S. 377, 28 L. Ed. 787; *Baltimore & O. R. Co. v. Baugh*, 13 Sup. Ct. 914, 149 U. S. 368, 37 L. Ed. 772).

The question of whether or not one is a "fellow servant" is to be settled by the nature of the act rather than the rank of the respective servants. In relation to the doctrine of vice principals, there are many servants who represent the master but have, in the division of labor, control, more or less general in their respective departments, who are called "fellow servants," and it is the effort of the servants, on the one hand, to extend this relation, and on the part of the master, on the other hand, to curtail it. *La Barre v. Grand Trunk Western R. Co.*, 94 N. W. 735, 737, 133 Mich. 192.

In the absence of a statute, "unless the negligent servant is the general manager, or

general superintendent of the business of the master, it is not his rank or authority over other employés, but it is the nature of the duty he is discharging when he is guilty of the negligence that determines whether he is a 'vice principal' or a 'fellow servant,' and when the master is liable or is exempt from liability for the injury caused by his negligence. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence, but, if he is discharging one of the primary duties of the service, his employer is exempt from liability." *Southern Pac. Co. v. Schoer*, 114 Fed. 466, 468, 52 C. C. A. 268, 57 L. R. A. 707.

The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master has the power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant resulting in an injury to one of the others, without regard to other circumstances; if the negligence complained of consists of some act done or omitted by one having such authority which relates to his duty as a collaborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. *Anderson v. Higgins*, 122 Ill. App. 454, 457.

The foreman is not the fellow servant of a switching crew in the performance of duties peculiar to his position, but is presumptively the representative of the master. *Berglund v. Illinois Cent. R. Co.*, 123 N. W. 928, 109 Minn. 317.

Where the duty of inspecting a mine for gas is delegated to a certain servant while performing it, he is as to his co-workers a vice principal, irrespective of his ordinary duties. *Western Coal & Mining Co. v. Buchanan*, 102 S. W. 694, 695, 82 Ark. 499.

A boss of a crew, loading rails onto a flat car, engaged in the same work as the crew, although he may have direction of it, is not a "vice principal" of the master, but a mere "fellow servant" of the members of the crew. *Whitfield v. Louisville & N. R. Co.*, 66 S. E. 973, 975, 7 Ga. App. 268.

A foreman, directing the work of constructing a building, was not, while temporarily running the engine by which the derrick was operated in the absence of the regular engineer, the fellow servant of a stone mason receiving stone from the derrick. When a foreman for the time being takes a place made vacant by the absence of a laborer who was under him, he does not surrender the duties and obligations of a superior; but the master will be responsible for his negligence if it results in injury to an employé also subordinate to the foreman. *John Die-*

**bold & Sons v. Wollborn (Ky.)** 122 S. W. 212, 213.

Where a servant is injured through the negligence of a superior servant in exercising the authority of the master by negligently directing the performance of a dangerous task, the master is prima facie liable for the injury if the injured servant was in the exercise of due care. A servant injured by the acts of another occupying the dual capacity of superior and fellow servant cannot recover against the master without showing that the injury resulted from an act in the exercise of the authority of the master distinct from any manual act in the common employment, unless such act operated as a breach of a non-delegable duty of the master. The act of one occupying the dual capacity of superior and fellow servant in prematurely starting a machine at which both he and plaintiff worked, resulting in plaintiff's injury, was in the capacity of fellow servant for which the master is not liable. *English v. Roberts, Johnson & Rand Shoe Co.*, 122 S. W. 747, 748, 145 Mo. App. 439.

Where a carpenter, employed with others on the repair of a house, acted as foreman of the work, his negligence in constructing a scaffold or in causing the same to be constructed was not the negligence of a "fellow servant" as to the other servants, notwithstanding that at other times he labored with them in the common employment. *Neves v. Green*, 86 S. W. 508, 509, 111 Mo. App. 634.

A foreman directing employes engaged in moving things in a railway yard did not lose his status of vice principal, fixed by *Sayles' Ann. Civ. St.* 1897, art. 4560g, declaring that all persons intrusted by a railway company in controlling other employes are vice principals, and become "fellow servants" of the employes by assisting them in moving a tool box in the yard pursuant to his orders. *Missouri, K. & T. Ry. Co. of Texas v. Dean (Tex.)* 89 S. W. 797, 798.

The fact that a foreman in charge of a single job of work being done by defendant corporation, who worked with the men under him, had the power to hire and discharge them and to direct their movements in that particular work did not erect that single job into a department of defendant's business, so as to make the foreman a "vice principal," but he remained a "fellow servant" with the men under him, and, for his negligence resulting in an injury to one of such men, defendant cannot be held liable. *Vilter Mfg. Co. v. Otte*, 157 Fed. 230, 232, 84 C. C. A. 673.

Where the foreman pulled a box which a trucker was moving from a freight car to the platform after the truck wheel had caught on the edge of the gangplank, causing the box to fall on the trucker, the foreman's determination that the box should be pulled for the trucker's assistance was an act of superintendence, while his manual act in

pulling it was that of a fellow servant. *Silvia v. New York, N. H. & H. R. Co.*, 89 N. E. 1061, 1063, 203 Mass. 519.

Where plaintiff, an ironworker, was injured by the negligence of defendant's foreman in allowing "wash plates" to be used in the construction of a boat, to be so negligently on the deck of such boat that they fell into the hull, where plaintiff was working, and struck him, the foreman was engaged in a delegable duty, and was a fellow servant of plaintiff, and not a vice principal, for whose negligence defendant was liable. *Amoe v. Great Lakes Engineering Works*, 114 N. W. 1010, 1011, 151 Mich. 212.

Where a belt became entangled, and while the foreman was attempting to loosen it, and directing the plaintiff in assisting him, the foreman, severed the belt, so that plaintiff was caught and injured, the injury was caused by the foreman's act as a fellow servant, and not by his superintendence of the work, so that as matter of law the master was not liable either at common law or under the employers' liability act (*Laws* 1902, p. 1748, c. 600). *Gulmartin v. Solvay Process Co.*, 101 N. Y. Supp. 118, 122, 115 App. Div. 794.

Where the foreman of defendant's shipping department carried a broken bottle from the packing room and left it in the corner of a hall, and thereafter plaintiff, while sweeping the hall, slipped and fell on the bottle and was injured, the act of the foreman was the act of a fellow servant for which defendant was not liable, since the duty to pick up broken glass in the packing rooms where bottles are constantly handled might properly be committed to another without the master's liability for negligence. *Freebourn v. Chamberlain Medicine Co.*, 113 N. W. 918, 136 Iowa, 434.

Where the negligence of the superintendent of a factory consisted in his ordering a servant to take hold of material which the superintendent was running through a circular saw when the saw was so out of repair that it was liable to kick the material and bring the servant's hand in contact with the saw, and the servant was injured by having his hand come in contact with the saw, the master could not escape liability on the ground that the servant and the superintendent were fellow servants. *Chenoweth v. Burr*, 89 N. E. 1008, 1010, 242 Ill. 312.

Plaintiff was injured while operating a steel drop press by the parting of a belt due to a defective lacing. The work of adjusting the lacings was not easily accomplished by operators of the presses, and had been placed on a superior servant in charge of some 35 of such presses in defendant's factory. Held, that such servant, whose duty it was to lace the belt, was not plaintiff's "fellow servant" with reference to such act, but a vice principal, although when his other duties permit-



ted he operated one of the drop presses. *Gilmore v. American Tube & Stamping Co.*, 66 Atl. 4, 5, 79 Conn. 498.

Plaintiff was employed as a miner at a specified price for coal delivered at the mouth of the pit, plaintiff being required to run his cars of coal to the entry, where they were transported to the mouth of the pit by mule power. Plaintiff was promised assistance in running his cars out, in order to facilitate his mining efforts, and, on the derailment of a car in the room, he was assisted by the pit boss to reraill the same, in which operation his fingers were pinched between the bottom of the car and a wooden prop the pit boss had been using, and which he had dropped near the car. Held, that the acts of the pit boss in assisting plaintiff were those of a fellow servant and not of a vice principal. *Cavanaugh v. Centerville Block Coal Co.*, 109 N. W. 303, 306, 131 Iowa, 700, 7 L. R. A. (N. S.) 907.

Plaintiff was employed to run an elevator in defendant's factory, and the foreman got in and ran up to the third floor, where plaintiff had a bundle to deliver. The foreman then told him to deliver the bundle, and he would wait for him till he came back. On his return, he found the chain down and the door partly open, and in the darkness attempted to step on the elevator, which in the meantime had presumably been run up the fourth floor by the foreman, and he thus fell to the bottom of the shaft. Held that, independently of the foreman's direction and assurance, the foreman's act of moving the elevator without putting up the chain and closing the door was the act of a fellow servant, for which the master was not liable; the running of the elevator involving no "element of superior duty, supervision, or command." *Martin v. Cornell*, 121 N. Y. Supp. 119, 120, 136 App. Div. 585.

A conductor in charge of a freight train backed his train into a siding with such force as to throw a heavy casting from a car, which was standing on the siding and which was struck by the freight train, onto the main track, where it was struck by a passenger train, which it wrecked, thereby injuring the fireman of such passenger train. A rule of the railroad required employes in charge of trains to promptly report to the superintendent any incident involving the obstruction of the road, to repair damages and take entire charge of necessary work, and to first protect the train with proper danger signals, and take every precaution to prevent further accident. Held that, under the laws of Tennessee, the crews of the freight and passenger trains were "fellow servants" up to the time when the casting was thrown upon the main track, but, from that time until the time when the passenger train was wrecked, the conductor of the freight train was, by virtue of the railroad's

rule, a vice principal, whose duty it was as a representative of the railroad to remove the obstruction from the main track and to warn the approaching passenger train for its protection. *Cincinnati, N. O. & T. P. R. Co. v. Curd*, 89 S. W. 140, 141, 133 Ky. 138, 134 Am. St. Rep. 444.

A street railway barn foreman, whose duty it was to give orders with reference to the running of cars, with authority to lay off men for infraction of rules, directed plaintiff to take out a new car, which plaintiff stopped just outside the car shed, at a sandhouse, to get sand for his trip. While plaintiff was getting sand, the foreman got on the standing car and started it forward without signal, crushing plaintiff against the side of the sand bin. Held, that the foreman was plaintiff's "vice principal," and that his act in momentarily moving the car, instead of ordering another to do so, did not render his negligence in so doing that of plaintiff's "fellow servant." *Blen v. St. Louis Transit Co.*, 83 S. W. 986, 987, 108 Mo. App. 399 (citing *Grattis v. Kansas City, P. & G. R.*, 55 S. W. 108, 153 Mo. 380, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Bane v. Irwin*, 72 S. W. 522, 172 Mo. 306; *Miller v. Missouri Pac. Ry. Co.*, 19 S. W. 58, 109 Mo. 350, 32 Am. St. Rep. 673; *Hawk v. McLeod Lumber Co.*, 65 S. W. 1022, 166 Mo. 121; *Dayharsh v. Hannibal & St. J. R. Co.*, 15 S. W. 554, 103 Mo. 575, 23 Am. St. Rep. 900; *Russ v. Wabash West. Ry. Co.*, 20 S. W. 472, 112 Mo. 45, 18 L. R. A. 823; *Donahoe v. City of Kansas City*, 38 S. W. 571, 136 Mo. 670; *Foster v. Missouri Pac. Ry. Co.*, 21 S. W. 916, 115 Mo. 165; *Fogarty v. St. Louis Transfer Co.*, 79 S. W. 669, 180 Mo. 490, 1 Ann. Cas. 136; *Hutson v. Missouri Pac. Ry. Co.*, 50 Mo. App. 300; *Haworth v. Kansas City Southern R. Co.*, 68 S. W. 111, 94 Mo. App. 215; *Donnelly v. Aida Min. Co.*, 77 S. W. 130, 103 Mo. App. 349; *Strode v. Conkey*, 78 S. W. 679, 105 Mo. App. 12).

Plaintiff was employed in a box factory as a belt repairer and assistant to the machinery foreman, to whose orders he was subject. The freight elevator having fallen, plaintiff and the foreman started to repair it, and without making any examination of the machinery assumed that the elevator fell because of the breaking of the cord. A new cord was put in, and a stop put on for the ground floor, when plaintiff and the foreman went up on the elevator to the second floor to put the stop on there; but before they could do so the elevator fell, injuring both of them. After the accident a complete examination of the elevator disclosed that the drum shaft was bent, and that the sprocket wheel and gearing were so broken as to be inoperative, either of which might have caused the accident. Held, that plaintiff and the foreman, while engaged in repairing the elevator, were fellow servants, so that plaintiff could not recover for the foreman's negli-

gence in failing to discover the defects in the elevator. *Reed v. Moore & McFerrin*, 153 Fed. 358, 360, 82 C. C. A. 434, 25 L. R. A. (N. S.) 331 (citing *American Bridge Co. v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. [N. S.] 1041; *Kinnear Mfg. Co. v. Carlisle*, 152 Fed. 933, 82 C. C. A. 81).

Plaintiff was employed to assist in aligning bridge piles which were held in place by timber caps; an iron bolt being driven through each cap into the top of the pile. Defendant's foreman discovered that one of the bents of piles was too high, and undertook to lower the same by sawing into the bolts, and then by driving down the caps to the ends of the piles. After plaintiff had sawed away the piles, the foreman, without bracing them, and without notice to plaintiff, who stood on a scaffold beside the same, directed plaintiff's "fellow servant" to strike the cap, and when he did so it sprang from the pile and struck and injured plaintiff. Held, that the act of the foreman in adopting the method he did to lower the cap was not the act of the plaintiff's "fellow servant." *Deputy v. Chicago, R. I. & P. R. Co.*, 84 S. W. 103, 104, 110 Mo. App. 110 (citing *Fogarty v. St. Louis Transfer Co.*, 79 S. W. 664, 180 Mo. 490, 1 Ann. Cas. 136; *Barnicle v. Connor*, 81 N. W. 452, 110 Iowa, loc. cit. 240).

A mere foreman, not the head of a separate department, is a "fellow servant" of the workmen under him or a "vice principal" dependent on the nature of the duties he is discharging at the time of the negligent act, with which he is charged. If he is discharging one of the absolute or personal duties of the master, he is a "vice principal," and his negligence is imputable to the master. Where a bridge company sent a force of men under a foreman to make repairs on a railroad bridge, consisting in part of replacing certain old parts with heavy steel girders, and in doing this it was necessary to construct on the spot wooden frames or bents to support the weight of the girders, while they were being put in place, which were made by the workmen as an incident to the work, the foreman was not a "vice principal" either with respect to the construction of such frames or their subsequent inspection. *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175, 179, 180, 65 C. C. A. 481.

#### Engaged in same particular work

A "fellow servant" is defined to be one employed about the same work with the servant injured, whose negligence caused the injury to the servant complaining. *Krogg v. West Point R. R.*, 77 Ga. 202, 214, 4 Am. St. Rep. 77 (citing *Hough v. Texas Pac. R. R.*, 100 U. S. 214; *Baine v. Athens Foundry*, 75 Ga. 718; *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638).

An employer is liable to an employé, injured through the negligence of another employé in the performance of different

work under their common employment. *Taylor v. E. C. Palmer & Co.*, 50 South. 522, 523, 124 La. 531.

A servant engaged in the excavation of a trench and the foreman directing the work are "fellow servants" in a common employment. *Rocco v. F. A. Gillespie Co.*, 64 Atl. 117, 118, 73 N. J. Law, 591.

A servant employed to operate in the nighttime a particular machine was not a "fellow servant" with others employed to operate the same machine in the daytime. *Goshorn v. Wheeling Mold & Foundry Co.*, 64 S. E. 22, 24, 65 W. Va. 250.

An employé engaged in hauling rock and unloading it and another whose duty it was to carry the rock after being unloaded to the place where used were "fellow servants." *Martin v. Mason-Hoge Co. (Ky.)* 91 S. W. 1146.

Two servants tamping the floor of a furnace, one of them holding a block of wood on the floor, and the other pounding it with a sledge hammer, are "fellow servants." *Wilkinson Co-Operative Glass Co. v. Dickinson*, 73 N. E. 957, 959, 35 Ind. App. 230.

An employé engaged in charging holes in rock with dynamite and exploding the same is a "fellow servant" of the employés engaged in drilling the holes for the charges. *Hooe v. Boston & N. St. Ry. Co.*, 72 N. E. 341, 342, 187 Mass. 67.

A helper in a machine shop, engaged with another helper in painting an engine, and an engine tester, all three of whom were working under the same foreman and on the same engine, were "fellow servants." *Millett v. Puget Sound Iron & Steel Works*, 79 Pac. 980, 981, 37 Wash. 438.

Workmen engaged in the ordinary occupation of unloading a railroad car under the direction of a common overseer are "fellow servants," and the master is not liable for an injury to one engaged in such occupation caused by the negligence of a competent fellow servant. *Westlake v. Murphy*, 122 N. W. 684, 685, 85 Neb. 45, 19 Ann. Cas. 149.

An engine wiper and roundhouse hostler, who was temporarily engaged with the wiper in cleaning an engine, were "fellow servants"; and for injuries to the former caused by the negligence of the latter, while engaged in the common work, there could be no recovery against the common master. *Cloyd v. Galveston, H. & S. A. Ry. Co.*, 84 S. W. 408, 410, 37 Tex. Civ. App. 506.

A trackman and a brakeman in charge of cars operated on the track, though working for a common master, were not engaged in a common employment, and were not therefore fellow servants. *Hale v. Crown Columbia Pulp & Paper Co.*, 105 Pac. 480, 482, 56 Wash. 236.

The conductor and porter of a sleeping car are fellow servants in so far as their du-

ties require that they shall during certain night hours keep watch over said car, one serving during one portion of the night and the other during the remainder thereof. *Pullman Co. v. Woodfolk*, 121 Ill. App. 321, 327.

When any duty connected with operating an appliance is delegated to another by the master, such other becomes a "fellow servant" of all those engaged by the master in carrying on the common enterprise. *Chicago, I. & L. Ry. Co. v. Barker*, 83 N. E. 369, 371, 169 Ind. 670, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375.

An employé engaged in mixing concrete for a building in process of construction is a "fellow servant" of the carpenters and employes engaged in sweeping rubbish into the basement; all being engaged in the common work of erecting the building, with no one having authority over the others. *Armour & Co. v. Dumas*, 95 S. W. 710, 711, 43 Tex. Civ. App. 36.

The engineer and hostler in charge of an engine while being run on an ash pit track in a railroad yard, and a servant employed to wet down the ashes dumped into the pit by engines and thereafter shoveling them into empty cars on a siding, are "fellow servants." *Konoski v. Delaware, L. & W. R. Co.*, 74 Atl. 516, 517, 77 N. J. Law, 645, 28 L. R. A. (N. S.) 644.

In the absence of a statute to the contrary, a master is not liable to one servant for injury caused by the negligence of another servant in the same common employment, unless the negligent servant was the master's representative, or the master was negligent in employing or retaining him. *McIntosh v. Jones*, 93 Pac. 557, 560, 36 Mont. 467, 14 L. R. A. (N. S.) 933.

Where one who was employed to remove broken stone from a trench after blasting was injured through the carelessness of those who did the blasting, it was negligence of his fellow servants, for which the master could not be liable at common law. *Citrone v. O'Rourke Engineering Const. Co.*, 80 N. E. 1092, 1094, 188 N. Y. 339, 19 L. R. A. (N. S.) 340.

A servant employed in a glue factory engaged in sacking hair and loading it on wagons for shipment, and a servant engaged in driving a wagon and in assisting in loading it, are "fellow servants," while engaged in loading the wagon, since they are engaged by the same master in the prosecution of the same enterprise and common duty. *McCaffrey v. Tamm Bros. Glue Co.*, 123 S. W. 944, 946, 143 Mo. App. 24.

An engine crew and common laborers engaged in construction work are fellow servants upon the principle that they were actually employed by the same master and that the work of each had for its object the accomplishment of a common end sought to be

performed by the united efforts of all. *Chicago & E. I. R. Co. v. Kimmel*, 123 Ill. App. 382, 384.

Where plaintiff, a skilled machinist employed by defendant, was engaged in the work of chipping a casting, and held a handled chisel, while a helper struck it with a plainly defective sledge hammer supplied by the defendant, and a sliver of steel broke from the head of the sledge, flew into plaintiff's eye, and destroyed his vision, under all the circumstances of the case stated at length in the opinion, it was held that plaintiff and the helper were not "fellow servants." *Missouri, K. & T. Ry. Co. v. Quinlan*, 93 Pac. 632, 635, 77 Kan. 126.

A member of a pile-driving crew, engaged in driving piling for the erection of falsework essential to the reconstruction of a bridge, is a "fellow servant" with a machinist employed by the same master to repair stationary engines located in the midst of the work upon barges, upon the bridge, and upon the falsework, and used for hoisting material and driving piling in the progress of the general enterprise of building the falsework. *Atchison & E. Bridge Co. v. Miller*, 80 Pac. 18, 29, 71 Kan. 13, 1 L. R. A. (N. S.) 682.

Where plaintiff's intestate, a blacksmith's helper in a machine shop, was killed by the explosion of a piston head while it was being heated by H., who was employed at a forge adjoining that at which plaintiff's intestate worked, H., not having been intrusted by defendant with any duty with regard to other employes, was deceased's "fellow servant," for whose negligence defendant was not liable. *Duff v. Willamette Iron & Steel Works*, 78 Pac. 363, 364, 45 Or. 479.

Sayles' Ann. Civ. St. 1897, art. 4560h, defines "fellow servants" as follows: "All persons who are engaged in the common service of the person, receiver or corporation controlling or operating a railroad or street railway and who while so employed are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are 'fellow servants' with each other." Within such statute, one employed by a lumber company to cut and scale timber was not a fellow servant to employes operating a logging train. *Keystone Mills Co. v. Chambers (Tex.)* 118 S. W. 178.

If two coservants are associated together in the same service, and neither is under the control or direction of the other, they are fellow servants, and one cannot recover damages from the employer caused solely by the negligence of the other. A woman of mature age was employed as housekeeper in general charge of the housework, and was injured by an accident caused by the negligence of the 14 year old son of her employer, who was also performing ordinary house-

hold services, in the absence of his father, but pursuant to the father's general directions to perform such service. Held, that the woman and the boy were fellow servants, and that she could not recover from the employer for her injuries. *Waxham v. Fink*, 125 N. W. 145, 148, 86 Neb. 180, 28 L. R. A. (N. S.) 387, 21 Ann. Cas. 301.

To render employes fellow servants, it is not necessary that they should be engaged in the same particular work; but it is sufficient if they are in the employment of the same master, engaged in the same common enterprise, and are both employed to perform duties intended to accomplish the same general purpose, where such duties are not peculiar to the master as such. *Stearns & Culver Lumber Co. v. Fowler*, 50 South. 680, 683, 58 Fla. 362.

A "fellow servant" is not necessarily one engaged in the same particular work, nor belonging to the same grade or rank, as the servant injured; but it is sufficient if both are employed by the same master under the same control and performing the duties and services for the same general purpose. A servant whose business it is to letter monuments is not a fellow servant of cranimen whose duty it is to place monuments in a position for lettering, although the cranimen are called upon by the letterers to place the monuments for them, in the performance of which duty they are sometimes assisted by the letterers; such work, however, not being a part of their duty. *Halwas v. American Granite Co.*, 123 N. W. 789, 793, 141 Wis. 127.

The term "fellow servants" in connection with evidence in an action for injuries to a switchman, while uncoupling cars, through the negligence of fellow servants, another switchman and the engineer, implies that each of them was engaged with the injured switchman in the common purpose of coupling and uncoupling cars; the other switchman in giving signals in furtherance of the work, and the engineer in operating the engine. *Southern Pac. Co. v. Allen*, 106 S. W. 441, 447, 48 Tex. Civ. App. 66.

Whether a duty to be performed is that of a fellow servant or of the master does not depend so much on the relative situations of the servants as upon the nature of the duty, and the fact that all are engaged in a common enterprise does not necessarily render their several employments those of fellow servants, neither does the circumstance that they are engaged in different lines of duty alone warrant the opposite conclusion. *Strelcher v. Davenport Brick & Tile Co.* (Iowa) 124 N. W. 327, 329.

One who, at the time of the accident, was engaged in the particular business of converting iron into steel, is not the fellow servant of a coemployé, who at such time was engaged in cleaning and carling for cer-

tain tools used in such occupation (if such coemployes were not brought into habitual consociation), inasmuch as such relationship did not constitute a direct co-operation in a particular business in the same line of employment. *Illinois Steel Co. v. Ziemkowski*, 123 Ill. App. 285, 294.

Within the rule that those persons are "fellow servants" who work together at the same time and place to a common purpose, one who was in charge of engines as hostler, whose duty it was to receive incoming locomotives and carry them to the roundhouse and take out-going locomotives from the roundhouse and deliver them to the engineers, and a car repairer, who at the time injuries were inflicted was on a car under orders to proceed to assist in repairing damages caused by a wreck, were not "fellow servants." *San Antonio & A. P. Ry. Co. v. Keller*, 82 S. W. 847, 848, 11 Tex. Civ. App. 569.

Where defendant, through its proper servants, was attempting to repair a feed pipe in its ore reduction plant, and had provided abundant means of support therefor, and appliances convenient at hand for holding the lower section of the pipe in place, but during the progress of the repairs the lower section of the pipe was either pushed by one of the other employes or fell out of place and struck plaintiff, an employé, causing the injuries complained of, the negligence, if any, by which the pipe was caused to fall, was that of plaintiff's "fellow servants," for which the defendant was not liable. *Colorado-Philadelphia Reduction Co. v. Fretz*, 83 Pac. 631, 632, 34 Colo. 472.

Defendant operated a steam log skidder, consisting of a flat car, on each end of which were disconnected engines operating separate skidding cables. Plaintiff, who was employed as a decker in the crew attached to one of the cables, was injured by being struck by a log negligently moved by the order of the decker connected with the other cable. Held, that plaintiff and such other decker were not engaged at the same piece of work at the time of the injury and, were therefore not "fellow servants" within *Sayles'* Ann. Civ. St. 1897, art. 4560h. *Hampton v. Woolsey* (Tex.) 139 S. W. 888, 891.

Where a railroad bridge gang, in repairing a depot platform, divided into two squads to remove cotton bales from a portion of the platform to another part on which the repairs had been made, and during the removal all the men worked together, and plaintiff, while rolling a bale, was injured by another squad rolling another bale on him from the rear, they were engaged in the "same piece of work," and were fellow servants, within *Sayles'* Rev. Civ. St. art. 4560h, defining the same. *International & G. N. R. Co. v. Still*, 101 S. W. 442, 444, 100 Tex. 499.

Decedent, a member of a car repairing crew, under the immediate direction of a foreman, was killed by the fall of a car. After the car had been jacked up and blocked, the foreman ordered it to be raised higher, and, without putting any further blocks under the car, directed decedent to get under it and perform the work, after which the end of the car, resting only on the jacks, slued, and fell to the ground. Held, that decedent and the foreman were fellow servants, and that defendant was not responsible for the foreman's negligence unless it was at fault in retaining him with knowledge of his incompetency. *McClure v. Detroit Southern R. Co.*, 109 N. W. 847, 848, 146 Mich. 457.

Plaintiffs' intestates, their foremen, and defendant's roadmaster were all engaged in removing débris from defendant's track, caused by a landslide into a cut. During the afternoon one of the section foremen had been warned that the adjoining mountain side was dangerous, and in the evening the roadmaster stated, in the hearing of those present, that he had examined the mountain side before dark and that it was all right. Thereafter several of the employés were killed by a rock which rolled down the side of the mountain during the night. Held, that all engaged in the work were fellow servants. *Maloney v. Florence & Cripple Creek R. Co.*, 89 Pac. 649, 651, 39 Colo. 384, 19 L. R. A. (N. S.) 348, 121 Am. St. Rep. 180, 12 Ann. Cas. 621.

#### Equality of authority

Servants not in the same grades of employment are not "fellow servants." *El Paso & S. W. Ry. Co. v. Kelly* (Tex.) 83 S. W. 855, 861.

Under Comp. Laws 1907, § 1343, providing that all employés of a common master, engaged in the same grade of service and working together at the same time and place and to a common purpose, are "fellow servants," neither a section foreman and those working under him on the tracks, nor a telegraph operator, are "fellow servants" of an engineer. *Neesley v. Southern Pac. Co.*, 99 Pac. 1067, 1069, 35 Utah, 259.

Under the employers' liability statute, making railroads liable for damages for personal injuries suffered by employés while in their service in certain cases, where the injured employé is in the exercise of due care, a liability may arise for an injury to the conductor of a railroad train through the negligence of the engineer of the train, notwithstanding a rule of the road makes the conductor in some respects the superior servant. *Pittsburgh, C., C. & St. L. Ry. Co. v. Collins*, 80 N. E. 415, 420, 168 Ind. 467.

Where the conductor of a freight train, who had business elsewhere, gave the switch list to the rear brakeman, who, in co-operation with the head brakeman, proceeded to

select certain cars in the yard and put them into the train, the rear brakeman, taking the lead in the switching operations and in the selection of the cars and giving signals, in which connection it was his duty to cut off the cars and adjust switches, while it was the duty of the head brakeman to ride the cars when kicked or moved, and to set the brakes and stop them at the proper places, the two employés were "fellow brakemen," each with his own duties to perform, and the rear brakeman did not represent the company nor stand in such relation as to make him the superior of the head brakeman. *Higgins v. Atchison, T. & S. F. Ry. Co.*, 79 Pac. 679, 680, 70 Kan. 814.

Although the rules of a railroad company direct that the enginemen must show their orders to the firemen, who are required to read them, and that after reading them they must keep such orders in mind, and, should there be occasion to do so, must remind the enginemen of them, a fireman could not be held guilty of contributory negligence precluding recovery for his death caused by a collision by reason of the disobedience by the conductor and engineer of a train dispatcher's order, in the absence of a showing that such order was shown to the fireman, since he was an inferior employé, whose duty it was to remain on the engine and obey the orders of the engineer, in the absence of knowledge on his part of the contents of such train dispatcher's order. *Sinclair's Adm'r v. Illinois Cent. R. Co.* (Ky.) 100 S. W. 236, 238.

#### Exercise of master's duties

A fellow servant is one to whom the master has not intrusted the performance of some nonassignable duty. *Anderson v. Pittsburg Coal Co.*, 122 N. W. 794, 796, 108 Minn. 453, 26 L. R. A. (N. S.) 624.

Only those servants who are engaged in common employment, who are not discharging any of the duties of the master, are "fellow servants." *Gadsden v. Catawba Power Co.*, 61 S. E. 960, 963, 80 S. C. 239.

The question whether a certain servant was the "fellow servant" of another does not depend on the former's right to hire or discharge the latter, but on whether the former was intrusted by the master with the discharge of duties owing by him. *Chesson v. Walker*, 60 S. E. 422, 423, 146 N. C. 511.

In the absence of some statute defining fellow servant, the test to be applied is whether the negligent act, which caused the injury, was a breach of a positive duty owing by the master to his servant, in which case the person performing the act is a vice principal, and not a fellow servant. *Morrison v. San Pedro, L. A. & S. L. R. Co.*, 88 Pac. 998, 1002, 32 Utah, 85 (quoting and adopting definition in *Merrill v. Oregon Short*

Line R. Co., 81 Pac. 86, 29 Utah, 264, 110 Am. St. Rep. 695).

In determining who are "fellow servants," the usual test is not whether one has the power to direct the services of the other but lies in the nature of the acts done by the offending servant, whether such offending servant was in the performance of some duty which the master had intrusted to him and which the master owed to the injured servant. *James v. Fountain Inn Mfg. Co.*, 61 S. E. 391, 392, 80 S. C. 232 (citing *Braham v. American Telephone & Telegraph Co.*, 50 S. E. 716, 71 S. C. 56; *Tucker v. Buffalo Cotton Mills*, 57 S. E. 626, 76 S. C. 549, 121 Am. St. Rep. 957).

Agents who were charged with the business of supplying the necessary machinery cannot be regarded as "fellow servants." *Lininger v. Westinghouse Air Brake Co.*, 59 Atl. 430, 431, 210 Pa. 62 (quoting *Pennsylvania & N. Y. Canal & R. Co. v. Mason*, 109 Pa. 296, 58 Am. Rep. 722).

A roadmaster of a railroad, in discharging his duty of seeing that a portion of the tracks were clear of clinkers, was not a "fellow servant" with a brakeman. *Missouri, K. & T. R. Co. of Texas v. Keefe*, 84 S. W. 679, 682, 37 Tex. Civ. App. 588.

A roadmaster of a railroad, in discharging his duty of seeing that a portion of the track was in good and safe condition, was not a "fellow servant" with a locomotive fireman. *Chicago, R. I. & P. R. Co. v. Birk*, 99 S. W. 753, 754, 44 Tex. Civ. App. 615.

The negligence of a superintendent in failing to inspect a way used by employes in their work was the negligence of the master. *Kirby v. Montgomery Bros. & Co.*, 90 N. E. 52, 197 N. Y. 27.

An employé, regardless of rank or title, who performs with the master's consent a nondelegable duty, is not a fellow servant of the laborers who do the work. *McDuffie v. Ocean S. S. Co.*, 62 S. E. 1008, 1009, 5 Ga. App. 125.

The foreman is not the fellow servant of a switching crew in the performance of duties peculiar to his position, but is presumptively the representative of the master. *Berglund v. Illinois Cent. R. Co.*, 123 N. W. 928, 929, 109 Minn. 317.

A distinct and independent employé, to whom is delegated the duty to disconnect and make safe the wires on which others must work, is a "vice principal" and not a "fellow servant" with the linemen and other like workmen. *Massy v. Milwaukee Electric Ry. & Light Co.*, 126 N. W. 544, 546, 143 Wis. 220, 40 L. R. A. (N. S.) 814, 139 Am. St. Rep. 1096.

An employé, to whom the master leaves the regulation of matters which ought to be provided for by specific rules, will be regard-

ed as the master's representative, and not a fellow servant of those who do the work. *McDuffie v. Ocean S. S. Co.*, 62 S. E. 1008, 1009, 5 Ga. App. 125.

Where the custom of giving a warning by the foreman is proven, it is embraced in the duty owed by the master to the servants, and for the failure of the foreman to properly discharge that duty the master is responsible. *Germanus v. Lehigh Valley R. Co.*, 67 Atl. 79, 80, 74 N. J. Law, 662 (citing *Bellville Stone Co. v. Mooney*, 39 Atl. 764, 61 N. J. Law, 253, 39 L. R. A. 834).

A foreman of a crew in which a servant is working is not his fellow servant, but a vice principal of the master, in respect to informing the servant of dangers attendant upon the place where the foreman directs the servant to work. *Hume v. Ft. Halifax Power Co.*, 75 Atl. 300, 303, 106 Me. 78, 138 Am. St. Rep. 332.

Instructions which an employé receives from a co-employé, to whom the duty of giving instructions has been delegated by the master, are the instructions of the master, and negligence in the giving of the instructions is the negligence of the master. *Morena v. Winston*, 80 N. E. 473, 474, 194 Mass. 378.

A mine boss discharging the duty of the employer in furnishing to an employé engaged in mining ore as a common laborer a reasonably safe place in which to work is a vice principal, and not a fellow servant of the employé. *Low Moor Iron Co. v. La Bianca's Adm'r*, 55 S. E. 532, 535, 106 Va. 83, 9 Ann. Cas. 1177.

A mining boss, employed to inspect the safety of the mine, as required by Burns' Ann. St. 1901, § 7479, in the performance of his duty to see that the mine is safe, is the vice principal and not the "fellow servant" of a miner injured by the negligence of the boss. *Antioch Coal Co. v. Rockey*, 82 N. E. 76, 78, 169 Ind. 247.

A car inspector is the master's alter ego, and his failure to exercise ordinary care in inspecting and examining instrumentalities furnished by him to his servants with which to do their work is negligence of the master, and not the negligence of a "fellow servant." *El Paso & S. W. R. Co. v. Vizard*, 88 S. W. 457, 460, 39 Tex. Civ. App. 534.

It being defendant's duty to see that its cars were properly inspected for the safety of its employes, if it delegated this duty to one of its employes, such employé in making the inspection would be a vice principal, and not a fellow servant. *Missouri, K. & T. Ry. Co. of Texas v. Blachley*, 109 S. W. 995, 999, 50 Tex. Civ. App. 141.

Where the superintendent of an electric railway company takes out a car to test it, acting as a motorman, he is not a fellow servant of a motorman injured by the negligence

of the superintendent while so operating the car. *Latsha v. Shamokin & E. Electric Ry. Co.*, 70 Atl. 1002, 1004, 222 Pa. 201.

Under the law of Virginia, the maintaining of a safe roadbed by a railway company is a duty, in the performance of which a servant is a vice principal for whose neglect, resulting in the injury of another servant, the company is responsible, and not a "fellow servant." *Louisville & N. R. Co. v. Pointer's Adm'r*, 69 S. W. 1108, 1113, 113 Ky. 952.

Where the duty of a stone company to keep its quarry in a reasonably safe condition devolved upon its foreman, whose duty it was to inspect the quarry, in the discharge of such duty such foreman was not the fellow servant of workmen in the quarry. *Black's Adm'r v. Virginia Portland Cement Co.*, 55 S. E. 587, 591, 106 Va. 121.

Where a servant in charge of a straw chopper, superintending the work, puts another servant to work thereon, such superintending servant is not a fellow servant of the other, but a vice principal of the master as to the duty of giving instructions. *Wyman v. Berry*, 75 Atl. 123, 127, 106 Me. 43, 20 Ann. Cas. 439.

Under the laws of Pennsylvania, a flagman employed at a place where the track was obstructed to give warning to approaching trains, the place being a crossing of the railroad by a highway at grade, was not a fellow servant of a fireman on the engine. *Ferguson v. Central R. Co.*, 67 Atl. 602, 604, 74 N. J. Law, 691.

Servants to whom a master delegates the duty to use reasonable care to furnish other servants with a safe place to work, and to see that rules and regulations regarding care and condition of appliances are complied with, are "vice principals," and not "fellow servants." *Girard v. Grosvenordale Co.*, 73 Atl. 747, 750, 82 Conn. 271.

Employees charged with the duty of keeping a place to work and machinery in a safe condition, and of inspecting the same, are "vice principals" of the employer, regardless of their rank. Neither a roundhouse inspector, charged with the duty of inspecting the pilot of an engine, nor a section foreman and his men, required to keep the track in safe condition, are "fellow servants" of a brakeman. *Missouri, K. & T. Ry. Co. v. Wise* (Tex.) 106 S. W. 465, 468.

A machinist, employed by the master to repair an elevator cable, was the representative of the master as to his duty to use reasonable care to provide the elevator operator with a reasonably safe place in which to work and reasonably safe appliances. *Haynie v. Hammond Packing Co.*, 103 S. W. 581, 582, 126 Mo. App. 88.

An employé, while engaged in assisting the foreman or superintendent in making an inspection after a blast of dynamite for the

purpose of ascertaining whether any part of the charge had failed to explode, is performing a part of the master's duty, and is not a "fellow servant" of those engaged in drilling holes for the charge and removing the rock after the blast. *Hooe v. Boston & N. St. Ry. Co.*, 72 N. E. 341, 342, 187 Mass. 67.

Under Labor Law (Laws 1897, p. 480, c. 415, § 81), providing that all machinery shall be properly guarded, and that when guards are taken off to make repairs they shall be promptly replaced, where the foreman of a printing shop took a guard rail off a press, and failed to replace it, whereby a press feeder was injured, the negligence of the foreman was that of the master, and not that of a "fellow servant." *Pinsdorf v. E. L. Kellogg & Co.*, 95 N. Y. Supp. 617, 620, 108 App. Div. 209.

Where defendant directed its superintendent to obtain and set up a pile driver for use on the succeeding day, the negligence of the superintendent in failing to properly stay the pile driver, which resulted in an injury to a servant while working on the same, was the negligence of a vice principal, and not of a fellow servant. *Wilder v. Great Western Cereal Co.*, 109 N. W. 789, 792, 134 Iowa, 451.

A railroad fireman, employed in removing snow from the track, was killed by a derailment of the locomotive in consequence of the existence of ice as high as the top of the rails. The ice was visible to the track walker, and he did not point out the particular places at which the patches of ice were found. Held that, as the duty of the track walker to point out the ice to be removed was a detail of work, the track walker and the fireman were "fellow servants," relieving the railroad from liability. *Neagle v. Syracuse, B. & N. Y. R. Co.*, 77 N. E. 1064-1066, 185 N. Y. 270, 25 L. R. A. (N. S.) 321.

If a master invests a person with authority to employ and discharge employees in one department of its business, and intrusts such person with the supervision and care of making necessary repairs and caring for the machinery used in its mill, such person, while engaged in performing these duties, is a representative of the master, and not a "fellow servant." *Allen v. Standard Box & Lumber Co.*, 96 Pac. 1109, 1111, 53 Or. 10.

A shift boss and powderman, who had charge of blasting and drilling in connection with railroad construction work, and who used dynamite which required skill and great care, were not the "fellow servants" of a common laborer engaged in shovelling earth into cars in the cut which was being constructed, and who had no means of knowing what they were doing, and no means of guarding against their acts, but were "vice principals," and were bound to notify laborers in places made dangerous by their work. *Ongaro v. Twohy*, 94 Pac. 916, 917, 49 Wash. 93.

Where the foreman of a powder gang in a rock quarry directed plaintiff to strike the drill while it was being held by such foreman in a hole, without removing the blast, with reference to the duty to warn plaintiff of the dangers attending the work he was called to perform, the foreman was a vice principal, and not plaintiff's fellow servant. *Burrows v. Ozark White Lime Co.*, 101 S. W. 744, 82 Ark. 343.

Negligence of a master in failing to provide safe tools, machinery, and appliances to work with or a safe place to work in, safe materials to work on, and competent fellow servants and proper regulations for the work, will render the master liable without regard to the standing or authority of the employé through whose direct fault the injury is occasioned. *E. Van Winkle Gin & Machine Co. v. Brooks*, 116 Pac. 908, 910, 29 Okl. 351.

Where the foreman of the mechanical department of a cotton mill in making repairs worked under the orders of the superintendent and left unguarded a hole in the floor of the dyer room, into which the boss dyer fell and was injured, the foreman and superintendent represented the master in doing the work, and the master could not defeat a recovery on the ground that the boss dyer and the foreman and superintendent were fellow servants. *Shives v. Eno Cotton Mills*, 66 S. E. 141, 143, 151 N. C. 290.

Plaintiff, employed to drill pop holes in a stone quarry, injured by the discharge of an unshot battery hole, was not the fellow servant of the employé charged with the duty of discovering unexploded charges and warning other workmen of their locality, it being a duty which the master was bound to fulfill, and failure to do so constituted actionable negligence on his part. *Harper v. Iola Portland Cement Co.*, 93 Pac. 179, 180, 76 Kan. 612.

Where defendant's carpenter shop was strictly a part of its molding department, in which plaintiff was employed, and the foreman of the carpenter shop was under control and direction of the foreman of the molding department, and it was essential that the molding flasks be put together by the carpenter in the molding department for use by the iron molders, who were required to prepare the molds the foreman of the carpenter shop was a "fellow servant" of a molder. *Leishman v. Union Iron Works*, 83 Pac. 30, 34, 148 Cal. 274, 3 L. R. A. (N. S.) 500, 113 Am. St. Rep. 243.

The duty of an engineer in a sawmill to warn employés by sounding the whistle before starting the machinery in motion was that of a vice principal and not that of a fellow servant, and the master is liable for failure to perform the duty. *Comrade v. Atlas Lumber & Shingle Co.*, 87 Pac. 517, 519,

44 Wash. 470 (citing *McDonough v. Great Northern Ry. Co.*, 46 Pac. 334, 15 Wash. 244; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 82 Pac. 273, 40 Wash. 276).

Where an employé, engaged in the operation of a steam shovel used in removing a bank of earth, was injured by the falling of an overhanging ledge, and the master had furnished a competent foreman and suitable appliances with which to work, excepting explosives, if the injury was attributable to the omission of the foreman to make use of the tools at hand or procure other appliances to break away the ledge, the negligence was that of a fellow servant. *Russell v. Lehigh Valley R. Co.*, 81 N. E. 122, 123, 188 N. Y. 344, 19 L. R. A. (N. S.) 344.

The direction of a foreman, who had power to stop machinery, that it be stopped, or the failure to so direct, while a condition of the machinery was being remedied which necessitated the loosening of a belt running from the main shaft to a countershaft, which had become wound around a pulley, on the countershaft, was an act of "superintendence," within Employers' Liability Act (Laws 1902, p 1748, c. 600), making an employer liable for injuries to an employé by the negligence of any person in the service of the employer exercising "superintendence," and it was not the negligence of a "fellow servant" in a detail of the work for which the master was not liable. *Guilmartin v. Solvay Process Co.*, 82 N. E. 725, 726, 189 N. Y. 490.

Where a servant is injured in performance of work of his master, and the negligence of a coemployé is involved, whether such coemployé is to be deemed a fellow servant or a vice principal is to be determined, not so much by the rank or title, if any, used to describe him, but chiefly by the character of the duties intrusted to him; and an employé performing for the master the duty to provide the place and instrumentalities of work, a coterie of competent servants, or to arrange the general system of work, is deemed the vice principal of the master. *Mills v. Bartow Lumber Co.*, 70 S. E. 983, 985, 9 Ga. App. 171.

Where a wreck on one track of a railroad did not in any way obstruct a parallel track, a flagman on a wrecking train, whose duty it was to warn trains approaching on the parallel track was not performing a duty of the railroad, which the latter could not delegate, but was a mere fellow servant with the trainmen on such trains, and the railroad was not responsible for his negligence in failing to warn a train approaching at a time when the parallel track was temporarily obstructed by a crane projecting out from the wrecking train. *McAuley v. New York Cent. & H. R. R. Co.*, 97 N. Y. Supp. 631, 112 App. Div. 906.



Plaintiff was employed by defendant as a stationary engineer in its car shops, where he was under the orders of a chief engineer, who called him from his regular duties to another part of the works to assist in testing a new electric motor. Plaintiff had no knowledge of such machines, but the chief engineer had and directed the work. The motor became heated, as the evidence tended to show, from the presence of water therein, which was a recognized source of danger; but the chief engineer, although having knowledge of such fact, again turned on the current, when an explosion took place by which plaintiff was injured. Held, that the rule of "fellow servants" did not apply. *American Car & Foundry Co. v. Brinkman*, 146 Fed. 712, 714, 77 C. C. A. 138.

In determining who are "fellow servants," the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having the power to control and direct the services of another, but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant. Tested by this rule, a section boss whose duty it is to oil rollers in a mill, and in charge of the employés in his section, is not a "fellow servant" of an infant whom he sent to get oil to oil a roller near an unguarded machine. *Tucker v. Buffalo Cotton Mills*, 57 S. E. 626, 629, 76 S. C. 539, 121 Am. St. Rep. 957 (citing *Brabham v. American Telephone & Telegraph Co.*, 50 S. E. 716, 71 S. C. 56).

An employé intrusted with the performance of the employer's personal duties is, in regard to those duties, a vice principal, and the employer is liable for injuries to a co-employé resulting from the negligence of the employé. Within this rule a car dispatcher, having not only control of the motormen and conductors of an interurban electric railway, but also control of the cars and their operation, is not a "fellow servant" of the motormen and conductors, but is a vice principal. *Edge v. Southwest Missouri Electric R. Co.*, 104 S. W. 90, 95, 206 Mo. 471.

The delegation to a coemployé of the duty to furnish suitable and safe machinery and to keep the same in repair will not, under the doctrine of coservice, defeat an action for negligence by an employé, where the delinquent was discharging one of the personal duties of the employer. Where the employer is a corporation, the performance of such delegated duty by the subagent or employé is the act of the corporation, and it is responsible for its faithful and prudent performance to the same extent as if the service was performed by the highest officer of the corporation. *Kane v. Babcock & Wilcox Co.*, 67 Atl. 1014, 1016, 75 N. J. Law, 698 (citing *Nord Deutscher Lloyd Steamship Co.*

*v. Ingebregsten*, 31 Atl. 619, 57 N. J. Law, 400, 51 Am. St. Rep. 604; *Curley v. Hoff*, 42 Atl. 731, 62 N. J. Law, 758, 763; *Burns v. Delaware & A. Telegraph & Telephone Co.*, 59 Atl. 220, 592, 70 N. J. Law, 745, 754, 67 L. R. A. 956).

Plaintiff was employed by defendant at its stone quarry, and engaged in breaking waste rock, working beside a large pile, on which the rock were dropped from time to time by a derrick. The derrick was in charge of a boss derrickman, whose duty it was, under instructions from defendant, to operate the same, and also to give warning to plaintiff and other workmen when rock were about to be deposited on the pile. On one occasion he neglected to give such warning, and a rock slid down the pile and injured plaintiff. Held, that the giving of such warning signals was a part of the work of operation, in which the boss derrickman acted as a "fellow servant" of plaintiff, and not as representative of the master in the performance of a nondelegable duty to provide a safe place to work, and that his negligence gave plaintiff no right of recovery against defendant. *Maine & N. H. Granite Corp. v. Hachey*, 173 Fed. 784, 786, 97 C. C. A. 508.

A superintendent received an order from the general manager to cut down a portion of a bridge over a sidewalk; the details of the work being left to the superintendent. There was plenty of material furnished to properly support the remaining portion of the bridge, but without supporting it the superintendent directed plaintiff to cut off the portion to be razed. During the work another directed the superintendent's attention to the fact that the remaining structure should be supported, and was directed to do so, but before the supports could be put in plaintiff sawed through the timbers and the structure fell, causing plaintiff's injuries. Held, that the furnishing of such supports was a mere detail of the work, in doing which plaintiff, the superintendent, and foreman were fellow servants, and that defendant was therefore not liable for their negligence. *Connolly v. Hall & Grant Const. Co.*, 102 N. Y. Supp. 599, 602, 603, 117 App. Div. 387.

The miners' statute of 1899 (Rev. St. 1899, c. 133, art. 2, § 8823) requires entryways in mines to be run parallel for ventilation purposes with cross cuts not more than 50 feet apart. Section 8826 requires, in part, that all shots prepared by the miner for extracting coal from the solid shall be so placed, drilled, and charged that, when fired, they shall perform safely the work required of such shots. Two entries in a mine were allowed to converge until only seven or eight feet apart at a point where by law a new cross-cut was made, and a shot was driven deep into the dividing wall, so that, when fired, it broke through into the other entry,

and killed plaintiff's husband. Held, that while section 8826 requires the safe placing of shots to be done by the miner, a fellow servant of deceased, yet the fact that the entries were allowed by the pit boss to converge to such a short distance apart at a spot where a new cross-cut must be made, and that he allowed a shot to be placed at such spot, was negligence on his part, rendering the employer liable. *Kirby v. Manufacturers' Coal & Coke Co.*, 106 S. W. 1069, 1071, 127 Mo. App. 588.

Railroad Law (Laws 1890, c. 565) § 42a, as added by Laws 1906, c. 657, provides that in actions against a railroad company for death resulting from personal injury to an employé arising from the company's negligence or that of its employés, the employé or his legal representative shall have the same rights and remedies as are now allowed, and, in addition thereto, it shall be held that persons engaged in the company's service, or intrusted with the authority of superintendence, control, or command of other employés, or with the authority to direct them in the performance of their duties, or who have, for the time being, physical control or direction of the movement of a signal, engine, etc., are vice principals, and not "fellow servants," of the injured employé. Decedent was third-rail patrolman in defendant's employment, and it was the custom of such patrolman to work in pairs; one of them repairing minor defects, while the other kept watch for the approach of trains and warned the working patrolman thereof, alternating in working and watching as they themselves determined. Held that, since the duty of the other patrolman to warn decedent of approaching trains was only incidental to his work, he was not a vice principal as to decedent, but a "fellow servant"; the statute only making an employé a vice principal in such case, where his special or sole duty was to give warning. *Hintze v. New York Cent. & H. R. R. Co.*, 125 N. Y. Supp. 644, 646, 140 App. Div. 852.

In the performance of those duties placed upon the master by express law, or implied to him under the contract of employment, and variously designated as the "positive," "absolute," "personal," "nondelegable," or "nonassignable" duties of the master, the servant intrusted with them, even though he be the most menial in point of rank, is to the extent of such duties the alter ego or vice principal of the master. Conversely the co-employé, however important be his official title, who is doing mere servant's work, or is engaged merely with the ordinary details of the labor, is to be regarded as a "fellow servant" in the business at hand. In a suit by a servant against the master, where the injury was occasioned by the negligence of another employé, the defense of a common employment is excluded, or allowed to prevail, according as the delinquency was or was not

a breach of one or more of what the law regards as the absolute, personal or nondelegable duties of the master. *Dennis v. J. S. Schofield's Sons Co.*, 57 S. E. 925, 1 Ga. App. 489 (citing *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. [N. S.] 772).

A mere foreman or gang boss is a "fellow servant" of those working with or under him, and for his defaults, by which a fellow servant is injured, the master is not responsible, unless the duty as to which the default is made is an absolute duty of the master, the performance of which has been delegated to such foreman. Defendant railroad company owned barges on which cars were transported into a dock to be loaded from a pier alongside. There were two parallel tracks on the barge and between them a platform at about the height of the car doors used in loading the cars. There was a space a foot wide between the platform and the cars and iron plates were provided to be placed across such space from the car doors to the platform. Plaintiff was a workman employed by defendant with others in loading cars on such a barge under direction of a foreman. Having occasion to move one of the cars the foreman directed that the plate be not replaced, and plaintiff while assisting to roll a cask from such car to the platform in obedience to an order of the foreman, without knowledge or notice that the plate was not in place stepped backward into the opening and fell and was injured. Held, that defendant having provided proper appliances to make the work safe was not under the personal duty to see that such appliances were replaced after being temporarily removed by the workmen, and that plaintiff's injury was due to the negligence of the foreman, who was his fellow servant, for which defendant was not liable, but which was one of the assumed risks of the employment. *Baltimore & O. R. Co. v. Brown*, 146 Fed. 24, 28, 76 C. C. A. 482.

Defendant railroad company was engaged in constructing a railroad on which trains west of C. were operated under bulletin orders issued by defendant's trainmaster. An order was issued that all east-bound work trains should have right of way over west-bound trains between 12 o'clock noon and 12 o'clock midnight, and vice versa between 12 o'clock midnight and 12 o'clock noon. On the day of the accident plaintiff, as engineer, was running an extra east-bound train about 60 miles west of C., and at 1 o'clock p. m. his train, having the right of way under such orders, was run into by a west-bound train in charge of the trainmaster as foreman in charge of a crew of laborers. The latter train was run at a high rate of speed on a crooked track through a rough and mountainous country, and no flagman was put out or any steps taken to protect plain-

tiff's east-bound train. Held, that the negligence of the trainmaster in permitting his train to be run in violation of the bulletin was negligence in his capacity as vice principal, and not as plaintiff's fellow servant, for which the railroad company was responsible. *Morrison v. San Pedro, L. A. & S. L. R. Co.*, 88 Pac. 998, 1001, 32 Utah, 85 (citing *Hankins v. New York, L. E. & W. R. Co.*, 37 N. E. 466, 142 N. Y. 416, 25 L. R. A. 396, 40 Am. St. Rep. 616; *Darrigan v. New York & N. E. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590; *Lewis v. Seifert*, 11 Atl. 514, 116 Pa. 628, 2 Am. St. Rep. 631; *Hunn v. Michigan Cent. R. Co.*, 44 N. W. 502, 78 Mich. 513, 7 L. R. A. 500; *Little Rock & M. R. Co. v. Barry*, 23 S. W. 1097, 58 Ark. 198, 25 L. R. A. 386; *Chicago, B. & Q. R. Co. v. McLellan*, 84 Ill. 109; *Smith v. Wabash, St. L. & P. R. Co.*, 4 S. W. 129, 92 Mo. 359, 1 Am. St. Rep. 729; *Washburn v. Nashville & C. R. Co.*, 3 Head. [40 Tenn.] 638, 75 Am. Dec. 784; *Galveston, H. & S. A. R. Co. v. Arispe*, 23 S. W. 928, 24 S. W. 33, 5 Tex. Civ. App. 611).

Among the duties which the master owes to the servant, and which he cannot delegate to others so as to absolve himself from liability for negligence in their performance, are the duties of the master to warn the servant of latent defects and dangers which are or ought to be known to the master, and of which the servant without fault is ignorant, and to exercise reasonable diligence to furnish the servant a reasonably safe place in which to perform his work. Whoever is set to perform these duties, no matter what be his grade or rank, represents the master in that particular and is not a "fellow servant" of those to whom the duty is due, but is a "vice principal." If the servant by whose negligence the injury is caused was at the time, with the knowledge, consent, and procurement of the master, engaged in the performance of a duty which under the law the master owed to the servant, the relation of "fellow servant" does not exist between the offending employé and the injured servant. A driver in a coal mine, after putting his mule away for the day, returned through the main entry of the face of the coal to get his coat and bucket. While he was walking through the entry, an explosion of dynamite occurred in the roof above his head, and he was injured as a result. The shot had been placed and ignited by two of defendant's timbermen, whose duty it was to keep the roof in safe condition, and in the performance of such the timbermen were "vice principals" engaged in performing the master's nondelegable duty to keep the mine safe, and the master was responsible for their negligence in failing to warn plaintiff of the impending explosion. Whether servants are fellow servants of the person injured or vice principals does not depend on whether they were engaged in a

common employment under the same general contract and paid by the same principal, but whether the negligent servant, in the act or omission complained of by the direction or consent of the master, was in discharge of a duty which the master personally owed to the injured servant. *Donk Bros. Coal & Coke Co. v. Thil*, 81 N. E. 857, 858, 859, 228 Ill. 233 (citing *Hess v. Rosenthal*, 43 N. E. 743, 160 Ill. 621; *Chicago & A. R. Co. v. Scanlan*, 48 N. E. 826, 170 Ill. 106; *Chicago & A. R. Co. v. Maroney*, 48 N. E. 953, 170 Ill. 520, 62 Am. St. Rep. 396; *Chicago Union Traction Co. v. Sawusch*, 75 N. E. 797, 218 Ill. 130, 1 L. R. A. [N. S.] 670; *Mobile & O. R. Co. v. Godfrey*, 39 N. E. 590, 155 Ill. 78; *Pullman Palace Car Co. v. Laack*, 32 N. E. 285, 143 Ill. 242, 18 L. R. A. 215; *Libby, McNeill & Libby v. Scherman*, 34 N. E. 801, 146 Ill. 540, 37 Am. St. Rep. 191; *Hines Lumber Co. v. Ligas*, 50 N. E. 225, 172 Ill. 315, 64 Am. St. Rep. 38; *Leonard v. Kinmare*, 51 N. E. 688, 174 Ill. 532; *Kewanee Boiler Co. v. Erickson*, 54 N. E. 1044, 181 Ill. 549).

Defendant corporation operated a plant for the manufacture of machinery, one of the buildings being a blacksmith shop, in which plaintiff was employed as head blacksmith, and where he was injured by the explosion of a piston head which was being heated by him and another employé for the purpose of being shrunk onto a new piston rod. The head was hollow, and it was dangerous to heat it without drilling a vent for the escape of moisture from the inside, but plaintiff did not know the danger. The entire plant was under the management of a superintendent who employed and discharged the men, and directed their work. There was evidence that he sent the other employé with the piston to the blacksmith shop with directions that it be heated, although there were other safe ways of attaching the rod without heating, and, although he knew the danger unless a vent was made and that plaintiff did not, he gave no warning nor directions as to how the work should be done. Held, that his negligence in that regard was that of the master, and the evidence was sufficient to sustain a verdict finding defendant liable for plaintiff's injury. If the master has delegated the general control and management of the business to a superintendent, it is his duty as representing the master to warn a servant who is under his orders of latent dangers, and his negligence in failing to do so is the negligence of the master, and renders him liable to an employé for an injury of which such negligence is the proximate cause. *Gagnon v. Klaunder Weldon Dyeing Mach. Co.*, 174 Fed. 477, 480.

#### Keeping machinery, etc., in repair

A servant employed to operate in the nighttime a particular machine was not a "fellow servant" with a machinist employed

to keep the machinery in the plant in good order and condition. *Goshorn v. Wheeling Mold & Foundry Co.*, 64 S. E. 22, 24, 65 W. Va. 250.

Where defendant employer intrusted a paper cutting machine and its care and repair into the hands of a foreman, who, knowing of the defective condition of the machine, directed plaintiff, who was ignorant of such condition, to operate it, the foreman was the representative and agent of defendant, and not a "fellow workman" of plaintiff. *Brunger v. Pioneer Roll Paper Co.*, 92 Pac. 1043, 1045, 6 Cal. App. 691.

The plaintiff was employed to strike a steel chisel with a hammer, and was injured by a piece of steel struck off in the process of hammering. The defect alleged was the deterioration of the chisel due to the constant use. Held, that the duty of inspection and repair was incidental to the duty to use, and the negligence was that of the plaintiff's "fellow servants," and not of the master. *Demato v. Hudson County Gas Co.*, 67 Atl. 28, 74 N. J. Law, 793 (citing *Nord Deutscher Lloyd Steamship Co. v. Ingebregsten*, 31 Atl. 619, 57 N. J. Law, 400, 51 Am. St. Rep. 604; *Campbell v. T. A. Gillespie Co.*, 55 Atl. 276, 69 N. J. Law 279).

A distinct and independent employé to whom is delegated the duty to disconnect and make safe electric wires on which others must work is ordinarily a vice principal, and not a fellow servant with the linemen and other like workmen. *Massy v. Milwaukee Electric Ry. & Light Co.*, 126 N. W. 544, 546, 143 Wis. 220, 40 L. R. A. (N. S.) 814, 139 Am. St. Rep. 1096.

The operator of a lathe in a machine shop and a blacksmith employed in the shop to temper the steel portions of lathes are "fellow servants," and in the absence of evidence of the incompetency of the blacksmith, or of his negligence in tempering the steel in the lathe, or of defects in the quality of the steel itself or the appliances for tempering it, the employer is not liable for injuries sustained by the operator in consequence of the steel in the lathe bursting shortly after the same had been tempered by the blacksmith. *Hohl v. Hewitt Motor Co.*, 106 N. Y. Supp. 881, 882, 121 App. Div. 866.

Plaintiff was assistant engineer in charge of a stationary engine. He worked nights, and reported to the chief engineer for orders, and when the plant was not running acted as night watchman, and had instructions to report the necessity of repairs to the chief engineer, who was to have them made. He occasionally made simple repairs himself. The engine became defective, and plaintiff reported the fact to the chief engineer, who neglected to make the repairs, and plaintiff was injured. Held, that the chief engineer

was a vice principal and not a fellow servant of plaintiff, and that the latter was entitled to recover for the injuries received. *Peterson v. G. W. Van Dusen & Co.*, 111 N. W. 839, 840, 101 Minn. 50.

Defendant's elevator being out of repair, the engineer went on top of it and discovered that a screw was loose in the dog on the cable, which was a part of the device for stopping the elevator, and asked plaintiff, whose duty it was to run the elevator and do anything the engineer asked him to do, to come up on the top of the elevator and hold the dog while the engineer fastened it, and he told plaintiff, in response to an inquiry, that it was all right for him to come up on top. As soon as plaintiff stepped on top, the elevator went up to the roof, injuring plaintiff. There was nothing to show that the engineer was a superintendent, within the employers' liability act. Held, that the statement of the engineer was the act of a fellow servant. *Archer v. Eldredge*, 90 N. E. 525, 526, 204 Mass. 323.

Those entering into the service of a common master engaging in a common service are, as a general rule, "fellow servants," and prima facie the common master is not liable for the negligence of one of the servants resulting in an injury to a fellow servant. A master must provide safe tools. A railroad is liable for injuries to a servant resulting from failure of its foreman to inspect a hand car, though the foreman was a fellow servant of the person injured, since the duty of providing safe appliances could not be delegated. *Missouri, K. & T. R. Co. v. Wilhoit*, 98 S. W. 341, 345, 6 Ind. T. 534.

#### Laborers on buildings

A servant employed in excavating for a building, having nothing to do with the blasting of the frozen earth, is not a "fellow servant" of the person employed specially to do the blasting. *Rankel v. Buckstaff-Edwards Co.*, 120 N. W. 269, 271, 138 Wis. 442, 20 L. R. A. (N. S.) 1180.

An engineer in charge of a derrick engine hoisting stone to be set in the walls of a building and a stone mason receiving and placing them in position were "fellow servants." *John Diebold & Sons v. Wollborn* (Ky.) 122 S. W. 212, 213.

An engineer in charge of an engine and a derrick used to raise girders to be placed on pillars in a building in process of construction, and an employé charged with the duty of putting the girders in position on the pillars, are fellow servants, and the employer is not liable for the negligence of the engineer. *Cooper's Adm'r v. Oscar Daniels Co.* (Ky.) 96 S. W. 1100, 1101.

An employé engaged in mixing concrete for a building in process of construction is a "fellow servant" of the carpenters and em-

ployés engaged in sweeping rubbish into the basement; all being engaged in the common work of erecting the building, with no one having authority over the others. *Armour & Co. v. Dumas*, 95 S. W. 710, 711, 43 Tex. Civ. App. 36.

Where an employé of defendant, while engaged in clearing away débris from around a pillar that was being incased in brick, was injured by being struck by a brick knocked off a scaffold by one of the bricklayers working above him, the injury was due to the negligence of a "fellow servant," for which defendant was not liable. *Willis v. Thompson-Starrett Co.*, 104 N. Y. Supp. 668, 670, 54 Misc. Rep. 238.

A foreman in charge of construction of a building is a "fellow servant" of carpenters employed on the building, in construction of a scaffold under his direction, to be used in their work, as the master's responsibility in case of accident is not fixed by grade of service, but character of the act, and the act to furnish a safe scaffold was not a part of his duty. *McDonald v. Hoffman*, 102 Pac. 673, 674, 10 Cal. App. 515.

Where the foreman of a contractor who was erecting a building directed a carpenter to move a certain derrick with the assistance of a gang of men, the situation warranted a finding that the carpenter, as concerning the moving of the derrick, was a superintendent or foreman, in the absence of the regular foreman, with the authority and consent of defendant. *Farrell v. B. F. Sturtevant Co.*, 80 N. E. 469, 470, 194 Mass. 431.

If the building of staging and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master for an injury resulting from their negligent construction. *Thompson-Starrett Co. v. Fitzgerald*, 149 Fed. 721, 722, 79 C. C. A. 427.

An employer constructing a building supplied derricks and ropes to properly guy them. A derrick used in raising building material was moved from place to place as the work required. An employé and co-employés under a foreman used the derrick. When the derrick was installed in place a single guy rope was used, and it toppled over and injured the employé. Held, that he and the foreman were fellow servants, defeating a recovery. *Christiansen v. W. H. & F. W. Cane Co.*, 69 Atl. 453, 454, 75 N. J. Law, 262.

A superintendent received an order from the general manager to cut down a portion of a bridge over a sidewalk; the details of the work being left to the superintendent. There was plenty of material furnished to properly

support the remaining portion of the bridge, but without supporting it the superintendent directed plaintiff to cut off the portion to be razed. During the work another directed the superintendent's attention to the fact that the remaining structure should be supported, and was directed to do so, but before the supports could be put in plaintiff sawed through the timbers and the structure fell, causing plaintiff's injuries. Held, that the furnishing of such supports was a mere detail of the work, in doing which plaintiff, the superintendent, and foreman were fellow servants, and that defendant was therefore not liable for their negligence. *Connolly v. Hall & Grant Const. Co.*, 102 N. Y. Supp. 599, 602, 603, 117 App. Div. 387.

#### Mill employés

Employés in a sawmill who are not co-associated in the same work are not fellow servants. *Payne v. Georgetown Lumber Co.*, 42 South. 475, 477, 117 La. 983.

A boss in a spinning department of a cotton mill, who was the immediate superior of an employé in that department, was not the "fellow servant" of such employé. *Morrisett v. Elizabeth City Cotton Mills*, 65 S. E. 514, 515, 151 N. C. 31.

Where the owner of a sawmill operates in connection therewith a private railroad to transport his employés from the mill to their work in the woods and to haul logs to the mill, the servants engaged in operating the log train and the servants riding thereon from the mill to their work are "fellow servants." *Roland v. Tift*, 63 S. E. 133, 134, 131 Ga. 683, 20 L. R. A. (N. S.) 354.

The electrician of a pulp mill, to whom was intrusted the charge of the electric lights thereof, was a fellow servant of one engaged in hauling pulp from one room to another of the mill, and who was injured through negligence of the electrician in turning off lights, leaving the elevator shaft dark. *Miller v. Centralia Pulp & Water Power Co.*, 113 N. W. 954, 955, 134 Wis. 316, 13 L. R. A. (N. S.) 742.

Where a mill company desired to remove an engine across a street occupied by railroad tracks laid in a cut, and a trestle was built by a miller and men employed about the mill from an abundant stock of sound material supplied by the company, and the men were allowed their discretion as to the plan of the structure, and all the work was performed under the control of the miller, and the trestle collapsed from faulty construction, liability of the company for the injury cannot be based on the superior rank of the miller, but must rest on the breach of some nonassignable duty. *Maib v. Aetna Mill & Elevator Co.*, 109 Pac. 688, 689, 82 Kan. 660.

An employé in a steel manufactory, whose duties were to superintend and direct

other employes in the process of converting iron into steel, and to give warning when a blast or heat was about to be blown, was not a "fellow servant" of another employe, not under the former's immediate control, whose duties were confined strictly to taking care of stoppers used in the vessels in which the steel was blown, so as to exempt the employer from liability for injuries to the latter resulting from failure of the former to give such warning. *Illinois Steel Co. v. Ziemkowski*, 77 N. E. 190-192, 220 Ill. 324, 4 L. R. A. (N. S.) 1161.

"To constitute 'fellow servants,' it is not necessary that the negligent workman causing the injury and the one injured should both be engaged in the very same particular work. It is sufficient if they are employed by the same master, under the same control, and performing duties and services for the same general purpose." "Fellow servants" are defined as "those engaged in the same common pursuit, under the same general control," as "persons employed in the same general business by a common employer"; that the question is not "controlled by the fact that different parts of the work necessary to the general enterprise are placed in hands of employes remote from each other, and receiving immediate command from different superiors, or, indeed, one from the other." A head sawyer operating the carriage of a circular saw, and edger men engaged in managing the saws for edging the lumber, being employed by a common master, and performing duties for the same general purpose, are "fellow servants." *Grant v. Keystone Lumber Co.*, 96 N. W. 535, 537, 119 Wis. 229, 100 Am. St. Rep. 883 (citing *Toner v. Chicago, M. & St. P. Ry. Co.*, 31 N. W. 104, 33 N. W. 433, 69 Wis. 188).

#### Miners and other employes

A mine boss appointed pursuant to statute (Code [Ed. 1899] Appendix, p. 1052 [Ann. Code 1906, § 410]) is a "fellow servant" with the miners. *McMillan v. Middle States Coal & Coke Co.*, 57 S. E. 129, 130, 61 W. Va. 531, 11 L. R. A. (N. S.) 840.

One who had entire charge of the work of timbering in a mine, and was in full control of the timbermen, was not a fellow servant with one working under him in the work of timbering. *Cripple Creek Mining Co. v. Brabant*, 87 Pac. 794, 796, 37 Colo. 423; *Same v. Esteb*, 87 Pac. 796, 37 Colo. 431.

A mine boss and fire boss in a coal mine employed under Code 1906, §§ 409, 410, in performance of their duties, including that of the mine boss to see as the working places advance break-throughs for air are made, or that the brattice shall be used, are fellow servants of the miner employed therein, and the master is not liable for injuries to a miner by the negligent performance of such duties. *Bralley v. Tidewater Coal & Coke*

*Co.*, 66 S. E. 684, 685, 66 W. Va. 278, 40 L. R. A. (N. S.) 945, 19 Ann. Cas. 510.

A coal mine foreman who hired the miners and had charge of the operations had authority to make any reasonable promise to induce a miner to remain at work, so that, in promising a miner that he would warn him when workmen driving an adjoining room were about to blast through an air passage between it and plaintiff's room, such foreman was not a fellow servant of the miner. *Hill v. Nelson Coal Co.*, 104 Pac. 876, 880, 40 Mont. 1.

Where an assistant track repairer in a mine had full charge of the track in the portion of the mine in which decedent, a miner, was suffocated on the day of the injury, and was directed to repair a curtain hung across a gallery as a part of the ventilating appliances, such act was administrative in character, in the performance of which he did not act as a fellow servant of decedent. *Wilmington & Springfield Coal Co. v. Sloan*, 80 N. E. 265, 266, 225 Ill. 467.

#### Officers, crew, etc., of vessel

A kitchen boy on a steamship was a "fellow servant" of the ship's carpenter, and was therefore not entitled to recover for injuries sustained by the latter's negligence. *The Esperanza*, 133 Fed. 1015, 1016.

A stevedore and a winchman, both being at the same time working in a common employment under the same general control and direction, were "fellow servants." *The Elton*, 142 Fed. 367, 374, 73 C. C. A. 467.

A coal trimmer, working in a vessel which was being loaded with coal, was a fellow servant with a "wheelman," whose duty it was to empty the coal into a barrow, and, when full, to run the barrow over a hatch and dump the coal. *Griffin v. Curran*, 80 N. E. 509, 510, 194 Mass. 359.

Where two vessels came into collision as the result of excessive speed, maintained at the direction of the master, the latter represented the shipowner, so that the personal representatives of the subordinate officers and crew who were drowned in the collision were not precluded from a recovery on the ground that they were fellow servants of the master. *The Hamilton*, 146 Fed. 724, 727, 77 C. C. A. 150.

Libellant was injured by the breaking of the capstan of a vessel while it was being used to heave the vessel carrying a deck load of lumber alongside a wharf at low tide. The master superintended the navigation of the vessel from the bridge, and libellant alleged that the negligence consisted in the master giving orders to take additional turns of a hawser around the capstan, instead of requiring the hawser to be removed to the bits of the vessel provided for such maneuvers. Held, that the negligence of the captain in giving such orders, if any, was in

the ordinary navigation of the vessel, in which he was libellant's "fellow servant." *The Westport*, 136 Fed. 391, 396, 69 C. C. A. 235 (citing *Olson v. Oregon Coal & Navigation Co.*, 104 Fed. 574, 44 C. C. A. 51).

Plaintiff, a longshoreman, engaged in loading a vessel as an employé of a master stevedore, who had contracted to do such loading, and who had contracted with defendant for the steam power, is not a fellow servant of the employé of defendant, who worked the steam winch, and through whose negligence plaintiff was injured; the winchman being hired and paid by defendant, and the master stevedore having no power to discharge him. *Standard Oil Co. v. Anderson*, 152 Fed. 166, 167, 81 C. C. A. 399.

A mate and floatman belonging to the same crew, having the same employer, and being engaged in a common object, although of different rank, and working on different lines to accomplish the undertaking, are "fellow servants," and the negligence of the mate, whereby the floatman was injured, is the negligence of his fellow servant; and neither the vessel nor its owner is chargeable with the consequences of such negligence, in the absence of evidence showing that the owner was negligent in the selection of such servant. *Smith v. Lehigh Valley R. Co. of New Jersey*, 141 Fed. 192, 194.

#### Railroad employes

The relation of "fellow servant" does not exist as to employes engaged in operating the cars, locomotives, or trains of a railroad, and those not so engaged. *Galveston, H. & S. A. R. Co. v. McAdams*, 84 S. W. 1076, 1080, 37 Tex. Civ.App. 575.

A conductor and an engineer on a train are not "fellow servants." *Snipes v. Southern Ry. Co.*, 166 Fed. 1, 6, 91 C. C. A. 593.

The engineer and conductor of a train are "fellow servants" of the fireman of said train. *Hayes v. New York, N. H. & H. R. Co.*, 105 N. Y. Supp. 592, 593, 121 App. Div. 198.

An engineer and brakeman on the same train are "fellow servants" at common law. *Breed v. Lehigh Val. R. Co.*, 115 N. Y. Supp. 1019, 1020, 131 App. Div. 492.

The fireman and a brakeman of a train are "fellow servants." *Louisville & N. R. Co. v. Percy (Ky.)* 121 S. W. 1037, 1040.

Under the statute in force in November, 1905, a brakeman and car inspector were not "fellow servants." *St. Louis, I. M. & S. R. Co. v. Holmes*, 114 S. W. 221, 222, 88 Ark. 181.

A switchman under the orders of a conductor is not a "fellow servant" of such conductor. *Yeates v. Illinois Cent. R. Co.*, 145 Ill. App. 11, 24.

A station agent and a freight brakeman on a train switching at the station are "fel-

low servants." *Hallock v. New York, O. & W. Ry. Co.*, 90 N. E. 1124, 197 N. Y. 450.

One employed in unloading rails from a train was a fellow servant of the engineer. *De Santes v. New York, N. H. & H. R. Co.*, 103 N. Y. Supp. 849, 119 App. Div. 95.

The members of a train crew, such as engineer, fireman, and brakeman or switchman of the same train, are fellow servants. *Prairie Pebble Phosphate Co. v. Taylor*, 60 South. 114, 115, 64 Fla. 403.

A railroad section foreman and the members of the crew working under him are "fellow servants" within the rule of the federal courts. *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893, 895.

A section hand working on a railroad track is not a fellow servant of the engineer of a passenger train by which he was killed, under the fellow servant law of 1897 (*Laws 1897, p. 96*). *Degonia v. St. Louis, I. M. & S. R. Co.*, 123 S. W. 807, 815, 224 Mo. 564.

An employé of a railroad, while being transported to his work on the train of his employer, is a "fellow servant" of the trainmen. *Baltimore & O. S. W. R. Co. v. Clapp*, 74 N. E. 267, 268, 35 Ind. App. 403.

Employes working under a superintendent in repairing the roadbed of a railroad are not, while being carried by a train to their work, fellow servants of the train crew; the employes having nothing to do with the operation of the train, nor with making up the train, and the train crew being governed by rules as to the management and operation of trains distinct from the rules under which the employes perform their work. *Jachetta v. San Pedro, L. A. & S. L. R. Co.*, 105 Pac. 100, 102, 36 Utah, 470.

One employed to clean the cinders out of engines in a cinder pit is a "fellow servant" of an assistant hostler employed to move engines from one part of the yards to another. *Atchison, T. & S. F. R. Co. v. Dickens*, 103 S. W. 750, 756, 7 Ind. T. 16.

A railway company is not liable in an action by a crossing tender for injuries caused by the negligence of a yardman in leaving a switch unlocked, since the injuries were due to the act of a fellow servant. *Dixon v. Grand Trunk Western Ry. Co.*, 111 N. W. 200, 201, 147 Mich. 667.

A crossing tender and a switchman are "fellow servants," and the railway company is not liable for injuries to the former by the negligence of a switchman. *Dixon v. Grand Trunk Western Ry. Co.*, 118 N. W. 946, 948, 155 Mich. 169.

A fireman on one train and a conductor of another train are "fellow servants," and the railway company is not liable for the death of the fireman resulting solely from the negligence of the conductor. *Still v. San Francisco & N. W. Ry. Co.*, 98 Pac. 672, 674,

154 Cal. 559, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177.

A conductor, who was not at work but was traveling in the caboose under orders to report for duty, and the engineer running the train on which he traveled are not "fellow servants," as defined by the statute. *Galveston, H. & S. A. Ry. Co. v. Crawford*, 29 S. W. 958, 961, 9 Tex. Civ. App. 245.

Where plaintiff, a brakeman on a freight train, was injured by the alleged negligence of the engineer in backing his engine against a defective car, plaintiff and the engineer were *prima facie* "fellow servants." *Southern R. Co. v. Elliott*, 82 N. E. 1051, 1055, 170 Ind. 273.

Conductors and engineers, engaged in running and operating trains, are "vice principals" and not "fellow servants" of a brakeman, and their negligence is the negligence of the company. *Southern Indiana Ry. Co. v. Baker*, 77 N. E. 64-66, 37 Ind. App. 405.

A locomotive engineer is a "coservant" of the fireman and of an employé in charge of a switch and semaphore signals, and the employer is not liable in a common-law action for injuries received by the engineer in consequence of the negligence of the fireman or employé. *Pearsall v. New York Cent. & H. R. R. Co.*, 82 N. E. 752, 753, 189 N. Y. 474.

A train dispatcher is a "vice principal," and not a "fellow servant," of an engineer of a train running under his orders. *Santa Fé Pac. R. Co. v. Holmes*, 136 Fed. 66, 69, 68 C. C. A. 634 (citing *Northern Pac. R. Co. v. Dixon*, 24 Sup. Ct. 683, 194 U. S. 338, 48 L. Ed. 1006; *Oregon Short Line v. Frost*, 74 Fed. 965, 21 C. C. A. 186; *Northern Pac. R. Co. v. Mix*, 121 Fed. 476, 57 C. C. A. 592).

A dispatcher of an interurban electric railway company was a vice principal, and not a fellow servant, of the conductors and motormen. *Edge v. Southwest Missouri Electric R. Co.*, 104 S. W. 90, 95, 206 Mo. 471.

A train dispatcher, whose duty is to issue telegraphic orders for movements of trains in the name of the superintendent, and to see that they are transmitted, is not a fellow servant of a fireman on one of the locomotives. *Ricker v. Central R. Co. of New Jersey*, 64 Atl. 1068, 1069, 73 N. J. Law, 751, 7 L. R. A. (N. S.) 650, 9 Ann. Cas. 785.

A towerman, in charge of the semaphore and interlocker at the crossing of two railroads, employed by the two railroads, each paying half of his compensation, is a fellow servant of an engineer of one of the railroads. *Stever v. Ann Arbor R. Co.*, 125 N. W. 47, 48, 160 Mich. 207.

A fireman employed on a locomotive and engaged in the movement of a train is not a fellow servant with the superintendent of construction and the foreman of a bridge gang, who are present and engaged in supervising and directing the work on the bridge.

*McCabe & Steen Const. Co. v. Wilson*, 28 Sup. Ct. 558, 560, 209 U. S. 275, 52 L. Ed. 788.

A student brakeman, on freight trains of defendant at his own request and by permission of defendant, for the purpose of gaining experience to render him competent to act as a regular brakeman, and who was entirely subject to defendant's orders, and was required to perform such ordinary duties of brakeman as were allotted to him, was a "fellow servant" of the other trainmen, although he was receiving no pecuniary compensation. *Weisser v. Southern Pac. Ry. Co.*, 83 Pac. 439, 440, 148 Cal. 426, 7 Ann. Cas. 636.

Under Sand. & H. Dig. § 6248, providing that persons engaged in the operation of a railroad, who are intrusted with the duty and authority of superintendence of other persons in the railroad service, are vice principals of the railroad and not "fellow servants" with those superintended by them, a train dispatcher, who governs the movement of trains and originates their running orders, and a conductor, under whose direction a train is actually run, are not "fellow servants" with a fireman on the train. *Choctaw, O. & G. Ry. Co. v. Doughty*, 91 S. W. 768, 769, 77 Ark. 1.

"All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaging in the same general business, although in different grades or departments, are 'fellow servants' and take the risk of each other's negligence." A yard foreman who had no authority over a yard engineer except to direct him when and where to move his engine, and who did not have the right of employment or discharge of the engineer, was a "fellow servant." *Southern Ry. Co. v. Smith*, 59 S. E. 372, 374, 107 Va. 553.

A railroad section foreman is a "fellow servant" of the engineer operating trains over the road, under the rule that all who enter the same employment are *prima facie* fellow servants; the burden being on him who denies the relation to prove the contrary. *Chicago, I. & L. Ry. Co. v. Barker*, 83 N. E. 369, 374, 169 Ind. 670, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375.

A checkman on an interurban electric road, employed to look after the reception and discharge of freight and express matter, is a "fellow servant" of a general trainmaster, as affecting the company's liability to the checkman for injuries caused by the trainmaster's negligence in running a car against one on which the checkman was employed. *Indiana Union Traction Co. v. Pring*, 83 N. E. 733, 734, 41 Ind. App. 247.

Where intestate, a cub brakeman, was killed by the starting of a portion of the train on which he was employed by reason of the negligence of one of the brakemen in signaling the engineer to proceed before he had emerged from between two cars, where he



had gone to couple the air hose, the negligence of the brakeman was the negligence of intestate's "fellow servant," for which the railroad company was not liable. *Louisville & N. R. Co. v. Vincent*, 95 S. W. 179, 188, 116 Tenn. 317, 8 Ann. Cas. 66.

The boss of a gang of four or five sectionmen or track repairers is, when not charged with duties of the master, a "fellow servant" of those under him, notwithstanding he has been authorized to give orders to those under him, with respect to the performance of their duties. *Indianapolis Traction & Terminal Co. v. Kinney*, 85 N. E. 954, 958, 171 Ind. 612, 23 L. R. A. (N. S.) 711.

One employed to shovel from between construction cars dirt pushed there from such cars by the plow attached to the engine by a cable, is a fellow servant of the engineer as to an injury received by the engine starting while the employé was assisting in replacing the plow in position. *Bradford Construction Co. v. Heflin*, 42 South. 174, 183, 88 Miss. 814, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077.

A railroad section foreman charged with the duty of keeping the tracks in repair, and an employé in a roundhouse, charged with the duty of keeping the engines in repair, are not, by the common law in force in Indian Territory, "fellow servants" of a brakeman. *Missouri, K. & T. Ry. Co. of Texas v. Wise*, 109 S. W. 112, 101 Tex. 459.

An engine crew and common laborers engaged in construction work are fellow servants upon the principle that they were actually employed by the same master and that the work of each had for its object the accomplishment of a common end sought to be performed by the united efforts of all. *Chicago & E. I. R. Co. v. Kimmel*, 123 Ill. App. 382, 384.

A telegraph operator, whose mistake in receiving a train order from a train dispatcher in another city resulted in a collision, was a "fellow servant" of the engineer to whom the order was given; that the order originated with the train dispatcher, a vice principal of the engineer, not changing the engineer's relation to the operator. *Rogers v. Pere Marquette R. Co.*, 131 N. W. 159, 160, 166 Mich. 42, Ann. Cas. 1912D, 881.

When a fireman is injured by a collision between his engine and another through the negligence of the switch tender in failing to change the semaphore signal, or by want of due care on the part of the engineer in failing to observe the danger signal, it must, in each instance, be deemed the result of the negligence of a fellow servant. *Tillson v. Maine Cent. R. Co.*, 67 Atl. 407, 409, 102 Me. 463.

Where two sections of a train are operated as two distinct and independent trains, the members of the crew of one section are

not fellow servants of the members of the crew of the other section within the statute defining fellow servants as persons engaged in the service of a common employer, working together at the same place and time, and to a common purpose. *Meyers v. San Pedro, L. A. & S. L. R. Co.*, 104 Pac. 736, 742, 36 Utah, 307, 21 Ann. Cas. 1229.

A locomotive engineer is a "fellow servant" of a locomotive cleaner, and the latter cannot recover for injuries caused by failure of the engineer to report defects in the engine which he was required to do under the rules of the company, and which neglect caused an injury to the cleaner. If a master employs competent servants for inspection, and gives them reasonable facilities for the work, he will not be liable for the negligent performance of such labor to a "fellow servant," unless he knew of the defective manner in which the inspection was conducted. *Sage v. Baltimore & O. R. Co.*, 67 Atl. 985, 987, 219 Pa. 129.

Where plaintiff drives a buggy on the premises of a railroad company to superintend the work of his employé in unloading coal on a siding, and continues to drive along the siding and turns across the track at a permissive crossing and is struck by a train negligently operated, as his business of superintending the work in the railroad company's premises had ceased, and he was on his way to attend to his own business, he was no longer a fellow servant of the railroad company's employé under Act April 4, 1868 (P. L. 58), so as to be barred from recovery, because of the negligence of such employé. *Sloan v. Philadelphia & R. Ry. Co.*, 80 Atl. 366, 367, 231 Pa. 332.

A petition, in an action for injuries to a railroad employé while loading trucks on a flat car, which alleges that the vice principal and a fellow servant of plaintiff negligently caused the trucks to fall on the employé by permitting the blocks behind the wheels to fall from their proper positions, etc., shows that the vice principal is but a "fellow servant," engaged in the performance of the duties of a laborer, within fellow servant act (Ann. St. 1906, § 2875), declaring that persons engaged in the common service of railroads, and working together at the same time and place, are fellow servants. *Robinson v. St. Louis & S. F. R. Co.*, 112 S. W. 730, 734, 133 Mo. App. 101.

Where a wreck on one track of a railroad did not in any way obstruct a parallel track, a flagman on a wrecking train, whose duty it was to warn trains approaching on the parallel track was not performing a duty of the railroad, which the latter could not delegate, but was a mere fellow servant with the trainmen on such trains, and the railroad was not responsible for his negligence in failing to warn a train approaching at a time when the parallel track was tem-

porarily obstructed by a crane projecting out from the wrecking train. *McAuley v. New York Cent. & H. R. R. Co.*, 97 N. Y. Supp. 631, 112 App. Div. 906.

Plaintiffs' intestates, their foremen, and defendant's roadmaster were all engaged in removing debris from defendant's track, caused by a landslide into a cut. During the afternoon one of the section foremen had been warned that the adjoining mountain side was dangerous, and in the evening the roadmaster stated, in the hearing of those present, that he had examined the mountain side before dark and that it was all right. Thereafter several of the employes were killed by a rock which rolled down the side of the mountain during the night. Held, that all engaged in the work were fellow servants. *Maloney v. Florence & Cripple Creek R. Co.*, 89 Pac. 649, 651, 39 Colo. 384, 19 L. R. A. (N. S.) 348, 121 Am. St. Rep. 180, 12 Ann. Cas. 621.

Decedent, a member of a car repairing crew under the immediate direction of a foreman, was killed by the fall of a car. After the car had been jacked up and blocked, the foreman ordered it to be raised higher, and, without putting any further blocks under the car, directed decedent to get under it and perform the work, after which the end of the car, resting only on the jacks, slued, and fell to the ground. Held, that decedent and the foreman were fellow servants, and that defendant was not responsible for the foreman's negligence unless it was at fault in retaining him with knowledge of his incompetency. *McClure v. Detroit Southern R. Co.*, 109 N. W. 847, 849, 146 Mich. 457.

A station telegraph operator and a locomotive engineer, both working for the same company, under the control of and subject to the orders of the company's train dispatcher, and with no control of either one over the other, are fellow servants, both at common law and within the fellow servant law (*Laws 1897, p. 97, § 3*), providing that persons, engaged in the common service of a railroad, working together at the same time and place, to a common purpose of same grade, neither of such persons being intrusted with any superintendence over his fellow employes, are fellow servants with each other, provided that no agent or servant shall be a fellow servant with an agent or servant of the common master engaged in another department or service of the master. *Strottman v. St. Louis, I. M. & S. R. Co.*, 109 S. W. 769, 771, 211 Mo. 227.

Defendant, pursuant to a contract to furnish logs for a mill, used a logging railroad and certain extra spur tracks to which the logs were hauled by means of a steam skidder. Plaintiff and B., by whose negligence plaintiff was injured, were employed to take logs as they were hauled by two disconnected engines and skid cables to the edge of the

spur track. Neither plaintiff nor B. had anything to do with the movement of the skidder. Plaintiff was injured by being struck by a log negligently moved by the orders of B. Held that, since the employment of both plaintiff and B. had nothing to do with the operation of the railroad, they were "fellow servants," and were not within Sayles' Ann. Civ. St. 1897, art. 4560h, defining fellow servants in the employ of a person operating a railroad. *Hampton v. Woolsey (Tex.)* 139 S. W. 888, 892.

*Kirby's Dig. Ark. § 6358*, provides that all persons engaged in the service of any railroad corporation, foreign or domestic, doing business in said state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ of such corporation, or with authority to direct any other employé in performance of any duty, are vice principals of such corporation and not "fellow servants" of such employé. The members of a train crew who set cars on a spur track are "fellow servants" of the brakeman on another train, injured while his car is passing the cars on the spur track because the cars on the spur track are left too close to the main track. *Ham v. St. Louis & S. F. R. Co.*, 117 S. W. 108, 109, 136 Mo. App. 17.

At common law, all persons engaged in the service of the same master and working to a common purpose, whether or not they are in the same grade of service, or in the same department, or however widely their service may be separated, are "fellow servants." Under *Laws 1891, c. 24*, and *Laws 1897, c. 6*, providing that, to make the servants of a railroad company fellow servants, they must be engaged in the common service of the master in the same grade and department of service for a common purpose and working together at the same time and place, in the same character of work, and at the same piece of work, servants constituting a bridge gang under the direction of one foreman when divided into two squads and ordered to move bales of cotton from one side of a platform which was being repaired by the gang to the other, and one of them was injured by the servants of the other squad, the injured servant and the others were not "fellow servants." *International & G. N. R. Co. v. Still*, 88 S. W. 257, 258, 40 Tex. Civ. App. 22.

An engineer of a freight train is a "fellow servant" of the brakeman and not a superior officer or agent nor a person having a right to direct or control the services of the brakeman. The railroad company is therefore not liable for an injury to a brakeman caused by the negligence of the engineer on the same train. The relation of the brakeman to the engineer is entirely different from that of the fireman, and the fact that the management of the engine requires greater intelligence and more discretion than the

management of the brakes does not constitute the engineer an officer or agent superior to the brakeman. To make the superiority of the officer or agent dependent on the shades of intelligence or discretion required in carrying out the rules of railroad companies would be to sweep away the whole fellow-servant doctrine as to railroads; nor does the requirement that the brakeman shall respond to the signals of the engineer determine the relation. *Pagan v. Southern Ry. Co.*, 59 S. E. 32, 34, 78 S. C. 413, 13 Ann. Cas. 1105.

Under Const. S. C. art. 9, § 15, which abolishes the fellow-servant rule, when injury to a railroad employé results from the negligence of a superior agent or officer, from that of a fellow servant engaged in another department of labor from that of the party injured, or that of a fellow servant on another train or one engaged about a different piece of work, the question of who is a "fellow servant" is not to be determined by the department to which the servant belongs or his grade or authority, but the true test is as to the relations they sustained to each other at the time, and whether the act being performed by the offending servant was the performance of some delegated duty the master owed to the injured servant. A car coupler, acting under the directions of a conductor in going between a train of cars to make a coupling, is a fellow servant of an engineer who, acting without order from the conductor, moves the train. *Atlantic Coast Line R. Co. v. Farmer*, 176 Fed. 692, 696, 697, 700, 701, 100 C. C. A. 244.

Under Rev. St. 1895, art. 4560g, providing that persons engaged in the common service of a railroad in the same grade of employment, and doing the same character of work, and working together at the same time and place, and to a common purpose, are fellow servants, and employes not within the provisions are not fellow servants, the night hostler in a railroad yard, charged with the duty, pursuant to the orders of his superior, of inspecting a switch engine to determine whether it has been properly wiped, is not a fellow servant of an employé engaged in putting steam into another switch engine. *Galveston, H. & N. Ry. Co. v. Cochran*, 109 S. W. 261, 263, 49 Tex. Civ. App. 591. Where two of defendant's employes, by whose negligence plaintiff claimed to have been injured, were not working with plaintiff at the same place at the time of the injury, nor employed at the same character of work nor at the same piece of work, they were not plaintiff's fellow servants within the statute. *Texas & N. O. R. Co. v. Barwick*, 110 S. W. 953, 955, 50 Tex. Civ. App. 544.

Rev. St. 1899, § 2874, provides that persons intrusted by a railroad corporation with the authority of command of other persons

in the employ of the corporation, or the authority to direct any other servant in the performance of any duty, or with any duty owing by the master to the servant, are vice principals of the corporation. A rule by a railroad corporation provided that passenger conductors have entire charge of their trains and of all persons employed thereon, and will be held responsible for the prompt and safe movement of their trains and the conduct of the trainmen. Held, that a conductor is not a fellow servant of the master mechanic while the latter is riding on the locomotive for the purpose of discovering and remedying a defect in the locomotive, but is a vice principal; and the railroad corporation will be liable for the death of the master mechanic, caused by the negligence of the conductor, under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1837), providing that a railroad corporation shall be responsible for the death of a person resulting from the negligence of any employé while running a train. *Tabor v. St. Louis, I. M. & S. R. Co.*, 109 S. W. 764, 766, 210 Mo. 385, 124 Am. St. Rep. 728.

#### Street railroad employes

The motorman and conductor on a street car are "fellow servants." *Houts v. St. Louis Transit Co.*, 84 S. W. 161, 164, 108 Mo. App. 686 (citing *Stocks v. St. Louis Transit Co.*, 79 S. W. 1176, 106 Mo. App. 129; *Godfrey v. St. Louis Transit Co.*, 81 S. W. 1230, 107 Mo. App. 193; *Sams v. St. Louis & M. R. R. Co.*, 73 S. W. 686, 174 Mo. 53, 61 L. R. A. 475).

The conductor of one street car and the motorman of another are "fellow servants." *Stocks v. St. Louis Transit Co.*, 79 S. W. 1176, 1177, 106 Mo. App. 129.

A motorman would be a "fellow servant" of a conductor on another street car of the same railway operating cars over the same lines and both working for the same master, over the same line, for the same purpose. *Birmingham Ry., Light & Power Co. v. Moseley*, 51 South. 424, 426, 164 Ala. 111.

Men engaged in constructing railroad tracks, who are taken to and from the place of work in a special car, are "fellow servants" of the motorman, relieving the company from liability for injuries sustained in a collision between the car and the wagon. *Kilduff v. Boston Elevated Ry. Co.*, 81 N. E. 191, 195 Mass. 307, 9 L. R. A. (N. S.) 873.

The act of the motorman of a street car in approaching a railroad crossing at the rate of 30 miles an hour, with knowledge that the brakes on the car were defective, whereby a collision occurred resulting in injury to the conductor, was the negligence of a fellow servant. *Craig v. Great Northern Ry. Co.*, 106 Pac. 155, 156, 56 Wash. 640.

Where coal was put into the cellar of a street car barn in such quantity and manner that a piece of it was liable to fall, and did fall, on the watchman while he was making

his rounds, any negligence of the street railway company's superintendent, who, having been told that the coal ought to be pushed back or no more could be put in, had gone in the cellar before the accident, and on returning merely said to the watchman that he would find there was plenty of coal for a good while, was that of a "fellow servant." *Lapre v. Woronoco St. Ry. Co.*, 82 N. E. 9, 196 Mass. 363.

To constitute the relation of "fellow servants," the servants must not only be engaged in a common employment, but must have opportunity to use precautions against each other's negligence. The motorman and conductor of one car on a street railroad, the cars of which run on schedule time, are fellow servants of the motorman and conductor of another car on the line, so that one of the motormen injured through the negligence of the other motorman in not performing his duty of turning on the lights of a block-light system, and of the conductor of the other car in not performing his duty to see that his motorman performed such duty, cannot recover of the company. *Berg v. Seattle, R. & S. Ry. Co.*, 87 Pac. 34, 36, 44 Wash. 14, 120 Am. St. Rep. 968 (citing *Grim v. Olympia Light & Power Co.*, 84 Pac. 635, 42 Wash. 119; *Howe v. Northern Pac. Ry. Co.*, 70 Pac. 1100, 30 Wash. 569, 60 L. R. A. 949; *Conline v. Olympia Logging Co.*, 78 Pac. 932, 36 Wash. 345; *Northern Pac. R. Co. v. O'Brien*, 21 Pac. 32, 1 Wash. St. 599; *Millett v. Puget Sound Iron & Steel Works*, 79 Pac. 980, 37 Wash. 438; *Stevick v. Northern Pac. Ry. Co.*, 81 Pac. 999, 39 Wash. 501).

The definition of "fellow servants" is a question of law, and whether two servants of a common master are "fellow servants" is a mixed question of law and fact. The relation of "fellow servants" is ordinarily one of fact and only becomes a question of law when there is no dispute with reference to the facts, and the evidence, with all legitimate inferences to be drawn therefrom, is such that all reasonable and intelligent men must reach the same conclusion. To create the relation of "fellow servants," the servants must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to afford them the power and opportunity of exercising a mutual influence upon each other promotive of proper caution. A conductor on a cable car operated on a street, and a motorman on an electric car operated by the same company on a street crossing the first at right angles, are not, as a matter of law, "fellow servants," where the employes on the two lines are under the control of different superintendents in charge of different car barns, and the lines are not operated on a schedule requiring the meeting of the cars at the crossing, though rules of the company require, when cars on the lines meet at the

crossing, that cable cars shall have the right of way, and though on a signal from the gripman the motorman may cross first. *Bennett v. Chicago City Ry. Co.*, 90 N. E. 735, 737, 243 Ill. 420.

## FELO DE SE

Where a man of the age of discretion, which at common law was 14 years, voluntarily kills himself after he loses his mind by sickness, infirmity, or accident, he is not "felo de se," nor can he be said to commit murder upon himself. *McMahan v. State*, 53 South. 89, 91, 168 Ala. 70 (quoting 1 Hale's Pleas of the Crown, p. 411).

### Pleading

The doctrine of "felo de se" is operative only where one cause of action stated is destroyed by another, which shows that no cause of action exists in fact, and does not apply where petition states that deceased was negligently shot, if as a fact he was shot with criminal intent. *O'Brien v. St. Louis Transit Co.*, 110 S. W. 705, 707, 212 Mo. 59, 15 Ann. Cas. 86.

## FELON

See Convicted Felon.

## FELONIOUS—FELONIOUSLY

"Feloniously" imports criminal intent. An indictment charging that defendant "feloniously and with the intent then and there to steal," etc., sufficiently charges a felonious intent. *State v. Allen*, 87 Pac. 177, 178, 34 Mont. 403 (citing *Whart. Prec.* 415; *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264).

The word "feloniously," in an indictment, includes the word "wrongfully." *State v. Pellerin*, 43 South. 159, 161, 162, 118 Ga. 547.

An instruction that the term "feloniously" means an intent to commit a felony, or an intent to commit a wrongful act which might result in the commission of a felony, and that under the statutes the crime of receiving stolen property, knowing the same to have been stolen, is a felony, is faulty in that by the use of the word "might" the jury is told that a person is by law presumed to intend all the possible, rather than the reasonably probable, consequences of his voluntarily wrongful act, and is also objectionable in informing the jury that an intent to commit a wrongful act which might result in receiving stolen property, knowing the same to have been stolen, constituted a felonious intent. *State v. Denny*, 117 N. W. 869, 870, 17 N. D. 519.

### Criminal intent implied

The term "feloniously," in an information, means that the act was done with a mind bent on doing that which is wrong, or with a guilty mind. *State v. Connors*, 94

Pac. 190, 201, 37 Mont. 15 (citing *State v. Rechnitz*, 52 Pac. 264, 20 Mont. 491).

It is said that the word "feloniously" signifies an intent to commit a crime; that it means that the act proceeded from an evil heart or purpose; that it is ordinarily but a repetition of what is expressed in other and simpler words. *State v. Clark*, 75 Atl. 534, 535, 83 Vt. 305, Ann. Cas. 1912A, 261.

"'Felonious,' when used in defining the crime of robbery or larceny, implies an intent to steal." *State v. Fordham*, 101 N. W. 888, 889, 13 N. D. 494.

In an indictment alleging that defendant assaulted the prosecutor and attempted to feloniously rob him, the word "feloniously" means "done with intent to commit" the crime. *State v. Hughes*, 102 Pac. 562, 563, 31 Nev. 270 (citing 3 Words and Phrases, p. 2731).

An information for robbery, which alleges that accused "feloniously" took from a person named by violence a specified sum, is fatally bad for failing to allege the ownership of the property; the word "feloniously" characterizing the act as being done with a criminal intent, and not being a substitute for an allegation of ownership. *McGinnis v. State*, 91 Pac. 936, 937, 16 Wyo. 72.

The words "unlawfully, feloniously," as used in an indictment charging accused with "unlawfully, feloniously" receiving property theretofore feloniously stolen, mean that the act which they characterize proceeded from a criminal intent and evil purpose, and thus exclude all color of right and excuse for the act. *Bise v. United States*, 144 Fed. 374, 375, 74 C. C. A. 1, 7 Ann. Cas. 165.

The word "felonious," standing alone, rather designates the grade of the crime as a felony, in distinction to a misdemeanor, than any particular form of the felonious intent, but yet in a general sense it points to the intent which enters into a felony, and an indictment charging a person with feloniously receiving stolen goods, knowing them to have been stolen, is sufficient, although it does not allege an unlawful intent. *State v. Bannister*, 65 Atl. 586, 79 Vt. 524 (quoting and adopting the definition in 1 Bishop's New Crim. Law, 427).

An indictment for attempt to escape from a county jail, alleging that, while accused was lawfully confined in the jail of said county, he "did willfully, unlawfully, and feloniously attempt to break out of said county jail and in pursuance of said attempt did willfully, unlawfully, and feloniously break out of a cell in said county jail" in which he was confined, and assaulted and overpowered a jailer of said jail, contrary to the statute, etc., sufficiently alleges that the acts complained of were done with intent to escape, as the word "feloniously" means "done with intent to commit a crime," and

with a design on the part of the accused to commit the felony with which he is charged. *State v. Clark*, 104 Pac. 593, 595, 32 Nev. 145, Ann. Cas. 1912C, 754.

The use of the word "feloniously," to characterize the obtaining of money in another state, expresses the mere conclusion of the pleader, and purports that the obtaining was with criminal intent, and is not an allegation that the facts stated were criminal, either under the common law as interpreted in the state in question, or the equivalent to a setting forth of a provision of a statute of that state making the act criminal; the presumption being, in the absence of such allegation, that the common law prevailed. *People v. Arnstein*, 138 N. Y. Supp. 806, 811, 78 Misc. Rep. 18.

#### **Deliberation implied**

On a trial for murder, the court should instruct that the word "feloniously" means proceeding from an evil heart or purpose. *Ewing v. Commonwealth*, 111 S. W. 352, 355, 129 Ky. 237.

The word "feloniously," as used in the instructions defining willful murder and voluntary manslaughter, and in the indictment charging willful murder, means proceeding from an evil heart or purpose, done with a deliberate intent of committing a crime. *Ball v. Commonwealth*, 101 S. W. 956, 960, 125 Ky. 601; *Gambrell v. Commonwealth*, 113 S. W. 476, 480, 130 Ky. 513.

#### **As affecting grade of offense**

The mere use of the term "feloniously," in charging an offense, does not make it a felony. That term is simply a technical one which is indispensable in informations and indictments in a charge of a felony; but, in order to constitute an act a felony, there must be a valid and existing law making the commission of such an act that grade of offense. An indictment charging that accused broke into a building, with intent to feloniously, etc., cut, wound, and maim a certain horse, did not charge burglary in the second degree, within a statute making the breaking into any building, with intent to commit a felony, burglary in the second degree, where the offense of willfully and maliciously cutting, wounding, and maiming a horse, was not a felony, but a misdemeanor. *State v. Taylor*, 85 S. W. 564, 565, 186 Mo. 608.

#### **As descriptive of grade of offense**

The word "felonious" is descriptive of the grade of the offense rather than the criminal act which constitutes the offense, and ordinarily has no place in the instructions and can be omitted without affecting the sufficiency of the same. An instruction defining murder in the second degree, and stating what the jury must find to convict of that degree, is not bad for not containing the word "feloniously." *State v. Miles*, 98 S. W. 25, 29, 199 Mo. 530.

**As maliciously or willfully**

"Feloniously" means with a deliberate intent to commit a wrongful act, contrary to law, constituting an offense, an act done with intent to commit a crime, and, as so used, includes "maliciously." *State v. Smith*, 105 S. W. 68, 70, 119 Tenn. 521 (citing 3 Words and Phrases, p. 2731 et seq., and 5 Words and Phrases, p. 4307).

**As applicable to misdemeanors**

The use of the adverb "feloniously," in charging a misdemeanor, does not vitiate the indictment. *Barnwell v. Stephens*, 38 South. 662, 663, 142 Ala. 609.

In charging simple larceny of property of less than the value of \$35, it is surplusage to charge that the act was "feloniously" committed. *State v. Minnick*, 102 Pac. 605, 607, 54 Or. 86.

**Necessity of use of word "feloniously" in indictments for felonies**

The word "feloniously," as used in the Code of Criminal Procedure is a term of art adapted to define one of the constituent elements of a felony. There is no other word in the English language which is a perfect synonym for it and which can supply its place as a necessary requisite of the charging part of an indictment for a felony. *Hocker v. Commonwealth (Ky.)* 111 S. W. 676, 679.

Where the word "feloniously" is unnecessarily used in charging a felony, it amounts to no more than saying that the crime charged was a felony, and cannot be construed as meaning knowingly or with knowledge. *State v. Judd*, 109 N. W. 892, 893, 132 Iowa, 296, 11 Ann. Cas. 91.

Under the statute providing that it shall not be necessary to allege that the offense charged is done feloniously, the omission of the word "feloniously" from an information for grand larceny is not fatal. *Baldwin v. State*, 35 South. 220, 221, 46 Fla. 115.

The word "feloniously" is not essential to an indictment under a statute establishing a form for a bill of indictment for perjury without using the word, and declaring that this form shall be sufficient. *State v. Harris*, 59 S. E. 115, 116, 145 N. C. 456.

**Specific intent implied**

The word "feloniously" imports only that criminal intent which is the necessary part of every felony, or other crime, but they do not necessarily include the specific "purpose" to do the act which is an element of the crime charged. Whether the indictment is on a statute or at the common law, it is a rule universal and without exception that every intent, like everything else, which the law makes an element of the offense must be alleged, for otherwise no prima facie case appears. *Newby v. State*, 105 N. W. 1099, 1100, 75 Neb. 33.

**As unlawfully**

A charge that an act was done "feloniously" includes the charge of unlawfulness. *State v. Miller*, 89 S. W. 377, 380, 190 Mo. 449.

The word "feloniously" includes "unlawfully" in its meaning, for an act cannot be said to be "feloniously" done and not be "unlawfully" done. *People v. St. Clair*, 91 N. E. 573, 574, 244 Ill. 444 (citing *Carroll v. State*, 75 S. W. 471, 71 Ark. 403).

The word "feloniously," as used in an information for assaulting a female under 12 years, is fairly equivalent, in connection with the illegal act charged, to the word "unlawfully," for the purpose of charging the manifestly illegal act to have been "unlawfully" done. *Barnard v. State*, 60 N. W. 1058, 1059, 88 Wis. 656.

**As wickedly and against admonitions of the law**

"'Felonious' means wickedly and against the admonition of the law; unlawfully." *State v. Brown*, 79 S. W. 1111, 1112, 181 Mo. 192; *State v. Forsha*, 88 S. W. 746, 751, 190 Mo. 296, 4 L. R. A. (N. S.) 576; *State v. Hottman*, 94 S. W. 237, 239, 196 Mo. 110.

The word "feloniously" means wickedly, wrongfully, and against the admonition of the law. *State v. Platner*, 93 S. W. 403, 404, 196 Mo. 128; *State v. Wissing*, 85 S. W. 557, 559, 187 Mo. 96; *State v. Temple*, 92 S. W. 494, 496, 194 Mo. 228; *State v. Lehman*, 81 S. W. 1118, 1122, 182 Mo. 424, 66 L. R. A. 490, 103 Am. St. Rep. 670; *State v. Bateman*, 95 S. W. 413, 414, 196 Mo. 35.

The word "feloniously" means wrongfully and wickedly, and also refers to the punishment imposed by law. *State v. Vaughan*, 98 S. W. 2, 5, 200 Mo. 1.

**FELONIOUS ASSAULT**

Ordinarily the words "felonious assault," when applied to an assault upon a female, are intended to characterize an assault with intent to commit rape; but they do not exclude all other felonious assaults, such as assaults with intent to murder, assaults with intent to rob, nor do they exclude the suggestion of the consummated act of rape. *Huey v. State*, 66 S. E. 1023, 1027, 7 Ga. App. 398.

**FELONIOUS HOMICIDE**

"Felonious homicide" is either murder in the first or second degrees or manslaughter. *State v. Roberts (Del.)* 78 Atl. 305, 309; *State v. Wiggins (Del.)* 76 Atl. 632, 634, 7 Pennewill, 127; *State v. Reese (Del.)* 79 Atl. 217, 220; *State v. Primrose (Del.)* 77 Atl. 717, 719; *State v. Underhill (Del.)* 69 Atl. 880, 882, 6 Pennewill, 491; *State v. Russo (Del.)* 77 Atl. 743, 745, 1 Boyce, 538.

"Felonious homicide" is the killing of one human being by another without jurisdiction or excuse. *State v. Edmunds*, 104 N. W.

1115, 1117, 20 S. D. 135 (citing Anderson's Law Dict. 512).

A "felonious homicide" at common law is of two kinds, manslaughter and murder, the difference between which consists principally that in murder there is the ingredient of malice, while in manslaughter there is none. *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479.

### FELONIOUS INTENT

"Felonious intent," where used in penal statutes, means criminal intent. *People ex rel. Perkins v. Moss*, 100 N. Y. Supp. 427, 430, 50 Misc. Rep. 198 (quoting *People v. Moore*, 37 Hun, 93).

Under Rev. Laws 1905, § 3045, providing that no trust company shall lend its funds or other property to its officers, the "felonious intent" to appropriate the funds of the company is inferred from the fact that an officer becomes indebted to it, and no specific intent need be shown, but under the general larceny statute (section 5078) the state is compelled to prove beyond a reasonable doubt that the money was appropriated with the intention to deprive the company of it. Upon a trial under section 3045, the state having shown an indebtedness, a prima facie case of guilt is made out, but under section 5078 indebtedness may be consistent with innocence. In a prosecution under section 5078, it was error to charge that section 3045 might be considered as bearing on the question of intent. *State v. Barnes*, 122 N. W. 4, 5, 108 Minn. 227.

### FELONIOUS TAKING

As steal, see Steal.

### FELONY

See Assault with Intent to Commit Felony; Capital Felony; Cases of Felony; Compounding a Felony; Treason, Felony, and Breach of the Peace. Any other felony, see Any Other. Misprision of felony, see Misprision.

At common law the term "felony" comprehends a large class of high crimes as well as those of a less atrocious character. The term "felony" always drew after it a forfeiture of goods and chattels. *Perry v. Man*, 1 R. I. 263, 265.

At common law, a felony was an offense, a conviction for which caused forfeiture of lands or goods, or both, and was also subject to punishment by death, or otherwise. *Burton v. New York Cent. & H. R. R. Co.*, 132 N. Y. Supp. 628, 633, 147 App. Div. 557; *Tucker v. United States*, 196 Fed. 260, 266, 116 C. C. A. 62; *Ex parte O'Shea*, 105 Pac. 776, 779, 11 Cal. App. 568 (quoting and adopting definitions in *Bouv. Law Dict.*; *Moz. & W. Law Dict.*); *Dolan v. United States*, 133 Fed. 440, 452, 69 C. C. A. 274 (citing *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272; *Ban-*

*non v. United States*, 15 Sup. Ct. 467, 156 U. S. 464, 39 L. Ed. 494; *United States v. Coppersmith*, 4 Fed. 198).

Felony by common law is against the life of a man, as murder, manslaughter; against a man's goods, such as larceny and robbery; against his habitation as burglary, arson and houseburning; and against public justice, as breach of prison. *Leeman v. Public Service Ry. Co.*, 72 Atl. 8, 9, 77 N. J. Law, 420.

"An offense punishable by imprisonment in the penitentiary, absolutely or in the alternative, is a 'felony.'" *Waters-Pierce Oil Co. v. State*, 106 S. W. 918, 929, 48 Tex. Civ. App. 162.

A "felony" is an offense punishable by death or imprisonment at hard labor. *State v. Melles*, 42 South. 199, 200, 117 La. 656 (citing *Hen. Dig.* p. 356, No. 4).

A "felony" means an offense for which the offender, on conviction, shall be punished by death or imprisonment in the penitentiary, and not otherwise. *Freeman v. State*, 57 S. E. 924, 1 Ga. App. 276.

By the statutes of many states, a "felony" is a crime punishable with death or imprisonment in the penitentiary. *People v. Smith*, 77 Pac. 449, 450, 143 Cal. 597; *Cochran v. United States*, 147 Fed. 206, 208, 77 C. C. A. 432 (citing *Wilson's Rev. & Ann. St. Okl.* 1903, § 1926); *Ex parte Tani*, 91 Pac. 137, 29 Nev. 385, 13 L. R. A. (N. S.) 518; *State ex rel. Butler v. Foster*, 86 S. W. 245, 248, 187 Mo. 590; *People v. Russell*, 91 N. E. 1075, 1076, 245 Ill. 268; *Gordon v. Commonwealth*, 133 S. W. 206, 209, 141 Ky. 461; *Cochran v. United States*, 76 Pac. 672, 673, 14 Okl. 108; *Territory v. Gonzales*, 89 Pac. 250, 251, 14 N. M. 31. *Walden v. State*, 39 South. 151, 50 Fla. 151; *State v. McKee*, 104 S. W. 486, 487, 126 Mo. App. 524; *Milne v. People*, 79 N. E. 631, 632, 224 Ill. 125.

At common law, "felony" was an offense which occasioned a total forfeiture of land or goods, or both, and a "misdemeanor" was an offense less than a felony. In Oregon, conviction of crime does not work a forfeiture of the defendant's estate, and hence, in the absence of statute, the term "felony" is not descriptive of any offense, but by B. & C. Comp. § 1230, a felony is defined as a crime punishable by death or imprisonment in the penitentiary, every other offense being declared a "misdemeanor" by section 1231. *State v. Biggs* (Or.) 97 Pac. 713, 714.

Every "felony" includes trespass. *State v. Waller*, 74 S. W. 842, 844, 174 Mo. 518.

The word "felony" is not the name of any distinctive offense, but is a generic term employed to distinguish certain high crimes, such as murder, arson, and larceny, from minor ones, known as misdemeanors, and an averment that accused broke and entered a car for the purpose of committing a felony

falls to apprise him of the specific offense which it is claimed he intended to commit. *State v. Doran*, 59 Atl. 440, 441, 99 Me. 329, 105 Am. St. Rep. 278.

By the terms of the statute, any theft from the person is a "felony." *Campbell v. State*, 135 S. W. 548, 549, 61 Tex. Cr. Rep. 504.

Slander being, under Kirby's Dig. § 1861, a felony, and the law not requiring one instituting a prosecution for felony to give a bond, a bond for costs given by one instituting prosecution for slander, and the judgment based thereon, is void. *Emerson v. Hopper*, 127 S. W. 467, 94 Ark. 384, 140 Am. St. Rep. 121.

The words "felony" and misdemeanor," in the statute, authorizing disbarment on an attorney's conviction of felony or misdemeanor involving moral turpitude, and making the conviction record conclusive evidence, are used in their statutory sense, and, there being no offense known to the state law as "conspiracy to suborn perjury," an attorney's conviction of such offense in a federal court is not conclusive evidence, in a disbarment proceeding, of his commission of an act warranting disbarment. *State v. Biggs* (Or.) 97 Pac. 713, 714.

#### Felonious intent

Since the punishment for retailing spirituous liquors is that fixed for a misdemeanor, under Revisal 1905, § 3291, providing that a "felony" is a crime punishable by either death or imprisonment in the state's prison, and that any other crime is a "misdemeanor," the word "feloniously," in a warrant charging that accused unlawfully, willfully, and feloniously retailed spirituous liquors, is superfluous. *State v. Shine*, 62 S. E. 1080, 1081, 149 N. C. 480.

The word "felony," in the statutes defining justifiable homicide as the killing of a human being in self-defense or in defense of property against one manifestly intending to commit a felony, and providing that one who shall willfully destroy any fence or other valuable improvement shall be guilty of a "felony," does not include the mere placing by one of his hand on a post in a fence, not for the purpose of destroying the fence, but for the purpose of pulling it down to make a gap through which he might drive his cattle into a field, especially where the act was done under a claim of right. *Driggers v. United States*, 104 S. W. 1166, 1170, 7 Ind. T. 752.

Under the state Constitution, declaring that the term "felony" shall be construed to mean any criminal offense punishable with death or imprisonment in the state prison, and the statute, declaring any crime punishable by death or imprisonment in the state prison a felony, and providing that it shall not be necessary to allege in an indictment that

the offense charged is a felony or felonious, or done feloniously and that no indictment shall be quashed by reason of the omission of the words "felony," "felonious," or "feloniously," a failure to allege that the acts charged were feloniously committed, where that is not a part of the statutory definition of the offense, does not affect the validity of an indictment. The punishment fixed by statute determines whether the offense charged is or is not a "felony." *McCaskill v. State*, 45 South. 843, 844, 55 Fla. 117.

#### Misdemeanor distinguished

In general terms, all crimes are "felonies" and "misdemeanors." The former include more serious offenses, consequently receive more severe punishment. Misdemeanors include offenses less serious and usually punished by fine or imprisonment or both. *State v. Williams*, 38 South. 686, 687, 114 La. 939.

Under the statute, defining a "felony" as a crime punishable by death or state imprisonment, and making other offenses misdemeanors, obstructing a street being punishable by a fine only, is a "misdemeanor." *Commonwealth v. New York Cent. & H. R. R. Co.*, 92 N. E. 766, 769, 206 Mass. 417, 19 Ann. Cas. 529.

The statute defining trusts, and for a violation thereof providing a fine of not less than \$50 nor more than \$5,000, or imprisonment not less than six months nor more than a year, or both, prescribes a "misdemeanor," since by statute a "felony" is a crime punishable by death or by imprisonment in the state prison, and every other crime is a "misdemeanor." *Union Ice Co. v. Rose*, 104 Pac. 1006, 1007, 11 Cal. App. 357.

Under Rev. St. 1899, § 2393 (Ann. St. 1906, p. 1466), defining "felony" as any offense for which the offender shall be liable to be punished by imprisonment in the penitentiary, etc., and section 2395 defining a "misdemeanor" as any offense punishable by fine or imprisonment in the county jail, or both, one convicted of violating section 1838 (page 1272), providing that one carnally knowing an unmarried female between the ages of 14 and 18 years shall be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary, or by imprisonment in the county jail or by fine, or both, is convicted of a felony though he is punished by imprisonment in the county jail. *State ex rel. Sanks v. Johnson*, 121 S. W. 780, 781, 784, 138 Mo. App. 306.

The word "felony" is not the name of any distinctive offense, but is a generic term employed to distinguish different crimes, as murder, arson, and larceny, from "misdemeanors," or minor ones, and hence an averment in an indictment that accused broke and entered a car for the purpose of committing a felony is insufficient because fail-



ing to apprise him of the specific offense which it is claimed he intended to commit. *State v. Doran*, 59 Atl. 440, 441, 99 Me. 329, 105 Am. St. Rep. 278.

Where, in a prosecution for homicide, the court instructed the jury that: "It is only when a felony is intended that the killing is justifiable. A 'felony' is any offense punishable by death or by imprisonment in the penitentiary"—it was not error to further instruct that "simply pointing a gun at another is not a felony. It is a misdemeanor," where the theory of the state was that, while the deceased had pointed a gun at the accused, he had also at the same time pointed it at two others, and the contention of accused that the instruction in reference to pointing a gun at another, being only a misdemeanor, was calculated to create the impression that the defense of accused rested solely on the ground of reasonable fear, resulting from the gun being pointed, whereas the defense also rested upon the ground that the deceased was about to use a pistol, was not well taken, since it was the duty of the judge to submit to the jury all of the theories of the accused. *Long v. State*, 56 S. E. 444, 446, 127 Ga. 350.

At common law, "felony" was an offense which occasioned a total forfeiture of land or goods, or both, and a "misdemeanor" was an offense less than a felony. In Oregon, conviction of crime does not work a forfeiture of the defendant's estate, and hence, in the absence of statute, the term "felony" is not descriptive of any offense, but by B. & C. Comp. § 1230, a felony is defined as a crime punishable by death or imprisonment in the penitentiary, every other offense being declared a "misdemeanor" by section 1231. *State v. Biggs* (Or.) 97 Pac. 713, 714.

A "felony" at common law was an offense punishable by death, or to which the old English law attached the total forfeiture of lands or goods; but the essential difference between a felony and a misdemeanor is now practically lost in England since the felony act of 1870. In this country it simply denotes the degree or class of crimes. In fact, the distinction between a felony and a misdemeanor is for the Legislature. The Legislature may leave much to the discretion of the jury and the trial judge as to the punishment for crime, and it makes no difference that the Legislature has designated certain crimes as felonies which at common law were offenses punishable by death, or to which forfeiture of property was attached, and certain other crimes as misdemeanors, or divided crimes into two classes based on the punishment imposed, as is done in Pen. Code, § 17. *Ex parte O'Shea*, 105 Pac. 776, 779, 11 Cal. App. 568 (quoting and adopting definitions in Bouv. Law Dict., Moz. & W. Law Dict.).

A "felony" at common law is an offense which occasions a total forfeiture of either lands or goods or both, and to which capital or other punishment may be superadded, according to the degree of guilt. By the early common law in England, felonies were those crimes punishable capitally or by forfeiture of land, or goods, or both, but the term was not one of settled meaning, and by some authorities the test was the liability to forfeiture, rather than the liability to capital punishment. In statutes creating or defining offenses, the language usually expressly indicates whether the offense is to be deemed a felony or misdemeanor, and for practical purposes it may be said that those crimes which, by the common law, were punishable capitally, or which are expressly made felonies by statute, are now to be considered of that class, while all other criminal offenses are to be deemed misdemeanors, and no offense is to be deemed a felony unless it comes within this description. But, if the offense has been a felony, the mere reduction of the punishment will not of itself change it to a misdemeanor. An offense shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under a pain of forfeiting all that a man has or of forfeiting body and goods it shall amount to no more than a high misdemeanor. The word "misdemeanor," in its usual acceptation, is applied to all those crimes and offenses for which the law has not provided a particular name, and they may be punished according to the degree of the offense, by fine or imprisonment, or both. A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offenses which do not amount to felony. The selling of intoxicating liquors at common law was not a felony, not even a crime. So, when it is made a crime, and the statute does not expressly state as to whether it is a felony or misdemeanor, the presumption is that it is a misdemeanor. *Ex parte Cain*, 93 Pac. 974, 976, 20 Okl. 125 (citing 1 Russ. Cr. [9th Ed.] c. 4, pp. 77, 78; 1 McClain, Cr. Law, § 18; *State v. Hill*, 91 N. C. 561; *U. S. v. Belvin* [C. C.] 46 Fed. 385).

Rev. Laws Mass. c. 215, § 1, provides that any crime punishable by death or by imprisonment in the state prison is a felony, and that all other crimes are misdemeanors. When such statute was enacted the state had but one state prison, in which both men and women were confined, but subsequently it established a women's prison, and provided by statute that women convicted of offenses for which they would previously have been sent to the state prison should thereafter be sentenced to the women's prison, and also that women convicted of lesser of-

offenses punishable by imprisonment in a jail or house of correction might be sentenced to such women's prison. Held, that the latter class of offenses were not thereby made felonies, but that so far as relates to women the grade of the offense was no longer determined by the place of imprisonment to which they might be sentenced, but rather by the place in which a man guilty of the same offense would be confined. *Ex parte Brown*, 151 Fed. 710, 711.

#### **Offense must be declared to be a felony**

A "felony" at common law is an offense which occasions a total forfeiture of either lands or goods, or both, and to which capital or other punishment may be superadded, according to the degree of guilt. In statutes creating or defining offenses, the language usually expressly indicates whether the offense is to be deemed a felony or misdemeanor, and for practical purposes it may be said that those crimes which, by the common law, were punishable capitally, or which are expressly made felonies by statute, are now to be considered of that class, while all other criminal offenses are to be deemed misdemeanors, and no offense is to be deemed a felony unless it comes within this description. But, if the offense has been a felony, the mere reduction of the punishment will not of itself change it to a misdemeanor. An offense shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under a pain of forfeiting all that a man has, or of forfeiting body and goods, it shall amount to no more than a high misdemeanor. The word "misdemeanor," in its usual acceptation, is applied to all those crimes and offenses for which the law has not provided a particular name, and they may be punished according to the degree of the offense, by fine or imprisonment, or both. A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offenses which do not amount to felony. The selling of intoxicating liquors at common law was not a felony, not even a crime. When it is made a crime, and the statute does not expressly state as to whether it is a felony or misdemeanor, the presumption is that it is a misdemeanor. *Ex parte Cain*, 93 Pac. 974, 976, 20 Okl. 125 (citing 1 Russ. Cr. [9th Ed.] c. 4, pp. 77, 78; 1 McClain, Cr. Law, § 18; *State v. Hill*, 91 N. C. 561; *United States v. Belvin*, 46 Fed. 385).

A "felony" is defined by statute to be a public offense punishable with death, or which is, or, in the discretion of the court, may be, punishable by imprisonment in the penitentiary or territorial prison, or any other public offense which is or may be expressly declared by law to be a felony, and the statute, in relation to an assault with a

deadly weapon, does not declare the crime to be a felony, although it may become one by the penalty imposed. Hence, on a prosecution for such assault, it is not necessary that the indictment should charge the act to have been done feloniously. *Territory v. Gonzales*, 80 Pac. 250, 251, 14 N. M. 31.

Rev. St. § 5427, provides that "every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections" shall be punished, etc. In the original statute said four sections were all embraced in one section, which expressly declared the offenses now contained in the first three sections to be felonies, and the part which now constitutes section 5427 read, "Any person who shall \* \* \* aid and abet any person in the commission of any such felony," etc. In the revision such express declaration was omitted, and it has since been settled by decision that the offenses described in the first three sections are not felonies, but misdemeanors, under the common-law rule of construction applied to federal statutes, although the punishment prescribed is imprisonment in a penitentiary at hard labor, which, by the general understanding in this country, makes the offense a felony. Held, that such construction does not render section 5427 a nullity, but that the word "felony," as used therein, should be given its popular meaning, in order to give effect to the section in accordance with the manifest intention of Congress. *Dolan v. United States*, 133 Fed. 440, 444, 69 C. C. A. 274; *United States v. York*, 131 Fed. 323, 325.

#### **Minor offense distinguished**

An offense punishable by imprisonment in the parish prison or by hard labor in the penitentiary is a "minor offense" and not a "felony." *State v. Wall*, 52 South. 556, 560, 126 La. 400.

#### **Abortion**

Rev. St. 1899, § 1823, provides that for a person to kill any woman by administering to her any drugs or using on her any instrument with intent to destroy a pregnancy, not a medical necessity, should constitute manslaughter. Section 1825 declared that for a person to destroy any quick child while attempting to commit an abortion, unless a medical necessity, should constitute manslaughter in the second degree, and section 1853 made it a misdemeanor to administer to a pregnant woman any drug or to employ any other means with intent to produce an abortion, unless such act was a medical necessity, etc. Act March 20, 1907 (Laws 1907, p. 230) expressly repealed section 1825, and in lieu thereof enacted that any person who, with intent to produce an abortion, advises, gives, sells, or administers to a woman whether pregnant or not, or who, with such intent,

procures or causes her to take any drug, medicine, or article, or uses upon her or advises her to use any instrument to produce an abortion (unless necessary to preserve life), etc., shall, in the event of the death of the woman or any quick child whereof she be pregnant, on conviction be adjudged guilty of manslaughter in the second degree, and in case death does not ensue shall be guilty of the "felony of abortion," and shall be punishable accordingly. Held, that every element of the crime of abortion contained in sections 1823, 1825, and 1853 was included in the act of 1907, and that such act repealed such sections, so that thereafter the administering of a drug to a pregnant woman or the employment of any means (with intent to procure an abortion) was a felony, and not a misdemeanor. *State ex rel. Gaston v. Shields*, 130 S. W. 298, 300, 230 Mo. 91.

#### **Adultery**

As adultery may be punished by imprisonment in the penitentiary, it is a felony, as Code, § 5093, defines a felony as a public offense, which may be punished by imprisonment in the penitentiary. *State v. Clemenson*, 99 N. W. 139, 123 Iowa, 524.

#### **Assault with intent to kill**

An assault with intent to kill, being punishable by imprisonment in the penitentiary, is a "felony" under the statute, making any offense punishable by imprisonment in the penitentiary a felony. *State v. Wilson*, 126 S. W. 996, 140 Mo. App. 726.

#### **Bribery**

Bribery denounced by the statute, providing that every person who shall by bribery deter a witness from giving evidence in any cause shall be deemed guilty of a misdemeanor, and that, if the cause be a prosecution for a felony, the person so offending, shall be punished by imprisonment in the penitentiary for two years, or in the county jail, or by fine, is not a "felony" within the statute declaring that the term "felony" means any offense punishable with imprisonment in the penitentiary or with death, but the offense is a "misdemeanor," defined by statute as including every offense punishable only by fine or imprisonment in the county jail, or both. *State ex rel. Butler v. Foster*, 86 S. W. 245, 247, 187 Mo. 590.

#### **Petit larceny**

At common law petit larceny was a "felony," and the effect of the statute providing that, on a subsequent conviction for petit larceny, the offender should be sentenced to imprisonment for a term not exceeding five years was to make petit larceny charged as second offense a felony. *People ex rel. Cosgriff v. Craig*, 88 N. E. 38, 39, 195 N. Y. 190.

"Felony" being defined by statute to be an offense punishable with death or imprisonment in the penitentiary, petit larceny, which

is declared to be a misdemeanor, is not a felony within the statute making conviction of a felony ground for divorce. *Hartwig v. Hartwig*, 142 S. W. 797, 799, 160 Mo. App. 284.

"Felony," in American law, has no very definite meaning except in cases where it is defined by statute. The words "minor offenses," as used in the state constitution, authorizing the Legislature to grade all "misdemeanors and minor offenses against the state" and to fix the minimum and maximum penalty therefor, must be construed as meaning minor crimes, such as petty larceny and the like, which may be punishable by imprisonment in the penitentiary. The words were used to designate minor crimes which, in the discretion of the court, may be punishable by imprisonment in the parish jail or in the penitentiary, or, in other words, as misdemeanors or as felonies. Hence the act grading misdemeanors and minor offenses is constitutional in so far as it grades the offense of petty larceny and makes the same punishable by imprisonment in the parish jail. *State v. Eubanks*, 38 South. 407, 408, 114 Ga. 428.

#### **Pursuing liquor business in local option territory**

The offense of pursuing the business of selling intoxicating liquors in local option territory is a distinct offense from that of making a sale of intoxicating liquors, and is a "felony." *Byrd v. State (Tex.)* 151 S. W. 1068, 1070.

#### **Rape**

The offense of rape, being punishable by imprisonment in the penitentiary, is a "felony" under the statute of Kansas defining a felony to be an offense punishable by confinement in the penitentiary, and a boy being put upon his trial under an information charging that offense, even though he is under the age of 16 years at the time of his conviction is entitled to exercise six peremptory challenges in the selection of a jury. *State v. Davidson*, 80 Pac. 945, 71 Kan. 494.

## **FEMALE**

In "an indictment under the statute concerning rape on infants under 12 years of age, \* \* \* sex need not be alleged. The indictment is sufficient if it gives a woman's name and uses the pronouns 'she' and 'her' in speaking of the person on whom the rape was committed. The word 'female' in an indictment is equivalent to the word 'woman.'" *Com. v. Landis*, 112 S. W. 581, 582, 129 Ky. 445, 16 Ann. Cas. 901 (quoting and adopting *Rob. Cr. Law*, § 271, and citing *Commonwealth v. Fogerty*, 8 Gray [74 Mass.] 489, 69 Am. Dec. 264).

## **FEMALE RELATION**

Under the statute declaring that insulting conduct of decedent towards a "female

relation" of accused is adequate cause to reduce the killing to manslaughter, and providing that any female under the temporary protection of accused at the time of the killing shall be included within the term "relation," accused, who had been raised by a husband and wife, and who lived at their house, could show adequate cause for the killing of decedent by proving his insulting conduct towards a cousin of the wife present at the house. *Williams v. State* (Tex.) 144 S. W. 620, 621.

A mother is the "female relative" of her son, within the contemplation of the statute and if accused, on trial for the murder of his stepfather, was informed and believed that deceased had struck accused's mother, it would be adequate cause, requiring a charge on manslaughter. *Stapleton v. State*, 120 S. W. 866, 867, 56 Tex. Cr. R. 422.

## FENCE

See Division Fence; Good Fence; Lawful Fence; Legal and Sufficient Fence; Partition Fence; Securely Guarded or Fenced; Spite Fence.

Under a statute providing that all fences 4½ feet high, consisting of rails, timber, boards, stone, or any combination thereof, and all hedges or other things which shall be considered equivalent thereto in the judgment of the fence viewers, shall be deemed legal and sufficient, an ordinary worm or Virginia "fence" is one that owners of farm land may lawfully build, though it requires the use of a strip of land from 3 to 5 feet wide, and a stump fence built in accordance with the common practice of a locality may be lawfully built, if it meets the approval of the fence viewers. *Rose v. Linderman*, 110 N. W. 939, 940, 147 Mich. 372, 11 Ann. Cas. 198.

Under a statute declaring that, if a railroad company fence in its track, it shall only be liable in case of injury to stock resulting from want of ordinary care, a railroad track is not "fenced in," where it is inclosed on two sides and on one end, leaving the other end open. To fence in a place, as against live stock, means to surround it by a fence, so as to prevent the intrusion of such animals upon the inclosed premises. *Ft. Worth & R. G. Ry. Co. v. Swan*, 78 S. W. 920, 922, 97 Tex. 338. To "fence in," within the meaning of this statute, means to inclose the premises in such a way as, under ordinary circumstances, to effectually prevent stock of the ordinary kind from entering upon the roadbed and tracks, and requires the railroad company, after it has fenced in its track, to keep the same fenced in by making the necessary repairs. *Texas & P. Ry. Co. v. Sproles*, 105 S. W. 521, 522, 47 Tex. Civ. App. 294. A railroad is "fenced in," so as to avoid liability for stock killed, when it is inclosed in such a way as at least under ordinary circumstances to effectually exclude live stock of the ordinary kind and docility from enter-

ing on the roadbed and tracks. *Texas Cent. R. Co. v. Pruitt*, 109 S. W. 925, 926, 101 Tex. 548.

A "railroad cattle gap" or "guard" is a contrivance to restrain cattle. In a sense it is a "fence," but the construction of the gap or guard itself is not limited in its dangerous quality, as is a fence. To be at all effective and serviceable, it cannot be a barrier erected perpendicular to the surface of the ground, and rising above it, but must, in order to answer the purpose in view, be so constructed that its appearance of dangerousness will, under ordinary circumstances, deter cattle from attempting to pass over it; and, in so ordering the gap or guard, a really dangerous contrivance may be properly installed without, in the event of injury to cattle attempting to cross it, rendering the railway company liable, if the fact of its want of safety for that purpose is the proximate cause of the injury. *Carrollton Short Line Ry. Co. v. Lipsey*, 43 South. 836, 837, 150 Ala. 570.

### As building

See Building.

### Gate or bars

A gate, is a part of the "fence," within the statute requiring railroads to maintain fences beside their tracks, and the road is under the same duty to erect gates in the first instance and keep them in repair when erected as it is regarding any other part of the fence. *Johnson v. Southern Pac. Co.*, 104 Pac. 713, 716, 11 Cal. App. 278.

To escape the absolute liability that the statute declares in favor of the owner for the value of stock killed, a railway company must show that it had its road so fenced in at the time as to prevent stock of ordinary disposition from entering upon its roadbed, and a gate in the fence is a part of the fence. *Texas Cent. Ry. Co. v. Wills* (Tex.) 116 S. W. 145, 146; *Texas Cent. R. Co. v. Jenkins* (Tex.) 120 S. W. 948, 949; *Houston E. & W. T. Ry. Co. v. Lee* (Tex.) 135 S. W. 694, 695; *Texas Cent. Ry. Co. v. Pruitt*, 110 S. W. 966, 968, 49 Tex. Civ. App. 370.

### Hedge

The statute, authorizing a person who has laid a fence on a division line to remove it, is not applicable to trees and timber grown in a hedge "fence" on the line. *Griffith v. Carrothers*, 119 Pac. 548, 549, 86 Kan. 93.

A "hedge" is not a "fence," within Rev. St. 1895, art. 2502, specifying when and how a person may withdraw or separate a fence connected with other fences. *Brown v. Johnson* (Tex.) 73 S. W. 49, 50.

### As private nuisance

See Private Nuisance.

### Wall

Where plaintiff built a fence by first erecting a wall of split stone some 2½ feet high

on the side next to the street but filled with earth on the side next to the lot and on the wall placed a light wooden fence, the wall constituted a part of the "fence," within a fair construction of the special order under which a street commissioner was acting, in being ordered to remove the "fence," so that damages were recoverable against the city on the theory that he was acting in the course of his employment.—*Woodcock v. City of Calais*, 68 Me. 244, 246.

#### FENCE (Receiving Stolen Goods)

A "fence" is a place where burglars or thieves can dispose of their plunder without inquiry, and their identity be concealed. *State v. Rosenbaum*, 68 Atl. 250, 251, 80 Conn. 327, 15 L. R. A. (N. S.) 288, 125 Am. St. Rep. 121; *Schulman v. Whitaker*, 39 South. 737, 115 La. 628; *State v. Cohen*, 63 Atl. 928, 929, 930, 73 N. H. 543.

#### FENCED

What is meant by the word "fenced," in a reservation in a deed of a right of way which is not to be fenced, is not that the lands of the servient donor should be left entirely open and exposed on every side, but that the way shall not be closed at the ends by a permanent fence. *Frazier v. Myer*, 31 N. E. 536, 132 Ind. 71.

#### FENDER

As applied to sawmills, a "fender" is a guard to protect employes from flying pieces of wood driven by the saws. *Burns v. Rud-dock Orleans Cypress Co.*, 38 South. 157, 158, 114 La. 247.

As applied to street cars, a "fender" is a guard or protection against danger to pedestrians. *Spiking v. Consolidated Ry. & Power Co.*, 93 Pac. 838, 845, 33 Utah, 313 (citing 19 Cyc. p. 489); *Whitt v. Public Service Corp. of New Jersey*, 64 Atl. 972, 74 N. J. Law, 141.

#### FERÆ NATURÆ

Animals feræ naturæ as private property, see Private Property.

Migratory fish in navigable waters of a state, like game within its borders, are classed as animals feræ naturæ, the title to which, so far as it is susceptible to being asserted before possession is obtained, is held by the state in its sovereign capacity, in trust for all its citizens, and, as an incident of the assumed ownership, the state may protect the species from extinction by exhaustive methods of capture. *State v. Hume*, 95 Pac. 808, 810, 52 Or. 1.

#### FERMENTED

##### FERMENTED AND MALT LIQUORS

As intoxicating liquor, see Intoxicating Liquor.

As liquor, see Liquor.

As used in the Liquor Tax Law (Laws 1897, c. 312), regulating the sale of "fermented or malt liquors," includes a liquor known as "malt rose," which is a beverage made to imitate lager beer, having the same general color, taste, and appearance, and containing from .74 to 1.18 per cent. of alcohol. *People v. Cox*, 94 N. Y. Supp. 526, 527, 529, 106 App. Div. 299.

In a prosecution for selling intoxicants on Sunday, in violation of Liquor Tax Law, § 31, as amended by Laws 1897, p. 207, c. 312, and Laws 1903, p. 1111, c. 486, the magistrate could take judicial notice that lager beer is a fermented and malt liquor within Liquor Tax Law, § 2, as amended by Laws 1897, p. 207, c. 312, § 1, and Laws 1903, p. 1111, c. 486, § 1, defining "liquors" as including fermented and malt liquors, etc. *People ex rel. Land v. O'Reilly*, 114 N. Y. Supp. 258, 260, 129 App. Div. 522.

#### FERRET

See Tax Ferret.

#### FERRO-CHROME

"Ferro-chrome" is produced by reducing chrome iron ore with carbon in an electrical furnace. It contains iron chromium and carbon. One of its principal uses is in the manufacture of armor-piercing projectiles and armor plates. It is also generally used to impart hardness and toughness to steel structures and implements where these qualities are particularly needed, such as burglar-proof safes, crushers, cutting tools, and the like. *United States v. Roessler & Hasslacher Chemical Co.*, 137 Fed. 770, 771, 70 C. C. A. 346.

#### FERRO-MANGANESE

"Ferro-manganese" is produced by smelting the ore containing iron and manganese. It is added to steel in the process of manufacture. It is used in making steel for the cheaper class of projectiles and for other purposes where hardness, strength, and ductility are necessary. *United States v. Roessler & Hasslacher Chemical Co.*, 137 Fed. 770, 771, 70 C. C. A. 346.

#### FERRO-TUNGSTEN

Tungsten iron or "ferro-tungsten" is made from tungsten or wolframite by roasting it, freeing it from sulphur and arsenic by treatment with muriatic acid, and strongly igniting it with charcoal in a closed crucible, giving a sintered or scaly mass which is fusible with iron ore. *O. G. Hempstead & Son v. Thomas*, 122 Fed. 538, 539, 59 C. C. A. 342.

#### FERRULE

"Knight's Mechanical Dictionary describes a ferrule as a metallic ring or sleeve

on the handle of a tool or the end of a stick to keep the wood from splitting.' The Imperial Dictionary defines a ferrule to be 'a ring of metal put around a column, cane, or other thing, to strengthen it or prevent its splitting.' The common understanding is that a ferrule for an umbrella or cane is a ring or short tube of metal fitted on or inclosing the lower end of a cane or umbrella stick. It is in that sense that the term is employed in a patent, the specification of which describes a ferrule as primarily a tube open at both ends. *Evans v. Newark Rivet Works*, 126 Fed. 492, 494, 61 C. C. A. 474; *Evans v. Newark Rivet Works*, 121 Fed. 133, 134.

## FERRY

See Private Ferry.

"A 'ferry' is a public rather than a private right, and has been aptly called a public highway across a stream of water by boat instead of by bridge." *Warner v. Ford Lumber & Mfg. Co.*, 93 S. W. 650, 651, 123 Ky. 103, 12 L. R. A. (N. S.) 667.

The word "ferry" cannot be held to mean merely the landing place where it is operated by a railroad company and is a mere link in a great line of communication. *New York Cent. & H. R. R. Co. v. Board of Chosen Freeholders of Hudson County*, 65 Atl. 860, 863, 74 N. J. Law, 367.

One who employs a flatboat to transport his employes and his wagons and teams across a stream to and from his sawmill, and does not transport any part of the public for hire, is not operating a ferry. The term "ferry" imports the idea of charging or receiving toll for transportation. A ferry is the right of carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another for a compensation paid by way of toll. *Futch v. Bohnannon*, 67 S. E. 814, 815, 134 Ga. 313.

A "ferry" is, in respect of the landing, not the water, and the water may belong to one; the ferry to another. The state of Ohio has the right to establish ferries on the Ohio side of the Ohio river and to fix their charges for ferriage over the river from Ohio to West Virginia, and West Virginia cannot punish one who acts under a ferry franchise given by Ohio to operate a ferry from its side of the Ohio river over that river, for charging one coming from Ohio more than is allowed by West Virginia law for ferriage over that river. *State v. Faudre*, 46 S. E. 269, 272, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104.

A public ferry being merely a part of the highway, a county may establish such ferries in the absence of special statutory authority. Rev. Codes, § 2935, provides that notice of election to authorize a county bond issue shall clearly state the object of the loan, and

Const. art. 13, § 5, provides that no county shall incur any indebtedness or liability for any single purpose to an amount exceeding \$10,000, without the approval of a majority of the electors voting. Held, that as the notice required by the statute was merely a general notice, and as the people of the county may, in the absence of constitutional provision, expend the county moneys for any purpose they desire, the order and notice for special election held for the issuance of bonds to create a highway system, with bridges, and which included public ferries, was not invalid because merely generally stating those purposes, and not mentioning ferries; a "ferry" being a mere incident or movable portion of a highway where it crosses a stream. *Reid v. Lincoln County*, 125 Pac. 429, 438, 46 Mont. 31.

The term "ferry," in the chapter of the statutes entitled "Ferries," presupposes a road traveled by the public which is bisected by a water course, so that a ferry serves the purpose of a bridge; a ferry in its general sense being a highway over narrow waters and a continuation of a highway from one side of the water over which it passes to the other, and is for the transportation of passengers, their teams, and vehicles and other property. *State ex rel. United Rys. Co. v. Wiethaupt*, 133 S. W. 329, 333, 231 Mo. 449 (quoting 3 Words and Phrases, pp. 2749-2751).

In one sense a ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them. In a strict sense the ferry business is confined to the transportation of persons, with or without their property, and a ferryman carrying on only a ferry business is bound to transport in no other way. *St. Clair County v. Interstate Sand & Car Transfer Co.*, 24 Sup. Ct. 300, 304, 192 U. S. 454, 48 L. Ed. 518.

### As railroad

See Railroad—Railway.

## FERRY FRANCHISE

A "ferry privilege" is a public highway across a stream of water by boat, and the owner of such privilege must conform to the statutory requirements by giving bond, operate the ferry according to the statutory restrictions, and undertake to serve the public at all reasonable times. The owner of a ferry in operating it performs a public service, with the incidents of monopoly and the right to levy toll, but he has no exclusive right to the use of the stream. He has the same right to navigate it that every other citizen of the state enjoys. The fact that he may by condemnation acquire a landing and take private property for public use by making just compensation therefor shows that a ferry is more for public than private use.

Though the owner of a ferry, in operating it, performs a public service, with the incidents of monopoly and the right to levy toll, he has no exclusive right to the use of the stream crossed by his ferry. He has the same right to navigate it that every other citizen of the state enjoys. The owner of land taken for a ferry landing is entitled only to such damages as will result from the taking of his land for the ferry landing, and cannot recover damages for injuries to a boom on the river, resulting from a proper operation of the ferry. *Warner v. Ford Lumber & Mfg. Co.* 93 S. W. 650, 651, 123 Ky. 103, 12 L. R. A. (N. S.) 667 (citing and adopting *Brown v. Given*, 4 J. J. Marsh. [27 Ky.] 30; 1 *Farman, Water & Water Rights*, pp. 130, 131).

### FERRYBOAT

As instrument of commerce, see Commerce.

### FERRYMAN

As common carrier, see Common Carrier.

### FEVER

See Texas Fever.

### FIBROUS

"Fibrous," as used in the steel making art, is a generic term to denote a condition in contrast to the crystalline state. The "fibrous" state is obtained by annealing. *Fried. Krupp Aktien Gesellschaft v. Midvale Steel Co.*, 191 Fed. 588, 607, 112 C. C. A. 194.

### FIBROUS VEGETABLE SUBSTANCES

The term "Fibrous vegetable substances" in the Tariff Act does not include birch bark. *Reed & Keller v. United States*, 172 Fed. 453.

### FICTION

"When logic and the policy of a state conflict with a fiction due to historical tradition, the 'fiction' must give way." *Blackstone v. Miller*, 23 Sup. Ct. 277, 278, 188 U. S. 189, 47 L. Ed. 439.

### FICTION OF LAW

"It seems to be a rule founded in common sense, as well as strict justice, that 'fictions of law' shall not be permitted to work any wrong, but shall be used ut res magis valeat quam pereat." *United States v. 1,960 Bags of Coffee*, 8 Cranch [12 U. S.] 398, 415, 3 L. Ed. 602.

A "fiction of law" is an assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place. *Leavell v. Blades*, 141 S. W. 893, 895, 237 Mo. 695.

"The law often regards money as land and land as money, and, through the forms in which property may be put, will, if pos-

sible, trace and establish the original ownership." *McIntosh v. Aubrey*, 22 Sup. Ct. 561, 563, 185 U. S. 122, 46 L. Ed. 834.

Though a judgment upon an entry nunc pro tunc, in taking effect by a legal relation at a time before it was actually entered or existed, is based on a "fiction of law," it cannot be contradicted. *Mahaska County v. Bennett*, 129 N. W. 838, 839, 150 Iowa, 216.

### FICTITIOUS

The phrase "fictitious increase of stock," as used in Const. art. 12, § 6, declaring that all fictitious increase of stock or indebtedness shall be void, must include an issue of new stock when both the corporation and the recipient of the stock know that it is being issued for less than its face value. *Coler v. Tacoma Ry. & Power Co.*, 54 Atl. 413, 414, 65 N. J. Eq. 347, 103 Am. St. Rep. 786.

An increased issue of stock which was actually sold for cash was not "fictitious and void," within the Missouri Constitution providing that no corporation shall issue stock except for money paid, or property actually received; and that "fictitious increase of stock shall be void" because the statement which the state law required to be made, to the Secretary of State before such increase, was also false as to the corporation's assets and liabilities, and as to the fact of payment for the stock. *Scott v. Abbott*, 160 Fed. 573, 576, 87 C. C. A. 475.

Under Const. art. 12, § 11, providing that no corporation shall issue stock or bonds, except for money paid or property actually received, and that all fictitious increase of stock or indebtedness shall be void, a corporation cannot issue bonds as a bonus to subscribers to the capital stock, and where the subscribers paid for the stock issued to them, so that they were entitled to fully paid stock, bonds of the corporation issued to them in addition to the stock were void, as against creditors while in the hands of stockholders, not purchasers for value and without notice; they being a "fictitious increase of indebtedness" within the Constitution, even though they were issued and delivered as security for additional money advanced by the subscribers as a loan, either to or for the benefit of the corporation before issuance of the bonds, or though such sum advanced became a part of the consideration for the bonds, such advance amounting to only one-fourth of the amount of bonds issued, and as against the corporation they could not be enforced for any amount in excess of what the corporation received for them from the stockholders. *Rolapp v. Ogden & N. W. R. Co.*, 110 Pac. 364, 368, 37 Utah, 540.

Under Const. art. 12, § 5, providing that all "fictitious increase of stock or indebtedness" of a corporation shall be void, indebt-

edness incurred for less than full consideration is fictitious, and that some consideration is paid does not relieve the indebtedness from such character. *Rolapp v. Ogden & N. W. R. Co.*, 110 Pac. 364, 368, 37 Utah, 540.

### FICTITIOUS BANK BILL

"Webster defines 'fictitious' as 'feigned,' imaginary, not real, counterfeit, false, not genuine." Defendant passed an alleged \$20 bank bill in payment of rent. The bill consisted of two bills pasted together; the exposed sides being similar to each other. Both bills were of the denomination of \$20 and purported to be issued by a bank which had had no existence since 1865. One of the exposed faces bore a number and the date 1864, and the other showed the number blank, the date incomplete, the signature by the president, but a blank for the signature of the cashier. Held that, though such bills were genuine in so far as they were complete, they were nevertheless false and fictitious, within Pen. Code, § 476, prohibiting the passing of a fictitious bank bill of a bank not in existence with intent to cheat and defraud. *People v. Harben*, 91 Pac. 398, 399, 5 Cal. App. 29.

### FICTITIOUS CLAIM

A fictitious claim against the government is one preferred against it for supplies said to have been furnished to the government, or for services said to have been rendered to it, no part of which said supplies or services were in fact rendered or supplied. *Bridgeman v. United States*, 140 Fed. 577, 594, 72 C. C. A. 145.

### FICTITIOUS NAME

A firm name, showing the surnames only of the partners, is not a "fictitious name, or a designation not showing the names of the partners," within Wilson's Rev. & Ann. St. 1903, §§ 3901, 3903, providing that every partnership transacting business under a "fictitious name, or a designation not showing the names of the persons interested as partners," must file a certificate stating the names of the members of the partnership, etc. *Patterson v. Byers*, 89 Pac. 1114, 1115, 17 Okl. 633, 10 Ann. Cas. 810.

#### In negotiable instrument

A draft drawn by a bank, payable to an existing partnership, on the fraudulent request of a depositor's bookkeeper, who thereafter indorsed the partnership's signature, and deposited the draft in his own account, was not payable to a fictitious or non-existing person, so as to pass by delivery, within Negotiable Instruments Law (Laws 1897, p. 724, c. 612, § 28), as it is only where a person making an instrument knows that he is making it payable to a fictitious or non-existing person that it can be treated as payable to bearer. *Seaboard Nat. Bank v. Bank of America*, 85 N. E. 829, 832, 193 N. Y.

26, 22 L. R. A. (N. S.) 499. The name of the maker of checks purporting to have been signed by an administrator, made payable to beneficiaries entitled to a greater amount from the estate than the amount of the checks, was forged. The checks were accepted and paid by the drawee. The names of the payees were also forged. It did not appear who forged the maker's name, but the person who did so knew that the payees would never have any interest in the instruments. Held, that the payees were fictitious within the statute, and the drawee could not recover the money paid. *Trust Co. of America v. Hamilton Bank of New York City*, 112 N. Y. Supp. 84, 88, 127 App. Div. 515.

Where the drawer of a check intended to use the name of payee, and did use it, as that of a person who should never receive the check nor have any right to it, such payee, though an existing person, was a fictitious one, within the negotiable instruments act of May 16, 1901 (P. L. 194), making a check payable to bearer, if payable to the order of a fictitious or nonexisting person, and such fact is known to the person making it so payable. *Snyder v. Corn Exch. Nat. Bank*, 70 Atl. 876, 878, 221 Pa. 599, 128 Am. St. Rep. 780.

Where checks, obtained by fraud, were made payable to S., whether they were made to a fictitious person depended on whether the name given by the person who suggested it, and whose suggestion was followed by the drawer, was used as designating the person to whom the name belonged, or as a mere name without reference to its belonging to any person, and with an intention that it should not designate any particular person. *Jordan Marsh Co. v. National Shawmut Bank*, 87 N. E. 740, 742, 743, 201 Mass. 397, 22 L. R. A. (N. S.) 250.

### FIDEI COMMISSUM

A "fidei commissum" differs from the "substitution," in that the charge imposed on the first recipient is to be executed during his life. A better founded distinction, perhaps, lies in the fact that in case of a substitution the first recipient and ultimate beneficiary both take title to the thing given directly from the donor, while in the case of the fidei commissum the title vests in the ultimate beneficiary, for whom the first recipient holds and administers the gift as trustee. *In re Billis' Will*, 47 South. 884, 886, 122 La. 539, 129 Am. St. Rep. 355.

### FIDELITY.

"Fidelity" imports sincere and single intention to administer the trust for the best interest of the parties beneficially interested, and according to the duty which the trust imposes. And this is but a paraphrase of 'good faith.' *In re Burr*, 96 N. Y. Supp.



225, 230, 48 Misc. Rep. 56 (quoting King v. Talbot, 40 N. Y. 76).

### FIDELITY GUARANTY

The term "fidelity and guaranty company," as used in the gross receipts tax law, is to be given its accepted and ordinary meaning by holding to be appropriate to such corporations all kinds of business which fairly fall within the powers usually found in their charters or currently conducted by them. *State v. Central Trust Co.*, 67 Atl. 267, 270, 106 Md. 268.

## FIDUCIARY

### FIDUCIARY CAPACITY OR CHARACTER

See Debt of Fiduciary Character;  
While Acting in Fiduciary Capacity.  
See, also, Confidential Relation.

The defendants in attachment, being the general owners of the property attached, cannot be regarded as standing in a "fiduciary capacity" to the property after it is left undisturbed in their possession and under their control. *Fowles v. Treadwell*, 24 Me. 377, 380.

Where the superintendent in charge of laborers purchased beer for them from time to time as authorized by them and deducted from their wages sufficient to pay the seller of the beer, the fiduciary relation created, if any, was between the laborers and the superintendent, and the seller could not rely thereon to establish a "fiduciary relation" between himself and the superintendent, within Bankruptcy Act. In *re Camelo*, 195 Fed. 632, 635.

#### Executor or administrator

An executor of a deceased executrix having rendered a final account of the administration to which exceptions were taken by an administrator de bonis non, such executor was a party in a "fiduciary capacity" within the meaning of the statute allowing a trustee who has given a fiduciary bond to appeal without bond. In *re Sidwells' Estate*, 66 N. E. 521, 523, 67 Ohio St. 464.

#### As limited to express or technical trusts

The term "fiduciary capacity," as used in the Bankruptcy Act, embraces only cases of technical trusts and not those of implied trusts. *Stickney v. Parmenter*, 52 Atl. 73, 74 Vt. 58; *Young v. Clark*, 93 Pac. 1056, 1057, 7 Cal. App. 194 (quoting and adopting *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236); *Flanders v. Mullin*, 66 Atl. 789, 80 Vt. 124, 12 Ann. Cas. 1010; *Ehrhart v. Rork*, 114 Ill. App. 509, 511; In *re Wenham*, 153 Fed. 910, 911; In *re Harper*, 133 Fed. 970, 973 (adopting definition in *Chapman v. Forsyth*, 2 How. [43 U. S.] 202, 207, 11 L. Ed. 236); In *re Camelo*, 195 Fed. 632, 635; *Clarke v. Milliken*, 127 N. Y. Supp. 339, 341, 70 Misc.

Rep. 492. The term does not embrace officers of private corporations. In *re Harper*, 133 Fed. 970, 972. But it has been held to include a bank's vice president having full control of its affairs. *Harper v. Rankin*, 141 Fed. 626, 631, 72 C. C. A. 320. It does not include commercial transactions in which some trust was impliedly imposed in the bankrupt. *Lewis v. Shaw*, 106 N. Y. Supp. 1012, 1014, 122 App. Div. 96. It does not describe the relation which a broker holds to his customer for whom he is buying and selling and who has deposited with him money or collaterals. *Crosby v. Miller, Vaughn & Co.*, 55 Atl. 328, 25 R. I. 172. As the term has reference only to technical trusts, and not those which the law implies from contract, a debt arising out of an implied understanding had on a conveyance in the ordinary form of an absolute deed from R. to N. of certain parts of P.'s real estate, no trust being expressly declared, was not excepted from the operation of the discharge. *Reeves v. McCracken*, 60 Atl. 332, 333, 69 N. J. Eq. 203. The term has been held to include a laundry agent authorized to make collections, and remit to his principal, after deducting commissions. *Shipley v. Platts*, 97 N. W. 1, 2, 17 S. D. 357.

#### Partners and surviving partners

Misappropriation by a partner of partnership funds is not a misappropriation while acting in a "fiduciary capacity," within the provision of the Bankrupt Act excepting from the effect of a discharge in bankruptcy liabilities created by misappropriation while acting in any fiduciary capacity; the term "fiduciary capacity" referring to technical or express trusts, and excluding the relationship of agents, brokers, and partners to funds held generally by them in such capacities. *Karger v. Orth*, 133 N. W. 471, 472, 116 Minn. 124.

In view of a contemplated partnership between defendant and intestate, intestate paid money to defendant for the benefit of the firm, which money defendant deposited in a bank in his own name and converted to his own use after intestate's death. Held, that intestate's death dissolved the partnership after which defendant became trustee of the money for the benefit of intestate's estate, holding the same in a "fiduciary capacity" within the provision of the bankruptcy act, exempting from a discharge debts created by misappropriation while acting in a "fiduciary capacity." *Haggerty v. Badkin*, 66 Atl. 420, 422, 72 N. J. Eq. 473.

## FIDUCIARY RELATION

The terms "fiduciary relation" and "confidential relation," are frequently used interchangeably; in general, the relationship is one in which if a wrong arise the same remedy exists on behalf of the injured party as would exist against a trustee on behalf of the cestui que trust. *Dick v. Albers*, 90 N. E.

683, 685, 243 Ill. 231, 134 Am. St. Rep. 369; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 68, 26 L. Ed. 693.

A "fiduciary relation" exists when confidence is reposed on one side and there is resulting superiority and influence on the other, and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal. *Hensan v. Cooksey*, 86 N. E. 1107, 1109, 237 Ill. 620, 127 Am. St. Rep. 345; *Beach v. Wilton*, 91 N. E. 492, 495, 244 Ill. 413 (quoting 2 Pom. Eq. Jur. [3d Ed.] § 956); *Beare v. Wright*, 103 N. W. 632, 636, 14 N. D. 26, 69 L. R. A. 409, 8 Ann. Cas. 1057.

A "fiduciary relation" arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interest, in the whole or in part, or the bodily custody, of one person, is placed in the charge of another." *McKinley v. Lynch*, 51 S. E. 4, 9, 58 W. Va. 44 (quoting and adopting definition in 1 *Bigelow, Frauds*, p. 262).

"The phrases 'confidential relation' and 'fiduciary relation' seem to be used by the courts and law writers as convertible terms. It is a peculiar relation which undoubtedly exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and cestui que trust, executors or administrators and creditors, legatees or distributees, appointor and appointee under powers to partners and part owners. In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost good faith in all transactions between the parties." *Hemenway v. Abbott* (Cal.) 97 Pac. 190, 196 (quoting and adopting the definition in 1 *Story, Eq. Jur.* 218).

The term "fiduciary or confidential relation," as used in the law relative to undue influence, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. *Stahl v. Stahl*, 73 N. E. 319-321, 214 Ill. 131, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774; *Irwin v. Sample*, 72 N. E. 687, 690, 213 Ill. 160 (quoting and adopting definition in 2 Pom. Eq. Jur. §§ 947, 956).

A "confidential relation," with which a "fiduciary relation," is ordinarily synonymous, and like it is founded on trust or confidence reposed by one person in the integrity and fidelity of another, and precludes the

idea of profit or advantage to the person in whom confidence is reposed from dealings with the other, is any relation existing between parties to a transaction whereby one of them is in duty bound to act with the utmost good faith for the benefit of the other. *Bacon v. Soule*, 126 P. 384, 385, 19 Cal. App. 428; *Inge v. Stillwell*, 127 Pac. 527, 528, 88 Kan. 33, 42 L. R. A. (N. S.) 1093; *Ewing v. Ewing*, 126 Pac. 811, 815, 33 Okl. 414.

Merely reposing confidence in another does not of itself create a trust, nor make a trustee of one in whom confidence has been reposed. To create a "fiduciary relation" by contract it is necessary that the consent of the trustee to assume that relation be expressed in the contract or be derived therefrom by necessary implication. *State v. State Journal Co.*, 106 N. W. 434, 437, 75 Neb. 275, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254.

The relation between a corporation and its president, acting as its general manager, is a "fiduciary relation," and he is not permitted to secure to himself any profit in the management of the company's affairs not known to the other stockholders. *Teris v. Hammersmith* (Ind.) 81 N. E. 614, 616 (citing *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5; 2 Pom. Eq. Jur. [3d Ed.] §§ 157, 881, 964; *Pratt v. Luther*, 45 Ind. 250, 255; *Wayne Pike Co. v. Hammons*, 27 N. E. 487, 129 Ind. 368, 377; *Drury v. Cross*, 7 Wall. [74 U. S.] 299, 306, 19 L. Ed. 40).

Plaintiff and defendant purchased a flat building for resale, and not as an investment, agreeing to bear equally the expense of repairs and the conduct of the business of renting apartments until the building could be sold. Held, that a "fiduciary relation" existed between plaintiff and defendant, making it the duty of defendant on selling the property to truthfully state to plaintiff the amount of the consideration received. *Calkins v. Worth*, 74 N. E. 81-83, 215 Ill. 78.

"There is no stronger 'fiduciary relation' known to the law than that of a copartnership, where one man's property and property rights are subject to a large extent to the control and administration of another." A partner may not for his benefit deceive the copartner to his injury either by false representations or by concealment, and in effecting a firm settlement must disclose to the copartner the condition of the firm affairs. *Salhinger v. Salhinger*, 105 Pac. 236, 237, 56 Wash. 134 (citing *Pars. Part.* § 158, and note 2).

## FIELD

See Common Fields.

The word "field," in Rev. Civ. St. 1911, arts. 6595-6598, requiring every railroad company whose road passes through a "field" to place and maintain cattle guards at the points of entry, etc., means land inclosed by a

fence which will prevent the ingress of live stock, and a railroad company need not provide cattle guards unless its track passes through an undivided field inclosed by the owner, as distinguished from separate fields so inclosed. *St. Louis Southwestern Ry. Co. of Texas v. Lee* (Tex.) 151 S. W. 331, 332.

### FIELD NOTES

The term "field notes" in its ordinary sense means the notes made by the surveyor in the field while making a survey, describing by course and distance, and by natural or artificial marks found or made by him, where he ran the lines and made the corners. *State v. Palacios* (Tex.) 150 S. W. 229, 238.

### FIELD STORAGE WAREHOUSING

"Field storage warehousing" is warehousing the owner's goods on the premises of the owner or of the former owner. *American Can Co. v. Erie Preserving Co.*, 183 Fed. 96, 97, 105 C. C. A. 388.

## FIFTEEN

### Fifteen days' published notice

Rev. St. 1899, § 6276 (Ann. St. 1906, p. 3136; Rev. St. 1909, § 9595) provides that not less than 15 days' previous notice shall be given by publication, in some newspaper published in such city or town, of an election to take the sense of the voters on the question of increasing the municipal debt. Held, that 15 days' published notice did not require publication in all the issues of the paper published during such period, and that a single published notice 15 days prior to the election was sufficient. *Southworth v. City of Glasgow*, 132 S. W. 1168, 1170, 232 Mo. 108, Ann. Cas. 1912B, 1267.

## FIGHT

See *Provoking a Fight*.

The meaning of "to fight," according to Webster, is "to strike, or contend for victory, in battle or in single combat; to attempt to defeat, subdue, or destroy an enemy, either by blows or weapons." Worcester gives practically the same definition. *Sullivan v. State*, 7 South. 275, 276, 67 Miss. 346.

## FIGS

"Figs" preserved whole held not dutiable as "figs" in paragraph 264 of Tariff Act, c. 11, § 1, Schedule G, 30 Stat. 171. *United States v. Reiss & Brady*, 136 Fed. 741, 69 C. C. A. 393.

## FIGURES

See S. E. 4; S. E. Qr. 24.

The term "per 100" in a contract for the sale of "500 sax Bayo, at \$3.50 per 100," meant that the sale was of 500 sacks of Ba-

you beans at \$3.50 per 100 pounds. *Gardiner v. McDonogh*, 81 Pac. 964, 966, 147 Cal. 313.

It is a matter of common knowledge, when speaking of shingles, that "5x16" means 5 inches wide and 16 inches long, and of this the courts will take judicial notice, as they will of the meaning of all abbreviations in common use when employed in contracts. *Birmingham & A. R. Co. v. Maddox & Adams*, 46 South. 780, 781, 155 Ala. 292.

In a prosecution to restrain a liquor nuisance described as maintained at "83 and 85 Market street" in a certain city, such description would be construed to include premises designated as "83½ Market street" which was a stairway entrance to the second story of the building described, in which respondent and his family lived. *State ex rel. Lyon v. Chicco*, 63 S. E. 306, 307, 82 S. C. 122.

Under General Construction Law, § 21, providing that a folio is 100 words, counting as a word each figure, a "folio," in determining an allowance under Insanity Law, § 84, for taking and transcribing testimony, means words and figures, but not punctuation; the word "figure" being limited to numerals, which are letters or characters representing a number, and not including "punctuation," which is a pointing off or separating of one word from another by arbitrary marks. *In re Murtaugh*, 128 N. Y. Supp. 850, 851, 71 Misc. Rep. 513.

A negotiable note on which the maker indorsed after it was barred by limitations "on or before 1904 I promise to pay within note" was payable on or before "the year" 1904, it being a reasonable construction to add the last quoted words. *Lovenberg v. Henry*, 140 S. W. 1079, 1080, 104 Tex. 550.

## FILAMENT

The word "filament" may mean a separate fiber or fibril of any vegetable or animal tissue or product, natural or artificial, or of a fibrous mineral such as a "filament" of silk, wool, cobweb, or asbestos, a cortical or muscular "filament." *Haskell Golf Ball Co. v. Perfect Golf Ball Co.*, 143 Fed. 128, 130.

## FILATURES

See *Japanese Filatures*.

## FILCH

Under a statute making libelous any malicious defamation tending to impeach the honesty, integrity, virtue, or reputation of another, and thereby to expose him to public hatred, contempt, ridicule, or financial injury, and in view of the definitions of the word "filch" as "to steal privily," "to steal, especially in a small, sly way," "to take wrongfully from another," "to take from another in an underhand way, as by violation

of trust or good faith," and the commonly accepted synonyms "steal," "thieve," "rob," "purloin," and "pilfer," a publication charging a county treasurer with having illegally "filched" large sums of money belonging to the county is libelous, whether the accusation amounts to a charge of crime or not, as the statute does not require that it should. *People v. Fuller*, 87 N. E. 336, 338, 238 Ill. 116.

## FILE

See Judgment File; On File; Properly Filed; Regularly File.

See, also, Return Day.

"A paper or document is said to be 'filed' when it is delivered to the proper officer and lodged by him in his office. At common law a file meant a thread, string, or wire upon which writs and other exhibits of courts and officers were fastened or 'filed' for the more safe-keeping, and right turning of the same. *Barber Asphalt Paving Co. v. O'Brien*, 107 S. W. 25, 29, 128 Mo. App. 267 (quoting and adopting the definition in *Dawson v. Cross*, 88 Mo. App. 292).

The word "file" is derived from the Latin word *filum*, a thread; and its application is drawn from the ancient practice of placing papers on a thread or wire for ready reference. The words "to file" mean "receiving a paper into custody." Under a statute providing that claims against carriers shall be paid within 60 days after the filing of such claim with the agent of the carrier at the point of destination, and that failure to pay the claim within the period prescribed shall subject the carrier to a penalty, the claimant must present his demand in writing in order to recover the penalty, a verbal demand being insufficient. *Thompson v. Southern Express Co.*, 61 S. E. 182, 183, 147 N. C. 343 (citing *Beebe v. Morrell*, 42 N. W. 1119, 76 Mich. 114, 15 Am. St. Rep. 288; *State ex rel. Morgan v. Lamm*, 69 N. W. 592, 9 S. D. 420; *Lamson v. Falls*, 6 Ind. 309; *Black, Law Dict.* 492; 3 Words and Phrases, p. 2765).

A paper is "filed" when it is delivered to the proper officer, and by him received to be kept on file. *King v. Atlantic Coast Line R. Co.*, 68 S. E. 769, 770, 86 S. C. 510; *Smith v. Geraty*, 109 N. Y. Supp. 738, 739, 58 Misc. Rep. 556; *Meek v. State ex rel. Linville*, 88 N. E. 299, 301, 172 Ind. 654; *Yaltz v. State*, 103 Pac. 1104, 1105, 3 Okl. Cr. 20; *Falley v. Falley*, 50 South. 894, 895, 163 Ala. 626.

A document is "filed" with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept. *O'Brien v. Schneider*, 129 N. W. 1002, 1004, 88 Neb. 479 (citing 3 Words and Phrases, p. 2765).

In the sense of a statute requiring the "filing" of a paper, it is filed when delivered

to and received by the proper officer to be kept on "file." The word carries with it the idea of permanent preservation of the thing so delivered and received that it may become a part of the public record. *Spackman v. Gross*, 126 N. W. 389, 393, 25 S. D. 244.

The delivery of the information and complaint to the clerk is a "filing" in law. *Brogdon v. State*, 140 S. W. 352, 353, 63 Tex. Cr. Rep. 475.

The presentation and delivery of proof of claim to the trustee in bankruptcy within a year after the adjudication is a sufficient "filing" within the meaning of Bankr. Act July 1, 1898, § 57, when read in connection with general orders in bankruptcy No. 21, providing that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. *J. B. Orcutt Co. v. Green*, 27 Sup. Ct. 195, 197, 204 U. S. 96, 51 L. Ed. 390.

Leaving a paper with the clerk is not a filing with him under a code, providing that where service was made by publication, the summons, etc., must be filed with the clerk. *Fink v. Wallach*, 95 N. Y. Supp. 872, 874, 47 Misc. Rep. 247.

A translation of the shorthand notes of the evidence in a case, left with other papers in the clerk's office, and not accepted by him as a part of the record in the case, has not been filed in the clerk's office, as required by law. *Fitzgerald v. Paisley (Iowa)* 119 N. W. 166 (citing 3 Words and Phrases, pp. 2764, 2767, et seq.).

"There can be no 'filing' of a paper in a legal sense except by its delivery to an official whose duty it is to file papers and who is required to keep and maintain an office or other public place for their deposit, and the paper must either be delivered personally to such officer with the intent that the same shall be filed by him, or delivered at the place where the same should be filed." *Corrupt Practices Act*, § 213, requiring that the petition to the Supreme Court, or a justice thereof, for a summary inquest as to the failure of a person or committee to file a statement of election expenses and disbursements, or complaining that a statement filed is false or erroneous, shall be "filed" within 30 days after the election, is not complied with by presentation to a justice of the Supreme Court within that time, though the justice retain the same. *In re Lance*, 106 N. Y. Supp. 211, 214, 55 Misc. Rep. 13 (citing 3 Words and Phrases, p. 2764; *People v. Peck*, 22 N. Y. Supp. 576, 579, 67 Hun. 560; *Matter of Norton*, 53 N. Y. Supp. 1093, 34 App. Div. 79).

Under Act Feb. 20, 1900 (Laws 1909, p. 9), a petition for local option election is required to be filed with the county auditor; and when presented to him, with a request that it be filed and a tender of the legal fee,

the petition in contemplation of law is filed. *O'Connor v. Board of Com'rs of Bear Lake County*, 105 Pac. 560, 561, 17 Idaho, 346.

An appeal will not be dismissed because the certificate of the clerk recited "that the above and foregoing transcript contains full, true, correct, and complete copies of all papers and entries in said cause filed in my office as such clerk, and recorded in the records of this office as required by the above principle" which called for a transcript of all of the papers, on the ground that technically the complaint only is filed in the clerk's office, so that the other papers were excluded by the language of the certificate, since the words "filed in my office," etc., were surplusage, and, even if considered in their broader sense, included filing in open court; "filing" meaning to deposit the papers with the clerk for official custody. *Cleveland, C. & St. L. Ry. Co. v. Morrey*, 88 N. E. 932, 934, 172 Ind. 513.

The term "file in the circuit court" in a notice of election contest was substantially equivalent to "file in the office of the clerk of the circuit court," within Rev. St. 1899, § 7062, requiring the contestant's notice to state that the petition would be filed in the office of the clerk of the circuit court; the two expressions being identical in meaning. *State ex rel. Sale v. McElhinney*, 97 S. W. 159, 161, 199 Mo. 67.

Where a letter remonstrating against the granting of a liquor license was received in due time and called to the attention of the board which ordered the court to preserve "in the files of this office said letter," it was "filed" within the meaning of that word in the requirement of the statute. *Moore v. State ex rel. Macrae*, 96 N. W. 225, 226, 4 Neb. (Unof.) 781.

Under Municipal Court Act (Laws 1902, c. 580) § 332, which allows costs to a prevailing party who appears by attorney and who files a verified pleading or a written notice of appearance, such costs are not allowable to such a party who entered no written appearance by attorney and whose pleadings were oral, as a memorandum containing the attorney's name and address, handed to the judge, but not becoming part of the record of the case was not a "filed" pleading, nor a "written notice of appearance"; rule 2, subd. "d," of the rules of the Municipal Courts, declaring that the indorsements of the same and address of an attorney on any paper in an action shall be an appearance within the meaning of such section, being merely an interpretation of the term "written notice of appearance," and not dispensing with the filing of such a notice as a prerequisite to the court's jurisdiction. *Kaufman v. Cohn*, 138 N. Y. Supp. 403, 404, 78 Misc. Rep. 368.

#### As deposit

The books of account of the treasurer of the city and county of San Francisco, show-

ing the condition of the account of bail moneys received and paid out, are "filed or deposited" within Pen. Code, §§ 113, 114, punishing the falsification of records "filed or deposited" in any public office; the quoted words being equivalent to the words "on file or on deposit." *People v. Tomalty*, 111 Pac. 513, 516, 14 Cal. App. 224.

The word "deposit," as used in Act May 28, 1896, abolishing the office of circuit court commissioner and requiring such commissioners to deposit official documents in their possession with the clerk of the circuit court by which they were appointed, is not synonymous with "filing," and a clerk of court is not entitled to any fee for filing the various papers surrendered. *United States v. Van Duzee*, 22 Sup. Ct. 648, 650, 185 U. S. 278, 46 L. Ed. 909.

#### As made

The word "filed," in Acts 1905, p. 611, c. 169, § 118, providing that public offenses may be prosecuted "by affidavit 'filed' in term time," when considered in connection with section 119, providing that such affidavit shall be approved by the prosecuting attorney, etc., is intended for "made," and the clause should read "by affidavit made in term time." *Cole v. State*, 82 N. E. 796, 797, 169 Ind. 393.

#### As notice

The words "file with the owner," in section 3, c. 75, Code 1906, requiring a laborer or person furnishing material to a contractor to be used in the construction of a building to file with the owner or his authorized agent an itemized account, etc., are equivalent to the words "give notice to the owner," or "serve notice upon the owner." *Williams & Davisson Co. v. Bailey*, 70 S. E. 696, 697, 68 W. Va. 681.

#### As perfecting mechanic's lien

In Laws 1901, c. 101, p. 129, entitled "An act regulating the filing and foreclosure of mechanic's liens upon lands held or occupied under a filing, under any of the land laws of the United States," the words "filing and foreclosure" mean the doing of everything necessary to perfecting the lien, and no lien can be filed or foreclosed that has not been, or is not, created by some provision of law, as there is nothing to file or foreclose. The broadest meaning that the words are susceptible of may be given them, and the law will not be declared invalid because the words are not well selected. The word 'filing' is commonly used as in reference to lien, indicating the doing of everything essential to perfecting a claim for a lien authorized by law, and not the mere leaving of the affidavit and account in the office of the clerk. The technical meaning of the words should not be taken as limiting the provisions of the law. The choice of the language is a matter of legislative discretion, and courts will not nullify the legislative will because the language

is not well chosen, if upon any reasonable view the language expresses the subject. *Powers Elevator Co. v. Pottner*, 113 N. W. 703, 704, 16 N. D. 359.

#### Entering distinguished

"Entering" is the word ordinarily used for the commencement of a proceeding on the records of the superior court, while "filing" is more commonly used in reference to papers presented for action before the county commissioners. *Cheney v. Inhabitants of Dover*, 91 N. E. 1005, 1006, 205 Mass. 501.

#### Indorsement required

The "filing" of a paper is the delivery of it to the officer at his office, to be kept by him as a paper on file, and the file mark of the officer is evidence of "filing," but it is not the essential element of the act. *Mastersson v. Southern R. Co.* (Ind. App.) 82 N. E. 1021, 1023; *Bade v. Hibberd*, 93 Pac. 364, 365, 50 Or. 501 (citing *McDonald v. Crusen*, 2 Or. 258; *Conant's Estate*, 73 Pac. 1018, 43 Or. 530); *Goodwin v. Bickford*, 93 Pac. 548, 551, 20 Okl. 91, 129 Am. St. Rep. 729 (citing *Wescott v. Eccles*, 2 Pac. 525, 3 Utah, 261; *City of Pekin v. Dunkelburg*, 40 Ill. App. 184); *Todd v. Peterson*, 81 Pac. 878, 880, 13 Wyo. 513; *Day & Congleton Lumber Co. v. Mack*, 69 S. W. 712, 714, 139 Ky. 587.

The act of leaving or depositing a paper with the clerk to be made a part of the record constituted "filing," and it was the duty of the clerk to mark it filed. The fact that he did not do so until long after did not invalidate the previous filing. A paper is "filed" when delivered to the proper officer and by him received to be kept on file. *Eureka Stone Co. v. Knight*, 100 S. W. 878, 881, 82 Ark. 164.

Delivery of a bill in a chancery suit to the clerk in his office is a filing of the bill, though no indorsement on it of filing is made. *Darnell v. Flynn*, 71 S. E. 16, 18, 69 W. Va. 146.

Delivery to the clerk of the board of supervisors of the affidavit of publication of the resolution ordering prohibition was a sufficient "filing with the clerk" under Comp. Laws, § 5425, relating to local option, and requiring such affidavit to be filed with the clerk, but not in express terms requiring him to indorse anything on it. *People v. Fisch*, 130 N. W. 341, 164 Mich. 680.

The "filing" of a paper required by law to be filed does not consist in the indorsement of the fact that it has been filed, made upon the paper by the officer with whom it is filed. If the paper is delivered by the person, whose duty it is to file the same, to the proper officer, and by him received and kept on file in the proper place, it constitutes a "filing" within the legal meaning of the word. A record reciting that instructions given "are now ordered filed and made a part of the

record in this cause, and the same are in the words and figures following, to wit" (setting forth the instructions), sufficiently discloses that the instructions were properly filed and are part of the record on appeal. *Hammond, W. & E. C. Electric Ry. Co. v. Antonia*, 83 N. E. 766, 769, 41 Ind. App. 335.

A notice of appeal from an order of the town supervisors laying out a highway was delivered to the town clerk, but not at his office, and by him, within the time allowed by statute for filing it, taken to his office and deposited among the official records in his custody, but no certificate of filing was indorsed thereon. Held, a sufficient "filing" within Rev. Laws 1905, § 1188. *Burkleo v. Town Board of Baytown*, 121 N. W. 874, 875, 108 Minn. 224.

Where a decree of the orphans' court on a claim against an insolvent estate was signed December 2d, which was not a regular court date and was marked as "filed" as of that date by "G. L., Late Surrogate," G. L. not then being surrogate, and on December 17th, the actual surrogate found it and marked it "filed" as of that date, the decree was "filed" on the date when the actual surrogate marked it. *Young v. Young*, 32 N. J. Eq. 275, 276.

Under a statute requiring a county surveyor to make a written report of a survey, and file it in his office, and allowing an appeal therefrom to be taken within 30 days from the time the report is filed, such report, as to any person having knowledge of the facts, is deemed to be filed from the time it is completed, dated, certified to be correct, and signed by the surveyor, and placed among the reports of a similar nature in his office, subject to public inspection, although at the request of the attorney for such person he omits at that time to indorse it as filed, and afterwards places an indorsement upon it indicating that it was filed a few days later. *Anderson v. Roberts*, 119 Pac. 354, 355, 86 Kan. 175.

Under a statute requiring the tax collector to file all conveyances of land to individuals in the chancery clerk's office, to remain there for two years from the sale unless the land be sooner redeemed, it is not essential that the clerk shall mark a deed "Filed" that it may remain a memorial by which it may be ascertained whether the time for redemption has expired, since the time for redemption is two years from the day of sale, and not from the day of filing; the purpose of the statutory requirement being merely to lodge the deed in proper custody. It is plain that the intent was that where the requirement is simply to lodge for record, or to deliver to the clerk, recording was designed, and it was not intended that there should be necessarily a marking of the paper "filed" by the clerk. *Brannon v. Pringle*, 47 South. 674, 94 Miss. 215.

**Part of record imported**

The "file" in a cause includes original subpoenas issued for witnesses and all papers belonging to the cause. *Jackson v. Mobley*, 47 South. 590, 593, 157 Ala. 408.

**Recording**

A mortgage is "filed," within Wilson's Rev. & Ann. St. 1903, § 1284, when it is delivered to the proper officer and by him received for the purpose of being recorded, and the neglect or mistake of the register of deeds in recording the instrument does not affect the mortgagee. *Covington v. Fisher*, 97 Pac. 615, 617, 22 Okl. 207.

Under B. & C. Comp. § 1367, requiring pleas in criminal cases to be oral and entered on the journal, where the transcript on appeal in a criminal case showed only that a plea of former jeopardy was "filed" and overruled, and did not show any order that the plea be recorded, it sufficiently appeared that the plea was not formally read to the court, and, for that reason, was not ordered to be recorded, and hence was not properly part of the record; the word "filed" importing only that the paper was placed in the official custody of the clerk who probably indorsed as filed with the date of reception, signing his name thereto, and retained it in his office for inspection by interested parties. *State v. Holloway*, 110 Pac. 397, 398, 57 Or. 162.

**Retention by officer required**

A referee's report which is presented to the clerk and marked "Filed" within the time allowed for its filing, and then withdrawn and retained until after the expiration of such time in order to have it bound, is "filed" in time. *Poole v. Polindexter*, 83 Pac. 126, 127, 72 Kan. 654.

That on the day next following the date of the certificate as to filing of the mortgage for record, as shown by uncontradicted evidence, the clerk permitted the mortgagee to take the mortgage out of the clerk's office to that of a notary public, and procure before such notary the affidavit of the subscribing witness proving the execution of the mortgage, and then return the affidavit and mortgage to the clerk's office for record, would not render the mortgage inadmissible in evidence. The return of the mortgage to the office of the clerk of the superior court under the circumstances just enumerated would, in effect, amount to "filing" for record. *Albany Nat. Bank v. Georgia Banking Co.*, 74 S. E. 267, 137 Ga. 776.

**Filing of particular instruments**

Where a written building contract provides that the building shall be constructed in accordance with plans and specifications, referred to as attached or as kept in the office of an architect named therein, such plans, etc., are an essential part of the contract, and must be filed with it, in order to constitute a "filing of the contract," within Code Civ.

Proc. § 1183, which will protect the property from mechanics' liens. *Burnett v. Glas*, 97 Pac. 423, 425, 154 Cal. 249.

Act June 2, 1887 (P. L. 306), relating to proceedings for condemnation of a turnpike road, provides (section 6) that exceptions may be filed to the report of the jury of view within 30 days from filing of such report, and the court, after considering such exceptions, may refer the report back to the jury or may set it aside or confirm it, and if no exceptions are filed to any such report, unless appeal is taken as provided for in section 8 (and in such case the final confirmation of the proceedings shall await the result of the appeal from the assessment within 30 days from the filing thereof), then such report shall be confirmed or dismissed by the court. Section 8 provides that an appeal to the common pleas for the assessment of damages may be taken within 30 days after the approval of the report. Held, that exceptions may be filed within 30 days from the time the report is filed, and if the exceptions filed are withdrawn or dismissed and the report is not referred back to the jury or set aside, it is to be marked "Confirmed nisi," which is equivalent to the approval referred to in section 8, and another 30 days is then given to allow time for an appeal to the common pleas, and if no appeal is taken within such time the report is to be finally confirmed or disapproved at the end thereof, and if an appeal is taken the final confirmation cannot take place until 30 days after the result of the appeal is remitted from the common pleas and filed in the quarter sessions, and if no exceptions are filed or appeal taken to the common pleas within the times fixed by the act, the court may of its own motion confirm or dismiss the report; the phrase "filing thereof" within the parentheses in the sixth section referring to the filing in the quarter sessions of the result of the appeal from the assessment when it is remitted from the common pleas. *Chestnut Hill & Spring House Turnpike Road Co. v. Montgomery County*, 76 Atl. 726, 727, 228 Pa. 1.

**FILING AWAY SUIT**

"Filed away" is used by the courts with reference to suits, as synonymous with "discontinued" or "stricken" from the docket, so that an order that the case be "filed away" amounted to a final order of dismissal. *Alkman v. South (Ky.)* 97 S. W. 4, 5.

A recital in a divorce decree that a part of the judgment for alimony was paid by defendant, and, that the case was "filed away," was, in effect, keeping control of the case to be redocketed upon notice; the parties not having been dismissed. *Sebastian v. Rose*, 122 S. W. 120, 122, 135 Ky. 197.

**FILIATION**

"Filiation," which is the relation of parent and child, may be established by proof

that the child has always borne the name of the father to whom he claims to belong, and that the father has treated him as his child. *Lay v. Fuller* (Ala.) 59 So. 609, 610.

## FILIUS NULLIUS

See Illegitimate Child.

## FILL

See Duly Filled; Stop to Fill.  
As structure, see Structure.

A "fill" in connection with the grading of streets is the deposit of dirt on the strip taken as a street. In re *Sedgley Ave.*, 66 Atl. 546, 547, 217 Pa. 313.

## FILLED STOPE

A "filled stope" is a room in a mine where the waste rock taken from the vein is left on the floor, so as to raise the floor as the work proceeds, in order to keep it at all times conveniently close to the roof, in order that the miner, while standing on the floor, may drill holes in the roof and blast out the material; the term "stope" being defined as the working above or below a level where the mass of the ore body is broken—also an excavation for the extraction of ore, as distinguished from a shaft, drift, airway, etc. *Creede United Mines Co. v. Hawman*, 127 Pac. 924, 926, 23 Colo. App. 125.

## FILLER TOBACCO

Tobacco neither suitable for wrappers nor fillers, but which may be used as a filler in the manufacture of a small size of tobacco cigarettes, is not "leaf tobacco," within the paragraph of the Tariff Act defining "wrapper tobacco" as that quality of leaf tobacco suitable for cigar wrappers, and "filler tobacco" as all other leaf tobacco, and is properly dutiable as "all other tobacco not specially provided for." *Dominguez Bros. v. United States*, 122 Fed. 556, 557.

Under the paragraph of the Tariff Act imposing duties upon tobacco and defining "wrapper tobacco" as that quality of leaf tobacco which is suitable for cigar wrappers, and "filler tobacco" as all other leaf tobacco, the importer is limited to a choice between the terms "wrapper" and "filler" tobacco, and it was improper for the importer to describe his importation as mixed tobacco. *United States v. Seventy-Five Bales of Tobacco*, 147 Fed. 127, 132, 77 C. C. A. 353.

## FILLING

The word "filling," in its ordinary sense, means something that fills. In weaving it is synonymous with weft, and relates to the threads that fill the interstices in the warp, and thus form the fabric. Such threads run from edge to edge or from selvage to selvage of the fabric. It is therefore appropriate to refer to Jacquard goods as having "two or more colors in the filling" as the figures in

such goods are composed strictly of filling threads, running from one edge to the other, filling the wrap and constituting an essential part of the fabric, though serving the purpose of ornament as well. *Wimpfheimer v. United States*, 142 Fed. 849, 851.

## FILM

See Tape Film.

## FILTER

Filtering paper that has been cut into disks and made ready for use in filtering is not by this treatment removed from the provision in the Tariff Act for "papers commercially known as \* \* \* 'filtering paper,' \* \* \* made up in copying books, reams, or in any other form." *Alexander Murphy & Co. v. United States*, 148 Fed. 336.

## FINAL

See, also, Finally.

"Final" means last; conclusive; pertaining to the end. *Saylor v. Duel*, 86 N. E. 119, 121, 236 Ill. 429, 19 L. R. A. (N. S.) 377.

The word "final," as used in reference to judgments, may denote the essential character of the judgment and not the mere consequences thereof, and the word is so used in Acts 1907, p. 237, c. 148, relating to the jurisdiction of the Supreme Court and of the Appellate Court. *Indianapolis Union R. Co. v. Waddington*, 82 N. E. 1030, 1032, 169 Ind. 448.

### As conclusive

The word "final," in an agreement for arbitration which provided that the controversy between the parties under the arbitration agreement should be submitted to the circuit court, and that its decision should be final, necessarily implies that the decision of the circuit court shall not be reviewed by another court. *Hoste v. Dalton*, 100 N. W. 750, 751, 137 Mich. 522.

The word "final," in Laws 1894, c. 556, tit. 15, art. 1, §§ 4-7, providing that the decision of a county judge, in a proceeding by a school district trustee to compel reimbursement for expenses incurred by him in litigation affecting the interests of the district, allowing or disallowing the claim, shall be final, was merely intended to give the order the effect of a final order in a special proceeding, and, like other orders of that class, it is subject to review. *Anderson v. School Dist. No. 15, of Town of Cortlandt*, 85 N. Y. Supp. 943, 945, 89 App. Div. 231.

The word "final," in Laws 1907, p. 95, c. 5613 (dealing with primary elections), §§ 7, 8, making the decisions and rulings of the county, senatorial, and state committees final, is not to be construed as final in the sense that such decisions and rulings are absolute to



the exclusion of judicial inquiry, so as to make such sections obnoxious to Const. art. 5, § 35, providing that no courts other than therein specified shall be established; but the word "final" may be understood to mean that such decisions and rulings when made are final as to the committee making them, so that there shall be no delay in the canvass of the vote. *D'Alemberte v. State ex rel. Mays*, 47 South. 489, 497, 56 Fla. 162.

In the provision of section 10 of the immigration act (32 Stat. 1216) making the decision of the board of special inquiry based upon the certificate of the examining medical officer final as to the rejection of aliens affected with a loathsome or dangerous contagious disease, the word "final" is not used in such broad sense as to deprive an alien so rejected of the right of appeal unqualifiedly given by section 25 of the act, or of the right to invoke the provisions of section 37, relating to the wife and children of a naturalized alien, in a case to which such section is applicable. *Rodgers v. United States ex rel. Cachigan*, 157 Fed. 381, 385, 85 C. C. A. 79.

In a statute providing that the hearing on petition to the district court for appointment of a person to distribute the waters of a partnership ditch may be before the court, the judge thereof, or a district court commissioner, and that the decision so rendered shall be final unless appeal is taken to the district court, the words "the decision so rendered shall be final" do not mean that the decision shall be final as distinguished from an interlocutory order, but final in the sense that there shall be no further appeal. *Mau v. Stoner*, 83 Pac. 218, 221, 14 Wyo. 183.

#### FINAL ACCOUNT

See Decision and Decree Allowing a Final Account.

#### FINAL AND CONCLUSIVE

According to the great weight of authority, the words "final and conclusive," when used in reference to the decisions of inferior courts, indicate a final and conclusive determination of the litigation and the further right of appeal; the term not defining the character of the judgment. *Mau v. Stoner*, 83 Pac. 218, 221, 14 Wyo. 183.

The intent of the Customs Administrative Act, providing that decisions by the Board of General Appraisers in reappraisal cases shall be "final and conclusive," is that such decisions shall not be open to judicial review, except to inquire whether the appraisers have exceeded the authority conferred upon them by law or have otherwise acted illegally or fraudulently; and where there is no charge that the board acted illegally in denying the importers a hearing and opportunity to produce testimony, and

there is some evidence to support the board's conclusions as to value, its reappraisal is conclusive. *Grubnau v. United States*, 176 Fed. 904, 906, 100 C. C. A. 374.

The phrase "final and conclusive," as used in a statute declaring that the judgment of county court in proceedings to modify grades or streets on the second report of commissioners shall be final and conclusive, means that the judgment shall be final and conclusive for all purposes whatsoever, and shall not be subject to appeal, but shall end the litigation, and that it shall not be reviewed by the county court except by motion for a new trial. *Appeal of Houghton*, 42 Cal. 35, 55.

The words "final and conclusive," as used in a statute declaring orders of the county court made in special proceedings appealed from a decision of a town supervisor "final and conclusive," mean that there should be no appeal from the order. In *re Village of Cedarhurst*, 106 N. Y. Supp. 275, 276, 121 App. Div. 576 (citing *In re Commissioners of Central Park*, 50 N. Y. 493; *New York Cent. R. Co. v. Marvin*, 11 N. Y. 276; *In re Canal Street*, 12 N. Y. 406; *King v. City of New York*, 36 N. Y. 182, 187; *Matter of Delaware & H. Canal Co.*, 69 N. Y. 209).

#### As subject to inquiry

The words "final and conclusive," as used in a benefit certificate providing that the decision of the supreme court of the order shall be "final and conclusive" as to the legal liability of the order, is intended only to mark the distinction between the effect of the decision of the supreme court of the order and that of its other courts and not to exclude the jurisdiction of the legal tribunals. *Gilroy v. Supreme Court, I. O. F.*, 67 Atl. 1037, 1039, 75 N. J. Law, 584, 14 L. R. A. (N. S.) 632.

The provision in the landlord and tenant law that a judgment of the justices of the common pleas shall be "final and conclusive" will not preclude a writ of error from the Supreme Court. *Clark v. Patterson (Pa.)* 6 Bin. 128.

The term "final and conclusive," as used in a statute authorizing a hearing by the council of a city in case of an election contest, and providing that the council's decision shall be final and conclusive, means that the action and decision of the council shall not be reviewable so far as the merits are concerned, but not that it may not be reviewed to the extent of ascertaining whether the council acted in excess of its jurisdiction or exercised the same contrary to law, and does not preclude the exercise by the Superior Court of its constitutional right to review the proceedings by certiorari in matters jurisdictionable. *Rash v. Allen (Del.)* 76 Atl. 370, 376, 1 Boyce, 444.

**FINAL CONFIRMATION**

The final confirmation to which the act of Congress of 1851 refers is the final adjudication of the tribunals of the United States upon the validity of the title of the claimant under the Mexican grant. Until the survey which follows such adjudication is made and approved, the title is not definitely confirmed to any particular premises. *Davis v. Davis*, 26 Cal. 23, 46, 85 Am. Dec. 157 (citing *Johnson v. Van Dyke*, 20 Cal. 228; *Richardson v. Williamson*, 24 Cal. 289).

**FINAL DECISION**

See, also, Final Decree or Judgment; Final Order.

The term "final decision," as used in Judiciary Act, § 6, 26 Stat. 828, authorizing the review of a final decision on a writ of error, etc., is equivalent to the terms "final decree," or "final judgment," used in the statutes preceding the judiciary act. *Cassatt v. Mitchell Coal & Coke Co.*, 150 Fed. 32, 34, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; *Same v. Pennsylvania Coal & Coke Co.*, 150 Fed. 48, 81 C. C. A. 97; *Same v. Webster Coal & Coke Co.*, Id.

A decision of probate court denying an application for an order requiring an additional inventory of property claimed to belong to the estate, but omitted from the inventory filed, is a "final decision" of a matter arising under the jurisdiction of that court, and is appealable. *Dobson v. Holmes*, 112 Pac. 131, 132, 83 Kan. 476 (citing *Weston v. City Council of Charleston*, 2 Pet. [27 U. S.] 449, 464, 7 L. Ed. 481).

A decision of a circuit court of appeals which affirmed a ruling of the bankruptcy court, made in the course of the determination of an issue as to the alleged bankruptcy, upon a subordinate issue as to whether or not the petitioning creditors held "provable" claims, is not a final decision allowing or rejecting a claim within the meaning of the provisions of the bankrupt act governing appeals to the federal Supreme Court. *J. W. Calnan Co. v. Doherty*, 32 Sup. Ct. 460, 461, 224 U. S. 145, 56 L. Ed. 702.

The words "final decisions," as used in Act March 3, 1891, c. 517, § 6, cl. 1, 26 Stat. 828, which provides that the Circuit Courts of Appeal established by the act shall exercise appellate jurisdiction by appeal or by writ of error to review final decisions in the District Court and the existing Circuit Courts in all cases other than those provided by law, do not include an order denying the application of one not a party for leave to intervene, when discretionary with the court, nor an order refusing to entertain an appeal from the decision of receivers with reference to proof of a claim before them, where it was discretionary, and did not deprive the claimant of any substantial right. *Land Ti-*

*tle & Trust Co. v. Asphalt Co. of America*, 127 Fed. 1, 20, 62 C. C. A. 23.

A decision which finally determines the rights of the parties to secure in that suit the relief they seek is a "final decision" within the act creating the Circuit Courts of Appeal, though it does not bar another action or proceeding for the same cause. It therefore includes an order of dismissal of a petition for an adjudication in bankruptcy. *Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 73, 80 C. C. A. 25.

An order of the district court dismissing an action appealed from a justice's court is a "final decision," disposing of the action within Rev. Codes, § 6784, providing that an order from which an appeal may be taken shall be deemed to have been excepted to without bill of exceptions. *Mettler v. Adamson*, 99 Pac. 441, 443, 38 Mont. 198.

In Civ. Code Prac. § 177, providing that a defendant, against whom an order of arrest has been obtained, may, at any time before judgment, etc., apply to vacate the order, or to reduce the amount of bail, with notice to the plaintiff, and, if satisfied that the bail is too large, or ought not to have been required, the court, or judge, may vacate the order of arrest, or reduce the amount of bail, and the decision of the motion shall be "final in the action," the words "the decision of the motion shall be final in the action," means final in the sense of ending the matter, instead of final in the sense of being an appealable order. *Porter v. Griffin*, 136 S. W. 130, 131, 143 Ky. 138.

Const. art. 7, § 6, provides that "the Supreme Court shall have jurisdiction only to revise the final decisions of the circuit courts." B. & C. Comp. § 547, as amended by Laws 1907, p. 313, c. 162, § 6, provides that "a judgment or decree may be reviewed as prescribed in this chapter and not otherwise. An order affecting a substantial right and which in effect determines the action or suit so as to prevent a judgment or decree therein, \* \* \* for the purpose of being reviewed, shall be deemed a judgment or decree." Section 548 provides that "any party to a judgment or decree other than by confession or for want of an answer, may appeal therefrom." One adjudged a spendthrift and placed under guardianship married in another state without the guardian's consent, returned, and was sued for divorce; the guardian being made a defendant so as to subject the ward's estate to the payment of suit money and alimony. The court ordered defendants to pay a certain amount as suit money and a specified sum monthly as temporary alimony pending the suit. Held, that as against the guardian, who has no personal interest in the divorce litigation and no right to appeal from the final decree in the suit, the order is a "final decision," so as to be appealable. *Sturgis v. Sturgis*, 93 Pac.

696, 698, 51 Or. 10, 15 L. R. A. (N. S.) 1034, 131 Am. St. Rep. 724.

# **FINAL DECREE OR JUDGMENT**

See, also, Final Order; Interlocutory Judgment.

A "final decree" which may be reviewed on appeal or writ of error is one settling all matters in litigation within the pleadings, so that an affirmance will end the suit and leave nothing for the trial court but the execution of the decree. *Maas v. Lonstorf*, 166 Fed. 41, 43, 91 C. C. A. 627; *Macfarland v. Brown*, 23 Sup. Ct. 105, 107, 187 U. S. 239, 47 L. Ed. 159 (quoting and adopting definition in *Bostwick v. Brinkerhoff*, 1 Sup. Ct. 15, 106 U. S. 3, 27 L. Ed. 73).

A decree is "final" when the whole controversy between the parties has been considered, all "equities reserved" have been disposed of, and nothing remains to be done but to carry it into execution. *Crockett v. Crockett*, 106 N. W. 944, 946, 132 Iowa, 388 (citing *Fletcher*, Equity Pl. & Pr. § 700).

Generally a judgment disposing of the entire controversy is "final." *State ex rel. Potter v. Riley*, 118 S. W. 647, 655, 219 Mo. 667.

A judgment is not "final" unless it disposes of the cause both as to the subject-matter and the parties so far as the court before which it is pending has power to do so. *Ragle v. Dedman*, 91 N. E. 615, 616, 45 Ind. App. 693; *Starkey v. Starkey*, 76 N. E. 876, 877, 166 Ind. 140 (citing *Keller v. Jordan*, 46 N. E. 343, 147 Ind. 113, 115; *Champ v. Kendrick*, 30 N. E. 635, 130 Ind. 545, 546); *Terre Haute & L. R. Co. v. Indianapolis & N. W. Traction Co.*, 78 N. E. 661, 662, 167 Ind. 193; *Barnes v. Wagener*, 82 N. E. 1037, 1038, 169 Ind. 511; *State v. Derry*, 85 N. E. 765, 769, 171 Ind. 18, 131 Am. St. Rep. 237; *Mak-Saw-Ba Club v. Coffin*, 82 N. E. 461, 462, 169 Ind. 204 (citing *Elliot*, App. Proc. § 83; *Galentine v. Brubaker*, 46 N. E. 903, 147 Ind. 458; *Pfeiffer v. Crane*, 89 Ind. 485); *Wehmeier v. Mercantile Banking Co.*, 97 N. E. 558, 559, 49 Ind. App. 454.

The test in determining whether a judgment is "final" is whether it terminates a litigation between the parties on the merits. *State ex rel. Smith v. Superior Court for Cowlitz County*, 128 Pac. 648, 649, 71 Wash. 354.

As a general rule, a decree, to be final within the meaning of the statute authorizing appeals from final decrees in equity cases, must terminate the litigation on the merits, so that, in case of affirmance, the court below will have nothing to do but execute the decree already rendered. *McAuslan v. McAuslan*, 83 Atl. 837, 840, 34 R. I. 462.

A judgment or decree which fixes finally the rights of the parties in the action in which it is rendered, and leaves nothing

further to be done before such rights are determined, is final. *Burlington & C. R. Co. v. Colorado Eastern R. Co.*, 100 Pac. 607, 609, 45 Colo. 222, 16 Ann. Cas. 1002; *County Court of City and County of Denver v. Eagle Rock Gold Mining & Reduction Co.*, 115 Pac. 706, 708, 50 Colo. 365 (citing 3 Words and Phrases, p. 2776).

A judgment is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce, by execution, what has been determined. *Doudell v. Shoo*, 114 Pac. 579, 581, 159 Cal. 448.

A "final judgment" from which an appeal may be taken is a determination of the rights of a litigant with respect to his suit; an adjudication which finally disposes of the case before the court. *Appeal of Norton*, 78 Atl. 587, 590, 84 Conn. 24.

A judgment is final, for the purpose of an appeal, when it determines the rights of the parties. *Lemmons v. Huber*, 77 Pac. 836, 837, 45 Or. 282.

Considered with reference to the right of appeal, a "final judgment" is one which decides "all the points in controversy between the parties," and which, disposing of all the issues not previously disposed of by interlocutory judgments, is the last judgment rendered in the case. *Bossler's Heirs v. Hollingsworth & Jackson*, 41 South. 553, 555, 117 La. 221.

If a judgment is not one that disposes of the whole case on its merits, it is not final. *Heinze v. Butte & B. Consol. Min. Co.*, 129 Fed. 337, 340, 64 C. C. A. 15.

"Judgments" are generally defined to be 'final,' for the purpose of basing an action thereon, when the judgment is 'a definitive and personal judgment for the payment of money, final in its character, and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement.' Though an action on a decree for alimony or maintenance rendered in one state may be maintained in another state, if the amount payable is fixed and presently due, yet a decree for alimony or maintenance becoming due in the future and payable in installments is not a final decree enforceable in another state, within Const. U. S. requiring full faith and credit to be given in each state to the judicial proceedings of every other state, until the court which rendered it fixes the specific amount due, either in some proper proceeding in the original action or by an independent action. *Hunt v. Monroe*, 91 Pac. 269, 271, 32 Utah, 428, 11 L. R. A. (N. S.) 249 (quoting and adopting 23 Cyc. p. 1503).

There can be but one final judgment in a cause. *Doudell v. Shoo*, 114 Pac. 579, 582, 159 Cal. 448.

A final judgment, within Gen. St. 1906, § 1691, providing that writs of error shall lie only from final judgments, with a certain exception, is a judgment that adjudicates the merits of the cause or disposes of the action. *Graves v. J. M. Harris & Bro.*, 54 South. 390, 61 Fla. 254.

A "final judgment," appealable under Ky. St. § 950, is a judgment which disposes of the merits of the case and settles the rights of the parties under the issues raised by the pleadings, or which disposes of the case and places the parties out of court. *Trade Discount Co. v. J. R. Cox & Co.*, 136 S. W. 901, 143 Ky. 515.

A "final judgment" is one that puts an end to the action, by declaring either that plaintiff is or is not entitled to recover, and which by its own force grants the relief to which it finds the parties entitled. Thus a judgment in a suit by an administrator to settle the estate directing the administrator to assign to the widow all of certain personalty, after paying claims and expenses, one-third thereof absolutely, and two-thirds for life, remainder to persons named, and further ordering the widow to execute bond to the remainderman to account for such two-thirds interest, and reciting that the widow excepted to such orders, is not final so as to be appealable. *Harding v. Harding*, 140 S. W. 533, 535, 145 Ky. 315.

Under Code Civ. Proc. Mont. § 1000, a "judgment" is the final determination of the rights of the parties in an action or proceeding. There is no distinction between a "judgment" and a "final judgment." *Forrester & MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 74 Pac. 1088, 1093, 29 Mont. 397.

"The term 'final judgment' is generally used as a synonym for an appealable order; that is, one which not only affects a substantial right, but one which in effect determines the action in the court pronouncing the judgment." But the term "final judgment" as used in the forcible entry and detainer act, providing that if judgment be rendered against defendant no appeal shall be taken by him until he shall give an undertaking for the payment of twice the rental value of the property from the rendition of the judgment until final judgment in the action, refers to the final judgment on appeal, either in the circuit or Supreme Court, and hence the undertaking given on appeal from a justice's judgment to the circuit court is effectual on further appeal to the Supreme Court and no further undertaking is necessary. *Wolfer v. Hurst*, 80 Pac. 419, 420, 47 Or. 156, 8 Ann. Cas. 725.

Rev. Laws, c. 128, § 86, relating to registration and confirmation of land titles, providing that "the applicant may withdraw his application at any time before 'final decree' upon terms to be determined by the court,"

when construed with other terms of the chapter, as set forth in sections 12, 13, 37-40, providing in brief that after a determination of adverse interests in the land court an appeal lies to the superior and supreme judicial courts, and that the decision on appeal will be certified to the land court, which will be entered as the final decree, on which the certificate of title issues, refers to the "final decree" after appeal, and not to the confirmation of the title by the land court in the first instance; and this is so especially since it was the evident intention of the Legislature to follow only so much of the Torrens act, as found in New Zealand, Western Australia, Victoria, and Tasmania, after which the Torrens act of Massachusetts was patterned, as made the withdrawal absolute at any time before the issuance of the certificate of title, which under the Massachusetts act is the final decree; the certificate issuing as matter of course. *McQuesten v. Attorney General*, 83 N. E. 1037, 1038, 198 Mass. 172.

A bill was brought against the beneficiaries of a decedent to impress a trust on the devised property. A final decree was rendered against one defendant charging her share with the entire amount, but the decree did not dismiss the bill against any of the defendants, nor was there any reference therein to the rights of the other defendants. Upon appeal by the one defendant alone, the charge placed upon her share was diminished, the decree reversed, and the lower court entered a decree on remittitur. Held, that the decree on remittitur was "final," as to the character and extent of the appealing defendant's liability. As to the defendants not parties to the appeal, the decree on remittitur was only interlocutory. The decree was not "final" in favor of the other defendants. *Powell v. Yearance*, 67 Atl. 892, 895, 73 N. J. Eq. 117.

An employers' liability policy provided that the insurer would, at its own cost, defend actions by employes, but that its liability for injury to any person should not exceed \$5,000, and that no action should lie against it for any loss or expense, unless brought by the insured to reimburse him for loss sustained and paid in money under a final judgment. The insurer appealed from a judgment against the employer for less than \$5,000. Held, that the judgment was a "final judgment," within the insurance policy; and on affirmance the insurer was liable for interest on the judgment, though the total amount thereof exceeded \$5,000. *Cannon Mfg. Co. v. Employers' Indemnity Co.*, 76 S. E. 536, 537, 161 N. C. 19.

#### As conclusive

"A judgment of a probate court finally settling and distributing an estate and discharging an executor is a 'final judgment,'" and as such cannot be collaterally attacked for fraud. *State ex rel. Gray v. Carroll*, 74

S. W. 468, 469, 101 Mo. App. 110 (quoting and adopting the definition in *Smith v. Hauger*, 51 S. W. 1052, 150 Mo. 437. Citing *In re Judy's Estate*, 65 S. W. 993, 166 Mo. 13; *Green v. Pittman*, 27 S. W. 391, 124 Mo. 372; *Covington v. Chamblin*, 57 S. W. 728, 156 Mo. 574; *Patterson v. Booth*, 15 S. W. 543, 103 Mo. 402; *Nelson v. Barnett*, 27 S. W. 520, 123 Mo. 564; *Howell v. Jump*, 41 S. W. 976, 140 Mo. 441; *State ex rel. Pountain v. Gray*, 17 S. W. 500, 106 Mo. 526; *McClanahan v. West*, 13 S. W. 674, 100 Mo. 309; *Camden v. Plain*, 4 S. W. 86, 91 Mo. 117; *Miller v. Major*, 67 Mo. 247; *Sheetz v. Kirtley*, 62 Mo. 417; *Garnier v. Tucker*, 61 Mo. 427; *Woodworth v. Woodworth*, 70 Mo. 601; *State, to Use of Tourville, v. Roland*, 23 Mo. 95).

The decree in a suit to construe a will, made after the decree construing it as giving the widow only a life estate subject to be terminated by her remarrying, giving the widow, as prayed for in her petition, a lien on the estate for money advanced by her to the executor, and providing that such lien may be enforced "in this cause whenever she may be advised so to do," and concluding, "all matters in this cause having been finally disposed of, except the said house and lot in which the widow has a life estate, all the rest of the estate and the money advanced by the widow to the executor having been used to pay the debts of the estate, it is ordered that the cause be stricken from the docket, with leave reserved to any party to reinstate it and seek any proper relief at the foot of this decree," is a "final decree," which, with the prior decree, became conclusive, in the absence of a timely appeal or proceedings to set it aside. *Stout v. Stout*, 51 S. E. 833, 834, 104 Va. 480.

#### Same—As to court rendering decision

A "final judgment" from which an appeal will lie is one that either terminates the action itself, or operates to divest some right in such a manner as to put it beyond the power of the court making the order to place the parties in their former condition after the expiration of the term. *City of Batesville v. Ball*, 140 S. W. 712, 714, 100 Ark. 496; *McKinney v. Thomson* (Ky.) 69 S. W. 707, 708 (citing *Helm v. Short*, 7 Bush [70 Ky.] 624; *Turner v. Browder*, 18 B. Mon. [57 Ky.] 826; *Winn v. Carter Dry Goods Co.*, 43 S. W. 436, 102 Ky. 370).

A judgment against a receiver which disposes of all the parties and issues involved, and provides for its execution, is a "final judgment" which cannot be vacated at a subsequent term by motion or plea in intervention, though the suit in which it is rendered is retained upon the docket for the purpose of carrying the judgment into effect and winding up the receivership. *Malone v. Johnson*, 101 S. W. 503, 505, 45 Tex. Civ. App. 604.

A final judgment cannot be set aside after the term has adjourned, except for errors

appearing on the record, whether the adjournment be of the term finally or to a future day, pursuant to Code 1906, § 3023. A judgment rendered by a circuit court at a term at which all of the business has not been dispatched before the court, is, by an order entered on the record, adjourned to an "adjourned term" to begin on a day named in the order, is a final judgment upon such adjournment. *Helms v. Greenbrier Valley Cold Storage Co.*, 63 S. E. 1089, 1091, 65 W. Va. 203.

"An 'appealable judgment' is one which concludes the parties as regards the subject matter in controversy in the tribunal pronouncing it." Under B. & C. Comp. § 547, as amended by Laws 1907, p. 313, c. 162, limiting appeals to orders affecting substantial rights and in effect determining suits, etc., an order, in a suit by a taxpayer against a former Secretary of State to require him to account for moneys received, denying defendant's motion to dismiss on demurrer being sustained to the complaint for plaintiff's incapacity to sue, and granting substitution of the state as plaintiff, was not appealable; the sustaining of the demurrer and the substitution under B. & C. Comp. § 101, providing that if a demurrer be sustained the court may allow an amendment, and section 102, authorizing the name of a party to be added or stricken before trial, not being final as to the suit. *Sears v. Dunbar*, 91 Pac. 145, 147, 50 Or. 36 (quoting and adopting the definition in *Basche v. Pringle*, 26 Pac. 863, 21 Or. 24).

#### As decision on matters at issue

Where the complaint described the structure that defendant was proposing to erect, and asked that he be enjoined from erecting the same and from maintaining a nuisance therein as described, and defendant was not proposing to erect any other kind of a structure, or to maintain a nuisance in any other way than that set forth in the pleadings and shown by the evidence, a decree enjoining defendant from erecting the building according to the plans shown by him and the testimony was a final decree on the issues presented, and was appealable. *Cooper v. Whisen*, 130 S. W. 703, 704, 95 Ark. 545.

#### As determination of particular action

"Final judgments" are such as finish the proceedings by declaring that the plaintiff either has or has not entitled himself to the redress he sought and by ascertaining what amount he shall recover. *Elliott v. Mayfield*, 3 Ala. 223, 226 (2 Toml. Law Dict. 238; Bing. Judgm. 2; 3 Bl. Comm. 398).

In Gen. Laws R. I. 1909, c. 60, § 18, giving the right to redeem from a tax sale within one year after the sale or within six months after "final judgment" in any suit in which the validity of the sale is in question, provided the suit be commenced within one year after the sale, the term "final judgment" means a final disposition of the suit to test

the validity of the sale, and is not to receive such strict interpretation as when used in statutes concerning appeals or writs of error, but covers all judgments, whether before or after hearing on the merits, which put an end to the suit whose pendency defers the vesting of an indefeasible title in the purchaser. *Slade v. Rose*, 188 Fed. 749, 751.

#### Decree as to part of parties

A judgment, which fails to dispose of all the parties to the controversy, is not a "final judgment," and no appeal will lie therefrom. *Texas Co. v. Beddingfield*, 114 S. W. 894, 895, 53 Tex. Civ. App. 10 (citing *Mignon v. Brinson*, 11 S. W. 903, 74 Tex. 18; *Whitaker v. Gee*, 61 Tex. 217).

To be appealable as being final, a judgment must dispose of all the parties, as well as the issues raised in the suit. *McKneeley v. Armstrong* (Tex.) 141 S. W. 1003, 1004.

A judgment which in no way disposes of a party made a defendant is not a "final judgment" and is not appealable. But where the petition complained of a corporation as a defendant and alleged that the individual defendants were the sole stockholders of the corporation, which had become defunct, and the judgment disposed of the individuals, the judgment was final as against the objection that it did not dispose of the corporation, and was appealable. *Griffin v. Terry* (Tex.) 124 S. W. 115, 116.

To be final and appealable a judgment must dispose of all the issues as to all the parties, and a judgment entered in favor of three of four plaintiffs, but in no wise disposing of the fourth plaintiff, is not final. A partnership not being a legal entity and being empowered to sue and be sued only in the names of its individual members, a judgment in a suit in which a partnership is a party to be final must either expressly, or by fair implication, dispose of all the members of the plaintiff or defendant firm. *Benge v. Sledge* (Tex.) 132 S. W. 873, 874.

Under Rev. St. 1895, arts. 1283, 1337, providing for interlocutory judgments by default, and declaring that there shall be but one final judgment in a suit, a default judgment against a defendant duly cited, who fails to appear, and which does not dispose of the issue as to a codefendant appearing and obtaining a continuance, is not a "final judgment," and there is no warrant for abstracting it. *Blankenship & Buchanan v. Herring* (Tex.) 132 S. W. 882, 883.

Where a judgment in an action against a surety and the heirs of another surety did not in terms mention the heirs of the deceased surety, but provided that plaintiff take nothing by his suit, it was a "final judgment" for all the defendants within the statute allowing appeals. *Carlton v. Krueger*, 115 S. W. 619, 622, 54 Tex. Civ. App. 48.

Where several actions to enforce mechanics' liens against the same defendant are consolidated, a judgment sustaining a demurrer to the complaint of one of the plaintiffs is a "final judgment" as to him. *Orman v. Crystal, etc., Ry. Co.*, 39 Pac. 434, 435, 5 Colo. App. 493.

A judgment for plaintiff and against a defendant filing a cross-complaint against plaintiff and codefendants, rendered on sustaining a demurrer to the cross-complaint, but without adjudicating the rights of any of the codefendants who had never been defaulted, and who had never answered or pleaded to the cross-complaint is not a "final judgment" and appealable. *Hopp v. Luken*, 89 N. E. 916, 44 Ind. App. 568.

Where a suit was dismissed on demurrer on January 9, 1909, as to all the defendants save one, an appeal granted and the cause continued as to the remaining defendant, and was dismissed as to him on March 26, 1909, the case was still pending in the trial court up to the latter date; and hence an appeal filed within a year from that date was in time. *Ragle v. Dedman*, 91 N. E. 615, 616, 45 Ind. App. 693.

"The refusal of the court to render judgment by default against one of the defendants was not a 'final judgment' from which an appeal would lie." *Carpenter v. Ingram*, 91 S. W. 24, 25, 77 Ark. 299.

#### Decree as to part of questions

A decree dismissing a bill, in so far as relates to one branch only of the controversy between the parties, and that a subordinate one, leaving the principal issue in the case undetermined, is not a "final decree" and is not appealable. *Memphis Keeley Institute v. Leslie E. Keeley Co.*, 144 Fed. 628, 631, 75 C. C. A. 430.

There may be two or more decrees in a suit, each of which is final for purposes of appeal. *Wynn v. Tallapoosa County Bank*, 53 South. 228, 233, 168 Ala. 469.

A judgment which found as to a cross-action by certain defendants that they should recover against another defendant a certain amount less a payment, the amount of which it failed to determine, was not a final judgment from which an appeal would lie, though it disposed of all the other issues. *Farmers' & Mechanics' Nat. Bank of Ft. Worth v. First State Bank of Bangs* (Tex.) 152 S. W. 499, 500.

A judgment which determines the issues involved in six of the seven causes of action is a final judgment and appealable under L. O. L. § 548. *Taffe v. Smyth*, 125 Pac. 308, 311, 62 Or. 227.

In a suit by a bank against the administrator of a deceased cashier for an accounting and to foreclose a lien on his stock and a deposit in the bank, a decree that complain-

ant was entitled to the relief prayed, and referring to the register the ascertainment of the amount due, and a decree confirming his report and the former decree, and decreeing that complainant have and recover of respondent a specified sum and costs, and a lien on the cashier's deposit, as to which a further reference was ordered, to ascertain its amount and interest thereon, and whether dividends had been declared on his stock since his death, are both final so as to support an appeal. *Wynn v. Tallapoosa County Bank*, 53 South. 228, 233, 168 Ala. 469.

A decree finding certain conveyances absolute in form to be in trust, and referring the case to the master for an accounting, is "final" as to the title, so as to justify an appeal pending the accounting. *Stahl v. Stahl*, 77 N. E. 67, 68, 220 Ill. 188.

A "final decree" is one which so far terminates the litigation between the parties on the merits that, in case of affirmance, nothing would remain to be done but to execute the judgment or decree. Where a bill in a Circuit Court set up four distinct causes of action, one for infringement of a patent, one for infringement of a trade-mark, and two for unfair competition, a decree dismissing the bill as to the first three causes of action is a "final decree" thereon, in such sense as to be appealable, although as to the fourth cause of action the bill is sustained and an accounting is directed thereunder. *Scriven v. North*, 134 Fed. 366, 368, 67 C. C. A. 348.

Under Court and Practice Act 1905, § 328, providing that any party aggrieved by a "final decree" of the superior court in equity or proceeding following the course of equity, etc., may appeal to the Supreme Court, in a proceeding to enforce a mechanic's lien, under Gen. Laws 1896, c. 206, and the amendments thereto, a decree "that the petitioner had a legal claim against the property described in the petition at the time of the filing of the petition," etc., and that the cause be referred to a master in the usual form, is final as to the petitioner's right to a lien and appealable. *Robert v. Rousseau*, 67 Atl. 330, 331, 28 R. I. 335.

Where, in an action on an acceptance of a bill of exchange, brought by an assignee of the bill, defendant alleged that the acceptance was procured by fraud, and that plaintiff acquired it with knowledge thereof, after maturity, a verdict that the bill was not transferred until after maturity, but not disposing of the questions of fraud and misrepresentation, and a judgment that defendant recover his costs for the term, and continuing the case, is not final and appealable under Ky. St. § 950 (Russell's St. § 2784). *Trade Discount Co. v. J. R. Cox & Co.*, 136 S. W. 901, 143 Ky. 515.

A judgment in justice's court for plaintiff without disposing of defendant's plea in

reconvention is not a final judgment within Rev. St. 1895, art. 1668, authorizing appeal from final judgments in justice's court to the county court; a final judgment disposing of the entire matter in controversy. *Sapp v. Anderson (Tex.)* 135 S. W. 1068.

The mere entry upon the minutes by the clerk of the Supreme Court of the territory of a decision overruling exceptions taken under Rev. Laws Haw. 1905, § 1862 et seq., which did not bring up the whole case, and called upon the reviewing court merely to pass upon specific questions raised by the bill, does not make such decision a final judgment, so as to be subject to review in the federal Supreme Court. *Cotton v. Territory of Hawaii*, 29 Sup. Ct. 85, 88, 211 U. S. 162, 53 L. Ed. 131.

An attachment was sued out by a creditor against a firm of two members, levied upon sufficient property to make the amount of the debt sought to be collected, and a replevin bond was given, with defendants in attachment as principals and others as sureties. Subsequently an order was taken suggesting the death of one of the principals, and authorizing the case to proceed against the firm and the surviving partner and against the sureties on the replevin bond. A verdict was rendered for plaintiff against one of the principals as surviving partner and in his individual capacity, and against the sureties. A new trial was granted, and upon the second trial the sureties were allowed to intervene, setting up the defense that their risk had been increased, because plaintiff had dismissed one of the principal defendants, and the issue made by the intervention was tried independently of the main case and prior thereto; the main case standing on the docket for trial. Held, that plaintiff in attachment, upon determination by verdict of the issue made by the intervention after moving for a new trial, could sue out a direct bill of exceptions for review of the judgment overruling the motion for new trial, as well as the rulings made during the trial of the issue made by the intervention. *Watts v. Langston*, 68 S. E. 1115, 135 Ga. 161.

#### Effect of appeal

The term "final decree," as used in *Sayles' Ann. Civ. St. 1897*, art. 2986, providing for alimony to the wife in a suit for divorce until final decree, means a decree finally terminating the action, and not a decree of the district court from which an appeal has been perfected by supersedeas, and hence the wife is entitled to alimony pending such appeal. *Williams v. Williams (Tex.)* 125 S. W. 937, 1199.

The judgment obtained in the lower court is the "final judgment" in the suit, even though the case is pending in the Supreme Court, within the meaning of Rev. St. c. 64, §§ 8-10, providing that judgment will be rendered in favor of the defendant if the

plaintiff, a woman, shall marry before final judgment and omit to join her husband in the action. *Sweet v. Sherman*, 21 Vt. 23, 28.

#### Effect of reversal

A "judgment" upon which execution may be issued, as it is defined in the statute, means the final judgment which disposes of the action. If the judgment remains unreversed, it is a final judgment; but if for error of any kind inherent therein it is in due course set aside, vacated, or annulled, it then becomes absolutely void. A judgment so reversed has no existence. *Gunnison v. Abbott*, 64 Atl. 23, 25, 73 N. H. 590 (citing *Allen v. Adams*, 17 Conn. 67).

#### Entry and record

The words "final judgment" as employed in Code 1868, c. 125, § 53, providing that at any time before final judgment or decree a defendant may file a plea or answer, are to be construed as applying to "final judgment" as used in section 46, providing that every judgment entered in the office in a case wherein there is no order for an inquiry for damages becomes final, unless it be set aside by defendant appearing and pleading to issue, so that defendant's plea of the statute of limitations was properly disallowed after the verdict of the jury had been found. *Ellott v. Hutchinson*, 8 W. Va. 452, 459, 460.

Where no final judgment is entered in the minutes of the court, but a final judgment nunc pro tunc is put in form for record and signed by the judge at a subsequent date, a writ of error issued prior to such signing cannot be used to bring the judgment up for review. *Pittsburg Steel Co. v. Streety*, 53 South. 505, 60 Fla. 183.

#### Expiration of time for new trial

Although an appeal was taken from a judgment pending in term, and at a time when the court still had control thereof, and might have granted a new trial, or amended or changed the same, it was none the less a "final judgment," and the appeal was perfected by the ending of the term without a change therein or the granting of a new trial. *Robbie v. Upson* (Tex.) 151 S. W. 570.

Under Municipal Court Act, § 21, providing that every judgment final in its nature may be vacated to the same extent as judgments of the circuit court during the term at which the same was rendered, provided a motion to vacate be entered in the municipal court within 30 days after the entry of such judgment, a judgment does not become final until a motion to set the same aside and for a new trial is disposed of, and hence a bill of exceptions may be tendered at the time of the ruling on such motion. *Grubb v. Milan*, 94 N. E. 927, 930, 249 Ill. 456.

#### Formal requisites

An opinion of the Supreme Court is not a "final judgment or decree" necessary to

support a plea of prior adjudication. *Lambert v. Rice*, 120 N. W. 96, 97, 143 Iowa, 70.

It is not a conclusive criterion whether a definitive judgment has been rendered that the entry employs or omits the usual form of "ideo consideratum est." Judgments are "final" and subject to review by writ of error as well when entered without that clause as with. *Whitaker v. Bramson*, 29 Fed. Cas. 947, 950, 2 Paine, 209.

An order for a decree in accordance with the findings of the judge in an equity suit is not a "final decree," and is not appealable. *Kenworthy v. Equitable Trust Co.*, 67 Atl. 469, 470, 218 Pa. 286.

An order, "judgment is directed non obstante veredicto in favor of the garnishee," is not a "final judgment" and appealable. *Keystone Brewing Co. v. Canavan*, 67 Atl. 48, 218 Pa. 161.

A modified judgment, rendered in lieu of the original judgment, is the final judgment, and an exception to it is sufficient to authorize the Supreme Court to review it. *Washington County v. Murray*, 100 Pac. 588, 590, 45 Colo. 115.

A judgment that the plaintiff "have and recover of defendant the sum of \$—, its costs in this behalf expended," is not a final judgment, and will not support a writ of error. *Bell v. Niles*, 53 South. 714, 60 Fla. 31.

A judgment merely that plaintiff be and is nonsuited is not a final judgment, unless it states that the action is dismissed, or defendant go hence without day, or that plaintiff take nothing, or other equivalent expressions adjudicating the action. *Goldring v. Reid*, 53 South. 503, 504, 60 Fla. 78.

A judgment which recites the verdict in full, and continues, "Therefore it is adjudged that the plaintiff \* \* \* recover of the defendant \* \* \* the possession of the real property described in the complaint," followed by the words "by the court" and the judge's signature, is a "final judgment," and not an order for judgment, and may be proved as such as a former adjudication of the issues in a subsequent case. *Ottow v. Friese*, 126 N. W. 503, 506, 20 N. D. 86.

Where the judgment recited that "the court, being fully advised, sustained defendants' motion for judgment in their favor on the ruling of the court sustaining defendants' demurrer to plaintiffs' complaint," and adjudged "that plaintiffs take nothing by their action and that defendants recovered of plaintiffs their costs," it was in form a "final judgment," from which an appeal would lie. *Wehmeier v. Mercantile Banking Co.*, 97 N. E. 558, 559, 49 Ind. App. 454.

A judgment or order overruling a motion to set aside a verdict for defendant and refusing plaintiff a new trial is not a "final judgment" within the statute as to the time for making bills of exception. The judgment



to be final in such a case must be a judgment *nil capiat*. *Barker v. Stephenson*, 68 S. E. 113, 114, 67 W. Va. 490.

A judgment reciting that the court after hearing the evidence in the case rendered judgment for defendants is not appealable under Rev. St. 1909, § 2038, providing for appeals from final judgments, for a "final judgment" is the actual judgment as distinguished from a mere finding that one of the parties is entitled to judgment, and should be that the plaintiff take nothing, and that the defendant be discharged, and recover his costs. *Freeman v. McCrite*, 147 S. W. 1102, 1103, 165 Mo. App. 1.

A "final judgment" is one relieving the defendant of the necessity of further appearance, and allowing him to go without day with his costs. *Tamblyn v. Chicago Lead & Zinc Co.*, 143 S. W. 1095, 1096, 161 Mo. App. 296.

The rescript of the Supreme Judicial Court in an equity case, "Bill dismissed," and a docket entry in pursuance thereof, are not a "final decree," precluding further action in the case, and hence the court thereafter has power to allow an amendment changing the suit to an action at law. *Crossman v. Griggs*, 74 N. E. 358, 359, 188 Mass. 156.

A final judgment is not disclosed by a journal entry reciting the submission of a cause to the court and concluding: "The court finds for the defendant and judgment of dismissal. Plaintiff excepts to findings and judgment." *Fauber v. Keim*, 120 N. W. 1019, 84 Neb. 167.

"The 'judgment' at common law is the final determination pronounced by the court upon the matters submitted to it." A judgment entered by a federal court in an action at law, which includes costs against the losing party, is none the less final because a blank is left for the insertion of the amount of such costs when taxed; such taxation and entry being made as of course under Rev. St. § 983, by the judge or clerk, and requiring no further judicial action, and the time for suing out a writ of error to review such judgment runs from such entry, and not from the time when the blank is filled. *Allis-Chalmers Co. v. United States*, 162 Fed. 679, 680, 89 C. C. A. 471 (citing and adopting 23 Cyc. p. 665).

Where the judgment in condemnation proceedings under the local improvement act was not entered on the recast rolls as required by section 26, it was not a "final judgment" as to all the parties within section 32, which provides that on the return of the verdict in condemnation, if a motion for a new trial is not made, or is overruled, petitioner shall, within 90 days after final judgment as to all defendants, both as to damages and compensation, elect whether to dismiss or enter judgment, and, if it elects to enter judgment, it shall become bound whether the assessment is collected or not, and the judg-

ment shall not be conditional and petitioner cannot thereafter dismiss the proceedings without the consent of all landowners; the various sections of the act relating to condemnation by municipalities and payment by special assessments indicating that the legislative intention was not to make the judgment final until judgment had been obtained as to all defendants, and section 26 providing that no final judgment shall be entered until all the issues have been disposed of, including revised recast rolls, if any. Hence petitioner could dismiss the proceedings without the landowner's consent. *City of Evanston v. Knox*, 89 N. E. 670, 672, 241 Ill. 460.

An entry in the record of an action, that the plaintiff, after a ruling excluding the evidence offered by him, stated that on account thereof it was necessary for him to suffer a nonsuit, and requested that he be allowed to file a bill of exceptions, and that by order of the court the nonsuit was allowed, and plaintiff granted time to file his bill of exceptions, did not show a "final judgment" which would support proceedings in error, since it did not purport to declare the sentence of the law upon the entry of the nonsuit which is an essential element of a final judgment, but was at most a mere recitation that a nonsuit had been entered. *Mizell Live Stock Co. v. J. J. McCaskill Co.*, 49 South. 501, 57 Fla. 118.

An appeal from an order granting a new trial made before a sentence will not lie, as the sentence is the "final judgment" essential to the maintenance of appeal. *State v. Byars*, 60 S. E. 448, 79 S. C. 174.

That a sentence in a criminal case was followed by a motion in arrest of judgment does not deprive it of its character as a "final judgment" so as to prevent a writ of error therefrom. *State v. Rosenblatt*, 83 S. W. 975, 976, 185 Mo. 114.

An entry of what appears to have been intended as a confessed judgment for a fine and costs following on a mere verdict of guilt, but with no judgment of guilt, is not a "final judgment" such as will support an appeal. *Moss v. State*, 37 South. 156, 140 Ala. 199.

#### Future judicial action

"Final judgments" are such as at once put an end to the action." A judgment upon a bond for the performance of collateral conditions for a penalty of \$4,000 rendered subject to a subsequent inquiry as to the amount due in equity is not a final judgment. *Towner v. Wells*, 8 Ohio, 136, 141 (quoting 3 Bl. Comm. 398).

A judgment declaring certain parties to be stakeholders, requiring them to pay the fund into court, fixing the priority of liens for such sums as may afterwards be established, and continuing the cause as to all parties except such stakeholders, is not a "final judgment" from which an appeal will lie.

*E. L. Wilson Hardware Co. v. Duff*, 85 S. W. 786, 98 Tex. 467.

Where a decree in a suit to wind up the affairs of a joint stock association expressly pretermits any decision concerning the rights of the parties in the distribution of the assets of the association between the shareholders, reserving such matter for later disposition, the decree is not final. *Randolph v. Nichol*, 84 S. W. 1037, 1040, 74 Ark. 93.

In a suit to restrain a sale of property under a trust deed, a decree directing the clerk to pay the trustee's attorneys a fee out of certain funds belonging to the grantor on the motion to dissolve the injunction, and referring the case to the master to take an account showing what part of the expenses claimed by the trustee other than counsel fees should be allowed as a charge against the trust estate, was not a "final decree" from which an appeal would lie, under the rule that a final decree is one which disposes of the whole subject, giving all the relief that is competent, and leaves nothing to be done by the court. *Stull v. Harvey*, 72 S. E. 701, 702, 112 Va. 816.

The owner of an undivided interest in land instituted a suit for partition, and a judgment, entered in 1854, found that such owner should have an undivided one-fourth during her life, and after her death in fee simple to her heirs, and partition was decreed accordingly. Commissioners were appointed to carry out the order and report, and in 1855 the commissioners reported the land incapable of division in kind, and an order of sale was entered, which was executed in 1856, and on sheriff's return made in 1858 the court ordered distribution of the proceeds. Under the acts then in force (Rev. St. 1845, p. 764) it was the court's duty to order the sale of lands not susceptible of division in kind, and the sheriff was to pay out the proceeds to the parties as their interests appeared. Held, that the judgment in 1854, and not the order of distribution in 1858, was the "final judgment," and hence the proceedings were not void on the ground that an heir born after the judgment of 1854, and before the order of distribution in 1858, was not a party. *Sparks v. Clay*, 84 S. W. 40, 43, 185 Mo. 393.

A judgment of a federal Circuit Court entered upon a verdict directed in favor of the government on the issues raised by a special plea in bar, by which the accused claimed immunity from prosecution under Act Feb. 25, 1903, c. 755, 32 Stat. 904, as amended by Act June 30, 1906, c. 3920, 34 Stat. 798, because of his testimony before the grand jury, is not a final judgment, reviewable under Act March 3, 1891, c. 517, § 5, 26 Stat. 827, by a direct writ of error from the federal Supreme Court, where leave was given to plead over, and a plea of not guilty was entered, upon which no trial has been had. *Heike v. Unit-*

*ed States*, 30 S. Ct. 539, 540, 217 U. S. 423, 54 L. Ed. 821.

#### Future stating of account or assessment of damages

A decree may be final, though it directs a reference. On a bill for accounting under a license to use a patent, a decree finding facts substantially as alleged in a bill and ordering a reference, and ordering that, in stating the account, the master make specific charges against defendant, and that defendant disclose specified facts within its knowledge, and reciting that the court retained jurisdiction to enter such further order and decree as the case might require, was appealable as a final decree. *Fould De Grasse v. H. W. Gossard Co.*, 86 N. E. 176, 179, 236 Ill. 73.

A "final decree" is one which fully decides and finally disposes of the entire merits of the case. Some other order or decree of the court may be necessary to carry into effect the rights of the parties or some incidental matter may be reserved for consideration, which decision either one way or another cannot have the effect of altering the decree by which the rights of the parties have been declared. A decree is final even where, as a mere incident to the relief granted, it directs a reference to a master to state an account. Where accounts are to be settled between the parties and the decree contains an order of reference by which the accounts are to be stated according to certain principles fixed by the decree, such order of reference will not have the effect of rendering the decree "interlocutory"; but where the chancellor fails to fix the principles by which the accounts are to be stated, and judicial action on his part is contemplated and necessary, or where some equity other than that involved in the accounting remains for further adjudication, then such decree is interlocutory, unless the status of the account or other matter to be thereafter determined is apart from the equities involved. *Gray v. Ames*, 77 N. E. 219, 220, 220 Ill. 251, 5 Ann. Cas. 174 (citing *Mills v. Hoag* [N. Y.] 7 Paige, 18, 31 Am. Dec. 271; *Myers v. Manny*, 63 Ill. 211; *Hunter v. Hunter*, 100 Ill. 519; *Allison v. Drake*, 32 N. E. 537, 145 Ill. 500).

A decree adjudging deeds to be mortgages, and appointing a referee to take evidence as to the value of the improvements placed on the lands by defendant and the amount of the debt, was not final, and there could be not final decree until the report of the referee and the exceptions thereto had been passed on. *State ex rel. Potter v. Riley*, 118 S. W. 647, 655, 219 Mo. 667.

A decree that complainants are entitled to be let in to redeem from mortgages on the ground that there has never been a sale under the power contained in the mortgages is such a "final decree" as will support an appeal, although it further orders a ref-

erence to state an account of what is due and directs how the account is to be stated. *C. W. Zimmerman Mfg. Co. v. Pugh* (Ala.) 39 South. 989.

A "final decree" is not necessarily the last order in the case, as orders sometimes follow merely for the purpose of carrying out or executing the matters which the decree has determined, but when it finally fixes the rights of the parties it is final and may be reviewed. Thus where the decree in a stockholders' suit against directors and officers for an accounting found defendants guilty of fraud in purchasing certain real estate, in receiving salaries, and doing other acts complained of, and appointed a receiver and referred the cause with directions to take an account, ordering that the account be taken in accordance with the findings in the decree, the proofs taken, and the instructions of the court, and specifically found defendants liable, and fixed the basis on which the account should be taken, it was held that the decree was final and appealable. *Klein v. Independent Brewing Ass'n*, 83 N. E. 434, 438, 231 Ill. 594 (quoting *Allison v. Drake*, 32 N. E. 537, 539, 145 Ill. 500, 510).

#### Grant of relief essential

A judgment, to be final, must not only decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court or by process for contempt. *Reed v. Reed* (Ky.) 80 S. W. 520, 522 (citing *Bondurant v. Apperson*, 61 Ky. [4 Metc.] 30).

In a technical sense, the "final decree" of a court of chancery is the sentence of the court, finally and conclusively determining all the matters in controversy, disposing entirely of the cause, leaving nothing further for the court to do; but, under the statute relating to appeals, the test of finality to support an appeal is not whether the cause remains, in some respects, in the court of chancery awaiting further proceedings, necessary to entitle the parties to the full measure of the rights it has been declared they have, but whether the decree ascertains and declares these rights, and the decree is final and will support an appeal if they are ascertained and are adjudged. *Wynn v. Tallapoosa County Bank*, 53 South. 228, 233, 168 Ala. 469.

#### Interlocutory decree or judgment distinguished

No hard and fast rule can be laid down to distinguish a final from an interlocutory judgment, further than that "final judgments" are those which finally dispose of the subject-matter as to all parties as far as the court before which it is pending has power to dispose of it. In *re Appleman*, 94 N. E. 566, 570, 176 Ind. 253.

A decree is interlocutory, and not final, if the further action of the court in the cause, as distinguished from proceedings necessary to execute the decree, is necessary to give completely the relief contemplated by the court. Thus where the decree, in a suit by judgment creditors to subject to their liens defendants' interest in a trust estate, overruled a demurrer to the supplemental bill, amended and confirmed a commissioner's report of the liens and priorities of the creditors and of the judgment debtor's interest in the trust estate, determined what creditors were entitled to participate therein, found that partition could not be conveniently made, and that the rents would not satisfy the liens within five years, and that the other parties interested in the estate desired that one-eighth interest therein be allotted them upon paying its fair value, and decreed that they be permitted to do so by depositing the sum in a bank payable to the court, and appointed special commissioners to convey to such defendants such one-eighth interest in the trust estate, and required a report by the special commissioners as to how they had executed the decree, it was held that the decree was not final, so that defendants could file their answer, tendered at the following term of court, under Code 1904, § 3275, to the amended and supplemental bill, of which one the original bill was made a part. *Collier v. Seward*, 74 S. E. 155, 156, 113 Va. 228.

A decree in a partition suit adjudging the property susceptible of partition in kind and appointing commissioners to make the same is "interlocutory" and not "final." *Dangerfield v. Caldwell*, 151 Fed. 554, 556, 81 C. C. A. 400.

A judgment in an action to reform a contract, for the amount due thereunder, for an accounting, and for the delivery of corporate stocks and bonds, which reforms the contract, directs a judgment for plaintiff for a specified sum, orders the transfer of stocks and bonds, requires defendant to account, and appoints a referee to take the account, and which recites that it is an interlocutory judgment, is an "interlocutory judgment," within Code Civ. Proc. § 1200, providing that judgments are final or interlocutory, and defining a final judgment as the final determination of the rights of the parties. *Potter v. Rossiter*, 95 N. Y. Supp. 1036, 1037, 109 App. Div. 35.

An interlocutory decree is one made pending the cause and before the hearing on the merits. An order appointing a receiver of a corporation, entered at the same term, but subsequent to the rendition of a judgment against it, is not an interlocutory judgment, but is a "final judgment," and the order is, after affirmation by the Court of Civil Appeals, reviewable in the Supreme Court under the statute authorizing appeals

from final judgments, etc. *Waters-Pierce Oil Co. v. State (Tex.)* 106 S. W. 326, 329 (quoting *Freem. Judgm.* § 29).

Generally a judgment which at once disposes of the entire controversy, settling the rights of the parties, leaving nothing for further consideration, is "final," while a judgment which merely settles some preliminary point or reserves for future determination some detail essential to the complete adjustment of the litigation is not final but "interlocutory" only. In *Black on Judgments*, § 41, it is said: "The difficulty appears to arise in relation to those decrees which, while settling the general equities of the cause, leave something for future action or determination. And the true rule seems to be that, if that which remains to be done or decided will require the action or consideration of the court before the rights involved in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the court in execution of the decree as it stands." And in section 44 the same author says: "The most difficult cases in which to draw the line between final and interlocutory decrees are those in which the decree, after finding the general equities, orders reference to a master for some specific purpose. Yet there are not wanting principles upon which to base a reasonable and accurate distinction in these cases. As the condensed result of the numerous authorities on the subject, we may formulate the following specific rules: First, where a decree is made disposing of the general equities of the case, but ordering a reference to a master to ascertain damages, or to find certain facts, or to do anything else necessary to be done before a final adjustment of the rights of the parties can be had if the functions of the master are to be judicial and not merely ministerial and the provisions depending on his report are not already incorporated in the decree then the decree is interlocutory and not final. Second, where a decree ascertains and fixes all the rights of the parties, but a reference is ordered to a master to do or ascertain something that is necessary to carry the decree into effect, if the functions of the master are to be merely ministerial and not judicial, or if all the consequential directions depending on the result of the proceedings before him are given in the decree itself, then the decree is final and not interlocutory. To take a single illustration, the reference of a case to a master, to take an account upon evidence, and for the examination of the parties, and to make or refuse allowances affecting the rights of the parties and to report his results to the court, is not a final decree. For his report is subject to exceptions from either side, which must be brought to the notice of the court before it

can be available. It can only be made so by the court's overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment." Again, discussing final and interlocutory decrees, 23 Cyc. p. 786, says: "Although there cannot be two final judgments in the same case, it is sometimes proper to enter an interlocutory judgment for the final disposition of the case. Generally speaking, the judgment is final if it at once disposes of the entire controversy settling the rights of the parties, and leaving nothing for further determination, but interlocutory if it merely settles some preliminary point or matter or reserves for future determination some detail essential to the complete adjustment of the subject of litigation. The judgment is ordinarily final when rendered in pursuance of a general verdict, or on submission for decision on the pleadings. But an interlocutory judgment may be entered where it is necessary to frame an issue on which the parties may properly go to trial, or on overruling a demurrer, where leave is given to amend the pleading or to plead over, or where the court has not before it all the papers necessary to settle the form of the final judgment, or reserves the decision of some point affecting the amount recoverable or the right to modify the judgment, or finds it necessary to appoint a master or referee to find issues in the case, unless where the action to be taken on the coming in of his report is definitely prescribed. So, also, a judgment is generally interlocutory if it embodies a condition, the performance of which is necessary to make it effective or a condition on the performance of which it may be released. And, in the action of account it is usual and proper to render a preliminary judgment that the parties do account. *State ex rel. Potter v. Riley*, 118 S. W. 647, 654, 655, 219 Mo. 667.

Judgments are interlocutory or final. Interlocutory judgments "are rendered in some intermediate stage of the cause, as, in account, *quod computet*; in abatement, *respondet ouster*; of which error is not predicable. "Final judgments" are rendered at the termination of a cause and make an end of it by awarding damages and costs to the plaintiff or costs to the defendant. These only are the foundation of a writ of error, hence the granting or refusal of a new trial on a petition for that purpose is a matter of discretion and not the subject of error. *Magill v. Lyman*, 6 Conn. 59, 61 (citing *Bac. Abr. tit. Error, A. 2*).

Under Ky. St. § 950, giving appellate jurisdiction over final judgments, an order sustaining a demurrer to specific demands in the petition and overruling it as to others, followed by an amendment to the petition and a trial of an issue, is interlocutory and is not appealable, and the mere fact that the court tried the issue does not enlarge the

right of appeal from the order; a "final judgment" being one which puts an end to the action on the merits, and which settles the rights of the parties under the issues. *Harrison v. Stroud*, 150 S. W. 993, 994, 150 Ky. 797.

The Constitution authorizes appeals from final judgments of the district court. The general appeal statute authorizes an appeal within six months from the judgment or order appealed from. Comp. Laws 1907, §§ 1184, 1212, as amended by Sess. Laws 1909, c. 109, §§ 1, 2, require an entry of an interlocutory decree in a divorce suit when the court finds that a divorce should be granted, and provide that an interlocutory decree shall become absolute after six months from its entry, unless appealed from, etc. Section 3 makes it unlawful for either party to a divorce suit whose marriage is dissolved by final decree to marry any other person within the period allowed for an appeal from the final decree. Held, that such an interlocutory decree is a "final decree" in the sense of conferring a right of appeal therefrom, requiring that appeal be taken within six months from entry thereof. *Parsons v. Parsons* (Utah) 122 Pac. 907, 908.

A "final decree," within the acts of Congress giving an appellate court jurisdiction on appeal, must terminate the litigation on the merits. An order requiring a party to pay into the registry of the court money in its possession which is the subject of litigation is interlocutory and not final, and is not appealable. *Norris Safe & Lock Co. v. Manganese Steel Safe Co.*, 150 Fed. 577, 578, 80 C. C. A. 563 (quoting and adopting definition in *Grant v. Phoenix Mut. Life Ins. Co.*, 1 Sup. Ct. 414, 106 U. S. 429, 27 L. Ed. 237).

A bill was brought against the beneficiaries of a decedent to impress a trust on the devised property. A "final decree" was rendered against one defendant charging her share with the entire amount, but the decree did not dismiss the bill against any of the defendants, nor was there any reference therein to the rights of the other defendants. Upon appeal by the one defendant alone, the charge placed upon her share was diminished, the decree reversed, and the lower court entered a decree on remittitur. Held, that the decree on remittitur was final, as to the character and extent of the appealing defendant's liability. As to the defendants not parties to the appeal the decree on remittitur was only interlocutory. The decree was not final in favor of the other defendants. *Powell v. Yearance*, 67 Atl. 892, 895, 73 N. J. Eq. 117.

A decree in a suit to cancel a sale by a mortgagee in possession, and a sale by him as administrator of the purchaser, and for an accounting, which cancels the sale, orders

an accounting, appoints a commissioner to take an accounting, and reserves other questions until the coming in of the report of the commissioner, is not a final decree, from which an appeal should have been taken within the time limited by law, so that a failure to appeal would bar a right to revive the action after the death of parties thereto, but was an interlocutory decree only; a "final decree" being one which disposes of the cause, either by sending it out of court before a hearing on the merits, or after a hearing on the merits, decreeing either in favor of or against the prayer of the bill; and an "interlocutory decree" being one made pending the cause, and before a final hearing on the merits. *Comans v. Tapley*, 57 South. 567, 571, 101 Miss. 203.

A "final judgment" is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues. A judgment which is not final is called interlocutory. "Interlocutory judgments" are such as are given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory. Under V. S. 1411, providing that the court may ascertain the sum due when judgment is rendered otherwise than on a verdict, a default judgment in an action by trustee process, with a declaration of debt on judgment, where the case was continued, and a commissioner appointed to assess the damage, was an interlocutory, and not a final, judgment, and the court had authority on report of the commissioner, to render final judgment with leave to take out execution. *Leonard v. Sibley*, 56 Atl. 1015, 76 Vt. 254 (citing Black, Judg. § 21; Bouv. Law Dict.).

An order of the probate court confirming the verdict of a jury adverse to the caveator, on an issue framed by that court to determine whether the caveator was lawfully married to the decedent, is an interlocutory order, and not appealable, where the caveator in her caveat claimed to be the lawful widow of the decedent, and also the beneficiary under a prior will. *Richardson v. Reeves*, 34 App. D. C. 9, 11.

A judgment "that the plaintiff pay the costs herein," following a general finding "for the defendants," is not a "final judgment" from which an appeal will lie. *Miller v. McKean*, 78 N. E. 1049, 38 Ind. App. 695.

#### Judgment or order for alimony

A judgment for alimony pendente lite is a "final" one, and appealable. *Kessler v. Kessler*, 83 Pac. 257, 259, 2 Cal. App. 509.

A decree awarding a wife certain weekly allowances as alimony pendente lite until final order is not a "final judgment," on which an action could be maintained. *Geisler v. Geisler*, 98 S. W. 1023, 1024, 124 Ky. 292.

A decree for alimony granted to a wife on dissolution of the marriage, being merely for the enforcement of the husband's obligation to support his wife, is not a "final adjudication," but is a determination which is open to revision from time to time as the circumstances of the parties subsequently require. *Wallace v. Wallace*, 67 Atl. 580, 581, 74 N. H. 256, 13 Ann. Cas. 293 (citing *Bish. Mar. & Div. §§ 1385-1389*; 2 Nels. Div. & Sep. § 933a).

An order refusing to set aside an order for alimony and to quash an execution to enforce it, though issued after the dismissal of the suit, is not a "final judgment," within Rev. St. 1895, arts. 1337, 1383, providing that only one final judgment may be rendered in any case, and limiting appeals to appeals from final judgments, and is not appealable. *Dawson v. Dawson* (Tex.) 140 S. W. 513, 514.

An order directing the issuance of an execution to enforce the collection of unpaid alimony is not a "final judgment," within *Sayles' Ann. Civ. St. 1897*, art. 1383, authorizing appeals from final judgments. *Williams v. Williams* (Tex.) 125 S. W. 937, 1199.

#### **Judgment or order allowing or dismissing appeal**

An order of the circuit court dismissing an appeal in condemnation proceedings to take land for a highway, on the ground that the statute authorizing an appeal was unconstitutional, was a final judgment. *Hartz v. Wayne Circuit Judge*, 129 N. W. 25, 26, 164 Mich. 231.

The granting of a motion to dismiss or erase an appeal from an order of the railroad commissioners, approving the location of an electric railway, for want of jurisdiction, is a "final judgment," from which an appeal may be taken. *Appeal of Norton*, 78 Atl. 587, 590, 84 Conn. 24.

#### **Order confirming report**

"A 'final judgment' is one which leaves nothing to be judicially determined between the parties in the trial court. It must finally conclude all the necessary parties on the merits and finally dispose of the subject-matter of the controversy." An order confirming the report of a master in chancery is not a final disposition of the cause and is not appealable within statutes authorizing appeals from judgments or decrees which are final. *Woods v. Woods*, 82 S. W. 878, 881, 5 Ind. T. 475.

A decree confirming a master's report in partition proceedings is a final decree, from

which an appeal will lie. *Lincoln v. Africa*, 77 Atl. 918, 920, 228 Pa. 546.

A decree of the Court of Appeals of the District of Columbia, although involving a decision upon the merits of the case, is not final for the purpose of an appeal to the Supreme Court of the United States, where it contemplates and requires further proceedings not inconsistent with its opinion. A decree confirming the report of commissioners appointed in a partition suit is not final for the purpose of appeal, where the plan adopted was dependent upon a sale of a part of the property, which had not taken place, and which required the confirmation of the court. *Clark v. Roller*, 26 Sup. Ct. 141, 143, 199 U. S. 541, 50 L. Ed. 300.

The "final decree" in partition, within Const. art. 7, § 6, limiting the review by the Supreme Court of decisions of the circuit court to those that are final, is that entered on confirmation of the report of referees. *Kesler v. Nice*, 104 Pac. 2, 54 Or. 585.

#### **Judgment for costs**

A "final judgment" is one that at once disposes of all the issue as to all the parties to the full extent of the power of the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such issues. Where the judgment is for the defendant, either upon a ruling upon demurrer and refusal to plead further or upon the finding of a court or verdict of a jury, the judgment in order to be final should be "that the plaintiff take nothing by this suit, nil capiat per breve, and that the defendant go without day, eat inde sine die." While our modern forms of procedure may not require this exact form of words, it has not gone so far as to adjudge that to be a "final judgment" which does not show on its face by some proper words that the court pronounced the sentence of the law upon facts found as to the merits of the controversy, and the Code of Procedure requires that the court or jury trying the case shall find either generally or specially the facts for the plaintiff or defendant, and the court shall pronounce judgment in conformity therewith, *Burns' Ann. St. 1901*, §§ 554, 560, 573. Since costs form no part of the matter in controversy in a suit and are mere incidents or necessary appendages in the litigation, a judgment merely for costs is an interlocutory judgment and not a "final judgment," and where a demurrer to a complaint was sustained, and plaintiff withdrew leave to amend, and judgment was awarded against him for costs, the record disclosing no adjudication of the controversy on its merits, the judgment was not appealable within *Burns' Ann. St. 1901*, §§ 644, 1337o, limiting appeals to "final judgments" with certain exceptions. *Neyens v. Fletcher*, 79 N. E. 1087-1089, 39 Ind. App. 399 (citing *Black, Judg. § 31*; *Bouv. Inst. §§ 3300, 3302*; *Bostwick v. Brinkerhoff*, 1 Sup. Ct. 15,

106 U. S. 3, 27 L. Ed. 73; *Grant v. Phoenix Mut. Life Ins. Co.*, 1 Sup. Ct. 414, 106 U. S. 429, 27 L. Ed. 237; *St. Louis, I. M. & S. Ry. Co. v. Southern Exp. Co.*, 2 Sup. Ct. 6, 108 U. S. 24, 27 L. Ed. 638; *Champ v. Kendrick*, 30 N. E. 635, 130 Ind. 545; *Western Union Tel. Co. v. Locke*, 7 N. E. 579, 107 Ind. 9; *Brannock v. Stocker*, 76 Ind. 573; *Needham v. Gillaspay*, 49 Ind. 245; *Hamrick v. Loring*, 45 N. E. 107, 147 Ind. 229; *Keller v. Jordan*, 46 N. E. 343, 147 Ind. 113; *Sprick v. Washington County*, 3 Neb. 253; *People v. Severson*, 113 Ill. App. 496; *Metzger v. Morley*, 56 N. E. 299, 184 Ill. 81; *Lee v. Yanaway*, 52 Ill. App. 23; *Riddle v. Yates*, 7 N. W. 289, 10 Neb. 510; *Warren v. Shuman*, 5 Tex. 441; *Hancock v. Metz*, 7 Tex. 178; *Eastham v. Sallis*, 60 Tex. 576; *Higbee v. Bowers*, 9 Mo. 354; *Young v. Stonebreaker*, 33 Mo. 117; *Smarr v. McMaster*, 34 Mo. 204; *Boggess v. Cox*, 48 Mo. 278; *Preston v. Missouri & P. Lead Co.*, 48 Mo. 541; *Zahnd v. Darling*, 48 Mo. 557; *Evans v. Russell*, 61 Mo. 37; *Adams v. Trigg*, 35 Mo. 190; *Martindale v. Brown*, 18 Ind. 284; *Wood v. Wood*, 51 Ind. 141; *Keller v. Jordan*, 46 N. E. 343, 147 Ind. 113; *Thomas v. Chicago & E. Ry. Co.*, 39 N. E. 44, 139 Ind. 462; *Pfeiffer v. Crane*, 89 Ind. 485; *Ernest v. Grand Trunk Western R. Co.*, 72 N. E. 1136, 34 Ind. App. 409; *Foster v. Lindley*, 50 N. E. 367, 20 Ind. App. 155).

A "final order" either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such a manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition. Thus where the court, in an action for personal injuries, instead of entering judgment upon the verdict containing the recital that by reason thereof the petition was dismissed and defendant allowed costs, entered judgment only for defendant's costs, but separate orders showed the giving of the peremptory instructions and return of the verdict in favor of the defendant, and that plaintiff's motion for a new trial was overruled, and an appeal prayed and granted, the judgment and the subsequent orders should be treated as a final judgment. *Willis v. Maysville & B. S. Ry. Co.*, 92 S. W. 604, 606, 122 Ky. 658, 13 Ann. Cas. 74 (quoting and adopting *Maysville & L. Ry. Co. v. Punnett*, 15 B. Mon. [54 Ky.] 48).

A judgment merely awarding costs to defendant is not a "final judgment," but, to be final, it must state that he be dismissed without day, or that it is considered that plaintiff take nothing by the suit, or otherwise refer to the disposition of the subject-matter. *De Armit v. Town of Whitmer*, 60 S. E. 136, 137, 63 W. Va. 300.

The word "judgment" in Code, § 4100, giving the Supreme Court appellate jurisdiction over all judgments except as otherwise provided by law, and section 3769, providing

that every final adjudication of the rights of the parties is a judgment, means a final judgment. Thus a judgment for costs, which does not finally determine the rights of the parties, is not final and appealable; costs being merely incidental to the main action. *Keller v. Harrison (Iowa)* 129 N. W. 57, 58.

#### Order in contempt proceedings

A decree denying and dismissing a petition that defendant trustees be adjudged in contempt for not paying to complainant a specified sum in satisfaction of a decree previously entered determines the right of complainant, and is a "final decree," within Const. Amend. art. 12, § 1 (Laws 1903, p. 2, c. 1089), granting to the Supreme Court appellate jurisdiction on all questions of law and equity. *Jastram v. McAuslan*, 71 Atl. 454, 456, 29 R. I. 390, 17 Ann. Cas. 320.

#### Judgment or order by default or on plea in abatement

Judgment by default is a "final" one from which an appeal will lie. *Oregon R. & Nav. Co. v. McCormick*, 89 Pac. 186, 187, 46 Wash. 45.

#### Order relating to demurrer

"A judgment, to be 'final,' must put an end to the suit." A judgment of the superior court on demurrer to a cross-bill in answer to the original bill, adjudging it insufficient, with leave to amend, is not a final judgment on which a writ of error can be brought. *Treadway v. Coe*, 21 Conn. 283, 284.

An order overruling a general demurrer to a bill of complaint is a "final decree or order" within the law allowing appeals from any final decree or order in the nature of a decree. *Darcey v. Bayne*, 66 Atl. 434, 435, 105 Md. 365, 10 L. R. A. (N. S.) 863; *Mayor, etc., of Hyattsville v. Smith*, 66 Atl. 44, 45, 105 Md. 318.

An order sustaining a demurrer to a petition, but not dismissing the petition, is interlocutory and therefore not appealable. *Metzger v. Kelly*, 34 App. D. C. 548, 549.

A judgment sustaining a general demurrer is a "final judgment," and is as conclusive as if rendered upon a hearing of the facts, and a judgment sustaining a general demurrer to a complaint is a bar to another action between the same parties on the same cause of action, though the judgment dismissed the action without giving plaintiff an opportunity to amend. *Carpenter v. Landry*, 101 S. W. 277, 278, 45 Tex. Civ. App. 506.

A judgment refusing to allow a general demurrer to a petition to be amended is not a "final judgment," nor would a judgment allowing the amendment have been a final disposition of the cause, so as to authorize a writ of error to the judgment first named while the case was pending in the trial court. *Henderson v. State*, 51 S. E. 385, 386, 123 Ga. 465.

**Decree or judgment of dismissal or nonsuit**

A judgment dismissing a suit without prejudice to plaintiff, on the ground that the account sued on was not itemized as the law directs, is not a "final adjudication" of the rights of the parties so as to sustain a plea of res adjudicata. *Wilson & Gray v. May Pants Co.* (Miss.) 37 South. 813.

An order refusing a nonsuit is not appealable until after final judgment, but an order granting a nonsuit is appealable at once. *Bowen v. Johnson*, 69 S. E. 294, 295, 87 S. C. 250.

Where both parties introduced their evidence, and plaintiff's evidence supported a judgment for him, and defendant made no motion for a judgment of dismissal, a judgment, though termed a dismissal, was a "final" decision, and deemed excepted to, within Code Civ. Proc. § 647, and not a judgment of "nonsuit," within section 581, authorizing a nonsuit, on motion of defendant, on plaintiff failing to prove a case. *Saul v. Moscone*, 118 Pac. 452, 454, 16 Cal. App. 506.

A judgment of nonsuit, though not res judicata of the merits of the controversy between the parties, is nevertheless a final judgment, reviewable on writ of error. *Connecticut Fire Ins. Co. v. Manning*, 177 Fed. 893, 894, 101 C. C. A. 107.

A decree sustaining demurrers to a cross-bill and dismissing the same is not a "final decree," within Code 1907, § 2837, authorizing appeals from final decrees. *Aston v. Dodson*, 49 South. 856, 857, 161 Ala. 518.

A judgment of compulsory nonsuit, entered by a federal court in Pennsylvania in conformity to the state practice is a "final judgment," and reviewable on writ of error. *Fadley v. Baltimore & O. R. Co.*, 153 Fed. 514, 517, 82 C. C. A. 464.

Where in a suit in chancery to compel an executor charged with fraud in the management of an estate, to account, the executor answered, denying that he had any assets and expressed a willingness to have an accounting, and subsequently filed in the probate court an accounting, an order denying a petition to dismiss the suit for want of jurisdiction was not a final order because it did not deprive him of any supposed right or fix on him any liability, and it was not appealable. Whether an order in a chancery case is final is determined by its effect on the rights of the parties, and the fact that by a petition of defendant to dismiss the suit the jurisdiction of the court is challenged does not determine the question whether the order denying the petition is a final and appealable order. *Brooks v. Hargrave*, 127 N. W. 689, 162 Mich. 599.

A judgment in favor of the defendants in justice court, dismissing an action of forcible entry and unlawful detainer and for

costs, upon the withdrawal of the plaintiff from the trial of the case, is a "final judgment," and appealable by the plaintiff. *Van Vliissingen v. Oliver*, 113 N. W. 383, 384, 102 Minn. 237.

The order of a justice of the peace, dismissing an action and taxing costs against plaintiff, is a "final judgment," from which an appeal may be taken as authorized by Justices' Code, § 99. *Jackson v. Berndt*, 123 N. W. 76, 24 S. D. 14.

An order dismissing a remonstrance filed to a drainage petition, because not signed by a sufficient number of property owners, is not a final judgment from which an appeal may be taken, under Burns' Ann. St. 1908, § 671, authorizing appeals from final judgments, which contemplates a judgment making a final disposition of the subject-matter of the litigation as to all parties, and putting an end to all issues arising between them regarding such subject-matter, to the full extent of the power of the court to dispose of them. *Crow v. Evans*, 100 N. E. 8, 178 Ind. 661.

Code Civ. Proc. § 3367, provides for the trial of issues raised by the petition and answer in a condemnation proceeding by the court or referee. Section 3369 provides for judgment on the decision of the court or referee, and provides that, if in favor of the defendant, the petition shall be dismissed, with costs, but, if in favor of plaintiff, the judgment shall adjudge that condemnation is necessary, and the court shall thereupon appoint commissioners to ascertain the compensation, nothing being said as to costs being included in this judgment. Section 3371 provides that, upon confirmation of the commissioners' report, the final order shall be entered directing payment of the compensation, and that thereupon plaintiff shall be entitled to possession. Section 3372 provides for an offer by the plaintiff to purchase the property, and that if the offer is not accepted, and the compensation awarded by the commissioners does not exceed the offer no costs shall be allowed, but that if the compensation exceeds the offer, or if no offer is made, the court shall in the final order direct that the defendant recover the costs of the proceeding at the same rate as where the defendant is the prevailing party in an action. It also provides that if a trial has been had, and the issues determined in favor of plaintiff, costs of the trial caused by the interposition of the unsuccessful defendant shall be allowed plaintiff. Section 3373 provides that upon entry of the final order it shall be attached to the judgment roll, and the amount directed to be paid as compensation, or costs, or expenses, shall be docketed as a judgment. Held, that a judgment dismissing the petition, entered on a decision in favor of defendant, is a "final judgment"; but the judgment directing the appointment of commissioners, entered on a decision in favor of plaintiff, is inter-



locutory. *Marshall v. Hatfield*, 138 N. Y. Supp. 733, 735.

#### **Decree in habeas corpus proceedings**

Habeas corpus to determine the right to the custody of a child is a civil proceeding, and the judgment rendered therein, fixing the custody of the child, is a "final judgment" reviewable by the Supreme Court. *Bleakly v. Smart*, 87 Pac. 76, 79, 74 Kan. 476, 11 Ann. Cas. 125.

The test of finality for the purpose of an appeal is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment. In a habeas corpus proceeding, the judgment of the court which either remands or discharges the petitioner is a "final judgment," notwithstanding the fact that another similar proceeding may be commenced by the petitioner if he elects to do so. *Winnovich v. Emery*, 93 Pac. 988, 991, 33 Utah, 345.

A decree in habeas corpus, refusing petitioner the custody of his minor child, and ordering that it be kept within the jurisdiction of the court, subject to further orders, the cause being continued on the docket, is a final decree, from which the petitioner may appeal. *Hall v. Whipple* (Tex.) 145 S. W. 308, 309.

#### **Decree, judgment, or order in injunction proceedings**

A "final judgment" is defined as one which puts an end to a suit, and is such as at once puts an end to the action by declaring that plaintiff has either entitled himself, or has not, to recover the remedy sued for. An "interlocutory judgment" is defined as one given in the course of the cause before final judgment, and is such as are given in the middle of the cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit. Hence a decree or order granting or dissolving an injunction which springs out of a suit or action pending, and is intended to operate only upon a final hearing, is an interlocutory order only and is not a final disposition of the cause, and under the statute the cause cannot be brought to the Supreme Court upon any bill of exceptions. *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309, 321 (citing *Bouv. Law Dict.*; 3 Bl. Comm. pp. 396, 398).

In a suit for injunction and other relief, the court granted a temporary restraining order enjoining defendants. Subsequently, upon defendants' application and without notice to plaintiff, the court granted an order, modifying the restraining order previously granted, upon condition that defendants give a certain bond, and providing that, if plaintiff failed to give a bond required of him to indemnify defendants against damages from the suit, the restraining order should be dissolved, if defendants gave bond in a named

sum to answer damages they might cause plaintiff by certain acts. Held, that the order modifying the temporary injunction, not being a final adjudication, cannot be reviewed on writ of error. *Watterson v. Stubbs & Hodges*, 69 S. E. 487, 135 Ga. 368.

#### **Decree, judgment, or order as to intervention**

A judgment or decree, in order to be "final" so as to be appealable, must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance, the court would have nothing to do but to execute the judgment or decree it had already rendered. An order of the District Court in admiralty dismissing a petition filed by the claimant of a vessel libeled in a suit for salvage, and which had been sold in such proceedings, which petition asked that claimant's right to the fund in the registry of the court be summarily determined, and the claimant allowed to withdraw the same on substituting a bond, is not a final decision in the cause from which an appeal will lie. *The Chief*, 142 Fed. 349, 352, 73 C. C. A. 459.

Where land was sold in a suit for partition and a portion of the proceeds, belonging to a minor heir, was paid into the registry of the court, an order of the court denying a petition under Rev. St. 1895, art. 3498w, by one as next friend of such minor to be appointed guardian for such minor to receive the share of such minor in such proceedings, was not a "final judgment" from which an appeal could be taken. *Naylor v. Naylor* (Tex.) 128 S. W. 475, 477.

#### **Judgment of particular courts**

A decree of the court of appeals of the District of Columbia on an appeal from the Commissioner of Patents, which affirms the latter's decision and directs the clerk of the court to "certify this opinion and proceedings in this court in the premises to the Commissioner of Patents, according to law," is not "final" within the meaning of Act Feb. 9, 1893 (27 Stat. 436, c. 74) § 8, defining the appellate jurisdiction of the federal Supreme Court, since under Rev. St. U. S. §§ 4914, 4915, decisions on such appeals do not preclude any person interested from contesting the validity of the patent in court, and a remedy by bill in equity is given where a patent is refused. *Frasch v. Moore*, 29 Sup. Ct. 6, 8, 211 U. S. 1, 53 L. Ed. 65.

A judgment of the Court of Appeals of the District of Columbia, affirming the decision of the Commissioner of Patents in an interference proceeding, and directing that its own decision be certified to the commissioner, as required by law, is not final for the purpose of a writ of error from the federal Supreme Court. *Johnson v. Mueser*, 29 Sup. Ct. 390, 212 U. S. 283, 53 L. Ed. 514; *E. C. Atkins & Co. v. Moore*, 29 Sup. Ct. 390, 392, 212 U. S. 285, 53 L. Ed. 515.

An order rendered by a justice of the peace sustaining a motion to retax costs and retaxing the same is not a final judgment from which an appeal may be taken and a trial de novo had. *Maggert v. Keele*, 95 Pac. 466, 467, 20 Okl. 681.

#### **Preliminary or special order or decree**

An order removing a cause to the federal court is not a final judgment within Rev. St. 1909, § 2038, authorizing an appeal from a final judgment, and, since it is not one of the special orders mentioned therein from which an appeal is allowed, such an order is not appealable. *State ex rel. Iba v. Mosman*, 133 S. W. 38, 42, 231 Mo. 474.

Orders of a federal Circuit Court directing witnesses to answer the questions put to them, and produce written evidence in their possession, on their examination before a special examiner appointed in a suit brought by the United States to enjoin an alleged violation of the anti-trust act of July 2, 1890 (26 U. S. St. 209, c. 647), lack the finality requisite to sustain an appeal to the Supreme Court. *Alexander v. United States*, 26 Sup. Ct. 356, 358, 201 U. S. 117, 50 L. Ed. 686.

An order entered in an action to recover damages from a carrier for violations of the interstate commerce act, requiring certain specified officers and employes who are not parties to produce relevant books and papers, is not, as to those persons, a "final decree" within the meaning of the provision of act March 3, 1891, § 6, governing writs of error from Circuit Courts of Appeals to the Circuit Courts, and hence will not sustain a writ of error sued out by them. *Webster Coal & Coke Co. v. Cassatt*, 28 Sup. Ct. 108, 110, 207 U. S. 181, 52 L. Ed. 160.

"A 'final judgment' is that by which the rights of the parties at issue on the merits of the suit are adjudicated upon and which may acquire the force of res adjudicata." Code Prac. art. 539; *Cary v. Richardson*, 35 La. Ann. 505. A judgment overruling the recusal of the regular judge of the court is final so as to be the subject of an appeal. *State ex rel. Poché v. Judge*, 7 South. 586, 587, 42 La. Ann. 317.

A citation to an executor to file an inventory, or an order of inquest in partition, is not a final appealable decree. In *re Tressler's Estate*, 77 Atl. 461, 228 Pa. 281.

Denial of a change of venue is a "final judgment" reviewable on certiorari. *Carpenter v. Central Vermont Ry. Co.*, 80 Atl. 657, 84 Vt. 538.

An order granting a motion to quash an alternative writ of mandamus, but allowing relator to amend as he may be advised, is not such a "final judgment" as will support a writ of error. *State ex rel. Alexander v. Landis*, 39 South. 15, 50 Fla. 283 (citing *Gates v. Hayner*, 22 Fla. 325).

Under a statute declaring that a "judgment" is the final determination of the rights of the parties in an action or proceeding, an order quashing the service of summons without dismissing the action was not a "final judgment" and was not appealable. *Honerine Min. & Mill Co. v. Tellerday Steel Pipe & Tank Co.*, 85 Pac. 626, 627, 30 Utah, 449.

An order denying a motion to require plaintiff to make his complaint more definite and certain is not appealable until final judgment. *Miles v. Charleston Light & Water Co.*, 69 S. E. 292, 293, 87 S. C. 254.

#### **Decree, judgment, or order in probate proceedings**

Though a decree of distribution of a decedent's estate made by a district court is, under Code Civ. Proc. § 445, a "final judgment," from which an appeal lies, and an order refusing to vacate the decree is therefore a special order after final judgment, the order is not appealable under subdivision 2 of section 1722, as amended by Sess. Laws 1899, p. 146, authorizing appeals from such orders, as that subdivision does not apply to orders in probate proceedings, except in so far as it is made applicable by other provisions, such as section 2921, providing for an appeal from an order granting or denying a motion for a new trial in such proceedings; the term "final judgment" being used in such subdivision 2 only with reference to such judgments at common law, and not applying to statutory determinations and orders termed "orders and judgments" in probate proceedings. In *re Kelly's Estate*, 79 Pac. 244, 31 Mont. 356.

#### **Order relating to receivers**

Where a final decree has been entered in a foreclosure suit awarding judgment and attorney's fees in favor of the judgment creditor, and subsequently the judgment is satisfied of record by the creditor as provided by statute, and the court on motion of the attorney who procured the judgment vacates the satisfaction thereof and enters an order adjudging the attorney to be the equitable assignee of the judgment in the amount of fees owing him and ordering execution to issue out of the original action in favor of the attorney, such judgment is a final judgment within Rev. Codes, § 4807, subd. 1, providing that an appeal may be taken to the Supreme Court from a final judgment in an action or special proceeding. *Dahlstrom v. Featherstone*, 110 Pac. 243, 244, 18 Idaho, 179.

A "final decree" is one which disposes of the cause either by sending it out of the court before a hearing is had on the merits, or, after a hearing on the merits, decreeing either in favor of or against the prayer of the bill. An order appointing a receiver of a corporation, entered at the same term but subsequent to the rendition of a judgment against it, is a "final judgment," and the order is after affirmance by the Court of Civil

Appeals reviewable in the Supreme Court under the statute authorizing appeals from final judgments, etc. *Waters-Pierce Oil Co. v. State* (Tex.) 106 S. W. 326, 329 (quoting *Freem. Judgm.* § 29).

A decree granting an injunction and appointing a receiver for an insolvent corporation under Laws 1905, c. 79, §§ 72, 73, is a final decree within the organic act, relating to appeals and writs of error. *Eagle Min. & Imp. Co. v. Lund*, 113 Pac. 840, 841, 15 N. M. 696; *Sacramento Valley Irr. Co. v. Lee*, 113 Pac. 834, 836, 15 N. M. 567.

An order directing the sale of property by a receiver is final and appealable. *Boothe v. Summit Coal Mining Co.*, 110 Pac. 536, 537, 59 Wash. 610.

#### **Judgment or order of reversal and remand**

A decree which reversed some of the findings and conclusions of law of the court below in an action for an accounting, and directed a new decree to be entered in accordance with the opinion of the court, is not a "final decree" for the purpose of an appeal to the Supreme Court of the United States. *Earle v. Myers*, 28 Sup. Ct. 86, 87, 207 U. S. 244, 52 L. Ed. 191.

Where leave to issue stocks and bonds for corporate purposes was denied by the Public Service Commission, and a writ of certiorari was taken to the Appellate Division, its order annulling the ruling of the Public Service Commission, and referring the case back to it for further consideration, was not a "final order," within the Constitution and Code Civ. Proc. § 190, providing that appeals from actual determinations may be made from the Appellate Division of the Supreme Court to the Court of Appeals. *People ex rel. Long Acre Electric Light & Power Co. v. Public Service Commission for First Dist. of State of New York*, 92 N. E. 629, 199 N. Y. 254.

Under Rev. St. 1899, § 806, authorizing appeals from any final judgment, an order of the Circuit Court remanding a cause transferred to it by a justice of the peace, entered under the authority of section 3951, authorizing the Circuit Court to remand to the justice a cause which has been transferred as involving title to land, where the court is of the opinion that the "statement" filed does not show that title is in issue, is not a "final judgment," and is not appealable. *Walker v. Walker*, 96 S. W. 418, 419, 119 Mo. App. 503.

#### **Order in special proceedings**

The highway act (Acts 1905, p. 579, c. 167, § 123; *Burns' Ann. St.* 1908, § 7793) provides for a hearing de novo in the circuit court on appeal from decisions of the board of commissioners, and authorizes the Supreme Court to finally determine the cause or to refer it back to the county board. A judg-

ment of the circuit court authorized the highway improvements petitioned for, made final disposition of all the questions involved in the appeal, and certified it back to the board of commissioners, with directions to proceed according to the law; and no motion was made to modify the judgment. Held, that the judgment was a "final judgment," and appealable to the Supreme Court under *Burns' Ann. St.* 1901, § 644 (*Burns' Ann. St.* 1908, § 671), permitting an appeal to the Supreme Court from all final judgments, and *Burns' Ann. St.* 1908, § 1393 (Acts 1907, p. 137, c. 96) requiring appeals in proceedings to establish highways to be taken directly to the Supreme Court. *Hall v. McDonald*, 85 N. E. 707, 710, 171 Ind. 9.

Under 1 Mills' Ann. St. § 1727, relating to eminent domain, and providing that an appeal or writ of error lies only on final determination of the special proceeding in the trial court, the only final judgment in such proceeding is the judgment approving the award of the commissioners, or the verdict of a jury as to the damages, and an order determining that petitioner has the power to condemn is interlocutory merely, and no appeal therefrom or writ of error thereto lies. *Burlington & C. R. Co. v. Colorado Eastern R. Co.*, 100 Pac. 607, 609, 45 Colo. 222, 16 Ann. Cas. 1002.

An order of the county court modifying and approving the report of the commissioners of a drainage district organized under the levee act, consisting of surveys, plans, and estimates of the cost of repair work to be done on the system, is not a "final judgment" and is not an appealable order, since section 25 of that act (*Hurd's Rev. St.* 1905, c. 42) allows appeals only to review judgments confirming the assessment and ordering it spread upon the records. *Drainage Com'rs of Union Drainage Dist. No. 1 v. Milligan*, 81 N. E. 382-384, 227 Ill. 303.

Commissioners of a drainage district filed a petition for an assessment, praying that the commissioners, in lieu of a jury, be ordered to make an assessment for benefits, etc. This prayer was granted. The commissioners made an assessment for benefits, and afterwards, on objection, they vacated all orders made since the filing of the petition. Held, that the order authorizing the commissioners to assess the benefits was not a "final judgment," and hence the order vacating it was not appealable under the statute providing for appeal from the order confirming the assessment. *Lacey Levee & Drainage Dist. v. Langellier*, 74 N. E. 148, 149, 215 Ill. 271.

On a complaint under the Maine bastardy statute, the adjudication and order of the presiding justice that the defendant is adjudged the father of the child, and that he stand charged with its maintenance and the assistance of the mother, constitutes the

"final judgment"; and no surrender of the defendant in court on any day of the term thereafter will operate as a discharge of the sureties on his bond. *Corson v. Dunlap*, 14 Atl. 933, 934, 80 Me. 354; *Brett v. Murphy*, 14 Atl. 934, 935, 80 Me. 358.

#### Supplemental orders

The "final judgment" in Code Civ. Proc. § 1251, providing that plaintiff in condemnation proceedings must, within 30 days after final judgment, pay the sum assessed, etc., is the judgment fixing the amount of damages, and is not the final order of condemnation authorized by Code Civ. Proc. § 1253, providing that, where the sum assessed in a condemnation proceeding has been paid, the court may make a final order of condemnation. *Lincoln Northern Ry. Co. v. Wiswell*, 97 Pac. 536, 537, 8 Cal. App. 578; *Same v. Clark*, 97 Pac. 537, 8 Cal. App. xiii.

A judgment of the Court of Civil Appeals refusing to permit the filing of a transcript out of time on the ground that failure to file the same was inexcusable, is not a final judgment within Rev. St. 1895, art. 941, providing that all causes shall be carried to the Supreme Court on writs of error, upon final judgment, and hence such judgment is not reviewable in the Supreme Court on writ of error. *Casey v. Bell*, 137 S. W. 918, 919, 104 Tex. 338.

#### Order vacating judgment or granting new trial

An order vacating a default decree of divorce and allowing defendant to answer in accordance with L. O. L. § 59, is not an appealable order within section 548, providing that appeals will lie from final judgment and decrees, in effect determining the action and orders setting aside the judgment and granting a new trial, for the order is not a final one determining the suit, and neither is it an order granting a new trial which is defined by section 173 as a re-examination of an issue of fact in the same court after judgment, for this order only vacates a default, and there has been no trial which is defined by section 113 as the judicial examination of the issues between the parties. *Taylor v. Taylor*, 121 Pac. 431, 432, 61 Or. 257.

An order vacating a judgment for want of service on a defendant entitled notice of the proceedings as required by statute, is not final, so that an appeal will not lie therefrom. *Molloy v. Union Transfer, Moving & Storage Co.*, 111 Pac. 160, 162, 60 Wash. 331.

#### FINAL DETERMINATION

Under Labor Law (Consol. Laws 1909, c. 31) § 21, providing that, if complaint is made to the Commissioner of Labor that a contractor with a city for public work is failing to comply with the law as to paying the prevailing rate of wages, he shall, if he finds it well founded, present evidence thereof to

the board having charge of the work, which shall take the proper proceedings to revoke the contract, the functions of the Commissioner are merely advisory; and his determination is not conclusive, within Code Civ. Proc. § 2122, providing that, except as otherwise expressly prescribed, certiorari cannot issue to review a determination not finally determining the rights of the parties. *Key-stone State Const. Co. v. Williams*, 137 N. Y. Supp. 405, 407, 152 App. Div. 575.

#### FINAL DISPOSITION

The words "final disposition of the cause," in Bankr. Act July 26, 1876 (19 Stat. 102), which limits the time within which a bankrupt may apply for a discharge from his debts to a time "before the final disposition of the cause," mean the final disposition of the administration of the estate, and it is too late for him to apply for a discharge after his assignee has been discharged from all liability as assignee to any creditor. In re *Brightman*, 4 Fed. Cas. 136, 137, 14 Blatchf. 130.

The term "final disposition," as used in Bankr. Act July 1, 1898, § 3, subd. 3, c. 541, 30 Stat. 546, defining an act of bankruptcy, does not mean a gift of the property to some third person or a voluntary transfer to the creditors in satisfaction of a preferential judgment, but includes every other method than that specified of passing the control and dominion of the property, either absolutely or as security. In re *Tupper*, 163 Fed. 766, 770.

A judgment on a motion for nonsuit, sustaining or denying the same, is a "final disposition of the cause" within Civ. Code 1895, § 5526, providing that no cause shall be carried to the Supreme Court unless the judgment complained of, if it had been rendered as claimed by plaintiff in error, would have been a final disposition of the cause. *Rice v. Ware & Harper*, 60 S. E. 301, 303, 3 Ga. App. 573.

Where defendant in a penal action dies after judgment against him and before its reversal, the action is not dismissed nor finally disposed of in favor of or against a party within Code Civ. Proc. §§ 3228, 3229, and neither party is entitled to costs on the entry of judgment of abatement. *People v. Newcomb*, 135 N. Y. Supp. 151, 153, 75 Misc. Rep. 258.

#### FINAL DISTRIBUTION

See On Final Distribution.

#### FINAL DIVISION

A decree in a divorce suit providing for the payment of a certain annual sum to the wife as alimony so long as she remained unmarried, in lieu of all other interest in her husband's estate, was not such a "final division and distribution" of the property as to preclude the court from afterwards enter-

taining a petition in relation to the wife's assignment of such alimony. *Kempster v. Evans*, 51 N. W. 327, 328, 81 Wis. 247, 15 L. R. A. 391.

#### FINAL HEARING OR TRIAL

"Final hearing" is sometimes used to describe the stage of the proceedings which relates to the determination of the suit on its merits, as distinguished from those of preliminary questions, which are termed "interlocutory." *McArthur Bros. Co. v. Commonwealth*, 83 N. E. 334, 335, 197 Mass. 137.

Since the hearing on a motion to set aside the service is not a "final hearing" of the cause, no statutory docket fee can be taxed therefor. *Michigan Aluminum Foundry Co. v. Aluminum Co. of America*, 190 Fed. 903, 904.

#### FINAL JUDGMENT

See Final Decree or Judgment.

#### FINAL JURISDICTION

The words "final jurisdiction," as used in Gen. St. 1902, § 1483, relating to prosecuting attorneys of criminal courts of common pleas filing informations for offenses occurring within the period within which such courts respectively have final jurisdiction, mean a jurisdiction to try the cause and upon conviction to impose the full penalty prescribed, as distinguished from a jurisdiction given in respect to offenses the punishment whereof may be greater or less than that which a justice court can impose. *State v. Compagnie*, 57 Atl. 164, 76 Conn. 549.

The words "final jurisdiction," in Gen. St. 1902, § 1446, depriving inferior courts of final jurisdiction of offenses punishable by imprisonment in the state prison, refer to the power to sentence or acquit, as distinguished from the power to bind over. *State v. Fox*, 76 Atl. 302, 304, 83 Conn. 286, 19 Ann. Cas. 682.

#### FINAL LOCATION

The charter of a railroad authorized it to construct a road from a point at or near the southern boundary of a certain city to a certain other point, and commencing at the latter point the road condemned a right of way and constructed its line to a point about three miles distant from the municipal boundary in question, but neither by the adoption of a survey, by resolution of the directors, nor by the acquiring of a right of way was the remainder of the line located. Held, that the road had not been finally located, so as to preclude the fixing of the northern terminus at a point beyond that to which the road had been built, under Acts 1887, p. 112, c. 39, authorizing the directors of a railroad company to change the terminus at any time prior to "final location." The "final location" is the location upon which the officers of the road finally decide.

As soon as the location is reached it is final and irrevocable, and all discretion theretofore existing in the railroad company as to the location of the road is exhausted. *Memphis & St. L. R. Co. v. Union Ry. Co.*, 95 S. W. 1019, 1025, 116 Tenn. 500.

Where a railroad company was given five years under their charter to construct a railroad by making and filing their location on or before a certain date, the "final location" within the meaning of the privilege was the last location which the company under the terms of the charter could make before the expiration of the period covered. After the company had made a survey and staked out a tract across plaintiff's land, it purchased a strip of his land, taking a deed in which it was described as "covered by the location of the said railroad or that may finally be covered by such location." The Legislature subsequently granted the company a further time to file their location, and they made a different one across the plaintiff's land and filed the same; but the court held that the company obtained no rights under such new location under the deed. *Hall v. Pickering*, 40 Me. 548, 555.

#### FINAL ORDER

See, also, Final Decision; Final Decree or Judgment.

A "final order" is one which disposes of the whole subject-matter of the action, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order. *White Oak Ry. Co. v. Gordon*, 56 S. E. 837, 838, 61 W. Va. 519 (citing *Ludlow v. City of Norfolk*, 12 S. E. 612, 87 Va. 319; *Postal Tel. Cable Co. v. Norfolk & W. R. Co.*, 12 S. E. 613, 87 Va. 349; *Burch v. Hardwicke*, 23 Grat. [64 Va.] 51; *Alexander v. Byrd*, 8 S. E. 577, 85 Va. 690; *Pack v. Chesapeake & O. Ry. Co.*, 5 W. Va. 118; *Wheeling Bridge & Terminal Ry. Co. v. Wheeling Steel & Iron Co.*, 24 S. E. 651, 41 W. Va. 747).

"Final orders" in special proceedings are in the nature of judgments. *Snively v. Buggy Co.*, 12 Pac. 522, 523, 36 Kan. 106.

"A 'final order' either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such a manner as to put it out of the power of the court making the order after the expiration of the term to place the parties in their original condition." Thus an order directing a sale of mortgaged property in a suit to foreclose the lien, entered before the entry of a judgment of foreclosure, was a "final order" and appealable. *Tipton v. Harris* (Ky.) 87 S. W. 1074, 1075 (quoting *Maysville & L. R. Co. v. Punnett*, 15 B. Mon. [54 Ky.] 47). But an order refusing to transfer an action against a foreign corporation

and residents to the federal court, on the ground that the petition does not state a cause of action against the residents, is not final and appealable, since during the trial, on it developing that plaintiff had no reasonable grounds on which to base the allegation that the residents were liable, the court must find for the residents, and transfer the case to the federal court. *Chesapeake & O. Ry. Co. v. Helton's Adm'r*, 132 S. W. 1024, 1025, 141 Ky. 404.

An order confirming or refusing to confirm a foreclosure sale is a "final order" affecting a substantial right made on a summary application in an action after judgment, within St. 1898, § 3069, subd. 2, and is appealable. *Griswold v. Bardon*, 130 N. W. 952, 953, 146 Wis. 35. So is an order made after the expiration of the statutory period for serving a bill of exceptions, extending the time for service. *Sly v. Village of Kilbourn City*, 128 N. W. 872, 873, 144 Wis. 203. But an order setting aside a default judgment in an action on a benefit certificate by the devisee of the assured, and staying proceedings till distribution of the estate, is not a "final order" affecting a substantial right, and is not appealable. Such order is not final in any such sense as that it concludes or ends the controversy. It leaves everything open for future proceedings and investigation. Its effect upon the rights of the parties is a test whether it is a final order. *Ledebuhr v. Grand Grove of Wisconsin of the Order of Druids*, 72 N. W. 884, 885, 97 Wis. 341.

In Rev. St. 1899, § 4247, providing for review of a judgment or final order, and section 4249 declaring that an order affecting a substantial right, which in effect determines the action or prevents a judgment, and an order affecting a substantial right in a special proceeding, is a "final order" which may be reviewed in the Supreme Court, the term "special proceeding" as so used is not limited to a proceeding apart from an action, but includes a necessary proceeding to aid the ultimate relief sought in an action, and hence an order denying a motion to dissolve a temporary injunction before judgment is a final order, terminating a special proceeding, and reviewable on writ of error. *Anderson v. Englehart*, 105 P. 571, 572, 18 Wyo. 196, Ann. Cas. 1912C, 894. And an order dismissing an appeal from justice court for irregularity is also a "final order," as defined by said section 4247. *Mayott v. Knott*, 92 Pac. 240, 241, 16 Wyo. 108.

An order rendered by a justice of the peace sustaining a motion to retax costs and retaxing the same is not a final judgment from which an appeal may be taken and a trial de novo had, but it is a "final order," defined by the statute as one affecting a substantial right made in a special proceeding, or upon a summary application in an action

after judgment, and it may be reviewed on petition in error. *Maggert v. Keele*, 95 Pac. 466, 467, 20 Okl. 681.

An order denying a petition to vacate a judgment is a "final order," within *Ballinger's Ann. Codes & St.* § 6500, subd. 7 (*Pierce's Code*, § 1048), authorizing appeal from any final order made after judgment affecting a substantial right, if not a final judgment within subdivision 1 of the same section. *Kath v. Histogenetic Medicine Co.*, 97 Pac. 464, 50 Wash. 454.

An order made by a District Court of Alaska setting aside a prior judgment of such court and granting a new trial is not appealable under *Codes Alaska*, pt. 4, c. 51, § 504, which gives the right of appeal from a "final judgment or order," but such order may be reviewed on appeal by the Circuit Court of Appeals for want of jurisdiction in the court to make it. *Nelson v. Meehan*, 155 Fed. 1, 3, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374.

An order denying a motion to strike from a judgment a provision directing that execution issue against the person of the defendant after return of execution against his property unsatisfied was a final order within the meaning of *Carter's Ann. Code Civ. Proc. Alaska*, § 504, which permits a writ of error from the United States Circuit Court of Appeals, Ninth Circuit, to review a final order of a District Court of Alaska. *Mitchell v. Porter*, 194 Fed. 49, 54, 114 C. C. A. 69.

*Code Civ. Proc.* § 2058, authorizes an appeal "from an order refusing to grant a writ of habeas corpus \* \* \* or from a final order, made upon the return of such a writ, to discharge or remand a prisoner or to dismiss the proceedings. \* \* \* An appeal does not lie from an order of the court or judge before which or whom the writ is made returnable except" as thus prescribed. Held, that an order refusing to dismiss a writ of habeas corpus and continuing the proceeding in force was not a "final order," and was not appealable. *People ex rel. Duryee v. Duryee*, 81 N. E. 313, 314, 188 N. Y. 440.

On motion to punish a third party for contempt for failing to appear and submit to an examination pursuant to an order of a justice, an order requiring such party to appear and submit to an examination, otherwise the commitment to issue, was not a "final order," and no appeal therefrom would lie. *Siegel v. Solomon*, 92 N. Y. Supp. 238, 239.

Where the surrogate court on petition of attorney for contestant continued an administrator's accounting because he had made secret settlements and had procured the withdrawal of objections, and to allow the attorney who claimed a lien on such account

to establish his lien, the order of the Appellate Division dismissing the attorney's petition and denying his right to establish such lien was a "final order" in a special proceeding and appealable. In re Fitzsimons, 66 N. E. 554, 558, 174 N. Y. 15.

Where an order on the settlement of accounts of trustees provided that the wives of certain bankrupt beneficiaries were not entitled to dower, authorized commissions to the trustees, and, after ruling on matters presented by other parties in interest, reserved a question for further consideration, and required the auditor to restate his account so as to conform to the terms of the order, it was not a final order, but was an "appealable order," within Code Pub. Gen. Laws 1904, art. 5, § 27, authorizing an appeal from an order determining a question of right between the parties, and directing an account to be stated on the principal of such determination; and, no appeal having been taken therefrom, it was reviewable on appeal from the final order as authorized by section 28. *Slingluff v. Hubner*, 61 Atl. 326, 328, 101 Md. 652.

As an order, overruling objections to an application for the appointment of commissioners to determine the necessity of a proposed highway and appointing commissioners, is not a final order within Code Civ. Proc. § 2550, defining a "final order" as the final determination of the rights of the parties, on appeal resulting in affirmance with costs of the appeal, the costs must be awarded in accordance with section 3239, providing for costs on appeal from an interlocutory order, and not in accordance with section 3240, providing for costs in a special proceeding, and the costs must be limited to \$10 and disbursements, as provided by section 3251. In re Van Dusen, 116 N. Y. Supp. 915, 916, 132 App. Div. 592.

Where the Appellate Division, on appeal from a decree denying probate, decided that the Surrogate's Court erred in excluding certain evidence, and reversed and remanded the case without directions, its order was not a final order under Const. art. 6, § 9, and Code Civ. Proc. § 190, subd. 1, permitting appeals as matter of right to the Court of Appeals from an order finally determining a special proceeding, so that that court has no jurisdiction of an appeal from the order. In re Gibson's Will, 88 N. E. 1100, 1102, 195 N. Y. 466.

An order by the superior court of Cincinnati that a default judgment rendered by such court at a previous term be suspended and execution thereon stayed until the case should be tried on its merits, and granting leave to defendant to answer, is an order affecting a substantial right in a summary application after judgment, and is a final order within Rev. St. § 6707, providing that an order affecting a substantial right, made

upon a summary application in an action after judgment, is a "final order," from which error may be prosecuted. *Van Ingen v. Berger*, 92 N. E. 433, 434, 82 Ohio St. 255, 19 Ann. Cas. 799.

An order of dismissal for want of prosecution and awarding costs is a final order within Rev. St. § 6707, reviewable on error to the common pleas in the circuit court. *Lowellville Coal Mining Co. v. Zapplo*, 89 N. E. 97, 100, 80 Ohio St. 458.

An order dismissing, for want of sufficient evidence, without prejudice to a renewal thereof on further evidence, an application on affidavits to set aside a decree of divorce, claimed, as attempted to be shown in the affidavits to have been procured by fraud and duress of plaintiff's husband, is "final" and appealable, at least in the absence of a showing that the provision for leave to renew was inserted by request of and for the benefit of plaintiff. *Lake v. Lake*, 108 N. Y. Supp. 964, 965, 124 App. Div. 89.

An order sustaining a demurrer to a petition for certiorari, unaccompanied by any application for leave to amend, or final order denying the petition, or any final judgment, does not determine the case, and, under Civ. Code 1901, pars. 441, 1214, 1493, permitting appeals from final judgments, no appeal lies from the order. *Aiton v. Board of Medical Examiners*, 108 Pac. 221, 222, 13 Ariz. 74.

The order appointing commissioners on drainage proceedings is not a "final order affecting substantial rights," from which an appeal will lie. In re *Horicon Drainage Dist.*, 108 N. W. 198, 201, 129 Wis. 42.

"A final order in a special proceeding" to be appealable is one which determines and disposes finally of the proceeding, one which so long as it stands precludes any further steps therein. It bears the same relation to the proceeding in which it is entered as the final judgment bears to an action. *Kingston v. Kingston*, 102 N. W. 577, 578, 124 Wis. 263.

An order, in a proceeding to establish a drainage district, confirming the commissioners' report and finding the district duly established, is not a "final order" from which an appeal will lie; but the order which terminates the proceeding and constitutes a basis for review is the order of confirmation of the assessment roll. *Damon v. Barker*, 88 N. E. 278, 279, 239 Ill. 637.

An order made, vacating a judgment for the purpose of permitting a party against whom said judgment is rendered to prosecute or defend, is interlocutory, and not a "final order," from which an appeal will lie to the Supreme Court. *Maddle v. Beavers*, 104 Pac. 909, 24 Okl. 703.

"The action of a taxing board is, in its nature, a 'final order' which cannot be at-

tached collaterally, and can only be reviewed on error or appeal." *State ex rel. Union Pac. R. Co. v. State Board of Equalization and Assessment*, 115 N. W. 789, 791, 81 Neb. 139.

A ruling of the district court that a claim against an estate was equitable and not triable as a legal action, and that both the county and the district court were without jurisdiction to hear and determine the controversy as a law action or special statutory proceeding, was not a "final order" disposing of the merits of the controversy, and from which error could be prosecuted. *Huffman v. Rhodes*, 100 N. W. 159, 160, 72 Neb. 57.

An order of the district court overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace is not a "final order" so as to be appealable. *Raymond v. Raymond*, 79 Pac. 1056, 1057, 32 Mont. 170.

An order striking the complaint from the files, on the ground that it contains several causes of action not separately stated, is not final, as plaintiff may file an amended complaint, and therefore is not appealable. *Vaktaren Pub. Co. v. Pacific Tribune Pub. Co.*, 83 Pac. 426, 41 Wash. 355.

An order refusing to require a nonresident plaintiff to give security for costs is not a "final order" within the statute authorizing appeals from "final orders." *Boggs v. Inter-American Mining & Smelting Co.*, 66 Atl. 259, 262, 105 Md. 371.

Complainant, having obtained an injunction against the maintenance of certain suits in a state court affecting its water rights, and right to cut off service in order to coerce payment of back debts, filed a bill, the object of which was to have defendants made parties to the original bills, and to obtain against them a perpetual injunction restraining further prosecution of certain suits which defendants had brought in a state court for the same purpose. Held, that an order modifying a temporary restraining order against defendants, so as to permit them to prosecute their suits in the state court with reference to questions not determined in the prior proceedings, but not determining the cause on the merits nor ordering that the bill or motion be dismissed, was not a "final order" from which an appeal could be taken. *Vicksburg Waterworks Co. v. City of Vicksburg*, 153 Fed. 116, 120, 82 C. C. A. 250.

An order of the city court of Salt Lake City, after final judgment in the original action, setting aside and releasing a garnishment, was "final" and appealable within the statute providing for an appeal in garnishment proceedings. *Hewlett Bros. v. Mallett*, 117 Pac. 68, 70, 39 Utah, 357.

Defendant telephone company having been temporarily enjoined from severing its connection with plaintiff telephone company,

and from interfering in any way with the service between plaintiff's exchange and its own exchanges, upon its attempt to end an agreement for interchange of business with plaintiff, and establish such relations with another company, the cut lines were restored, but thereafter, while the patrons of plaintiff were given connection with subscribers of defendant, yet defendant gave such other company exclusive connection for all business originating on its lines refusing to send messages over plaintiff's lines. Defendant was thereupon adjudged to have violated the injunction, and ordered to restore the service existing before the wires were severed, giving the subscribers of each of the exchanges connections both ways. Held, that the order was not a "final order," and was not appealable. *Rural Home Telephone Co. v. Kentucky & I. Telephone & Telegraph Co. (Ky.)* 100 S. W. 847, 848.

The action of a court in granting or denying a motion for a new trial is not a "final order" from which an appeal lies. *First Nat. Bank v. McCullough*, 93 Pac. 366, 369, 50 Or. 508, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 738.

Where a motion by defendant to strike certain portions of plaintiff's petition is sustained, the order is not a final or appealable one, authorizing an appeal from such action. *Grunawalt v. Grunawalt*, 104 Pac. 905, 906, 24 Okl. 756.

An order vacating an order appointing a trustee under a will, on the ground that the Special Term was without jurisdiction to make the appointment, is a "final order" in a special proceeding, and is appealable to the Court of Appeals. *In re Earnshaw*, 89 N. E. 825, 826, 196 N. Y. 330.

An order directing the parties to a divorce suit to convey real property to a trustee for the benefit of their minor children was a final order, affecting a substantial right from which they could appeal. *Lowe v. Lowe*, 101 Pac. 704, 705, 53 Wash. 50.

An order of the court on appeal from the assessment of damages in a ditch proceeding, under Gen. Laws 1905, p. 303, c. 230, assessing appellant's damages and directing judgment to be entered, is not a final order and appealable within the terms of that statute. *Prahl v. Brown County*, 116 N. W. 483, 104 Minn. 227; *Adams v. Same*, 116 N. W. 484, 104 Minn. 527.

Where the result of an election showed an apparent majority of two in favor of prohibition, but the result as certified by the board of canvassers was set aside by the contest board, which declared that it was unable to find from the evidence that a majority of the legal votes were cast either way, and therefore adjudged that the return of the board of canvassers be set aside, canceled, and held for naught, and further or-



dered and adjudged that there was no election and that neither party was entitled to have any fact certified concerning the election, the decision was a "final order or judgment," so that an appeal would lie from it to the Circuit Court under Ky. St. 1903, § 2567. *Erwin v. Benton*, 87 S. W. 291, 292, 120 Ky. 536, 9 Ann. Cas. 264.

### FINAL PARTICIPATION

In *Laws of Muskogee Nation 1880*, p. 60, § 1, providing that all noncitizens, being married to citizens of this nation, shall enjoy all the privileges enjoyed by other citizens, except participation in annuities and "final participation" in the lands, it was not intended to exclude such a person from taking a child's part in the allotment of a deceased wife, but was intended to exclude him from the right to receive an allotment for himself. *Sanders v. Sanders*, 117 Pac. 838, 342, 28 Okl. 59.

### FINAL PASSAGE

The "final passage of a bill" is, within the meaning of the constitutional provision providing that the vote must be taken by yeas and nays, the vote on which each house adopts the bill after it has passed its first and second readings and after it has been read again for the purpose of being put upon its passage. *Johnson v. City of Great Falls*, 99 Pac. 1059, 1060, 38 Mont. 369, 16 Ann. Cas. 974.

*Los Angeles City Charter*, § 39, provides that all ordinances finally adopted shall be published, and until such publication no ordinance shall be valid, but does not provide when it shall be published; and section 198b provides that no ordinance shall go into effect before 30 days from the time of its final passage and its approval by the mayor, and if during said 30 days a petition, signed by a certain number of electors, protesting against its passage, be presented to the council, the ordinance shall be suspended, and the council shall reconsider it, and, if it be not repealed, shall submit it to a vote of the electors. Held, that the 30-day period for filing the referendum petition commenced to run from the final passage of the ordinance by approval by the mayor, or its passage over his veto, and not from the date of its publication; the term "final passage" merely meaning favorable action on the ordinance by the council. *Solomon v. Alexander*, 118 Pac. 217, 219, 161 Cal. 810.

### FINAL PORT OF DISCHARGE

Under shipping articles signed in New York for service on the vessel during a voyage to Port Arthur, Tex., "and back to final port of discharge, \* \* \* with liberty to call at intermediate ports," where she loaded a cargo of oil at Port Arthur, in part for Philadelphia and in part for New York, the latter, as the port where she was completely discharged of her cargo, was the "final port

of discharge," and the action of the seamen in leaving the vessel at Philadelphia after her partial discharge there, was in violation of the contract, and amounted to desertion, which forfeited their right to wages. *The Larimer*, 174 Fed. 429, 430.

### FINAL PROCEEDING

Where a judgment is recovered against executors in their representative capacity in the Supreme Court, an application to the surrogate to issue an execution on such judgment is a "final proceeding" *de novo* in the Surrogate's Court, within Code Civ. Proc. §§ 1825, 1826, to be commenced by the filing of a verified petition and an issue of citation, or an order to show cause, unless the issue and service of such citation or order is waived by the parties affected; service being had personally on each of the executors, in the absence of a showing that such service cannot be had with due diligence, in which case notice must be given in such manner as the surrogate directs. *McGinn v. Lighthouse*, 137 N. Y. Supp. 110, 111, 112.

### FINAL SETTLEMENT

Where, in proceedings to surcharge the final settlement of a guardian with a larger charge on the item of the balance of the last annual settlement, the record did not show that any item of property of the ward had been omitted from the settlement, or that any credit was allowed except on items of credit specifically set out in the settlement, and the order of the probate court confirming the annual settlement became final for want of timely appeal, it was proper to refuse to surcharge the final settlement; the confirmation of the annual settlement being conclusive except against direct attack. *France v. Shockey*, 121 S. W. 1056, 1057, 92 Ark. 41.

*Mills' Ann. St.* § 4728, provides that a guardian may resign in writing to the county court having settlement of his accounts, and, when such resignation is accepted, he shall be discharged, but shall not be exonerated from liability previous thereto, and that no resignation shall be accepted until the guardian has given notice of his intention, as in cases of final settlement, and shall have made a complete settlement of all matters up to the time of his resignation, and shall have delivered into court all evidences of title to property, papers, moneys, and choses in action in his hands. Held, that "final settlement" or "final accounting" implies an accounting or settlement after the severance of the relation between guardian and ward, including a settlement when the relation is severed by resignation, so that a settlement by a resigning guardian under such section, as well as a final settlement, as authorized by sections 2084 and 2093, when regularly made, is a judgment conclusive between the ward and the guardian and her sureties, unless impeached in the court in which it was rendered

for fraud, or such other defects as would invalidate judgments generally. *American Bonding Co. of Baltimore v. People*, 104 Pac. 81, 83, 46 Colo. 394.

#### In administration of estates

"Final settlement" of an estate by an administrator comprehends a payment of the balance so as to leave nothing to be done to complete the trust. *Mefford v. Lamkin*, 76 N. E. 1024, 1025, 38 Ind. App. 33 (citing *Dufour v. Dufour*, 28 Ind. 421).

#### FINAL SUBMISSION

The term "final submission of the case to the jury" contemplated by Code Civ. Proc. § 430, providing that an action may be dismissed without prejudice to a future action, first, by the plaintiff before the "final submission of the case to the jury" or to the court where the trial is by the court, is the submission of an issue of fact on which the jury is at liberty to decide in favor of either party. Where a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost. The district court may, in the just exercise of discretionary power, permit plaintiff to dismiss his case after it has been finally submitted to the court or jury. But where the discretionary power of the court is not invoked, and the application to dismiss after final submission is made and allowed as a demandable right, the order of dismissal will not be upheld unless a denial of the application would amount to an abuse of discretion. *Bee Bldg. Co. v. Dalton*, 93 N. W. 930, 931, 68 Neb. 38, 4 Ann. Cas. 508.

Where the evidence is closed, the jury has returned their findings, and the case is ready for judgment, there is a "final submission" within the meaning of Gen. St. 1889, par. 4493, providing that an action may be dismissed without prejudice to a future action: First, by the plaintiff, before the "final submission" of the case to the jury, or to the court, where the trial is by the court. *Dickerman v. Crane*, 57 Pac. 305, 306, 8 Kan. App. 795.

Rev. Codes, § 6714, subd. 6, provides that an action may be dismissed or a nonsuit entered by the court when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months. Held, that "final submission," as so used, meant a submission equivalent to the return of a verdict; and hence where relator was served with summons on February 20, 1894, but no entry of his default was made by the clerk until July 5, 1912, and on the same day judgment was entered on the default after hearing, there was no final submission until the entry of the default; and hence the action was not subject to dismissal under such section. *State ex rel. Kohl v. District Court*, 128 Pac. 582, 583, 46 Mont. 348.

Where plaintiff has rested and defendants have moved for directed verdict for failure of plaintiff to make a case, and the motion has been submitted and the conclusion of the court announced, there is a "final submission" under Rev. St. § 5314, and plaintiff cannot dismiss without prejudice to a future action. *Turner v. Pope Motor Car Co.*, 86 N. E. 651, 655, 79 Ohio St. 153; *Turner v. Pope Motor Car Co.*, 29 Ohio Cir. Ct. R. 181, 184.

Within Code, § 3764, authorizing a dismissal by plaintiff before "final submission" of the case to the jury, until the jury proceeds or has been directed to proceed with the consideration of the case after the reading of the instructions, the cause is not "finally submitted" to the jury, nor to the court trying the case without a jury, until the cause is being considered or has been taken under advisement by the court. *Inman Mfg. Co. v. American Cereal Co.*, 136 N. W. 932, 933, 155 Iowa, 651. But where on motion at the close of plaintiff's evidence the judge directed a verdict for defendant, and one of the jurors designated as foreman was in the act of signing a verdict by direction of the court, the case had been finally submitted, and an announcement of dismissal then made came too late. *Duffy v. Glucose Sugar Refining Co.*, 141 Fed. 206, 207.

Within the statute requiring the jurors to be kept together after the case is "finally submitted," a cause is finally submitted at such time as the court directs the jury to enter upon its deliberations, and not necessarily at the conclusion of the charge. Thus where, at the conclusion of the reading of the court's charge, the jurors are permitted to separate for the purpose of the noon meal, being instructed that the cause has not then been finally submitted to them, and directed to return at 1 p. m. and retire to the jury room for deliberation, and being carefully admonished as to their conduct, and upon their return at the hour named the indictment, the court's written charge, and the blank verdicts are for the first time delivered to them, and they then retire to deliberate upon their verdict, the cause will be held to have been finally submitted at the hour of re-assembling and not at the time of such separation, and, in the absence of a showing that such separation has worked prejudice to the defendant, the fact of separation will not be ground for a new trial. *State v. Ferrell*, 69 N. E. 995, 996, 69 Ohio St. 521.

Code Civ. Proc. 1895, § 1004, subd. 6, provides that an action may be dismissed by the court, when after verdict or final submission the party entitled to judgment neglects to demand, and have it entered for more than six months. Held that, under the rule of *noscitur a sociis*, the words "final submission" mean a submission which is the equivalent of the return of a verdict, and refer to that state of the case when a judgment may rightfully be demanded as of course. *State ex*

rel. *Stiefel v. District Court of Ninth Judicial Dist.*, 96 Pac. 337, 339, 37 Mont. 298.

### FINAL TERMINATION

Under a stipulation that one suit should abide the result of another, and that the final termination of one should be the final termination of the other, there was no error in holding after a final judgment in the first case finding in favor of the plaintiff for the total amount of the insurance policy involved (allowing a small admitted credit for a premium returned) upon the trial of the suit on the policy involved in the second case (which was in all respects like the other policy save as to its amount), that a verdict and judgment should be entered for the full amount thereof, less the small deduction admitted to be proper on account of a return premium. *Commercial Union Assur. Co. of London v. Chattahoochee Lumber Co.*, 60 S. E. 554, 555, 130 Ga. 191.

### FINALLY

The word "finally" is defined to mean: "At the end or conclusion; ultimately; lastly." *Bear v. Reese*, 89 N. E. 522, 523, 44 Ind. App. 465.

"Final" and "finally" pertain to the conclusion and the end. "Finality" is as clear in meaning as "final." Both are derived from "finis," denoting the end; "precluding further controversy on the question passed upon, as the statute declaring that the decision of a specified court shall be final in that court" (Cent. Dict.). Also as indicating the end with respect to the suit (*Bouvier; Black.*). In relation to the writ of prohibition, and as used in Code Prac. La. art. 851, providing that "after the return of the judge ordered to make a return has answered, the superior court issuing the order shall pronounce 'finally and summarily' on the right of jurisdiction," the order of the court is final. *State ex rel. Le Blanc v. Twenty-First Judicial District Democratic Committee*, 47 South. 405, 407, 122 La. 83.

### FINANCE

The word "finance" in an agreement by which one was to "finance" a corporation, meant that he was to loan to the corporation the money on which it was to do business and to take therefor the note of the corporation. *Hobgood v. Ehlen*, 53 S. E. 857, 859, 141 N. C. 344.

### FINANCIAL

See Nonfinancial.

### FINANCIAL ARRANGEMENT

A person contracting to procure a purchaser of the corporate stock of two corporations or sufficient capital to develop their properties for a commission when the sale is made, or any financial arrangement is

concluded with parties introduced by such person, and, when the consideration for the stock or funds to develop the properties is received, is entitled to commissions only when he procures a purchaser of the stock or funds to develop the properties; the words "any financial arrangement" being construed with reference to the kind of financial arrangement which such person was employed to negotiate. *Farjeon v. Indian Territory Illuminating Oil Co. et al.*, 130 N. Y. Supp. 532, 534, 146 App. Div. 23.

### FINANCIAL CORRESPONDENT

As managing agent, see Managing Agent.

### FINANCIAL OFFICER

Where a municipality constructing a public building was a school district, and the board having charge of the work was the board of education, the "financial officer" within the meaning of a mechanic's lien law requiring notice of a claim to be filed with the "financial officer of the municipality," included both the district clerk, who was required to pay out, by orders drawn on the custodian of the school moneys, all school funds of the district, and the custodian, who is the officer intrusted with the finances of the district, and who receives and pays out its moneys. *Hazard v. Board of Education of School Dist. of Borough of Swedesboro (N. J.)* 75 Atl. 237, 239.

### FINANCIAL STANDING OR CREDIT

As property, see Property.

### FINANCIALLY SOLVENT

Where testator directed a trust fund to be paid over to the beneficiary whenever he became "financially solvent" and able to pay all his just debts from other resources than the principal of the trust fund, the beneficiary, who was discharged from all debts in bankruptcy after testator's death, was entitled to receive the fund. *In re Farmers' Loan & Trust Co.*, 121 N. Y. Supp. 1099, 1100, 65 Misc. Rep. 418.

### FIND—FOUND

See If You Find.

See, also, Found.

The words "to the satisfaction of the jury," used in an instruction authorizing a verdict on proof to the satisfaction of the jury, etc., are equivalent to "find" or believe. *Terre Haute Traction & Light Co. v. Payne*, 89 N. E. 413, 417, 45 Ind. App. 132 (citing *Callan v. Hanson*, 53 N. W. 282, 86 Iowa, 420; *Sams Automatic Car Coupler Co. v. League*, 54 Pac. 642, 25 Colo. 129; *Kenyon v. City of Mondovi*, 73 N. W. 314, 98 Wis. 50; *Torrey v. Burney*, 21 South. 348, 113 Ala. 496).

Chinese persons were not "found unlawfully in the United States," so as to entitle them to a hearing as to their right to remain, where, when they crossed the border into the

United States at a point remote from the designated port of entry, they were within sight of inspectors, who, intending to prevent their unlawful entry, followed them closely until they had proceeded about one-fourth of a mile across the border, and until it was apparent that they intended to enter unlawfully, and, taking them into custody, conducted them immediately to the nearest port of entry for investigation of their right to enter; the term, "found unlawfully in the United States" referring to those Chinese persons who have entered, gone at large, and mixed with and become a part of the population. Hence such persons having been given opportunity to show their right to enter, and having remained mute, the inspector in charge had jurisdiction to exclude them. *Ex parte Chow Chok*, 161 Fed. 627, 632.

A sheriff's return of service of notice of forfeiture of school land contracts, which states that "he found no one in possession" of the land, is not a finding or return that no one was in possession. *True v. Brandt*, 83 Pac. 826, 827, 72 Kan. 502.

In Rev. St. § 4965, prescribing a penalty for each copy of a copyright publication found in the possession of defendant, "found" means that there must be a time before the cause of action accrues at which they are found in the possession of defendant. *Stern v. Jerome H. Remick & Co.*, 164 Fed. 781, 782 (quoting and adopting definition in *Thornton v. Schreiber*, 8 Sup. Ct. 618, 622, 124 U. S. 613, 621, 31 L. Ed. 577).

As used in Rev. St. § 4965, prescribing a forfeiture and penalty against an infringer for every infringing copy of a copyrighted painting, etc., "found in his possession," the word "found" means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant, that is, before a penalty can be recovered, they must be actually found in possession of defendant, and "found in his possession" refers to a finding for the purposes of forfeiture and condemnation in an action brought both to procure condemnation and a penalty and does not refer to a finding in a prior action declaring a forfeiture. *Werckmeister v. American Tobacco Co.*, 28 Sup. Ct. 124, 126, 207 U. S. 375, 52 L. Ed. 254 (citing *Thornton v. Schreiber*, 8 Sup. Ct. 618, 124 U. S. 612, 31 L. Ed. 577; *Bolles v. Outing Co.*, 77 Fed. 966, 23 C. C. A. 594).

Code, § 2427, provides that "the finding of intoxicating liquors in the possession of one not legally authorized to sell or use the same," except in a private dwelling house not used in connection with a place of public resort, or "the finding" of the same in unusual quantities in a private dwelling, shall be presumptive evidence that such liquors are kept for illegal sale. Held, that it was not error to instruct that the presumption applied if liquor was "found or seen" or "is in

any building which is a place of public resort;" it not being necessary that it be "found" by an officer under a search warrant to make the presumption apply. *State v. Wilson*, 132 N. W. 820, 152 Iowa, 529.

In a prosecution for larceny, an instruction as to defendant being found in the recent possession of stolen property is applicable, though the property is not found in defendant's possession, but in the possession of one to whom he had sold it, since the word "found," as used in such instructions, simply means "discovered," "traced to," or shown to have been in defendant's possession. *State v. Minnick*, 102 Pac. 605, 607, 54 Or. 86.

### Indictment

An indictment is "found" when 12 grand jurors competent to vote upon such finding shall concur in finding such indictment. *Shivers v. Territory*, 74 Pac. 899, 901, 13 Okl. 466.

*Snyder's Comp. Laws* 1909, § 6738, provides that an indictment must be set aside when it is not found, presented, or filed as provided by statute. Held, that the phrase "when it is not found" means when not concurred in by at least nine grand jurors. *Eubanks v. State*, 114 Pac. 748, 751, 5 Okl. Cr. 325; *Elder v. Same*, 114 Pac. 752, 5 Okl. Cr. 693.

An indictment is "found" only when it is duly presented by a grand jury in open court and there received and filed. *People v. Herrmans*, 125 N. Y. Supp. 143, 146, 69 Misc. Rep. 303.

An indictment is "found" when it is presented by the grand jury in due form in open court and filed with the clerk. *State v. Disbrow*, 106 N. W. 263, 266, 130 Iowa, 19, 8 Ann. Cas. 190.

The phrase "when it is not found," in *Wilson's Rev. & Ann. St.* 1903, § 5399, providing that an indictment must be set aside on the motion of defendant "when it is not found," etc., means when not concurred in by at least 12 grand jurors, and has no reference to the kind or character of evidence received by the grand jury, or to the other matters or proceedings prior to the vote of the grand jury on which the indictment is found. *Robinson v. Territory*, 85 Pac. 451, 453, 16 Okl. 241.

### As affecting service of process

A publishing corporation whose residence and headquarters are in New York City, and whose only business in the state of Minnesota is to circulate its periodicals by mail and to send its employes into the state for the purpose of soliciting advertisements, is not doing business within the state of Minnesota to the extent that it can be said to be "found in that state" for the purpose of service under the acts of Congress governing service of process upon foreign corporations.

*Boardman v. S. S. McClure Co.*, 123 Fed. 614, 616.

L. O. L. § 54, providing that the summons shall be served by the sheriff of the county where the defendant is found, has no application to an action against a corporation; it not being a defendant which "may be found" within the statutory meaning. *Davies v. Oregon Placer & Power Co.*, 123 Pac. 906, 908, 61 Or. 594.

#### **As determining venue**

The word "found," as used in section 730 and in act March 3, 1847 (9 Stat. 175, c. 51), providing for the conviction and punishment of persons guilty of piracy taken on the sea "before any Circuit Court of the United States for the district into which such persons may be brought or 'found,'" is used in the same sense that the word "apprehended" is used in the crimes act of April 30, 1790 (1 Stat. 113, c. 9), providing that "the trial of crimes committed on the high seas or elsewhere out of the jurisdiction of any particular state shall be in the district where the offender is apprehended or into which he may first be brought," and in the act of March 3, 1825 (4 Stat. 118, c. 65, § 14), providing that the trial of offenses "committed on the high seas, or elsewhere, out of the limits of any state or district, shall be in the district where the offender is apprehended or into which he may be first brought." *Kerr v. Shine*, 136 Fed. 61, 63, 69 C. C. A. 69.

A foreign corporation is "found" within a federal judicial district, within Judiciary Act March 3, 1875, c. 137, § 1, 18 Stat. 470, providing that no civil suit shall be brought by original process or proceeding in any other district than that whereof defendant is an inhabitant or in which he shall be "found" at the time of serving such process or commencing the suit, where process was served on an agent of such corporation within the district designated by the defendant for service of process under the state law. *Elk Garden Co. v. T. W. Thayer Co.*, 179 Fed. 556, 559.

For the purpose of conferring jurisdiction on a Circuit Court of a suit for damages under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210, which authorizes a suit "in the district in which the defendant resides or is found," a foreign corporation is "found" in the state if it is doing business therein, but not otherwise. *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.* 190 Fed. 879, 883.

In an action against a railroad company, the record showed that the president thereof was served while passing through the territory as a sojourner and not connected with any business of the company; that the railroad company, before the time of the attempted service, had disposed of all its franchises and property, except some lands acquired by foreclosure within the territory; that its di-

rectors held its meetings in New York; that its president had his office in Chicago and its land commissioner had his office in Topeka, Kan. Held, that the president was not found within the territory, within Act Cong. July 2, 1890, c. 647, providing for suit in the Circuit Court in the district in which the defendant resides or is found. *Territory ex rel. Caledonian Coal Co. v. Baker*, 78 Pac. 624, 625, 12 N. M. 456.

Under Hurd's Rev. St. 1903, p. 1400, c. 110, § 2, providing that it shall not be lawful to sue a defendant out of the county where he resides or may be found, a defendant is "found" within a county where he is served, unless he was there by reason of some fraud or trick in order to obtain service on him. *Willard v. Zehr*, 74 N. E. 107, 108, 215 Ill. 148.

#### **FINDING**

See Decision (Of Court); General Finding; Special Finding.

Date of finding, see Date.

The word "finding," as used in the Kentucky revenue laws providing that the ascertainment of the amount of taxes unpaid on omitted property shall be made by the county court on application of the owner, that either the petitioner or the commonwealth may appeal to the circuit court, and that the "finding of the circuit court shall be conclusive and not subject to appeal," relates to the fixing of the value of the property assessed, and to that extent only is the appellate jurisdiction of the Court of Appeals curtailed. *Eastern Kentucky Coal Lands Corp. v. Commonwealth*, 106 S. W. 260, 270, 127 Ky. 667.

Under Code Civ. Proc. § 1228, providing that where the whole issue is one of fact which was tried by a referee, the report stands as a decision of the court, and section 1229, providing that in an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, on a referee's report as prescribed in section 1228, the terms "decision of the referee" and "findings of the referee" mean the referee's decision and findings to matters of fact, actually referred to him by the order of the court, and limit the subject of the report to the issues raised by the pleadings. To any other extent, his findings are not the findings of a referee within the statute, and the court will render a judgment agreeably to the actual determination of the facts upon which the referee was authorized to pass. *Bowe v. Bowe*, 106 N. Y. Supp. 608, 610, 55 Misc. Rep. 403.

#### **Decision distinguished**

See Decision.

#### **Decision synonymous**

See Decision.

#### **As judgment**

See Judgment.

**FINDING OF FACT**

If decision of an issue is made by a referee, or by the judge trying an issue without a jury, the determination of the issue of fact is usually termed "the decision" or "findings of fact." *Hamilton v. Murray*, 74 Pac. 75, 78, 29 Mont. 80 (citing *Froman v. Patterson*, 24 Pac. 692, 10 Mont. 107).

A mere opinion of a judge in the Circuit Court in an equity case is not a "finding or statement of facts." *Hendryx v. Perkins*, 123 Fed. 268, 270, 59 C. C. A. 266 (citing *Finney v. Guy*, 23 Sup. Ct. 558, 189 U. S. 335, 47 L. Ed. 839).

Where, in proceedings involving unjust discriminations by railroads, the report of the commission stated that "after full investigation and mature consideration \* \* \* we hold that where both modes of transportation are employed by the carrier and the use of one is not open to shippers, etc., \* \* \* is unjust discrimination against a barrel shipper, \* \* \* and that no circumstances and conditions have been disclosed by the evidence authorizing such discrimination by defendant carriers," all of the paragraph with the exception of the concluding negative allegation consisted of legal conclusions, and as a whole was argumentative and was not a "finding of fact." *Western New York & P. R. Co. v. Penn Refining Co., Limited, of Oil City, Pa.*, 137 Fed. 343, 348, 70 C. C. A. 23.

The "findings" of a jury are always mere conclusions, and the jury cannot in any case find ultimate facts. *Chicago, B. & Q. Ry. Co. v. Laughlin*, 87 Pac. 749, 751, 74 Kan. 567 (citing *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 197).

By "findings by responses to interrogatories," answers pertinent to, and perhaps controlling, although not necessarily fully covering, an issue framed, are given, always in connection with a general verdict. *Freedman v. New York, N. H. & H. R. Co.*, 71 Atl. 901, 905, 81 Conn. 601, 15 Ann. Cas. 464.

**Decision synonymous**

See Decision.

**FINE**

See Excessive Fine.

Voluntary payment of, see Voluntary Payment.

An employer is not guilty of violating St. 1911, c. 584, providing that no employer shall impose a fine on an employé engaged at weaving for imperfections arising during the process of weaving, where the system adopted by the employer is authorized by St. 1909, c. 514, § 114, providing that the system of grading the work of a weaver shall not affect or lessen his wages, except for imperfections in his own work, that a weaver's wages shall not be affected by fines, or other-

wise, unless the imperfections are first exhibited to him, and that fines shall not be imposed, unless the provisions of that section are first complied with and the amount of fines agreed upon; the word "fine" in the act of 1911 meaning an arbitrary imposition of a penalty for an imperfection, whether due to the fault of the weaver or not. *Commonwealth v. Lancaster Mills*, 98 N. E. 864, 212 Mass. 315.

The words "mulct," "punishment," and "fine," as used in the decisions of the Supreme Court of Alabama in referring to the statutory action for death, given by Code Ala. 1896, § 27, are not used in the sense that is ordinarily attached to such words in the domain of criminal law, and therefore such statute is not a penal one within the rule that one state will not enforce the penal laws of another state. *Whitlow v. Nashville, C. & St. L. R. Co.*, 84 S. W. 618, 620, 114 Tenn. 344, 68 L. R. A. 503 (citing *Southern Ry. Co. v. Bush*, 26 South. 173, 174, 122 Ala. 488, 489).

Damages awarded on affirmance of a judgment for contempt are neither a "fine" nor forfeiture, within Const. § 77, authorizing the Governor to remit fines and forfeitures. *Commonwealth v. French*, 114 S. W. 255, 256, 130 Ky. 744, 17 Ann. Cas. 601.

The \$2 on each \$100 of premiums paid by foreign insurance companies doing business in the state, which is required to be paid into the state treasury, is no part of the 22 cents on each \$100 valuation of property or corporate franchises directed to be assessed for taxation for the school fund by Ky. St. 1903, § 4370, subd. 5, nor is it a "fine," "forfeiture," or "license" within subdivision 6, providing that a portion of such revenues be paid into the school fund. *Fuqua v. Hager*, 84 S. W. 325, 119 Ky. 407.

**FINE (In Criminal Law)**

"The words 'fine' and 'fined' in their primary sense import the punishment of a person convicted of crime." *Schick v. United States*, 24 Sup. Ct. 826, 830, 195 U. S. 65, 49 L. Ed. 99, 1 Ann. Cas. 585 (dissenting opinion of Harlan, J.).

The word "fine" is a sum of money imposed by a criminal law. *State ex rel. McNamee v. Stobie*, 92 S. W. 191, 212, 194 Mo. 14.

A "fine" is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor. *Commonwealth v. French*, 114 S. W. 255, 130 Ky. 744, 17 Ann. Cas. 601; *United States v. Mitchell*, 163 Fed. 1014, 1016.

A "fine" is a pecuniary punishment for a criminal offense, or a contempt, which is quasi criminal, imposed by the court upon conviction. It is true the word "fine" does not always mean a pecuniary punishment of an offense inflicted by a court in the exercise of criminal jurisdiction. It has other

meanings, and may include a forfeiture, or a penalty recoverable by civil action. The true signification of the word, when used in a statute, must depend somewhat upon the context, and the meaning should be gathered from the intention, if it can fairly be ascertained from the language used. In ordinary legal phraseology, it is said the term "fine" means a sum of money exacted of a person guilty of a misdemeanor, or a crime, the amount of which may be fixed by law or left to the discretion of the court, while a penalty is a sum of money exacted by way of punishment for doing some act which is prohibited, or omitting to do something which is required to be done. Revisal 1905, § 259, provides that when the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge, etc. Held, that while the words "fine" and "penalty" were often used interchangeably to designate the same thing, it accorded more with the true intention of the Legislature to hold that in such statute the word "fine" was used in the sense of punishment for a criminal offense, and in bastardy proceedings the court could not impose a fine on defendant upon a finding of the issue of paternity against him; the issue being tried, according to the rules of procedure, applicable to a civil action. *State v. Addington*, 57 S. E. 398, 399, 143 N. C. 683, 11 Ann. Cas. 314 (citing *Black's Dict.* p. 494; *State v. Burton*, 18 S. E. 657, 113 N. C. 655; *People v. Nedrow*, 13 N. E. 533, 122 Ill. 363; *Hanscombe v. Russell*, 11 Gray [77 Mass.] 373; *Atchison, T. & S. F. R. Co. v. State ex rel. Sanders*, 22 Kan. 1; *Village of Lancaster v. Richardson* [N. Y.] 4 Lans. 136).

A "fine" imposed under Gen. Laws 1896, c. 118, § 6, declaring that no person shall deposit or permit to be deposited in the waters of Providence river any material used in connection with the manufacture of gas, and that every person violating the statute shall be fined a certain amount for each offense, was recoverable by indictment under chapter 288, § 1, etc., declaring that unless otherwise provided all fines upward of \$20 shall be recovered by indictment. "The word 'fine' as used in the statute has its primary signification, to wit, pecuniary punishment imposed by a lawful tribunal on a person convicted of crime or misdemeanor." "In ordinary legal language the term 'fine' means a sum of money, the payment of which is imposed by a court according to law as punishment for a crime or misdemeanor." *State v. Providence Gas Co.*, 61 Atl. 44, 45, 27 R. I. 142 (citing 1 Bouv. Law Dict. [Rawle's Ed.] p. 786).

#### Costs included

Costs follow sentence, but are no part of the "fine actually imposed," within Const. art. 85, limiting the criminal jurisdiction of the Supreme Court where a fine is actually imposed. *State v. Price*, 50 South. 794, 795,

124 La. 917, 134 Am. St. Rep. 523, 18 Ann. Cas. 881.

The words "fines and forfeitures," as contained in Const. art. 5, § 17, authorizing the Governor to remit such fines and forfeitures as may be prescribed by law, do not include costs in a criminal case. *Ryan v. State*, 95 N. E. 561, 176 Ind. 281.

A judgment for costs in a criminal prosecution is not a "fine" imposed as a punishment for an offense, and its discharge in bankruptcy is not contrary to public policy, as an interference with the course of justice in the criminal prosecution. *Olds v. Forrester*, 102 N. W. 419-420, 126 Iowa, 456.

#### Criminal offense or proceeding imported

An action under Rev. St. 1899, § 1017, subjecting a corporation failing to make statutory reports to a "fine," providing that no suit shall be maintained for any offense unless brought within a specified time, and requiring proceedings in the name of the state, on relation of the county, to recover the fine, is an action for a penalty, and not a "criminal action" within section 2815, authorizing the parole of persons convicted of crime; the word "fine" meaning penalty. *State ex rel. Howell County v. West Plains Telephone Co.*, 135 S. W. 20, 21, 232 Mo. 579.

#### As debt

See Debt.

#### Forfeitures and penalties included

In ordinary legal phraseology the term "fine" means a sum of money exacted of a person guilty of a misdemeanor, or a crime, the amount of which may be fixed by law or left in the discretion of the court, while a "penalty" is a sum of money exacted by way of punishment for doing some act which is prohibited, or omitting to do something which is required to be done. *State v. Addington*, 57 S. E. 398, 399, 143 N. C. 683, 11 Ann. Cas. 314 (citing *Village of Lancaster v. Richardson* [N. Y.] 4 Lans. 136).

The words "fine" and "forfeiture," though sometimes used in a technical sense and with restricted signification, at other times overlap and run together in meaning. The "fines," "penalties," and "forfeitures" contemplated by Code Cr. Proc. § 332, providing that all fines and penalties imposed and all forfeitures incurred in any county shall be paid into the treasury to the support of common schools are all pecuniary; moneys which are paid into the treasury and placed in the school fund, and altogether they make a single class; moneys recovered by some sort of punishment and not as damages by way of compensation or reparation. *State v. Rose*, 97 Pac. 788, 789, 78 Kan. 600.

The word "fine," as used in St. 1898, § 3294, authorizing a civil action for a forfeiture, and defining a forfeiture to include any penalty in money or goods other than a

"fine," does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violating their ordinances. *State v. Hamley*, 119 N. W. 114, 115, 137 Wis. 458.

Rev. St. 1898, c. 142, § 3294, provides that in all cases not otherwise specially provided for by law, where a forfeiture shall be incurred and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action; but when such act or omission is punishable by "fine" and imprisonment or by fine or imprisonment, or is specially declared by law to be a misdemeanor, it shall be deemed a misdemeanor within the chapter, and that the word "forfeiture" as used in the chapter shall include any penalty in money or goods other than a "fine." Const. art. 10, § 2, provides that the "clear proceeds of all fines collected in the several counties for any breach of the penal laws" shall be set apart as a separate fund to be called a "school fund." Held, that the word "fine" in section 3294 is used in the same sense as the same word is used in Const. art. 10, § 2, and does not include those forfeitures sometimes called fines imposed by municipal corporations for violating their ordinances. *Stoltman v. Town of Lake*, 102 N. W. 920, 921, 124 Wis. 462.

"Penalties" have been held to be "fines" and capable of collection by indictment or presentment as well as by civil suit. *United States v. Tsokas*, 163 Fed. 129, 130 (citing *United States v. Moore*, 11 Fed. 248).

The word "fines," in Const. art. 1, § 13, declaring that excessive fines shall not be imposed, includes "penalties," so that the provision prohibits the imposition of excessive penalties for the failure of a taxpayer to pay taxes imposed. *State v. Galveston, H. & S. A. Ry. Co.*, 97 S. W. 71, 78, 100 Tex. 153.

The term "fines" is synonymous with penalties. So the word "penalties," as used in a statute imposing penalties for failure of a railroad to erect water-closets at passenger stations, is synonymous with the word "fines," and a judgment rendered for the penalty imposed for a violation of such statute does not bear interest. *Missouri, etc., R. Co. v. State (Tex.)* 97 S. W. 724, 725.

The word "fine" in its ordinary acceptance has the distinct meaning of a pecuniary penalty, and has that restricted meaning in Const. art. 85, limiting the jurisdiction of the Supreme Court in cases where a fine is imposed, and hence the forfeiture of the right to conduct a barroom, pursuant to section 7 of the Gay-Shattuck law (Act No. 176, p. 239, of 1908), imposed in addition to the fine prescribed by section 6 for its violation, forms no part of such fine, the amount of which determines jurisdiction of an appeal in a prose-

cution thereunder. *State v. Price*, 50 So. 794, 795, 124 La. 917, 134 Am. St. Rep. 523, 18 Ann. Cas. 881.

As used in Immigration Act March 3, 1903, § 9, 32 Stat. 1215, making it unlawful to bring into the United States any alien afflicted with a loathesome or with a dangerous, contagious disease, and providing that if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought was afflicted with such disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such transportation company shall pay to the collector of customs \$100 for each and every violation of the provisions of this section, and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, the word "fine" means a penalty, and, if suable at all, recoverable in debt, and not through criminal proceedings, and therefore the statutory provision does not create a crime so as to render it unconstitutional because it does provide for a jury trial. *International Mercantile Marine Co. v. Strana han*, 155 Fed. 428, 431.

The word "fine," as used in Rev. St. 1898, c. 150, providing for the punishment of civil contempt, is not confined to mere indemnity to the injured party. The provisions of this chapter clearly warrant the imposition of a fine or imprisonment or both, in cases where no actual loss or injury is shown and in case of actual loss or injury resulting from the alleged misconduct, instead of imposing a fine a sum is to be ordered paid to him to indemnify for such loss or injury, and when a fine is imposed it is in the nature of a penalty which is to be paid into the state treasury for the benefit of the school fund. *Emerson v. Huss*, 106 N. W. 518, 522, 127 Wis. 215.

#### As a judgment

A "fine" imposed for a contempt of court is a judgment in a criminal case. *Ex parte Shull*, 121 S. W. 10, 11, 221 Mo. 623, 133 Am. St. Rep. 496.

#### FINE AND IMPRISONMENT

Under Pub. Loc. Laws 1911, c. 184, authorizing "fine and imprisonment" for permitting a setter or pointer dog to run at large in Henderson county during the closed season for quail, either punishment or both may be imposed. *State v. Blake*, 72 S. E. 1080, 1082, 157 N. C. 608.

A verdict finding accused guilty, and imposing a "fine of \$50 and 40 days in jail," shows that accused was fined \$50 and that his imprisonment should be 40 days in jail. *Ellis v. State*, 130 S. W. 171, 174, 59 Tex. Cr. R. 630.



**FINE OR IMPRISONMENT OTHERWISE THAN IN THE PENITENTIARY**

Const. art. 2, § 8, provides that no person shall be held to answer, unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, etc. Municipal Court Act 1905, § 2, par. 3, as amended, provides that the Chicago municipal court shall have jurisdiction of all criminal cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, and section 27 declares that all criminal cases in the municipal court in which the punishment is by fine or imprisonment otherwise than in the penitentiary may be prosecuted by information. Held, that the words "fine or imprisonment otherwise than in the penitentiary" include every class of offense where the punishment is either by fine or jail sentence, or both, and hence it is only such offenses as are punishable either by fine or imprisonment in the penitentiary, or both by fine and imprisonment in the penitentiary, that must be prosecuted by indictment. *People v. Glowacki*, 86 N. E. 368, 369, 236 Ill. 612.

**FININGS**

"Finings" is an article consisting of "gelatin" containing a considerable proportion of sulphurous acid or sulphite as a preservative and is dutiable as "gelatin" under paragraph 23, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152, and is not a manufacture of gelatin under paragraph 450, Schedule N, § 1, c. 11, of said act, 30 Stat. 193, or an unenumerated article under section 6, c. 11, of said act, 30 Stat. 205. *Sonoma Wine & Brandy Co. v. United States*, 123 Fed. 999, 1000.

**FINISH**

See *Interior Finish*; *Machine Finish*; *Unfinished*.

**FINISH SOUND**

Where plaintiff warranted certain metallic cylinders to "finish sound," such was an express warranty only that the shells should, when finished, be free from cracks and air holes, both obvious and hidden. *H. H. Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co.*, 75 N. E. 624, 625, 189 Mass. 344.

**FINISHED STEEL TUBES**

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163, for "steel tubes, finished," includes bottle-shaped vessels of steel, which are used in the transportation of gas and are about four feet long and eight inches in diameter, with one end permanently closed and the other tapered to a neck. *United States v. Liquid Carbonic Co.*, 160 Fed. 455, 87 C. C. A. 671.

**FIRE**

See *Greek Fire*; *Hostile Fire*; *Innocent Fire*; *Loss by Fire*; *Negligent or Unlawful Fire*; *On Fire*; *Set Fire To*. Subject to fire, see *Subject To*.

"Fire" is "the evolution of light and heat in the combustion of bodies; combustion; state of ignition." *Sun Ins. Office of London v. Western Woolen Mill Co.*, 82 Pac. 513, 517, 72 Kan. 41 (quoting and adopting definition in *Webst. Dict. Unab.*; dissenting opinion by Porter, J.).

A "fire" may be both a burning by slow and a burning by rapid combustion, either of which is covered by a stipulation of indemnity for loss by fire, unless a distinction is made in the policy. *Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 118 N. W. 371, 373, 140 Iowa, 240.

The word "fire," as used in an insurance policy, in the absence of language showing a contrary intention, is to be given its ordinary meaning, which includes the idea of visible heat or light. *Western Woolen Mill Co. v. Northern Assur. Co. of London*, 139 Fed. 637, 639, 72 C. C. A. 1.

A "fire" in a furnace of material so highly inflammable in character as to cause such volumes of heat and smoke to escape through the registers into the rooms damaging the house and furniture, though without ignition outside of the furnace, is a "fire" within a policy covering "direct loss or damage by fire." *O'Connor v. Queen Ins. Co. of America*, 122 N. W. 1038, 1039, 140 Wis. 388, 25 L. R. A. (N. S.) 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118.

**Explosion**

The term "fire," as used in fire insurance policies, is an actual "fire" according to the ordinary and common use of the term. The blaze produced by lighting a match, gas jet, or lamp is not in itself such a "fire" as is contemplated. Consequently the accidental ignition of escaping gas by such means resulting in an explosion is not a "fire" followed by explosion within the meaning of a policy. *German American Ins. Co. v. Hyman*, 94 Pac. 27, 32, 42 Colo. 156, 16 L. R. A. (N. S.) 77.

Plaintiff's house contained an acetylene gas plant. One of plaintiff's children went to the cellar to fill the generating machine with water and carbide. When the generator was filled, plaintiff's wife smelled gas, and one of the children struck a match, and, as she did so, there was a flash of light all over the house, then a report, and almost immediately the plastering began to fall. Immediately after the explosion, some of the furniture, the studding, and rafters were found on fire. It was proved that the gas generated by carbide would not explode except when ignited. Such an explosion was

a fire, within a policy stipulating for indemnity from loss by fire and containing no exemption of explosions. *Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 118 N. W. 371, 372, 140 Iowa, 240.

The damage to plate glass from an explosion caused by heat from a fire, both at a distance from the building containing the glass, is not within the provision of a plate glass insurance policy, excepting insurer from liability for damages resulting directly or indirectly from "fire," whether on the premises or not; such provision being intended to except only a loss which would be covered by a fire policy, and such a loss not being covered by a fire policy. *Metropolitan Casualty Ins. Co. of New York v. Berghelm*, 122 Pac. 812, 813, 21 Colo. App. 527.

#### **Fires negligently caused**

In the civil law loss by "fire" is not considered a "fortuitous event," as it arises almost invariably from some act of man. At common law the carrier is considered as in the nature of an insurer against loss by fire unless it be caused by lightning. The civil law does not go to this extent, but it does require the carrier to prove the precise cause of the fire, that it was impossible for human prudence to foresee or prevent the loss, and that no act of imprudence or negligence is chargeable to the carrier. *Lehman, Stern & Co. v. Morgans' Louisiana & T. R. & S. S. Co.*, 38 South. 870, 876, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

#### **As peril of the sea**

See Perils of the Sea.

#### **Spontaneous combustion**

"Fire" is the visible heat or light evolved by the action of a high temperature on certain bodies which are in consequence styled inflammable or combustible. It is the evolution of light and heat in the combustion of bodies; but, while it is always caused by combustion, combustion does not always cause fire. The loss of wool submerged for several days during a flood, which caused spontaneous combustion, though with smoke and great heat, by which the wool was damaged and its fiber destroyed, was not a loss by "fire" within the meaning of a fire insurance policy, where there was at no time any visible light or heat. *Western Woolen Mill Co. v. Northern Assur. Co. of London*, 139 Fed. 637, 639, 72 C. C. A. 1 (quoting and adopting definitions in Cent. Dict. and Webster Dict.).

#### **FIRE BRICK**

The phrase "fire brick," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 87, 30 Stat. 151, is a well-known commercial designation, which means brick made from fire clay, and therefore does not include magnesite brick. *United States v. O. G. Hempstead & Son*, 153 Fed. 483, 484.

The term "chamotte," as used in the arts and in the Panzl patent, No. 644,367, as an ingredient used in making an acid-resisting composition for lining pulp digesters, denotes a species of specially pure calcined clay, which must be silicate of alumina, and is not the equivalent of crushed "fire brick," used in prior preparations, which may or may not have the chemical composition and properties of chamotte. *Panzl v. Battle Island Paper Co.*, 138 Fed. 48, 50, 70 C. C. A. 474.

#### **FIRE DEPARTMENT**

As public utility, see Public Utility.

Member of fire department, see Member.

#### **FIRE INSURANCE**

A fire insurance policy is a personal contract for the indemnity of insured, and does not follow the property on its sale, in the absence of an agreement for the transfer of the policy. *American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co.*, 113 S. W. 394, 395, 121 Tenn. 13, 21 L. R. A. (N. S.) 442.

#### **FIRE INSURANCE COMPANY**

See Mutual Fire Insurance Company.

As public corporation, see Public Corporation.

#### **FIRE INSURANCE PATROL**

As public charity, see Public Charity.

#### **FIRE PROTECTION**

See First-class Fire Protection.

#### **FIREMEN**

See Duty as Fireman; Exempt Fireman.

The word "firemen" in the statute of 1902 (P. L. 1902, p. 793), for the purpose of providing and maintaining a fund to pension "firemen" and their families, is synonymous with "members of the fire department." A lineman, a watchman, and a veterinary surgeon, who are members of the Newark Paid Fire Department, are entitled to membership in the corporate association organized by the department under the provision of the statute of 1902 (P. L. 1902, p. 793), for the purpose of providing and maintaining a fund to pension "firemen" and their families. *Leflingwell v. Kiersted*, 65 Atl. 1029, 1030, 74 N. J. Law, 407.

#### **As laborer**

See Laborer.

#### **As officer**

See Officer.

#### **FIREPROOF BUILDING**

The term "fireproof" as used in an ordinance requiring fireproof roofs, when reasonably construed, means a roof that can be reasonably depended upon to resist the ac-

tion of ordinary fires. *Lane-Moore Lumber Co. v. City of Storm Lake*, 130 N. W. 924, 928, 151 Iowa, 130.

### FIREPROOF SAFE

A contract of sale of a safe designated as a "fireproof safe," merely represents that the safe is constructed of fireproof material, and does not warrant it as to the amount of heat or duration of exposure to heat which it will resist, and an implied warranty that the safe will protect its contents against any given exposure to fire is unauthorized. *Richardson v. Carlis*, 128 N. W. 168 170. 26 S. D. 202, Ann. Cas. 1913B, 47

### FIREPROOFED LUMBER

Lumber which has been subjected to a fireproofing process that largely increases its value, but which can still be applied to the ordinary uses of sound lumber, is not dutiable as manufactures of wood not specially provided for under paragraph 208, Tariff Act July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 168, but as "sawed lumber" under paragraph 195, 30 Stat. 167. Fireproofed lumber is an imported article and consists of oak and white pine sawed lumber which has been treated for the purpose of making it fireproof by a process by which it is chemicalized. The process involves softening the lumber and opening its pores, withdrawing the sap, injecting the chemicals into the fiber of the wood, and then treating the wood with heat until it is perfectly dry, thereby crystallizing the solution of the chemicals in the fiber of the wood. *F. W. Myers & Co. v. United States*, 147 Fed. 204, 205, 77 C. C. A. 430.

### FIRM

"In arriving at a conclusion as to the ordinary and popular meaning of the word 'firm,' we naturally first consult the standard dictionaries. Webster defines it thus: The name, title, or style under which a company transacts business, hence a partnership or house, as the firm of Hope & Co. The Century dictionary defines a firm to be a partnership or association of two or more persons for carrying on a business, a commercial house, a concern, also the name or title under which associated persons transact business. Nuttall's Standard Dictionary thus defines the word 'firm': Partnership or commercial house, or the name or title under which a company transacts business." A testator gave a specified sum to each of the employees of the firm of G. & K., of which he was a member. At the time of the execution of the will the testator was a member of two firms of the name of G. & K., and at the time of his death he was a member of a firm and of a corporation of that name. Held, that the testator intended to reward employees of the firm and of the corporation.

In *re Klein's Estate*, 88 Pac. 798, 802, 35 Mont. 185.

#### As person

See Person.

#### As merchant

See Merchant.

### FIRM DEBTS

Debts which are binding on partners only by estoppel as to creditors without notice of dissolution are not "firm debts," the nonpayment of which will authorize bankruptcy adjudication against the firm. In *re Pinson & Co.*, 180 Fed. 787, 790.

### FIRST

#### FIRST ASSISTANT

One who entered into a contract with the board of education to render such services as teacher as would be required of him for a certain time was not a "first assistant," within Laws 1900, p. 1605, c. 751, and entitled to the compensation provided by that law. *Wood v. Board of Education of City of New York*, 112 N. Y. Supp. 578, 580, 59 Misc. Rep. 605.

#### FIRST BILL

Where a policy of credit insurance insured a dealer against loss which he might sustain on account of nonpayment of the first bill for goods sold to new customers, which was not to be in excess of \$400, "first bill" meant the particular articles contracted for at one time, without regard to the time within which the bill therefor should be paid, and did not include all goods, not exceeding \$400, which were sold and delivered between the first sale and the maturity of the bill therefor. *Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.*, 118 S. W. 1004, 1006, 133 Ky. 745.

### FIRST CAUSE

"First cause," "initial cause," "efficient cause," and "proximate cause" all mean the same thing in the law of negligence. They mean the cause acting first and immediately producing the injury, or setting other causes in motion, all constituting a natural and continuous chain of events each having a close causal connection with its immediate predecessor; the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, and the person responsible for the first event having reasonable ground to expect at the moment of his act or default that a personal injury to some person might probably result therefrom. There may be pre-existing conditions or events without which the final injury could not have happened, such as the momentary shying of a horse on a defective highway, the inadvertent and nonnegligent misstep of a traveler into a dangerous exca-

vation close to the sidewalk, or the nonnegligent misstep or slip upon the floor or passage; but none of these is to be deemed a cause of the final injury any more than the mere presence of the injured person on the scene of the accident. They are not links, either initial or otherwise, in the legal chain of responsible causation, and should not be referred to as such, even though in ordinary nonlegal parlance they might broadly be termed causes. They are mere circumstances or conditions either existing, or to be expected in the natural order of things to occur at any time; and they do not enter into the chain of responsible causation. *Winchel v. Goodyear*, 105 N. W. 824, 827, 126 Wis. 271.

#### FIRST-CLASS BOOK

What may be considered a "first-class" book to adorn the library of a literary man might not be first-class when it was to be used by a doctor in his everyday work. The term "first-class" is relative in its meaning, and depends upon the use to be made of the book, and upon the character of the persons who are to use it. *Cleveland v. Martin*, 75 N. E. 772, 778, 218 Ill. 73, 3 L. R. A. (N. S.) 629.

#### FIRST-CLASS FIRE PROTECTION

A contract of a waterworks company to furnish "first-class fire protection" obligates it to furnish mains of the largest size mentioned in the contract if such protection cannot be given with less. *Meridian Waterworks Co. v. Meridian*, 37 South. 927, 928, 85 Miss. 515.

#### FIRST-CLASS ROAD

A "first-class road" is not less than 40 nor more than 60 feet wide. *Craighead v. State*, 117 S. W. 128, 129, 55 Tex. Cr. R. 386.

#### FIRST DAY

In specifications of a patent of a bank account book to facilitate the transfer of depositors' accounts, that "the first balance column and 'transactions of the first day' may be placed before the name column without varying from the principle of our invention," the term "transactions of the first day" means the transactions for Monday, including the deposits, checks, and balance; those being the items included under the heading as shown in all the drawings of the patent. *Time-Saver Co. v. Stamford Trust Co.*, 176 Fed. 358, 361, 99 C. C. A. 632.

#### FIRST DAY OF THE TERM

Where a district judge by written order in vacation adjourned the "October term" of the district court, which was set for October 21st, to the 11th day of November, which order was entered upon the journal, but no other proceedings had, the day to which the court was adjourned, being the day upon which the judge was present and the court ready to transact business, was "the first

day of the term," as applicable to the lien of judgments rendered during the term. *Parrott v. Wolcott*, 106 N. W. 607, 608, 75 Neb. 530.

#### FIRST INSTANCE

See In the First Instance.

#### FIRST MEETING OF CREDITORS

The term "first meeting of creditors," used in Bankr. Act July 1, 1898, c. 541, § 55b, 30 Stat. 559, providing that at the first meeting of creditors the judge or referee may allow or disallow claims then presented, means the first meeting after adjudication provided for in section 55a. In *re Back Bay Automobile Co.*, 158 Fed. 679, 682.

#### FIRST NET PROFITS

Where the owner of a mining lease sold a two-thirds interest therein, to be paid for out of the "first net profits" of the mine, the "first net profits" comprised the first excess of current receipts for ore taken out of the ground over and above the current expenses for producing the ore, and the necessary charges for repairs and betterments, and the purchasers were not to be reimbursed for moneys expended in the development of the mine, sinking of shaft, erection of mill, purchase of machinery, etc., which constituted capital, before an account of the first net profits was estimated. *Crocker v. Barteau*, 110 S. W. 1062, 1066, 212 Mo. 359.

#### FIRST OFFENDER

Ky. St. § 2095, subsec. 19a, provides that any juvenile or first offender of the age of 21 years or under committing any crime whereby punishment in the state prison or reform school is contemplated shall be sentenced to the house of reform. Section 1127 provides that offenses are either felonies or misdemeanors, and such offenses as are punishable by confinement in the penitentiary or with death are felonies, and all others misdemeanors, and section 1308 makes shooting in a public highway a misdemeanor punishable by fine and imprisonment. Held, that a boy 16 years of age was a "first offender" though he had theretofore been convicted of shooting at random in a public highway; the statute only contemplating felonies within the term "crime," so that upon convicting him of manslaughter he should have been committed to the reform school. *Henson v. Commonwealth*, 147 S. W. 399, 400, 148 Ky. 631.

#### FIRST PAYMENT

Earnest money synonymous, see Earnest.

#### FIRST REFUSAL

Where wheat is delivered to and received by a milling company in pursuance of a custom known to both parties and with reference to which they contract for the company to mix all wheat delivered to it with that belonging to it in one common mass, "first

refusal" of the wheat being reserved by the company, the term "first refusal" is intended to give the company a preferred right to purchase at all times and to limit the right of the holder of its receipt to receive grain in return therefor, to cases in which the company does not care to purchase. *Savage v. Salem Mills Co.*, 85 Pac. 69, 73, 48 Or. 1, 10 Ann. Cas. 1065.

#### FIRST REGULAR SESSION

Where a statute provides that, when a road is laid over lands not within any town or plantation required to raise money to make and repair highways the county commissioners shall, at their "first regular session" thereafter, assess thereon, and on adjoining townships benefited thereby, such an amount as they judge necessary for making and opening the road, the assessments are to be made at the same regular session at which the location of the road is filed; the object of the statute being to prevent their being made at an adjourned term of such regular session. Such regular session will be the "first" occurring after the road is laid over the lands. *Mansur v. County Com'rs of Aroostook County*, 22 Atl. 358, 359, 83 Me. 514.

#### FIRST TAKER

Where the owner of land transfers a life estate therein to one person and the remainder to another, the life tenant is called the "first taker" because he is the first to come into possession of the land. *Archer v. Jacobs*, 101 N. W. 195, 197, 125 Iowa, 467.

#### FIRST TEN YEARS

The phrase "the first ten years," as used in a franchise granted by a municipality to a waterworks company, providing that the privileges granted to the company shall continue for a term of 25 years from and after the passage of the ordinance, and the municipality agreeing to lease the company's fire hydrants for said term, and pay a rent per year, and the municipal taxes assessed on the property for the first 10 years, etc., points to the first period of 10 years in the period of 25 years, and, there being no period of 25 years except the one commencing with the life of the franchise, the 10-year period will commence at that time. *Town of Washburn v. Washburn Waterworks Co.*, 98 N. W. 539, 541, 120 Wis. 575.

A contract bound plaintiff to deliver to defendant power as follows: "For the first five years, 5,000 horse powers free of charge; for the second five years, 5,000 horse powers at the annual rate of \$2.50 per horse power; and thenceforth 5,000 horse powers at the annual rate of \$5.00 per horse power, or so much thereof as [defendant] shall consume. It is understood that if [defendant] desires further power, and the same is not being used [plaintiff] will furnish it for the first ten years at the annual rate of \$2.50 per horse

power, and thereafter at the annual rate of \$5.00 per horse power." Held, that the "first ten years" used in the stipulation for extra power ran concurrently with the five-year periods for which the power rate was fixed, and their commencement was not postponed until defendant should commence using extra power, but at the expiration of ten years from the date when power was first furnished under the contract defendant was bound to pay the \$5 rate for all power used by it, whether in excess of 5,000 horse powers or not. *Great Falls Water Power & Townsite Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 81 Pac. 392, 393, 33 Mont. 10.

#### FIRST TERM

The provision of Code 1899, c. 6, § 3, that notice of a contest of election to county office shall be presented to the "first term" of the county court after notice of contest is delivered to the contestee, means the first regular term, not a special term. *Stafford v. Mingo County Court*, 51 S. E. 2, 58 W. Va. 88.

#### FISCAL

"Fiscal" is defined, as a noun, by Webster as "treasurer," and as an adjective, "financial, pertaining to finance"; so that the comptroller of a city, who is the sole treasurer of the board of education, is the only fiscal officer of the board. *Eagan v. Board of Education*, 115 N. Y. Supp. 167, 168.

#### FISCAL AFFAIRS

"Fiscal affairs," as used in Const. § 172, providing that the fiscal affairs of the county shall be transacted by a board of county commissioners, "are not limited to matters pertaining solely to public revenue as they doubtless are in some connections." *State v. Lewis*, 119 N. W. 1037, 1040, 18 N. D. 125 (quoting and adopting construction in *Martin v. Tyler*, 60 N. W. 392, 4 N. D. 278, 25 L. R. A. 838).

#### FISCAL COURT

The "fiscal court" is one of special and limited jurisdiction. It has no power to appropriate the money of the county except as authorized by law. *Mitchell v. Henry County*, 100 S. W. 220, 221, 124 Ky. 833.

#### FISCAL OFFICER

A city officer who collects or receives public money, though not holding it, is a "fiscal officer" within Const. § 160, making fiscal officers of cities of the second class ineligible to succeed themselves, and providing that the term "fiscal officer" shall not include one whose chief duty is not collecting or holding public moneys. *Dorian v. Walters (Ky.)* 116 S. W. 313, 314.

#### FISCAL YEAR

See Current Fiscal Year.

Year as fiscal year, see Year.

**FISH**

As Animals, see Animal.

As *feræ naturæ*, see *Feræ Naturæ*.

**FISH IN PACKAGES**

Certain fish which have been dried, packed in ice or otherwise prepared for preservation, and are imported in packages containing less than one-half barrel, are dutiable under the provision in paragraph 261, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171, for "fish \* \* \* dried, \* \* \* packed in ice or otherwise prepared for preservation," and not under paragraph 258 of said act, 30 Stat. 171, as "fish in packages containing less than one-half barrel." *Harvey v. United States*, 137 Fed. 816.

Fish roe, or caviar, in tin packages, is, by virtue of the similitude clause in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205, dutiable at the rate applicable to fish in tin packages, enumerated in paragraph 258 of said act, § 1, Schedule G, 30 Stat. 171, which article it resembles in quality, texture and use, especially use, within the meaning of said section. *Menzel & Co. v. United States*, 135 Fed. 918, 919.

Frozen fish imported in packages containing less than one-half barrel are dutiable under the provision in paragraph 258, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171, for "fish in packages containing less than one-half barrel, and not specially provided for," rather than under that in paragraph 261 of said act, 30 Stat. 171 for "fish, fresh, \* \* \* frozen, packed in ice, or otherwise prepared for preservation, not specially provided for." *Loggie v. United States*, 137 Fed. 813, 70 C. C. A. 433.

Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171, provides for anchovies, etc., in tins of various sizes, but not larger than 70 cubic inches, with a further provision for (1) such fish "in other packages," (2) "all other fish \* \* \* in tin packages," and (3) "fish in packages containing less than one-half barrel." Held that anchovies in tins containing more than 70 cubic inches and less than half a barrel are subject to the provision for fish "in other packages." *Strohmeier & Arpe Co. v. United States*, 172 Fed. 295, 296.

Herring in tins, which have been pickled, salted, skinned, or boned, are dutiable as "fish \* \* \* in tin packages," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171, rather than as "herrings, pickled or salted," or as "fish, skinned or boned," under paragraphs 260, 261, 30 Stat. 171. The fact of importation in tins controls over the other conditions set forth in the two latter paragraphs. *Benson v. United States*, 159 Fed. 118, 119, 86 C. C. A. 308.

**FISH LEGALLY CAUGHT**

The proviso in Pub. Acts 1899, p. 128, Act No. 88, § 2, makes it unlawful to market or have in possession specified kinds of fish of less than specified weight: "Provided that it shall be lawful to transport or sell any of said described kinds of 'fish legally caught' during any season of the year," affirmatively gives fishermen the right to transport and sell mature fish at any time when legally caught, but that it does not allow the taking and sale of immature fish caught in the open season in legal nets and found dead or injured when removed from the nets. *People v. Coffey*, 118 N. W. 732, 733, 155 Mich. 103.

**FISH ROE**

Dutiable as an article preserved for food, see Preservation—Preserved.

**FISH SKINNED OR BONED**

Cream of codfish, consisting of codfish skinned and boned, and subjected to the further process of cutting or shredding, is dutiable as "fish skinned or boned," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 261, 30 Stat. 171. *H. B. Teed & Co. v. United States*, 126 Fed. 447, 448.

**FISHERY**

See American Fishery; Right of Fishery.

As personal property, see Personal Property.

As privilege, see Privileges and Immunities.

As real property, see Real Property.

As right, see Right.

Right of fishery as property, see Property.

What is ordinarily known as a "fishery" is the exclusive right of taking fish. By the ancient common or unwritten law prevailing within the locality now constituting the state of New Hampshire, exclusive rights of fishing in lakes and ponds did not vest the proprietor of the soil as such, but fishing, as well as fowling, was free or subject to public control. *Percy Summer Club v. Astle*, 145 Fed. 53, 55.

A "fishery" is a right to employ within a particular stretch of water lawful means for the taking of fish which may be found there. It is to be distinguished from a fishing place, or the right to use a particular shore or beach as a basis for carrying on the business. The latter is always vested in the shore owner, and is entirely distinct from the right to fish from the water. As a right of property, a "fishery" is real and not personal property. It is a part of the soil, and not an entity having an independent existence. So far as it is exercised upon another's land, it is a profit à prendre, and cannot therefore be claimed by way of easement. Where a mere right of fishery in public water

has been conferred by the sovereign, it will not be regarded as exclusive, in the absence of anything to indicate an intention to make it exclusive, although the title to the soil is in the grantor. A navigable stream is a public highway, where all the people of common right may go, and prima facie have a common right to fish. *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1067, 1068, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 132.

### FISHING

As public use, see Public Use (In Eminent Domain).

### FISHPLATE

See Railway Fishplates.

### FISSURE

The boundaries of a lode constitute a "fissure." *Noyes v. Clifford*, 94 Pac. 842, 847, 37 Mont. 138.

### FISSURE VEIN

"Fissure veins" have many characteristics. They are the fillings of fissures or openings of the country rock, of all kinds of rocks of all ages, contain different kinds of material, in some respects corresponding with, in others differing from, the country rock; the most common material being quartz. The fissures have selvages and slickensides, and the gangue material is generally easily distinguished from the country rock. Fissure veins are simple or banded, according to structure as to minerals. Some continue in the same direction; others are irregular and change their courses. Some have continuity of ore, while others are barren in places, and still others are faulted." *Grand Cent. Min. Co. v. Mammoth Min. Co.*, 83 P. 648, 676, 29 Utah, 490.

### FIT

See Reasonably Fit.

### FIT AND COMPETENT

As used in the rule requiring a master to select fit and competent persons as collaborators for his employes, the words "fit and competent persons" mean something more than skillful and experienced persons; carefulness and faithfulness being also required. *Furlong v. New York, N. H. & H. R. Co.*, 78 Atl. 489, 492, 83 Conn. 568, 21 Ann. Cas. 937.

### FIT ONLY

The words "fit only," as used in Tariff Act 1897, Free List, par. 568, admitting free grease and oils fit only for soap making, wire drawing, or stuffing or dressing leather, are to be strictly construed, so that, though a certain cod oil was commonly used for stuffing or leather dressing, it was not within the free list as "fit only" for that purpose, where it was fit, among other things, for the

manufacture of blacking, etc. *Swan & Finch Co. v. United States*, 113 Fed. 243, 244, 51 C. C. A. 200.

Bones which have been submitted to a process of crushing or grinding, producing an article known commercially as crushed or ground bone, which is fit for other than fertilizing purposes, was dutiable as "manufactures of bone" under paragraph 460 of the act of 1890, and was not free as "bones crude or not burned, calcined, ground, steamed, or otherwise manufactured, \* \* \* fit only for fertilizing purposes." *Gardiner v. Wise*, 84 Fed. 337, 338, 28 C. C. A. 148.

Old gunny cloth or cotton bagging, formerly used for covering cotton bales in ragged, dirty, and partly rotten pieces, to be used chiefly as paper stock for making Manila paper only, is no longer "fit only" for paper stock under paragraph 632 of the free list and is dutiable under paragraph 463, as waste, not specially provided for, at 10 per cent. ad valorem; it being shown that, besides being used for the making of paper, great quantities of it are used for patching cotton bales and for conversion into yarns or for making jute shoddy. *Train v. United States*, 107 Fed. 261.

### FITFUL ACTS OF OWNERSHIP

Claim of ownership of land for a number of years, the payment of taxes thereon, the occasional cutting of timber, and the employment of agents to maintain a watch to prevent other persons from trespassing thereon, were only "fitful acts of ownership" and insufficient to establish adverse possession. *Connerly v. Dickinson*, 99 S. W. 82, 83, 81 Ark. 258 (*citing Brown v. Bocquin*, 20 S. W. 813, 57 Ark. 97; *Driver v. Martin*, 60 S. W. 651, 68 Ark. 551; *Boynton v. Ashabranner*, 88 S. W. 566, 75 Ark. 415; *Henry Shoe Co. v. Williamson*, 40 S. W. 703, 64 Ark. 100).

### FITTED FOR USE

Where steel parts have been assembled and united into complete window sashes, they have been too far advanced in manufacture to permit their inclusion within Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 125, 30 Stat. 159, relating to "structural shapes of iron or steel \* \* \* fitted for use." *Ackerson v. United States*, 172 Fed. 303.

### FITTERS

See Iron Fitters.

### FITTINGS

Fittings of guns, see Parts or Fittings of Guns.

## FIVE

### FIVE AND ONE PER CENT.

Where defendants' grantors applied to a firm for a mortgage loan at "five and one

per cent. per annum" from a specified date, and the firm made the loan from its own funds at 5 and 1 per cent., taking two notes and mortgages; one securing the amount of the loan at 5 per cent. interest, and the other securing a note for 1 per cent. of such amount, with interest at 8 per cent., the words "five and one per cent." should be construed to mean 6 per cent. interest, and not 5 per cent. interest and 1 per cent. commission, so that, on payment of the loan on an interest date as authorized by the mortgage, the holder of the second mortgage was not entitled to hold and enforce it for the amount of interest subsequently accruing. *Citizens' State Bank of Perry v. Chambers*, 105 N. W. 692, 694, 129 Iowa, 414.

#### FIVE DOLLAR BILL

The ordinary meaning of the term "five dollar bill" is a bank bill for the payment of five dollars, and an indictment charging a person with stealing "one hundred and twenty dollars in paper money, to wit, two twenty-dollar bills, five ten-dollar bills, and six five-dollar bills," is not subject to demurrer on the ground that it does not disclose what kind of money was stolen. *Johnson v. State*, 45 S. E. 960, 962, 119 Ga. 257 (citing *Allen v. State*, 12 S. E. 651, 86 Ga. 400).

#### FIVE PER CENT. GRADE

A "five per cent. grade" is a rise of five feet in 100 feet. *Alexandria v. Morgan's Louisiana & A. T. R. & S. S. Co.*, 33 South. 65, 69, 109 La. 50.

#### FIVE SUCCESSIVE ISSUES

See For Successive Issues.

#### FIX

In a sentence reciting that accused is sentenced "for a term of not less than six years, and the court recommends that the maximum term be not more than seven years," etc., the language as to the maximum period, although in the form of a recommendation, amounts to a "fixing" of the maximum period of imprisonment, and hence the sentence cannot be treated as a nullity so as to justify a resentencing. *In re Richards*, 114 N. W. 348, 349, 150 Mich. 421.

Greater New York Charter (Laws 1897, c. 378), § 455, authorizing the commissioner of bridges, when thereto authorized by the board of estimate and apportionment and board of aldermen, to employ a consulting engineer skilled in bridge construction, and Laws 1897, c. 665, providing for the establishment of a public drive and parkway as an extension of Riverside Drive, did not authorize the commissioner of highways to contract with an engineer to furnish plans and specifications for the drive and superintend a part of the work for compensation based upon a percentage of the cost, until such plans and specifications were approved by the

board of estimate and apportionment, and such contract was not the fixing of the salary of a consulting engineer, within section 456. *Hildreth v. City of New York*, 122 N. Y. Supp. 1053, 138 App. Div. 103.

#### Finality implied

"Fix" is defined by the Standard Dictionary as "to decide definitely, make sure; settle, determine as, 'His fate will be fixed to-night,'" and in this sense it is used in the provision of the tax law that the assessors shall after a hearing "fix" the value of the property, and hence, the provision for the re-assessing of land unlawfully assessed and for an assessment at the valuation for the previous year having provided for a notice and hearing before the fixing of the value, it is not unconstitutional as providing for an assessment without notice. *Ft. Miller Pulp & Paper Co. v. Bratt*, 104 N. Y. Supp. 350, 356, 119 App. Div. 685.

Under Laws 1903, p. 64, § 9, requiring a public improvement ordinance to fix the time the work shall be completed, and providing that the council shall not consent to more than two extensions, an ordinance, requiring the work to be completed within a specified time provided the days' work lost because of injunction, court proceedings, bad weather, strikes, etc., shall be added to the days specified, is invalid, because it fails to fix the time for the completion of the work, the word "fix" meaning immovable or definite; to determine or settle definitely. *Rackliff v. Peters*, 115 S. W. 503, 504, 136 Mo. App. 168.

Under Laws 1903, p. 64, § 9, providing that ordinances for public improvements shall fix the time within which the work shall be completed after the contract shall be awarded, and that the council may give its consent for an extension of the time only on the contractor requesting it and consenting to a reduction of the price, an ordinance declaring that the work shall be completed within a specified time after the award of the contract provided that days' work lost through injunction, bad weather, general strikes, etc., shall be added to the number of days above specified, is not invalid for failing to fix the time for the completion of the work, the word "fix" merely meaning a rule by which the time is to be determined. *Gist v. Rackliffe-Gibson Const. Co.*, 123 S. W. 921, 926, 224 Mo. 369.

#### As prescribe

To "fix a compensation" within B. & O. Comp. §§ 2636, 2638, requiring the county court to "fix a compensation" for publishing its proceedings, is to prescribe a rule or rate by which it is to be determined (citing *And. Law Dict.*). It is something more than the mere examination and allowance of a claim against the county; it not only involves the determination of the amount to be allowed, but makes the result final and conclusive up-



on the parties by a decision or order. *Flags v. Columbia County*, 94 Pac. 184, 186, 51 Or. 172.

### FIXED

The word "fixed," as ordinarily used, means securely placed, fastened, settled, immovable, unalterable. *National Candy Co. v. Miller*, 160 Fed. 51, 56, 87 C. C. A. 207.

A letter written by the father of one of the makers of a note directed to the indorsee, reciting, "I have sworn off going on notes, but want to help my son, and, if he should not pay the \$3,000 note, I will see that it is fixed and told the banker that I would," signed, etc., constituted a guaranty of payment of the note, according to its tenor and legal effect; the word "fixed" in such letter being used in the sense of "pay." *McCauley v. Cross* (Tex.) 111 S. W. 790, 791.

A receipt for one month's rent of described premises, "five years' lease to be fixed later," should be construed as meaning that a five-year lease of the premises at the rate of rental specified in the receipt would be given later; the word "fixed" having the meaning of "given," and, as so construed, would constitute a sufficiently definite agreement to give a lease. *Schirmer v. Rehill*, 109 N. Y. Supp. 745, 746, 57 Misc. Rep. 439.

The word "fixed," as it relates to the compensation of a teacher in Laws 1899, c. 417, amending Greater New York Charter, authorizing each school board to adopt by-laws fixing the salaries of principals, etc., is used in the sense of regulated, pursuant to a continuous discretionary power to reduce salaries to the minimum limit. *Buckbee v. Board of Education*, 100 N. Y. Supp. 943, 947, 115 App. Div. 366.

### FIXED AND LIMITED TERM

A provision in a city charter authorizing the mayor and council to lease for a "fixed and limited term" any city property not needed for public use does not prevent the leasing of such property to be used for public entertainments; such leasing is "renting for a fixed and limited term." *Gottlieb-Knabe v. Macklin*, 71 Atl. 949, 951, 109 Md. 429, 31 L. R. A. (N. S.) 580, 16 Ann. Cas. 1092.

### FIXED BY LAW

See Now Fixed By Law.

### FIXED BY ORDINANCE

"Fixed by ordinance," as used in a statute authorizing the construction and maintenance of waterworks at such rates as may be fixed by ordinance, etc., may be construed to mean by ordinance from time to time as might be deemed necessary. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 155 Fed. 554, 563 (quoting and applying definitions in *Freeport Water Co. v. City of Freeport*, 21 Sup. Ct. 493, 180 U. S. 599, 45 L. Ed. 679).

### FIXED CHARGES

By the term "fixed charges" is meant the general running expenses which are attached to every business and composing an essential element in the cost of a manufactured article. *Worrell & Williams v. Kinneer Mfg. Co.*, 49 S. E. 988, 990, 103 Va. 719, 2 Ann. Cas. 997.

In a policy of strike insurance providing for an indemnity not exceeding \$50,000 against all direct damage from suspension of operations at plaintiff's factory caused by strike, and that, if a strike entirely suspended the production of goods, defendant insurer should be liable for loss of net profits and for fixed charges, to an amount not exceeding \$166 $\frac{2}{3}$ % per day for each working day of such entire suspension, and that, in case a strike prevented the making of a full daily average production of goods, defendant should be liable for that proportion of the net profits and fixed charges which the production so prevented from being made "bears to the average daily product," not exceeding the amount insured, and further that the average daily product should be determined from the amount of goods last produced during a period of 12 months' full work previous to the strike, and that losses should be computed from the day of the strike to such time as plaintiff should be able to produce the former daily average, etc., the term "fixed charges" meant those expenses necessarily incurred in maintaining the organization in such state of emergency as would enable it to resume normal production without substantial delay after the strike was ended, or as it might be broken by a gradual return of employes, and was not limited to interest, taxes, rent, maintenance, employes under contract, and such as could not be stopped without detriment to the property, exclusive of salaries, office force, or wages of mechanics. *Buffalo Forge Co. v. Mutual Security Co.*, 76 Atl. 995, 999, 83 Conn. 393.

### FIXED LIABILITY

The consideration for rent is the use of the land, and a covenant to pay rent creates no debt until the time stipulated for the payment arrives, and therefore rent accruing under a lease after the filing of a petition in bankruptcy against the lessee is not provable against his estate as "a 'fixed liability' \* \* \* absolutely owing at the time of the filing of the petition," within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562; both its existence and amount being at that time contingent upon uncertain events. A provision in a lease that in case the lessees should be declared bankrupt the lease should terminate, and the lessor should have the right to re-enter, and that in such case the lessees should indemnify the lessor for any loss of rents during the remainder of the term, paying the same monthly as upon rent days, does not create "a fixed liability

\* \* \* absolutely owing at the time of the filing of the petition" against the lessees, within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562, which can be proved as a claim against their estate; but the liability is altogether contingent, because of the uncertainty as to whether the lessor will re-enter and terminate the lease, and, if he does, whether there will be any loss, and its amount; nor is such claim provable as "a debt founded upon an express contract," under section 63a (4), which must be read in connection with, and as limited by, subdivision 1, and cannot be construed as permitting the proof of claims which are contingent both as to liability and amount at the time of the filing of the petition. In re Roth & Appel, 181 Fed. 667, 669, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270.

Where tenant under a lease for a year is adjudicated a bankrupt, and is granted his discharge before the expiration of the lease, claim for rent accruing after filing of petition is not a "fixed liability" within the Bankruptcy Act (Act July 1, 1898, c. 541), and provable against the estate, or released by his discharge. Scott v. Demarest, 135 N. Y. Supp. 264, 266, 75 Misc. Rep. 289.

A provision in a lease that, in case the lessee shall be petitioned into bankruptcy or declared a bankrupt, the lessor may re-enter and terminate the lease, and that in such case the lessee shall pay to the lessor "as damages a sum which at the time of such termination \* \* \* represents the difference between the rental value of the premises and the rent \* \* \* herein named for the residue of the term," does not create a liability which can be proved as a claim against the estate. Slocum v. Soliday, 183 Fed. 410, 412, 106 C. C. A. 56.

Where a lease provided that on default in the payment of any rent the rent for the entire term should at once become due and payable, on the bankruptcy of the lessee while so in default the rent for the term, so far as definitely fixed by the lease, is a "fixed liability absolutely owing," within the meaning of Bankr. Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562, and provable in bankruptcy against the lessee's estate; but taxes and insurance premiums which the bankrupt covenanted to pay as a part of the rent, but which at the time of the bankruptcy were not due, nor the amount then capable of ascertainment, are not so proven. In re Kittenburg Drug Co., 164 Fed. 482, 488.

Where the holders of notes given by a bankrupt, containing warrants of attorney and stipulations for the payment of attorney's fees for services rendered in the premises and collecting the same, took judgments on the notes, which were not due, a few days before the bankruptcy, after which they proved the notes in bankruptcy, together with claims for attorney's fees, it is held,

that under the law of Pennsylvania, by which such stipulations for attorney's fees are held not to create a "fixed liability" on the part of the debtor, but only a liability for reasonable fees for services rendered, not exceeding the amount stipulated, the creditors were not entitled to the allowance of the fees claimed; there being no proof of any collection service rendered which entitled them to indemnification. McCabe v. Patton, 174 Fed. 217, 218, 98 C. C. A. 225.

An attorney's fee provided for in a note, payable on condition that "default is made in the payment of this note at maturity, and it is placed in the hands of an attorney for collection or suit is brought on the same," is not a "fixed liability" owing at the time of the filing of a petition in bankruptcy against the maker, provable against his estate, under Bankr. Act July 1, 1898, c. 541, § 63a, cl. 1, 30 Stat. 562, where the petition was filed before the note matured, and it is immaterial that the note had been placed in the hands of an attorney. In re T. H. Thompson Milling Co., 144 Fed. 314, 315.

#### FIXED OPINION

By "fixed opinion" disqualifying for jury service is meant opinion of such a firm and fixed nature that it engenders in the mind that "pride of opinion" which causes one, involuntarily and innocently, it may be, to combat and doubt testimony tending to cast discredit on the opinion already fixed. Gammons v. State, 37 South. 609, 613, 85 Miss. 103.

Where a juror, at the trial for murder in the first degree, stated, on his examination, that a nephew of the deceased, who was not a witness of the homicide, had told him about the case, but that all that was said was hearsay, and also stated that he had formed a "fixed" opinion in his mind as to the guilt or innocence of accused, but that he could disregard that opinion and try the case according to the law and the evidence, and that he had no bias or prejudice for or against the defendant; and another juror, who had heard substantially the same account on rumor, also stated that he had no bias or prejudice against the accused, and that his opinion would not control him in the face of the evidence, it was held, that the word "fixed" was merely a relative term, not necessarily implying fixed bias; and that such opinions if based merely upon rumor, did not of themselves disqualify the jurors. Jackson v. State, 145 S. W. 559, 560, 103 Ark. 21.

#### FIXED STANDARDS

"There are standards of conduct in plenty, variation from which is permitted and even contemplated; but they cannot properly be called 'fixed standards' in the sense of being settled, firm, immovable. \* \* \* A standard of freight rates from which trans-

portation companies should be permitted to depart at will, generally or specially, openly or secretly, could hardly be regarded as a real or true standard in any sense." *Chicago, B. & Q. Ry. Co. v. Anderson*, 101 N. W. 1019, 1020, 72 Neb. 856.

#### FIXED UP

The term "fixed up," as used by a witness in referring to the acts of certain persons relative to an insurance application and note, merely denotes that they filled in the blanks and wrote out the note. *Weidenaar v. New York Life Ins. Co.*, 94 Pac. 1, 8, 38 Mont. 592.

#### FIXTURE

See Domestic Fixtures; Ornamental Fixtures; Permanent Fixtures; Stock, Fixtures, and Accounts; Trade Fixtures.

Other permanent fixtures, see Other.

A "fixture," as defined by Civ. Code, § 600, is a thing attached to land by roots, as in the case of trees, or imbedded in it, as in the case of walls, or permanently resting upon it as in the case of buildings, or permanently attached to what is thus permanent, as by cement, plaster, nails, bolts, or screws. *Las Animas & San Joaquin Land Co. v. Fatjo*, 99 Pac. 393, 394, 9 Cal. App. 318.

The rules for ascertaining whether an article is a "chattel" or an irremovable "fixture" are as follows: "(1) Real or constructive annexation of the article in question to the realty. (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." *Ozark v. Adams*, 83 S. W. 920, 921, 73 Ark. 227 (quoting and adopting definition in *Choate v. Kimball*, 19 S. W. 108, 56 Ark. 55, and citing *Bemis v. Bank*, 40 S. W. 127, 63 Ark. 625; *Monticello Bank v. Sweet*, 43 S. W. 500, 64 Ark. 502; *Markle v. Stackhouse*, 44 S. W. 808, 65 Ark. 23; *Tenniswood v. Smith* [Ark.] 82 S. W. 834).

"There is a wilderness of authority on this question of fixtures and a hopeless conflict of decision. The true criterion of a 'fixture' is the united application of these requisites: (1) Actual annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to change that part of the realty with which it is connected is appropriated; (3) the intention of the party making the annexation to make a permanent accession to the freehold." A heating plant, money drawer, ticket box, opera

chair, curtains and scenery, gas pipes, plumbing, electric switch boards, and lights contained in a mortgaged theater building are "fixtures" passing to the purchaser at foreclosure sale. *Filley v. Christopher*, 80 Pac. 834, 835, 39 Wash. 22, 109 Am. St. Rep. 853 (quoting and adopting definition in *Philadelphia Mortgage & Trust Co. v. Mille*, 56 Pac. 382, 20 Wash. 607, 44 L. R. A. 559, 72 Am. St. Rep. 138).

A "fixture" is an article which was once a chattel, but has become a part of the realty by physical annexation thereto; the requisites being actual annexation to the realty or something appurtenant thereto, application to the purpose to which that part of the realty is appropriated, and intention to permanently annex it. In an action for the conversion of property which defendant claimed as a fixture to realty placed thereon by the purchaser of mining claims, whether the property was a fixture must be decided with reference to the law of the province of British Columbia, where the property is situated, if that law is shown by competent proof. *Gasaway v. Thomas*, 105 Pac. 168, 170, 56 Wash. 77, 20 Ann. Cas. 1337.

"Real property" is land and generally whatever is erected or growing upon or affixed to the land, but there are many articles known as "fixtures," which, though originally wholly movable and personal in their nature, have acquired, by having been affixed to real estate or applied to use in connection with it, the character of realty. *State v. Wolf* (Del.) 66 Atl. 739, 740, 6 Pennewill, 323.

The essentials which will change the character of property from personality to realty are physical annexation of one to the other, adaptation of the improvements to the use for which the realty is devoted, and an intent to make a permanent improvement. One who does the plumbing work in a building makes it part of the realty, so that he cannot claim it as against a subsequent mortgagee, though the contract under which he does the work provides that all material furnished shall remain his till he is paid, of which contract the mortgagee had no notice, and which contract was not recorded. *McMillan v. Leaman*, 91 N. Y. Supp. 1055, 1056, 101 App. Div. 436.

Where land was conveyed with reversion if the grantee ceased to operate a tannery thereon, a building erected by the grantee for a tannery, built on a rock foundation for permanent use, was a "fixture" and part of the realty. *Mosca Town Co. v. Wellington*, 89 Pac. 783, 784, 39 Colo. 326, 121 Am. St. Rep. 175 (citing *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 24 Pac. 920, 15 Colo. 29, 22 Am. St. Rep. 373; *Cary Hardware Co. v. McCarty*, 50 Pac. 744, 10 Colo. App. 200).

A house or similar structure, when placed on the land by another, even by mistake as to the boundary, becomes a "fixture."

*Bollinger v. McMinn*, 104 S. W. 1079, 1080, 47 Tex. Civ. App. 89.

Where a lease of city lots provided that all improvements by the lessee should belong to him and might be removed during the last 60 days of the lease, a five-story building erected by the lessee remained personal property during the lease, but, if not removed, became a part of the realty, as a "fixture." *Hughes v. Kershaw*, 93 Pac. 1116, 1117, 42 Colo. 210, 15 L. R. A. (N. S.) 723.

**Agreement by parties as to character**

A ginhouse and machinery therein, such as engines and boilers, permanently annexed to the soil, are real estate, under the rule that whatever is affixed to the soil belongs to the soil, and this applies where one who erects fixtures has a permanent estate in the land, qualified only by the rule that the annexation must be of a permanent character; and personalty, when permanently affixed to realty, becomes a part of the realty, unaffected by the fact that a right of removal may exist by virtue of an agreement. *Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House* (Tex.) 147 S. W. 629, 632.

Where a sprinkler system installed in a knitting mill consisted of a 50,000-gallon tank tower erected on a concrete foundation, and pipes running underground into the plant, bolted to the beams of the buildings, it was a fixture, notwithstanding, a provision in the conditional contract for the installation and sale thereof that it should retain its character as personal property, and that the title should remain in the seller until paid for. *In re Williamsburg Knitting Mill*, 190 Fed. 871, 874.

Where plaintiffs sold a gasoline engine to L under an express agreement that the title thereto should remain in plaintiffs until the purchase price was paid in full, and that on default plaintiffs were authorized to remove the engine without process of law, such agreement operated as a matter of law to preserve the character of the engine as personal property, though it was substantially affixed to real estate purchased by L from defendant, not only as against L, but also as against defendant on her electing to resume possession of the real estate for L's default in paying the installments of the price. *Davis v. Bliss*, 79 N. E. 851, 852, 187 N. Y. 77, 10 L. R. A. (N. S.) 458 (citing *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Kerby v. Clapp*, 44 N. Y. Supp. 116, 15 App. Div. 37; *Godard v. Gould* [N. Y.] 14 Barb. 662; *Ford v. Cobb*, 20 N. Y. 344; *Slisson v. Hibbard*, 75 N. Y. 542).

**Annexation**

A chattel is not merged in realty, so as to become a fixture, unless it is annexed with the intent of the person making the annexation to make it a permanent accession to the realty. The most important element to be established tending to prove that a chattel

has been merged into a fixture is the intent with which the party provided its use, and such intent is the intent which the law deduces from all the circumstances of the annexation. *Roderick v. Sauborn*, 76 Atl. 263, 264, 106 Me. 159, 30 L. R. A. (N. S.) 1189, 20 Ann. Cas. 469.

There must be an actual annexation of the chattel to the realty, with an intention of making a permanent accession to the freehold, and the application of the chattel to the use for which the realty in connection with which it is used is appropriated; and, in determining the question of annexation, more weight is to be given to the intention of the owner than to the method adopted in making the annexation. *Security Trust Co. v. Temple Co.*, 58 Atl. 865, 866, 67 N. J. Eq. 514.

"The definition of a 'fixture' usually given is: 'An article which was a chattel, and which, being physically annexed or affixed to the realty, becomes accessory to it, and a part and parcel of it.' It thus appears that annexation is the controlling element in the very definition of a 'fixture,' and we find on examination that the overwhelming weight of authority in this country is that the physical annexation of a chattel to the realty is necessary in order to render it part of the realty;" and commercial finishing material not specially made for a building, and available for use in any building, purchased by the grantor of a deed of trust, and stored in the building covered by such deed, but in no manner attached thereto, and not mentioned in any conveyance of the property, does not constitute "fixtures" so as to pass to a purchaser of the property on foreclosure. *Blue v. Gunn*, 87 S. W. 408, 409, 114 Tenn. 414, 69 L. R. A. 892, 108 Am. St. Rep. 912, 4 Ann. Cas. 1157.

"A chattel that is fit to be annexed to the freehold, and has been brought upon it with an intention on the part of the possessor to annex it, does not become a 'fixture' unless actually annexed or placed in a position in which it is intended to be used, and in which it is adapted for use." *Longino v. Wester* (Tex.) 88 S. W. 445 (quoting and adopting definition in *Woodman v. Pease*, 17 N. H. 282).

Articles not otherwise attached to realty than by their own weight are prima facie personalty, while articles affixed to the land in fact, though but slightly, are prima facie realty, and the burden of proof is on the one contending that the former is realty, or that the latter is personalty. To constitute a "fixture" there must be actual annexation to the realty or something appurtenant thereto; appropriation to the use or purpose of that part of the realty with which it is connected; and the intention of the party making the annexation to make the article a permanent accession to the freehold. The commissioners' court of B. county purchased a safe and placed the same in the courthouse. Because

of its great weight the commissioners had a foundation of stone and cement built from the ground to the floor level to support the safe, and when the foundation was finished the safe was rolled on and supported by the foundation, but was not attached to it in any manner. The door of the room in which the safe was placed being too small to admit it, it was necessary to take out a part of the wall of the room, and it could only be removed in a similar manner. On a sale of the courthouse the commissioners reserved the safe. Held, that the safe was not so attached to the realty as to be a "fixture." *Parker v. Blount County*, 41 South. 923, 924, 148 Ala. 275 (citing 19 Cyc. pp. 1037, 1136; *Bank of Opelika v. Kiser*, 24 South. 11, 119 Ala. 201; *Powers v. Harris*, 68 Ala. 410).

Where a bank safe was not attached to the building by bolts or screws, irons, or nails, it was not a fixture, as such term includes only articles attached in some manner to the building. *Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin (Tex.)*, 135 S. W. 1083 (citing 3 Words and Phrases, p. 2832).

In the absence of a contract of conditional sale, or other evidence of an intention that gas ranges, affixed to the kitchens in an apartment house designed to rent, should remain personal property, they became "fixtures." *Central Union Gas. Co. v. Browning*, 131 N. Y. Supp. 464, 467, 146 App. Div. 783.

Ordinary kitchen ranges, placed in an apartment house under a contract of conditional sale, and not attached to the building otherwise than by stove pipes and water pipes leading to a detachable hot water reservoir, do not constitute a part of the realty, so as to pass to the mortgagee under a mortgage of the building. *Jennings v. Vahey*, 66 N. E. 598, 599, 183 Mass. 47, 97 Am. St. Rep. 409.

Engines, boilers, hoisting works, mills, pumps, and the like annexed to the soil for mining are fixtures. *Arnold v. Goldfield Third Chance Min. Co.*, 109 Pac. 718, 719, 32 Nev. 447.

#### As associated directly with building

Steel tanks installed in a brewery constitute fixtures where they are essential to operation of the plant, are eight feet in diameter more than twelve feet high, possess sufficient gravity to hold themselves in place without fastenings, and are removable from the building only on partial removal of a brick wall. *Detroit Steel Cooperage Co. v. Sistersville Brewing Co.*, 195 Fed. 447, 450, 115 C. C. A. 349.

#### Detriment to freehold by removal

The tests for determining whether articles attached to a freehold are "fixtures" are: (1) Actual annexation to the freehold; (2) application to the uses for which the real estate was appropriated; and (3) erection or annexation with the intention of making a

permanent accession to the freehold, by their use for an indefinite period in connection with the building. Pumps especially adapted and continuously used as a part of a manufacturing plant are fixtures included in a mortgage on the property, although they are removable without injury. *Prudential Ins. Co. v. Guild (N. J.)* 64 Atl. 694, 695.

Refrigerating machinery, boilers built into a building, electric wiring, pipes, etc., to conduct electricity and gas from one part of the building to another, were a part of the realty after installation, and not "fixtures," as between landlord and tenant, though they could have been pulled out on termination of the lease without materially injuring the building. *In re City of New York*, 92 N. Y. Supp. 8, 10, 101 App. Div. 527.

#### Enhancement of value of realty

Whenever chattels have been placed in and annexed to a building by their owner as a part of the means by which to carry out the purposes for which the building was erected or to which it has been adapted, and with the intention of permanently increasing its value for the use to which it is devoted, they become, as between the owner and his mortgagee, "fixtures," and as much a part of the realty as the building itself; and this is true, notwithstanding that such chattels may be severed from and taken out of the building in which they are located, without doing any injury either to them or to it, and advantageously used elsewhere, and notwithstanding that the building itself may thereafter readily be devoted to a use entirely different from that which was contemplated when the annexation was made. *Knickerbocker Trust Co. v. Penn Cordage Co.*, 58 Atl. 409, 410, 66 N. J. Eq. 305, 105 Am. St. Rep. 640.

#### Different relationship of parties

"What constitutes a 'fixture' depends largely on the particular circumstances of each case. In controversies between landlord and tenant there is the most liberal indulgence toward the claim of the tenant" (quoting *Davis v. Mugan*, 56 Mo. App. 311). \* \* \* The common-law rule has been relaxed as to the question between landlord and tenant, and what would be a fixture as between vendor and vendee, or mortgagor and mortgagee, does not apply to landlord and tenant." So where defendants leased plaintiff's property, in which was a steam boiler connected with pipes and with the building in such a manner that it could be unscrewed from the pipes and then removed by sections from the pit in which it stood, and, on finding the boiler insufficient, put in another similar boiler not attached to the walls in any way that would not permit its removal without injury to the building with the intention of removing the new boiler and replacing the old one when the term expired,

the new boiler was not a "fixture," and defendants could remove it. *McLain Inv. Co. v. Cunningham*, 87 S. W. 605, 606, 113 Mo. App. 519.

As to what are "fixtures," substantially the same rules prevail between grantor and grantee as between mortgagor and mortgagee, but different rules apply in relation to landlord and tenant from considerations of public policy and because of the temporary nature of the tenure. *Young v. Chandler*, 66 Atl. 539, 541, 102 Me. 251.

#### Design or intention

The purpose and intent of the party annexing personalty is a controlling circumstance in determining whether it has become a fixture. *Gasaway v. Thomas*, 105 Pac. 168, 170, 56 Wash. 77, 20 Ann. Cas. 1337.

The principal criterion for determining whether an article became a fixture is the owner's intention in putting the material in or on the land or building—whether his purpose was to make it permanently a part thereof. In case of machinery and other articles furnished to a factory, an important circumstance in ascertaining the intention of the proprietor to make it permanently a part of the building is the adaptability of the article or machine to the work or business of the place, and if the thing furnished was necessary thereto, or to the purpose for which the building was designed and used, or was a convenient accessory or commonly employed, in connection with such business, his intention to annex it permanently may be inferred. If the owner of the land or building purposed in putting an article in or on the same to make it permanently a part thereof, it will usually be treated as a fixture and lienable, though it is fastened only slightly, and may be displaced without injuring the freehold. *Banner Iron Works v. Aetna Iron Works*, 122 S. W. 762, 764, 143 Mo. App. 1.

Mining houses and machinery attached to the soil with the intent that they should remain and become part of the freehold are "fixtures." *Hoye Coal Co. v. Colvin*, 104 S. W. 207, 208, 83 Ark. 528.

The lease required the lessee of rooms in an office building to surrender the premises in as good condition as reasonable use permitted, and provided that all alterations, additions, or improvements made by either party, except movable office furniture put in by the lessee, should be surrendered to the lessor as a part of the premises. The lessee removed some of the permanent partitions with the lessor's consent, agreeing to restore them at the termination of the lease, and constructed temporary partitions, which did not extend to the ceiling, and were lightly nailed to the floor and walls, and at the termination of the lease the permanent partitions were restored. Held, that the reasonable intention of the parties was the test of wheth-

er fixtures were annexed to the realty, and the word "improvements" alone, though of wider meaning than "fixtures," did not include the temporary partitions; and, construing the word in connection with the exceptions in the lease, and in view of the intention shown thereby that such partitions should not be permanently annexed, they were not "improvements," but were "movable office furniture," within the meaning of the lease, and removable by the lessee. *United Booking Offices v. Pittsburgh Life & Trust Co.*, 119 N. Y. Supp. 216, 217, 65 Misc. Rep. 31.

Whether a structure is a "fixture" as between landlord and tenant depends on the intention to annex to the freehold. In *re Beeg*, 184 Fed. 522, 524.

In determining whether property attached to realty is a "fixture," the inquiry is as to the relation of the parties, and what they intended when the property was attached, and, when there is no special agreement, all the facts must be examined to arrive at the unexpressed intent, and the relationship of the parties considered. Where the owner of land embracing a factory for manufacturing fertilizer placed an engine therein for use in the process of manufacture, resting it upon a foundation of concrete four and a half feet thick sunk in the ground, and connecting it therewith by six three-quarter inch bolts four feet six inches long with metal bars laid on the bottom of the concrete, the concrete covering the bottom flange of the engine base, and set up a derrick in the earth supported by five metal guys, the lower end of each being anchored to a beam buried in the ground, the engine and derrick constituted "fixtures" and a part of the realty, for which the owner was entitled to compensation, where the lands were taken by the state for canal purposes through eminent domain. *Phipps v. State*, 127 N. Y. Supp. 260, 264, 69 Misc. Rep. 295.

Defendant owned an unfinished building. He bought finishing lumber, doors, and transoms, and placed them in the building for the purpose of completing it, but before finishing the building he sold it, with the land on which it stood, to plaintiff. The finishing material, etc., was still in the building, but annexed thereto only by its location and weight. Held, in replevin, that the finishing material, etc., passed with the conveyance, for the actual intent is the controlling question, and is that which the law deduces from all the circumstances of the annexation and not from secret intention in making it. *Rahm v. Domayer*, 114 N. W. 546, 547, 137 Iowa, 18, 15 L. R. A. (N. S.) 727.

#### Essential to use and permanent

A structure affixed to premises of another by a temporary occupant thereof or by a licensee is deemed temporary in its purpose and not part of the realty. *Young v. Chandler*, 66 Atl. 539, 541, 102 Me. 251.

A chattel is not merged in realty, so as to become a "fixture," unless it is adapted to and usable with that part of the realty to which it is annexed. A chattel need not be absolutely necessary to the completeness of a dwelling in order to become a fixture, if obviously adapted and intended to be used with it; and where a person who procured storm windows and doors, and with his wife took possession of the premises, intending to make it their home, lived there over four years, using the windows and doors as they were designed to be used during that period, and the doors and windows were made for the house and specially fitted to it, each window frame being fitted to a particular window casing on the building, the window casings being numbered consecutively, and the frames having been procured to make the place more comfortable for use, the doors and windows were fixtures. *Roderick v. Sanborn*, 76 Atl. 263, 264, 106 Me. 159, 30 L. R. A. (N. S.) 1189, 20 Ann. Cas. 469.

Showcases, racks, and hangers, purchased and specially adapted for use in connection with the business of manufacturing and selling harness, and attached by the purchaser to his own building, and used for many years in his conduct of the business, are fixtures, and pass as real estate on a sale on partition. *Owings v. Estes*, 100 N. E. 205, 206, 256 Ill. 553, 43 L. R. A. (N. S.) 675.

#### As property

See Chattel; Personal Property.

#### As improvement on land

See Improvement.

#### As merchandise

See Merchandise.

#### Heating boiler

Ky. St. § 2463, provides that a person who furnishes materials in the erection or repairing of a house, or for any fixture or machinery therein, or for the improvement of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, or authorized agent shall have a lien thereon, etc. Held, that a heating boiler purchased by a contractor and installed in defendant's residence constituted a "fixture" and "machinery," within the statute, and also an improvement of the property, within the section, so as to entitle the seller to a materialman's lien therefor. *Menne v. American Radiator Co.*, 150 S. W. 24, 25, 150 Ky. 151.

#### Light fixtures

Gas appliances, such as pendants, chandeliers, brackets, and globes, are not "fixtures" nor lienable articles, within the statute giving liens for material furnished and labor done on buildings, in the absence of evidence of an intention on the part of the owner when he has them put in to make them permanent parts of the building, and

such intention is not shown by the mere fact that they are put in by the original owner of the building, and remain in the same after it is sold by him to another. *Frank Adam Elec. Co. v. Gottlieb*, 86 S. W. 901, 903, 112 Mo. App. 228.

#### Loose material

"Unless the right to the timber cut passed to the respondent by his patent, he had none, and it could only pass as a 'fixture' on or appurtenance to the realty; but timber felled by the act of man, or wood cut, is personal property." *Longino v. Wester* (Tex.) 88 S. W. 445 (quoting and adopting definition in *Peck v. Brown*, 5 Nev. 81).

#### Machinery

In regard to machinery, there are well-defined rules to determine the character of the annexation. "Where the chattel, as attached to the realty, is useful and necessary to its enjoyment, and adds value thereto, and when detached loses its character and usefulness, the chattel becomes a 'fixture' and passes with the freehold." The ponderous character of the machinery, its special construction for the purpose for which the lease was given, the difficulty of detachment, and the necessity for reconstructing and re-adaptation, when refitted to another mill, are all indicia of the intention to become permanent. *Ozark v. Adams*, 83 S. W. 920, 922, 73 Ark. 227 (quoting and adopting definition in *Wiltse*, Mort. Fore. § 428).

Whether machinery is or is not "fixtures" must be determined by the following tests: First, by determining whether the machinery has been actually annexed to the realty, or something appurtenant thereto; second, whether the machinery is applicable to the use or purpose to which that part of the realty with which it is connected is appropriated; third, the intention of the party making the annexation to make a permanent annexation to the freehold. Machinery adapted to and suitable for a gristmill, attached to the real estate by nails, screws, bolts, and cleats, and used for carrying out the general purpose of the mill, is a "fixture." *Great Western Mfg. Co. v. Bathgate*, 79 Pac. 903, 905, 15 Okl. 87.

Where, under a lease of mining lands with option to purchase, the lessee places machinery on the land, the machinery is personalty, and can be sold and mortgaged by the lessee. Where machinery is placed on mining lands by the lessee thereof and does not become a fixture, an engine house of little value built around the machinery, and which has no use disconnected with the machinery, and is temporary in its character, is a chattel and not a fixture. Mining machinery placed on leased land does not become a fixture after the termination of the lease, where the tenant is a tenant at will, in the absence of a notice to quit as provided by Rev. St. 1899, § 4110 (Ann. St. 1906,

p. 2234). *Powell v. Plank*, 125 S. W. 836, 839, 141 Mo. App. 406.

Mere physical attachment is not the test as to whether personalty annexed to realty is a "fixture," the legal criterion being the intent to annex; and where machinery was sold under an agreement that title should not pass until the price had been fully paid, and the machinery was held in place by bolts and could be easily removed without injury to the building, and in correspondence between the seller and buyer it was referred to as the property of the seller, the purchaser at a receiver's sale of the property, with notice of the conditional sale of the machinery, or a holder of bonds secured by a mortgage given before the machinery was sold, has no higher right to the machinery than the buyer. *Wickes Bros. v. Island Park Ass'n*, 78 Atl. 934, 935, 229 Pa. 400.

A bankrupt, engaged in manufacturing steel and iron, purchased a "squeezer" and a steam pump for use in his steel mill. The squeezer was a heavy piece of machinery, weighing, with the pump, 37,500 pounds. It was erected on a brick base, to which it was fastened with bolts. To provide proper space therefor, the roof of the building was carried up some six feet, and a skylight built on top. The pump was to be put on a similar base, but none of the parts of the machine were connected with the wall of the building. As between the bankrupt and the seller, such machinery was a "fixture," and within Rev. St. Ohio 1892, § 3184, providing for a mechanic's lien for the furnishing of machinery for a mill, etc., on the mill or manufactory, and on the interest, leasehold, or otherwise, of the owner in the lot or land on which the same may stand. *Pfueger v. Lewis Foundry & Machine Co.*, 134 Fed. 28, 29, 67 C. C. A. 102.

In Pennsylvania, between a mortgagee and assignee for benefit of creditors, machinery in a factory which is a necessary part thereof, and without which it could not be a fully equipped establishment, is a "fixture," to be regarded as a part of the freehold subject to the lien of a real estate mortgagee or judgment against the owner. *In re Beeg*, 184 Fed. 522, 524.

Under the mining law, mining machinery, fixtures, and appurtenances placed on the property by the lessee are not regarded as fixtures that pass with the soil and lease as appurtenances, but as personal property of the lessee that may be removed by him in the absence of an express stipulation in the lease to the contrary. *National Bank of Wichita v. Spot Cash Coal Co.*, 136 S. W. 953, 957, 98 Ark. 597.

Under Tax Law (Laws 1896, p. 796, c. 908) § 2, subd. 3, as amended by Laws 1899, p. 1589, c. 712, defining the terms "land," "real estate," and "real property," as used in the tax law, machinery designed for the

production and distribution of electricity placed in a building in the city of New York, erected and planned for the same purpose upon specially prepared foundations, and which was being used for that purpose, is taxable as real estate, although the title to the machinery was not vested in the owner of the building because a part of the purchase price remained unpaid; greater New York Charter (Laws 1901, p. 380, c. 466) § 894, making the assessment of real estate to the wrong owner valid. *People ex rel. New York Edison Co. v. Wells*, 119 N. Y. Supp. 1057, 1058, 135 App. Div. 644.

The former rule that, to constitute a fixture as between vendor and vendee, or mortgagor and mortgagee, it was necessary that there should be such annexation to the freehold that the chattel could not be removed therefrom without injury either to the freehold or to itself is no longer followed in the case of machinery and appliances of a manufacturing plant. In such case machinery set upon the freehold by the owner and "fixtures" erected or fastened thereto for a permanent purpose, or as an improvement to the property, enhancing its value, will be considered a fixture, especially if the adaptation of the means to the end is shown to be appropriate as being indicative of a design to incorporate the machinery with the freehold and make it a part of it. When chattels are attached to the freehold for a permanent purpose, and are adapted to the employment or business to which the real estate is devoted, and the circumstances indicate a design on the part of the owner of the freehold to make the machinery a part of it, the chattels then become part and parcel of the freehold, and the owner of the land himself cannot detach or remove them, and change their character back into personalty, to the prejudice of a mortgage creditor. The rule as to "fixtures," as applied to machinery moved by the power of steam or water, has been greatly extended in modern times, both in England and America; but it still remains the settled law that machinery and implements in a cotton or woolen mill, although necessary for its use and enjoyment as such, and although of a character adapted only to the particular business there carried on, if not actually attached in some manner to the building, or to fixed machinery, by belting or otherwise, do not pass with the freehold. In cotton and woolen mills all machinery actually affixed to the freehold, although only by screws or bolts, or connected with it by belts or bands, passes with the realty. With the corpus of fixed machinery passes all that properly belongs to and forms an integral part of it, although capable of being detached and used elsewhere. In case a given article, from its nature or use, is part of a fixture, so are also all duplicates and different patterns of the same, used for the same purpose, although one only may be used in the same ma-



chine at a time. In woolen and cotton mills, and probably in most other mills, there are certain articles which are necessary for and are used with the fixed machinery, and are moved by and with it, which are of a more perishable character, are not purchased with such machinery, require more frequent renewal, and are not integral parts of it, but rather belong to the class of findings or supplies, and do not pass with such fixed machinery as part of the freehold. Articles whereby admitted "fixtures" are connected with the freehold, and whereby motion is imparted to the machinery, as shafting and belting, are an essential and integral part of the freehold, and pass with it. The simple criterion of physical attachment is so limited in its range and so productive of contradiction, even in regard to "fixtures" in dwellings, to which it was adapted before England had become a manufacturing country, that it will answer for nothing else. All the machinery of a manufacturing plant, which is necessary to constitute it, and without which it would not be such a plant, if attached to the freehold in any manner whatsoever, whether by physical annexation or being connected with the power which moves the machinery, or, in case of ponderous articles or machinery of immense weight, by mere gravitation, are "fixtures," and must pass for a part of the freehold. While the character of a chattel used in a manufacturing plant and connected with the freehold may be fixed by contract with the owner of the real estate, such contract cannot affect the rights of a mortgagee, or of an innocent purchaser without notice of it. Whether the machinery and appliances of a manufacturing plant are to be considered fixtures depends largely upon the intention of the owner with which they were placed in the building, and the tendency of modern cases is to make this intention the primary criterion; but the intention contemplated by the decisions is not an undisclosed purpose of the owner, but the intention made manifest by his act. This is necessarily so, because it is an intention which determined, not merely his own rights, but those of third persons, whose rights must necessarily depend, not upon the secret purposes of the owner, but upon the inference to be drawn from his acts and the surrounding circumstances. *Equitable Guarantee & Trust Co. v. Knowles*, 67 Atl. 961, 966, 8 Del. Ch. 106 (citing *Walker v. Sherman* [N. Y.] 20 Wend. 636; *Farrar v. Stackpole*, 6 Greenl. [Me.] 157, 19 Am. Dec. 201; *Gray v. Holdship* [Pa.] 17 Serg. & R. 415, 17 Am. Dec. 680; *Voorhis v. Freeman* [Pa.] 2 Watts & S. 116, 117, 37 Am. Dec. 490; *Hopewell Mills v. Taunton Sav. Bank*, 23 N. E. 327, 150 Mass. 519, 521, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Thompson v. Vinton*, 121 Mass. 139; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542, 545; *Case Mfg. Co. v. Garven*, 13 N. E. 493, 45 Ohio St. 289; *Turner v. Wentworth*, 119

Mass. 459; *Allen v. Mooney*, 130 Mass. 155; *Smith Paper Co. v. Servin*, 130 Mass. 511, 513; *Hubbell v. East Cambridge Five Cents Sav. Bank*, 132 Mass. 447, 42 Am. Rep. 446; *Maguire v. Park*, 1 N. E. 750, 140 Mass. 21; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Hill v. Farmers' & M. Nat. Bank*, 97 U. S. 450, 24 L. Ed. 1051; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Carpenter v. Walker*, 5 N. E. 160, 140 Mass. 416; *Southbridge Sav. Bank v. Mason*, 18 N. E. 406, 147 Mass. 500, 1 L. R. A. 350; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Parsons v. Copeland*, 38 Me. 537; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612; *Delaware, L. & W. R. v. Oxford Iron Co.*, 36 N. J. Eq. 452; *Roddy v. Brick*, 6 Atl. 806, 42 N. J. Eq. 218, 225).

#### Railroad equipment

A railroad roadbed was not a "fixture" and would pass by deed to the land, in the absence of an express exception, at least as to the embankment itself, which was not a fixture any more than a dyke or levee or a well, and the same rule applied to riprapping. *Van Husan v. Omaha Bridge & Terminal Ry. Co.*, 92 N. W. 47-51, 118 Iowa, 368.

#### Trade fixtures

Within the rule permitting a tenant to remove "fixtures" erected for the purposes of trade, within the term, the word "fixtures" includes buildings as well as machinery; the sole question being whether they are designed for purposes of trade. In re *Montello Brick Works*, 163 Fed. 624, 632.

Partitions, which did not reach to the ceiling, and were lightly nailed to the floor and walls, put in the rooms of an office building by the lessee for the benefit of his business, were practically trade fixtures, and not "fixtures" technically, so as to make them annexed to the realty. *United Booking Offices v. Pittsburg Life & Trust Co.*, 119 N. Y. Supp. 216, 217, 65 Misc. Rep. 31.

Alterations made by a lessee of a building to adapt it for use as a saloon, by which doors and their frames were removed, the openings enlarged, and the inclosures and doors extended 30 inches into a street, and marble platforms countersunk 2 inches into the water table, did not constitute movable or trade "fixtures" which the tenant could remove. *Excelsior Brew. Co. v. Smith*, 110 N. Y. Supp. 8, 10, 125 App. Div. 668, 670.

Vehicles, appliances, furniture, harness, embalming fluid, caskets, etc., used in an undertaker's business, are not "fixtures," within the bulk sales law (Pub. Acts 1905, No. 223). *People's Sav. Bank v. Van Allsburg*, 131 N. W. 101, 102, 165 Mich. 524.

A sale of horses, wagons, harnesses, coal bags, forks, shovels, baskets, stoves, sleigh runners, chutes, and books pertaining to a retail coal business was not a sale of "merchandise," within Bulk Sales Law, providing

that sales in bulk of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to a business, otherwise than in the ordinary course of trade, shall be void, etc. In Bulk Sales Law, providing that the sale in bulk of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conducting of a business, otherwise than in the ordinary course of trade, shall be void, etc., the word "fixtures" refers to such chattels as merchants usually possess and annex to the premises occupied by them, to enable them to better store, handle, and display their wares, and commonly known as trade fixtures, though removable without material injury to the premises at or before the end of the tenancy, and did not include horses, wagons, tools, books, and other appliances used in the conduct of a retail coal business. *Bowen v. Quigley*, 130 N. W. 690, 165 Mich. 337, 34 L. R. A. (N. S.) 218.

## FLAG

As personal property, see Personal Property.

Not dutiable as toys, see Toys.

The "flag" is the emblem of national authority. The power to prohibit the use of the national flag does not belong exclusively to the federal Congress, but may be exercised by the several states. *Halter v. State*, 105 N. W. 298, 300, 74 Neb. 757, 7 L. R. A. (N. S.) 1079, 121 Am. St. Rep. 754.

## FLAG STATION

A "flag station" is a railway station at which a train will not stop unless it is flagged or unless it has passengers for the place. *Marx v. Louisiana Western R. Co.*, 36 South. 862, 863, 112 La. 1085.

A railway station was a "flag station," and not a "regular station," within Kirby's Dig. § 6612, authorizing railroad companies to make special charges to passengers boarding or alighting at other than regular stations, where the company had no depot there and no joint agency with the railroad which it crossed and did not use the other company's depot, though trains stopped at the crossing opposite the depot and passengers were received and discharged there on signal, and freight, express, and mail matter was received there; no tickets, bills of lading nor baggage checks being issued, and such stations being designated "flag stations" by the railroad, as distinguished from regular stations at which tickets were sold, baggage checked, bills of lading issued, and station houses and agents were maintained. *Clark v. Jonesboro, L. C. & E. R. Co.*, 112 S. W. 961, 963, 87 Ark. 385 (citing 7 Words and Phrases, pp. 6039, 6644).

## FLAGGED CARS

"Flagged cars," in railroad parlance, are dead cars that are forbidden to be moved.

*Beck v. Southern R. Co.*, 59 S. E. 1015, 1022, 146 N. C. 455.

## FLANGE

A "flange" is defined as a projecting flat rim, collar, or rib used to strengthen an object, to guide it, to keep it in place, etc. *Beardsley v. Howard & Bullough American Mach. Co.*, 176 Fed. 619, 621.

## FLARE-UP LIGHT

"The term 'flare-up light' is not defined in the articles, but, since it is provided as the alternative for a fixed white light at the level of the side lights, it certainly must be one kept where it will be at hand and in proper condition when wanted, and which will not blow out in a high wind, but will burn with such continuity as to give fair warning to the approaching vessel." *The Kaiserin Maria Theresa*, 149 Fed. 97, 98, 78 C. C. A. 681.

## FLASH

### FLASH POINT

The temperature of a heated fluid at which the vapor rising from it flashes momentarily is termed the "flash point." *State v. Boylan*, 65 Atl. 595, 596, 79 Conn. 463.

### FLASHOVER

A "flashover" is the passage of a positive current of electricity over to the negative. *Sexton v. Metropolitan St. Ry. Co.*, 149 S. W. 21, 26, 245 Mo. 254.

## FLAT

The word "flat" signifies something that is level, without rotundity, curvature, or other variation or irregularity. *Long v. Noye Mfg. Co.*, 192 Fed. 566, 569.

In a sale of bonds under a contract whereby the buyer obtained them at their face value or in technical parlance, "flat" meant face value without taking into account interest which had accrued on them. *Citizens' Sav. Bank v. Town of Breenburgh*, 65 N. E. 978, 980, 173 N. Y. 215.

### As building or part thereof

See, also, Apartment House.

The word "flat" has no technical, legal meaning, so that a court can pronounce absolutely one way or the other as to whether a building is a flat or not, and, where the testimony is conflicting, the question is one of fact. The word is defined by Webster's New Dictionary as: "A floor, loft, or story in a building, especially a floor which forms a complete residence in itself. Residence flats of the better class are, in the United States, often called apartments. A building divided into flats." It is defined by the Standard Dictionary as: "A floor or portion of a floor,

especially one divided into rooms and fitted for the occupancy of a single family; apartment." The purposes of a restrictive covenant in deeds of lots and abutting on a street prohibiting the erection of "flats" or tenement houses is to prevent a house from being used by more than one family, each living by itself on different floors fitted up separately for housekeeping, and a construction of the covenant which will permit two-story dwelling arranged for the use of two families, each keeping house by means of fixed conveniences on each floor, and each using a common front entrance, and each having separate entrances in the rear, will defeat the object thereto. *Godfrey v. Hampton*, 127 S. W. 626, 628, 148 Mo. App. 157.

A "flat," etymologically, is a floor in a building. Later the use of the word became restricted to a floor completely equipped for housekeeping purposes. A building containing such floors so equipped, each of which is called a "flat," is itself termed a "flat," but, more properly speaking, should be termed a "flat house." Any building consisting of more than one story, in which building there are one or more suites of rooms on each floor equipped for separate housekeeping purposes, is a "flat," within the meaning of a restriction in a deed that the grantee shall not permit to be erected on the premises any building which shall be used or occupied as a flat. If what is known as a "flat" becomes an "apartment house" when higher rental is charged, the payment of a rental of from \$35 to \$40 per month does not turn what is otherwise a "flat" into an "apartment," so as to take it out of a building restriction binding the grantee not to erect a flat on the premises. *Lignot v. Jaekle*, 65 A. 221-224, 72 N. J. Eq. 233.

A "garage and store room" is not included within the term "flat building," and hence its erection is not a violation of a restriction in a deed against the erection of such structures. *Jones v. Williams*, 106 Pac. 166, 168, 56 Wash. 588.

#### FLAT RATE

A "flat rate," as used in city ordinances fixing rates to be charged consumers by water company, is a rate based on the number of fixtures used and the business for which the supply is intended. *Wilson v. Tallahassee*, 36 South. 63, 64, 47 Fla. 351.

Where a tax is imposed upon all merchants without regard to the volume of their business, it is termed a "flat rate." *Salt Lake City v. Christensen Co.*, 95 Pac. 523, 526, 34 Utah, 38, 17 L. R. A. (N. S.) 898.

#### FLAT STONES

In an action to confirm a special assessment evidence held to show that the term "flat stones," as used in an ordinance in describing the material for bedding the curb-stones, was understood by contractors to

mean limestone blocks about six inches thick and 12 to 16 inches square, as nearly uniform as can be obtained. *Beckett v. City of Chicago*, 75 N. E. 747, 749, 218 Ill. 97.

#### FLATS

The word "flats" is of doubtful meaning when used as a boundary, as it means in one case the sea side and in another case the land side of the "flats." The meaning to be attached to the word, when used in a deed, must depend upon the instrument in which it occurs, taken as a whole, and upon surrounding circumstances. It does not include the space between high and low water mark, if the word is used in its technical sense. *Haskell v. Friend*, 81 N. E. 962, 963, 196 Mass. 198 (citing *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155).

A mussel bed, over which the water flows at every tide, cannot properly be called an island, but constitutes what are called "flats." *Fowler v. Wood*, 85 Pac. 763, 776, 73 Kan. 511, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534 (citing *King v. Young*, 76 Me. 76, 49 Am. Rep. 596).

#### FLAVOR

An information charging that defendant sold in interstate commerce a liquid labeled "Flavor of Vanilla," which did not contain any extract of vanilla, does not state a case of adulteration or misbranding of vanilla extract in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768; the words "extract" and "flavor" not being synonymous terms. *United States v. St. Louis Coffee & Spice Mills*, 189 Fed. 191, 193.

#### FLAVORING EXTRACT

As liquor, see Liquor.

#### FLAX

Fabrics in chief value of flax, but in part of wool, are dutiable under the Tariff Act as goods "the component material of chief value" in which is "flax," and not as cloths "in part of wool." *United States v. Charles A. Johnson & Co.*, 154 Fed. 752, 754 (citing *Myers v. United States*, 110 Fed. 940; *United States v. Altman*, 107 Fed. 15, 46 C. C. A. 116; *Converse v. United States*, 113 Fed. 817; *Hartman v. Meyer*, 10 Sup. Ct. 751, 135 U. S. 237, 34 L. Ed. 110).

#### FLAX NOILS

"Flax noils" held dutiable as "waste," under the Tariff Act of 1897, and not as "tow of flax," by similitude. *G. B. Ritchie & Co. v. United States*, 141 Fed. 664.

#### FLEE FROM JUSTICE

See, also, Fugitive from Justice.

The term "fleeing from justice," as used in the United States Statutes, has been de-

fined as to leave one's home or residence or known place of abode within the district or to conceal one's self therein with intent in either case to avoid detection or punishment for some public offense against the United States. *State v. Lem Woon*, 107 Pac. 974, 979, 57 Or. 482.

An instruction in a criminal prosecution that the jury must find, to justify a conviction, that, after the commission of the offense, accused had concealed himself to avoid arrest and punishment was a sufficient definition of the term "flee from justice," as used in connection with statutory limitations of criminal prosecutions. *State v. Miller*, 87 S. W. 484, 487, 188 Mo. 370.

Where a person charged with crime against the United States in the courts of one federal district, when found elsewhere, resists removal to such district, with intent to avoid the jurisdiction and process of the court therein, such action constitutes a "fleeing from justice," which, under Rev. St. § 1045, takes away from him the privilege of pleading the statute of limitations, and, until he submits himself to such jurisdiction, the statute does not run in his favor as against prosecution for any offense charged to have been previously committed in said district. Although, under the extradition treaty of 1890 between Great Britain and the United States and the laws of Canada, a person whose extradition is sought by the United States from the Dominion of Canada has the right to oppose his extradition by legal proceedings, he is nevertheless, during the pendency of such proceedings, a person "fleeing from justice," within the meaning of Rev. St. § 1045. *United States v. Greene*, 146 Fed. 803, 889.

To constitute one a "person fleeing from justice" so as to prevent the running of the statute of limitations against a prosecution for a criminal offense against the United States under Rev. St. § 1045, it is not necessary that he should have left the United States, but it is sufficient that he had left the district in which the offense was committed when it was sought to apprehend him therefor, and was found in another district in which he did not reside under circumstances indicating a purpose to evade the authority of the court having jurisdiction. *Greene v. United States*, 154 Fed. 401, 402, 411, 85 C. C. A. 251.

In construing a statutory provision excepting from the limitation of time for prosecuting crimes "any person fleeing from justice," for the purpose of determining the sufficiency of an indictment to support proceedings for extradition, the exception should be held to apply to any person who, being within the state at the time the alleged offense was committed, failed for any reason to remain therein until the bar of the statute was complete, and it is immaterial that he did not leave for the purpose of avoiding prosecu-

tion. *Bruce v. Bryan*, 136 Fed. 1022, 69 C. C. A. 342.

It would seem by the language "who shall flee from justice," in the constitutional provision relative to the extradition of any person who has escaped to another state, that it meant a flight from a punishment, penalty, or condition which would follow capture and conviction, rather than a flight from a place or from the territorial limits of the outraged commonwealth. *Ex parte Moyer*, 85 Pac. 897, 902, 12 Idaho, 250, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep. 214.

## FLIGHT

See Flee from Justice; Immediate Flight.

## FLITTERS

Where ingots of composition metal are put through rollers, and further thinned down under a hammer until they become thin sheets, which are the composition metal of trade, and the shearings left after the sheets are cut into desired sizes are cut into smaller pieces with the shears or a machine, and then placed in a steel box, and by a stamp reduced in size almost to a powder, the product which is used to sprinkle over the face of surfaces where it is desired to produce a glittering metallic effect is known to the trade as "flitters," and is not free of duty as "composition metal," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 533, 30 Stat. 197, but is dutiable as manufactures of metal under paragraph 193, § 1, Schedule C, of the act (30 Stat. 167). *United States v. George Meier & Co.*, 136 Fed. 764, 765, 69 C. C. A. 421.

## FLOAT

### As land grant

"Float" is a term applied to a grant of land by the government, land not having been specifically selected; that is, a general grant of a certain amount of lands to be selected in the future by the grantee. *Corvalis & E. R. Co. v. Benson*, 121 Pac. 418, 425, 61 Or. 359 (citing 8 Words and Phrases, p. 2850).

## FLOATABLE STREAM

See, also, Navigable.

A "floatable stream" includes one which is capable of public use when increased by precipitation at seasons recurring periodically with reasonable certainty, so that the water is sufficient to be substantially useful for the transportation of products of the fields and forests, but does not include one which in its normal condition will not profitably or practically wash logs down its channel, except at irregular intervals, when it overflows and runs away so quickly as to leave the logs along the banks in the channel and on riparian land before they can be successfully floated to the mills. *Hot Springs Lum-*

ber & Mfg. Co. v. Revercomb, 65 S. E. 557, 558, 110 Va. 240; *Id.*, 55 S. E. 580, 106 Va. 176, 9 L. R. A. (N. S.) 894.

Where a fresh-water stream in a settled country, when not swollen by freshets or depleted by droughts, is without artificial aid periodically capable of floating mining and forest products, etc., and has been and will likely continue to be so used, it is a "floatable stream," subject to public user. *Blackman v. Maudlin*, 51 South. 23, 25, 164 Ala. 337, 27 L. R. A. (N. S.) 670.

A river which in its natural condition, unaided by artificial means, is susceptible to public use to float vessels, rafts, or logs, is a navigable or floatable stream according to the law of Maine, though not a navigable river in the technical sense of the common law. *Charles C. Wilson & Son v. Harrisburg*, 77 Atl. 787, 789, 107 Me. 207.

Where lumbering is a principal industry in a locality, a fresh water stream, which is capable of being used for the purpose of floating down logs to the mills or market, although it may be too small to admit of navigation, is navigable (or rather "floatable"), and, being such, it is a public highway. *Johnson v. Johnson*, 95 Pac. 499, 507, 14 Idaho, 561, 24 L. R. A. (N. S.) 1240.

A "floatable stream" is one of sufficient capacity to float sawlogs during some portion of the year. *Village of Bloomer v. Town of Bloomer*, 107 N. W. 974, 979, 128 Wis. 297.

A stream is a navigable or "floatable stream," as affecting a boom company's right to condemn water rights where during freshets recurring in fall, winter, and spring it is floatable for sawlogs for periods varying from one day to several days each, and is used to float shingle bolts. *State ex rel. United Tanners Timber Co. v. Superior Court for Lewis County*, 110 Pac. 1017, 1018, 60 Wash. 193.

#### FLOATER

The term "floater," as applied to an insurance policy, means a policy that floated around with the goods, and insured them wherever they were to the extent that the parties agreed that they should be insured. *Grossbaum Ceramic Art Syndicate v. German Ins. Co.*, 62 Atl. 1107, 1108, 213 Pa. 506

#### FLOATING

The "floating" of timber is not the same as "pulling timber." Floating timber is to float it from the stump to the mill, while to pull timber is to draw it from where it is felled to the water by which it is to be floated. *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 41 South. 332, 335, 117 Ga. 1.

#### FLOATING ENTRY

An entry of lands in the office of the entry taker of a county, made in the following form: "A. L. Adams enters and locates 300

acres of land in said county and state in district ten, on waters of Little Santeetla creek, beginning on a chestnut tree and runs various courses for complements"—is a "floating entry," being vague and indefinite. *Lovin v. Carver*, 64 S. E. 775, 776, 150 N. C. 710.

#### FLOATING INTENTION

"An indeterminate or floating intention" to return to a residence from which one moves does not include a case of intention to return upon the occurrence of some event which may be reasonably anticipated, as when the health of a relative has been restored. *McDowell v. Friedinan Bros. Shoe Co.*, 115 S. W. 1028, 1033, 135 Mo. App. 276.

#### FLOATING KIDNEY

The condition described as a "floating kidney" is that condition where for any cause the fat or tissues holding the kidneys in place are obstructed or in any way become stretched, causing the organ to float forward. It may be caused by blows direct or indirect, and is said to be due to the connection of the organ with the nervous system and reflex areas known as the "sympathetic nervous system." *Mackey v. Interurban St. Ry. Co.*, 101 N. Y. Supp. 439, 440, 115 App. Div. 467.

#### FLOATING POLICY

An insurance policy intended to supplement the specific insurance on goods and attaching only when it ceased to cover the risk is a "floating policy." *Cutting v. Atlas Mut. Ins. Co.*, 85 N. E. 174, 175, 199 Mass. 380 (citing *Peabody v. Liverpool & L. & G. Ins. Co.*, 50 N. E. 526, 171 Mass. 114).

Under "floating policies," or "shifting risks," "the property insured is the property of a class and kind described, in the place described, which the insured may have on hand at the time of the fire, whether it is or is not identical, in items with that which he had on hand at the time the insurance was written." *Bloch v. American Ins. Co.*, 112 N. W. 45, 48, 132 Wis. 150.

#### FLOGGING

##### FLOGGING HAMMER

A "flogging hammer" is a small sledge hammer used for striking a large cold-chisel in chipping castings. *Williams v. Garbutt Lumber Co.*, 64 S. E. 65, 70, 132 Ga. 221.

#### FLOOD

See Extraordinary Floods; Ordinary Floods.

#### FLOOD CHANNEL

The "flood channel" of a stream is that occupied by it when, swollen by rains and melting snows, it extends and flows over the bottom along its course. *Cole v. Missouri, K. & O. R. Co.*, 94 Pac. 540, 541, 20 Okl. 227, 15 L. R. A. (N. S.) 268.

A stream may have what is termed a "flood channel" to retain surplus waters until they can be discharged by the natural flow. *Price v. Oregon R. Co.*, 83 Pac. 843, 846, 47 Or. 350.

### FLOOD WATER

An irrigation district, which owned a canal of limited capacity, used the term "flood water" to designate water which would be in excess of the carrying capacity of the canal, if all the users were using water. *Gerber v. Nampa & Meridian Irr. Dist.*, 100 Pac. 80, 87, 16 Idaho, 1.

While an appropriator may divert for use to any point beyond the watershed any portion of the waters of a stream which can serve no useful purpose, either to the riparian owner or in supplying an underground stratum, or which are in excess of the quantity necessary for that purpose, waters of a stream are not necessarily "flood or storm" waters because the flow is increased by unusual rains beyond normal, so long as the water is confined to the general channel of the stream, nor so long as the waters perform an indispensable service in pressing into the gravel beds or trough the waters which go to supply the various artesian strata, from which the overlying landowners obtain water by means of wells. *Miller v. Bay Cities Water Co.*, 107 Pac. 115, 126, 157 Cal. 256, 27 L. R. A. (N. S.) 772.

### FLOOR

See Ground Floor.

### FLOOR BROKER

A broker, who bought and sold cotton on the floor of the Exchange, and, instead of making contracts in his own name, would "give up" to the person with whom he dealt the name of another broker, who would sign the contract, acted as "floor broker" for his principal, so that the principal must look to the broker whose name was "given up," and is liable to that broker for commissions. *Rait v. Carpenter*, 138 N. Y. Supp. 460, 461, 78 Misc. Rep. 385.

### FLOSS CANDY

"Floss candy" is candy consisting of thread-like or silk-like filaments formed from melted sugar or candy. *Electric Candy Mach. Co. v. Morris*, 156 Fed. 972, 973.

### FLOTSAM

"Flotsam," as distinguished from "wreck," is when a ship is sunk or otherwise perishes and the goods float upon the sea, while "wreck" is confined to such goods as, shipwrecked at sea, are by the sea cast upon the land. *Lacaze v. State, to use of Lanoix (l'a.)* Add. 59, 62.

### FLOUR

See Blended Flour.

The word "flour," as used in Const. 1898, art. 230, exempting from taxation the capital machinery and other property employed in the manufacture of "flour" for a period of ten years, is used in a restricted or special sense as the ground and bolted substance of wheat manufactured for human consumption. *Atlas Feed Products Co. v. City of New Orleans*, 37 South. 531, 533, 113 La. 611.

### FLOURING MILL

As mill, see Mill.

As public mill, see Public Mill.

### FLOW

See Constant Flow; Underflow.

### FLOWING LANDS

As taking property under eminent domain, see Taking (In Eminent Domain).

A dam across a navigable stream, which sets back the water of the stream without overflowing any lands outside its banks, but merely raising the water within the banks, so as to lower the available water power of the dam of an upper proprietor owning the lot on the side of the stream on which the dam rests, causes a "flowing of lands," within St. 1898, § 4221, subd. 3, limiting the time for an action for damages for the flowing of lands caused by the maintenance of a mill-dam. *Green Bay & Mississippi Canal Co. v. Telulah Paper Co.*, 122 N. W. 1062, 1065, 140 Wis. 417.

### FLOWING WATER

"In the absence of statutory regulations or private agreements, all waters are, in contemplation of law, regarded as either 'flowing' or 'percolating.' The former consists of those bodies, such as lakes, ponds, and streams, which are upon or beneath the surface of the earth, and whose boundaries and course are well defined and reasonably ascertainable, and whose existence is not of a temporary or ephemeral character. As to these the owner of land has no title. His right to use or divert is measured by its reasonableness and limited to the premises along, through, or over which the waters flow. The reason for this rule is found in the fact that all such riparian owners have rights therein, and one may not unreasonably interfere with another. All waters, not within the above description of 'flowing waters,' are deemed 'percolating.' They are so regarded because practically they constitute themselves parts of the substances in which they exist or through which they pass. When found in land, they may not be distinguished in law from the land. They are a part of the same, and the owner of the land is the absolute owner. He may use

them where and in such manner as he chooses or dispose of them to others for like use. He is subject only to the general limitation, which has application to all ownership of property, that in its acquisition and enjoyment he may not unreasonably injure or interfere with the rights of others." *Hathorn v. Dr. Strong's Saratoga Springs Sanitarium*, 106 N. Y. Supp. 553, 554, 55 Misc. Rep. 445.

## FLOWERS

See Artificial Flowers; Natural Flowers.

## FLUE

See Boiler Tubes or Flues.

So-called arched Purves furnaces, consisting simply of corrugated steel cylinders or tubes, which are not furnaces in fact, but intended to be used in the manufacture of furnaces, are dutiable under the provision of the Tariff Act of 1897, for boiler tubes or "flues." *Thomas v. F. B. Vandegrift & Co.*, 162 Fed. 645, 647, 89 C. C. A. 437.

## FLUME

A "flume" is a mere means of conveying water, and hence the abandonment of an old or dilapidated flume is entirely different from abandoning the right to divert and use water conveyed through such flume. *Wood v. Etiwanda Water Co.*, 81 Pac. 512, 514, 147 Cal. 228.

L. O. L. § 5136, provides that the owner of a "ditch or mining flume, or water right appurtenant thereto," who fails to operate or exercise ownership over such property for a period of five years shall lose the title, claim, and interest therein, etc. Held that, as a "ditch" is an "aqueduct," which is a water carrier or leader, and "flumes" are usually portions of ditches, a reservoir is not included within the statutory provisions; and nonuser thereof for the period named would forfeit no right. *Moore v. United Elkhorn Mines*, 127 Pac. 964, 966, 64 Or. 342.

## FLYER POLICY

"Flyer policies" are insurance policies issued, at a very low rate, by agents about the close of the year, in order to increase the amount of insurance written by them. *Union Casualty & Surety Co. v. Goddard (Ky.)* 76 S. W. 832, 833.

## FLYING DRILL

A "flying drill" is accomplished by uncoupling a car from a locomotive from which it has acquired its momentum and turning the switch after the locomotive has passed over it, but before the car has reached it, thereby diverting the car alone onto the switch track. *Cranbuck v. Delaware, L. & W. R. Co.*, 65 Atl. 1031, 74 N. J. Law, 473.

## FLYING SWITCH

A "flying switch" is a method of railway switching whereby a car may be moved onto a side track by its own momentum after being detached from a moving locomotive or train. *Carman's Adm'r v. Illinois Cent. Ry. Co. (Ky.)* 92 S. W. 954, 955.

A "flying switch" is made on a railroad by a locomotive, while under good headway, slacking up, and then pulling the pin which couples cars, the engine then on a signal going ahead from the switch with increased speed, and a switchman throwing a switch after the engine passes, thus sending the car following onto another track. *Carr v. St. Clair Tunnel Co.*, 92 N. W. 110, 111, 131 Mich. 592.

In reply to the contention that "kicking" cars was negligence per se, it was said that the word "kicking" seems to be used in railroad parlance as synonymous with making a "flying switch." *Allen v. Atlantic Coast Line R. Co.*, 58 S. E. 1081, 1082, 145 N. C. 214 (citing *Wilson v. Atlantic Coast Line R. Co.*, 55 S. E. 257, 142 N. C. 333).

"A 'running' or 'flying switch' is performed by attaching the cars to be thrown upon the other track to the engine. The train is then put in motion, running toward the switch, and before it is reached, and when sufficient momentum to answer the purpose has been acquired, the engine is detached, passes on the main track, and, after passing, the switch is changed, and the cars thus detached, by the momentum thus acquired, are carried along the side track to the point intended." *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379, 383, 384.

Where cars were moving in the same direction as the trains on the other road by their own momentum having been uncoupled from a train while in motion and left quietly to run along the track without any persons upon them to check their motion or to give an alarm, the mode of switching is not what is technically called a "flying switch," though it possess substantially the same elements of danger. *Chicago, R. I. & P. R. Co. v. Dignan*, 56 Ill. 487, 490.

The method of switching known as making a "running" or "flying" switch, which embraces "kicking cars," consists in detaching the portion of the train to be switched off while the cars are in motion, the forepart of the train advancing with increased speed, while the rear portion, proceeding more slowly, is, at the proper time, switched off upon the desired track; or the engine may push forward a car or part of a train with considerable speed, and then, giving it a strong propulsion, send it off alone on the desired switch. This practice in many courts is condemned as negligent, even towards trespassers, and when the cars are suffered to run over a crossing, after being detached from

the train, in making a flying switch, whereby travelers are injured, it is held negligence of an aggravated nature, and the practice is not infrequently sharply denounced by the courts. *Lacey v. Louisville & N. R. Co.*, 152 Fed. 134, 137, 81 C. C. A. 352 (citing *Beach*, *Contrib. Neg.* [3d Ed.] § 217).

In making "flying switches," a train is separated for a greater or less distance, a portion being carried on by its momentum or the effect of the grade, and between the passage of the different parts a switch is thrown so that the following cars are deflected onto a different track. *Lord v. Boston & M. R. Co.*, 65 Atl. 111, 114, 74 N. H. 39.

## FOAL-GETTER

"The warranty of a stallion as a 'foal-getter' means something more than that the stallion is able to get foals, and implies that he can render reasonable service as a foal-getter being sold exclusively for such use." A representation that a jack "was as sure a foal-getter as ordinary jacks in this climate and country" warrants the ability of the animal to render reasonable service as a foal-getter. *Wingate v. Johnson*, 101 N. W. 751, 126 Iowa; 154 (citing *McCorkell v. Karhoff*, 58 N. W. 913, 90 Iowa, 545).

## FOAM

As liquor, see *Liquor*.

## FOLIO

Under General Construction Law, providing that a folio is 100 words, counting as a word each figure, a "folio," in determining an allowance under Insanity Law, for taking and transcribing testimony, means words and figures, but not punctuation; the word "figure" being limited to numerals, which are letters or characters representing a number, and not including "punctuation," which is a pointing off or separating of one word from another by arbitrary marks. In *re Murtaugh*, 128 N. Y. Supp. 850, 851, 71 Misc. Rep. 513.

## FOLLOW—FOLLOWING

A restraining order prohibiting strikers from "following" employes to their homes or on the streets does not prevent a striker from walking on the streets in the same direction that an employe is going. *Union Pac. R. Co. v. Reuf*, 120 Fed. 102, 121.

### Following occupation

As used in the by-laws of a fraternal beneficial order, providing that, whenever a member became disabled from "following any occupation," he was entitled to certain benefits, the words "following any occupation" mean something more than the doing of one or more acts pertaining thereto. They involve the idea of continuity, and involve also the doing of all those things which are

an essential part of the work or business in which a party is engaged. It was not necessary that a member should be disabled to the extent that he has not sufficient physical power to follow an easy occupation, and to perform some slight service, although under great disadvantage and while suffering great bodily pain. *Monahan v. Supreme Lodge of the Order of Columbian Knights*, 92 N. W. 972-974, 88 Minn. 224.

## FOND

The first condition for the creation of an immovable by destination is that it must be placed by the owner, and no other, upon realty. This realty may be either land or a building erected upon land. This realty is called by the French commentators "fonds," from the Latin "fundus." *Morton Trust Co. v. American Salt Co.*, 149 Fed. 540, 542.

## FOOD

See *Necessary Food*; *Nerve Food*.

The word "food" is a general term, and applies to all that is eaten for the nourishment of the body, and includes anything which is eaten or drunk for nourishment, any substance that is taken in the body which serves, through organic action, to build up normal structure or supply the waste of tissue, and includes confectionery. *Commonwealth v. Pfau*, 84 Atl. 842, 843, 236 Pa. 294.

New York City Sanitary Code, § 68, providing that no person shall have, sell, or offer for sale any food which is adulterated or misbranded, expressly defines the word "food" to include every article of food and every beverage used by men, and all confectionery. *People v. Greenberg*, 119 N. Y. Supp. 325, 326, 134 App. Div. 599.

Public Health Law (Laws 1893, p. 1510, c. 661, art. 3) § 40, provides that "the term 'food,' when used herein, shall include every article of food and every beverage used by man, and all confectionery." *State Board of Pharmacy v. Gasau*, 107 N. Y. Supp. 409, 122 App. Div. 803.

The words "food" and "drink," in common usage and understanding, are complementary and associate terms, denoting the two prime necessities of life, but they import a plain and fundamental distinction, as universal as language and as old as the human race. No tongue is so primitive that it lacks different words to indicate them and different words to express the sensations of want of them, as hunger and thirst. Act June 26, 1895 (P. L. 317), entitled "An act to provide against the adulterating of food and providing for the enforcement thereof," which defines in section 2 the term "food" to include "all articles used as food or drink by man, whether simple, mixed, or compounded," is unconstitutional, as applied to



**drink**, in not stating the subject of the act in the title, as required by Const. art. 3, § 3. *Commonwealth v. Kebort*, 61 Atl. 895, 896, 212 Pa. 289.

The term "food," as used in Laws 1905, p. 163, c. 114, § 11, providing that it shall be unlawful for any person to sell or offer for sale any article of prepared foods, unless the true name of the manufacturer and the location of the factory where such article of food is prepared is plainly printed or stenciled on the package, box, can, etc., includes "all articles used for food, drink, flavoring, confectionery, or condiment, by man or domestic animals, whether simple, mixed, or compound." *Jewett Bros. & Jewett v. Small*, 105 N. W. 738, 741, 20 S. D. 232.

The fact that a "food" may also be a medicine or possess medicinal properties does not exempt it from the operation of a state statute regulating the sale of foods. A "condiment" is a "food" and not a "medicine." The "International Stock Food" is a "food or condiment," within the meaning of the Kentucky pure food law (Laws Ky. 1906, p. 282, c. 48), and its sale is subject to regulation thereunder. *Savage v. Scovell*, 171 Fed. 566.

Under Pure Food Law, § 2, defining the term "food" to include all articles used for food or drink, or intended to be eaten or drunk by man, whether simple, mixed, or compound, and section 3 defining adulteration, and declaring that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food if each package sold or offered for sale is distinctly labeled to show that it is a mixture or compound, and is not an imitation, and contains no injurious or poisonous substance injurious to health, it is held that, where sausage made by mixing pork meat with spices, cereals, and water was imported into the state, and sold to retail dealers in boxes so labeled as to disclose that the sausage was a mixture containing cereals, it could not be resold to consumers at retail, except in the original packages unless the retail packages were also labeled to show that it was "sausage with cereal." *Armour & Co. v. State Dairy and Food Com'r*, 123 N. W. 580, 584, 159 Mich. 1, 25 L. R. A. (N. S.) 616.

Comp. Laws, § 5007, declaring it unlawful to manufacture and sell any maple syrup that is in any wise adulterated with any foreign substance, without labeling the package containing it with the true name of such article, and the percentage in which the foreign substance enters into its composition, is a complete act in itself, intended to prohibit the manufacture and sale, under any name, of maple syrup, containing a foreign substance, without such label; so that the manufacture and sale of a syrup under the name "Pierre Viaus Pure Canadian Maple Syrup and Cane Syrup," the maple syrup therein exceeding the cane syrup, but the percentage

of the ingredients not being given in the label, is governed by such act, and not by the pure food law (Pub. Acts 1895, p. 358, No. 193), which by section 1 prohibits the sale of food adulterated within the meaning of the act, by section 2 defines "food" to include all articles used for food or drink, and by section 3 states what articles shall be deemed to be adulterated, concluding with the proviso that the provisions of the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if the package bear the name and address of the manufacturer and be distinctly labeled under its own distinctive name, and in a manner so as to plainly and correctly show that it is a mixture or compound, and is not in violation of definitions 4 and 7 of such sections. *Pierre Viaus Maple Co. v. Dairy and Food Com'r*, 117 N. W. 553, 554, 154 Mich. 73.

The term "food," within the federal Food and Drugs Act of 1906, is expressly defined as including "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." *Savage v. Jones*, 32 Sup. Ct. 715, 724, 225 U. S. 501, 56 L. Ed. 1182; *United States v. Frank*, 189 Fed. 195, 199; *United States v. One Car Load of Corno Horse and Mule Feed*, 188 Fed. 453, 455.

The terms "drug" and "food," as used in section 6 of the act of 1906 (34 Stat. 768), providing that the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals, and that the term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound, are merely terms of description, and, if the Pharmacopœia says a medicine is a drug, it is a drug, under the meaning of the act, or, if it comes under the other description of what a drug is, it is a drug. *United States v. Frank*, 189 Fed. 195, 199.

#### **As medicine**

See Medicine.

#### **As necessities**

See Necessaries.

#### **As provisions**

See Provisions.

## **FOOL**

See Natural Fool.

Where in a prosecution for unlawfully having carnal knowledge with an idiot, the court instructed that an idiot was "a natural fool; a fool from birth; a human being in

form but destitute of reason from birth and of the ordinary intellectual power of man," as the word "fool" is defined by Webster to be "one destitute of reason or of the common powers of understanding; an idiot; a natural; a person deficient in intellect; one who acts absurdly or pursues a course contrary to the dictates of wisdom, one without judgment; a simpleton; a dolt"—it was held that, while the words "a natural fool," "a fool from birth," might well have been omitted, they did not prejudice accused, and the instruction as a whole clearly defined the term "idiot," though it might be more aptly defined as one who has been from birth or infancy deficient in mental capacity, and destitute of the ordinary intellectual powers. *Sandefur v. Commonwealth*, 137 S. W. 504, 505, 143 Ky. 655.

### FOOLISHLY DRUNK

See Drunk.

### FOOT

See Front Foot; Running Foot; Running Front Foot.

Loss of foot, see Loss of Limb.

### FOOT LOCK

A "foot lock" is a support for a scaffold in order to prevent the tipping of the planks, and consists of a short joist, one end of which is inserted into the wall along which the scaffold is to be used and an upright post placed under the other end of the joist to sustain it in a horizontal position. This sort of a safety appliance is employed in situations where a four-legged trestle cannot be brought sufficiently near the end of the scaffold to prevent the ends from tipping. *United States Smelting Co. v. Parry*, 166 Fed. 407, 409, 92 C. C. A. 159.

### FOOT OF HILL

In determining the boundary of land calling for a line by and along the foot of a hill, the "foot of the hill" would be construed to mean the beginning of an abrupt rise, and not to include the bottom land, though sloping gradually upward from a stream. *Kerr v. Duvall*, 125 Pac. 830, 832, 62 Or. 470.

### FOOT PASSENGER

The term "foot passengers," used in resolutions fixing the rates of ferrage for the transportation of foot passengers between Weehawken and New York, might mean those arriving at Weehawken by rail from points outside of the state of New Jersey and entering the ferry from the railroad station, as well as those entering without having been passengers on the railroads, and was not limited to the latter class, and, giving them this meaning, the resolutions were invalid as an attempt to regulate interstate commerce. *New York Cent. & H. R. R. Co. v. Board of*

*Chosen Freeholders of Hudson County*, 65 Atl. 860, 861, 74 N. J. Law, 367.

### FOOTBALL SEASON

The court will take judicial notice that the football season proper, in American institutions of learning, begins in the fall and ends Thanksgiving day. *Sieberts v. Spangler*, 118 N. W. 292, 293, 140 Iowa, 236.

### FOOTING STONE

The terms "footing stone" and "dimension stone" are synonymous, but neither term is a synonym of "rubble stone." *Nugent v. Armour Packing Co. (Mo.)* 81 S. W. 506, 507.

### FOR

See Specify For.

#### As applied to

Under Comp. Laws 1909, §§ 7713, 7714, imposing an inheritance tax, fixing the primary rate for class 1 at 1 per centum, and providing that, upon all in excess of \$5,000 in class 1, the primary rate "shall be increased one one hundred-twenty-fifth of 1 per centum for every \$100 increase in valuation of such excess," the rate for the entire sum in excess of \$5,000 is  $1\frac{1}{125}$  per cent.; the word "for" meaning "to be applied to." *McGannon v. State ex rel. Trapp*, 124 Pac. 1063, 1067, 33 Okl. 145.

#### As on account of

The word "for," used in its ordinary signification, means "on account of," "because or by means of," or "growing out of." The word "for," in the statute limiting the time for the commencement of actions of tort "for injuries to the person," is used in its ordinary signification, and an action by a husband for the loss of services of his wife resulting from injuries received through the alleged negligence of defendant is an action "for injuries to the person," within the statute. *Mulvey v. City of Boston*, 83 N. E. 402, 403, 197 Mass. 178, 14 Ann. Cas. 349.

As used in Code 1858, § 2772, providing that all civil actions for injury to the person shall be commenced within one year after the cause of action accrued, the word "for" means "on account of," or "because of." *Blackwell v. Memphis St. Ry. Co.*, 137 S. W. 486, 487, 124 Tenn. 516.

In Gen. St. 1902, § 1119, as amended, providing that no action to recover damages for injury to the person, etc., caused by negligence, shall be brought but within one year from date of the injury or neglect complained of, the word "for" is used in its common meaning as a synonym for "by reason of," "because of," "on account of," so that the proper interpretation of the statute is that "no action to recover damages by reason of injury to the person," etc., and an action by husband and wife for injury to the wife's person not brought within a year is barred

as to the husband as well as to the wife. *Sharkey v. Skilton*, 77 Atl. 950, 952, 83 Conn. 503.

#### **As during or for the period of**

The word "for," as used in the statute requiring that notice be given for at least a specified number of days prior to the meeting of the city council as a board of equalization, means "during." *Shannon v. City of Omaha*, 100 N. W. 298, 299, 72 Neb. 281 (citing *Leavitt v. Bell*, 75 N. W. 524, 55 Neb. 57).

The preposition "for" means of itself duration, when it is put in connection with time, and, as it is so used in everyday conversation, it will be presumed that the Legislature, using it in statute, meant to use it in the same way. Two publications in each of four consecutive periods of seven days from the date of an order of publication satisfies the requirement of the act of Congress of June 8, 1898 (30 Stat. 434, c. 394, § 6), requiring such publication in the District of Columbia at least twice a week for a period of not less than four weeks, although there was but one publication in the last calendar week of such period. *Leach v. Burr*, 23 Sup. Ct. 393, 188 U. S. 510, 47 L. Ed. 567 (citing *Early v. Homans*, 16 How. [57 U. S.] 610, 14 L. Ed. 1079).

Under a village ordinance calling an election at a given date as to the issuance of bonds for the extension of waterworks, and providing for publication of notice in a certain paper for five weeks before such election, a publication in each issue of the paper thereafter till the election, being five weekly publications, is sufficient notice, although the first one was only 32 days before the election, though it must be conceded that under the decisions of this court upon various statutes, couched in similar terms, the words "for five weeks" must be construed as meaning during five weeks, which would be 35 days. *State ex rel. Village of Genoa v. Weston*, 93 N. W. 728, 67 Neb. 385.

In *Laws 1907*, p. 474, c. 153, § 5, requiring the county clerk to publish a notice of election once each week "for" three weeks, a publication in three successive issues of a weekly paper is sufficient, though the first issue was not three weeks prior to the election. In such provision the time mentioned indicates only the number of times the notice is required to be published. Where the provision is that a notice shall be given for three weeks by publication, it fixes the period of time during which the publication must be made, and the first publication must be at least three weeks prior to the event noticed. *State ex rel. Harris v. Hanson*, 115 N. W. 294, 299, 80 Neb. 724.

In *Rev. St. 1899*, § 3029, providing that the notice of a local option election shall be published in a newspaper in the county "for four consecutive weeks" and the last inser-

tion shall be within ten days before the election, the term "for four consecutive weeks" was used in the sense of 28 days, and a notice put in a newspaper for four consecutive weekly issues merely was not sufficient, but the publication must be continued for the full period of 28 days. *State v. Dobbins*, 92 S. W. 136, 137, 116 Mo. App. 29.

*St. 1901*, p. 28, authorizing the incurring of indebtedness by municipalities, provides by section 3 that the ordinance calling an election shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and that one insertion each week "for two succeeding weeks" shall be sufficient, and that in municipalities where no daily or weekly is published the ordinance shall be posted in three public places therein for two succeeding weeks; and in a municipality where there was no daily newspaper the ordinance was published for two succeeding weeks in a weekly newspaper, the first publication being only twelve days from the election. Held that, while the publication by posting "for two succeeding weeks" required a posting for two full weeks, where publication was by weekly newspaper and the second publication was completed several days before the election, it was sufficient. *City of Lindsay v. Mack*, 117 Pac. 924, 925, 160 Cal. 647.

#### **As in**

Under *Laws 1897*, p. 526, c. 418, § 30, giving a lien for material furnished, etc., "for or towards" the building, etc., of a vessel, a finding in a proceeding to enforce a lien that material was used "in or toward" the construction of a vessel is not objectionable as being equivocal; both phrases being tautological. In *re Froment*, 109 N. Y. Supp. 1073, 1074, 125 App. Div. 647.

#### **As suitable for**

Under a sale of all the pine timber "for sawmill purposes" on described lands, timber suitable at the time of sale for sawmill purposes passes, to that extent the phrase "for sawmill purposes" being identical with "suitable for sawmill purposes," but vendee does not, as when the broader phrase "suitable for sawmill purposes" is used, obtain the right to use such timber as may be within the description for any other than sawmill purposes. *Mills & Williams v. Ivey*, 60 S. E. 299, 300, 3 Ga. App. 557.

#### **FOR ACCOUNT OF**

In an action for goods sold, plaintiff introduced written orders from defendants containing the following words: "Please ship for our account"—followed by shipping directions and a description of the goods desired, but containing no price or terms of payment. Defendants testified that, when

the orders were given, it was agreed that the goods were to be shipped "gratis," and that defendants were to pay for them only if they should succeed in selling them at a certain place to which they were sent. Held, under the rule that, where a writing is manifestly incomplete, parol evidence is competent to complete it, that the testimony was properly admitted; it not being contradictory to the words, "for our account," such words not necessarily meaning an absolute purchase, but being equally applicable to such a transaction as testified to by defendants. *Crook v. Fidanque*, 110 N. Y. Supp. 198, 199, 59 Misc. Rep. 178.

### FOR ALL PURPOSES

The words, "for all purposes," in the appurtenant grant of the right of "ingress and egress to and from said right of way for all purposes," did not enlarge the grant with respect to the maintenance of the telegraph or telephone lines, so as to make it independent of the grant of the right to maintain the pipe lines. *Northeastern Telephone & Telegraph Co. v. Hepburn*, 69 A. 249, 250, 73 N. J. Eq. 657.

### FOR AND IN THE ERECTION

Where a materialman's stop notice declared that certain materials were furnished to the contractor "for and in the erection of a building," such words were sufficient to indicate that the materials were actually used in the building. *Beckhard v. Rudolph*, 63 Atl. 705, 707, 68 N. J. Eq. 740.

### FOR ANY REASON

See *If for Any Reason*.

### FOR THE BENEFIT OF

Where the grantor by a deed, with a clause specifying that the grantee assumed the mortgage, conveyed land upon which there was a mortgage debt for which she was not personally liable, the grantee, in the absence of other evidence, was not primarily liable for a deficiency arising on foreclosure sale; such clause and its acceptance being a mere agreement to indemnify the grantor and not for the benefit of the holder of the mortgage to whom the grantor owed no obligation, and it not appearing to have been inserted in the deed "expressly for the benefit of a third party" within the meaning of Civ. Code, § 1193, authorizing enforcement of such a contract. *Fry v. Ausman*, 135 N. W. 708, 29 S. D. 30, 39 L. R. A. (N. S.) 150.

A testator, who left his wife and 11 children living on his farm, which was not fully paid for, and whose will provided that the wife should have all the property during her life, or as long as she should remain a widow, to receive all the rents and profits thereof "for the benefit of my family," and that at her decease it should be divided among the children, and the wife and one of the sons were appointed executrix and ex-

ecutor, intended that the wife should use the income from the property, as her discretion directed, for the benefit of all the children as long as they continued members of the household, and the will did not create a trust, with the wife and children as equal beneficiaries, each taking a one-twelfth part. *Dee v. Dee*, 72 N. E. 429, 432, 212 Ill. 338.

The phrase "for my son's benefit," in a will whereby testator gave his residuary estate to his son to be held in trust by his executors, and managed and cared for by them, "for my son's benefit," until he arrived at a certain age, etc., means that the profits derived from the estate belong to the use of the son. *Higgins v. Downs*, 91 N. Y. Supp. 937, 938, 101 App. Div. 119.

### FOR BEVERAGE PURPOSES

A complaint charging that defendant unlawfully sold a quart of beer "for beverage purposes," in violation of an ordinance making it unlawful to sell intoxicating liquor, but providing that it should not be construed to prohibit the sale of alcoholic stimulants as medicine, nor the sale of alcoholic liquors by one registered pharmacist to another, sufficiently negated a lawful sale as medicine or by one pharmacist to another by the phrase "for beverage purposes." *Gue v. City of Eugene*, 100 Pac. 254, 256, 53 Or. 282.

### FOR BONDS

A bond issue election is not invalidated by the use of ballots containing the words "for bonds" instead of the words "for the bonds," as required by the order authorizing the election. *State ex rel. Johnston v. Metzger*, 26 Kan. 395, 396.

### FOR CAUSE

A challenge to a juror "for cause," without stating whether it was for principal cause or to the favor, and without setting out the facts on which it rests, is not sufficient as a challenge "for cause." *Drake v. State*, 20 Atl. 747, 751, 53 N. J. Law, 23.

Pen. Code 1895, § 813, amended, providing for appointment of jury commissioners by the judge of the superior court, giving him the right to remove the commissioner at any time in his discretion "for cause," the addition of the words "for cause" were admonitory that this discretion should not be arbitrarily or capriciously exercised. The legislative intent is clear that the power of removal was lodged with the judge as an act of discretion. *Edge v. Holcomb*, 70 S. E. 644, 645, 135 Ga. 765.

### FOR COLLECTION AND CREDIT

Where a draft was forwarded to a bank "for collection and credit," the bank became a mere agent of the forwarder for its collection, with authority only to present the draft for acceptance, collect the same when due, and credit the amount thereof to the

forwarder; and it could not claim any rights in the draft higher than those possessed by the forwarder. *Bank of America v. Waydell*, 92 N. Y. Supp. 666, 668, 103 App. Div. 25.

The term "for collection," indorsed on a draft, is a restrictive indorsement, and is notice to a bank, to whom it is finally sent for collection, of the qualified title of an intermediate collecting bank. *First Nat. Bank of Circleville v. Bank of Monroe*, 33 Fed. 408, 410.

Where a note is sent to a bank "for collection," and the bank sends it to a second bank, which collects from the maker and becomes insolvent before transmitting the proceeds, the second bank will be considered as the agent of the first bank, and the first bank will be responsible for the proceeds to the payee. *First Nat. Bank of Girard v. Craig*, 42 Pac. 830, 882, 3 Kan. App. 166.

"The words 'for collection,' appended to the indorsement of a check, limit the effect which the indorsement would otherwise have and warn subsequent takers that the purpose of the indorsement, although in blank, is not to transfer the ownership of the paper or its proceeds. Such an indorsement is intended not to give currency or circulation to the paper but to have an effect precisely the reverse; to prevent further circulation and limit the authority of the holder to the act of collection for the benefit of the indorser." *Hoffman v. First Nat. Bank of Jersey City*, 46 N. J. Law, 604-606.

#### FOR THE COMPLETION OF

The precise meaning of the words "for the completion of," when used in statutes appropriating money for public work, is sometimes uncertain and indefinite, and the idea intended to be conveyed by them may depend upon the connection in which they are used and the object to which they refer. *Jobe v. Caldwell & Drake*, 125 S. W. 423, 427, 93 Ark. 503.

#### FOR CREDIT

Where defendant's merchandise account with plaintiff included not only an original indebtedness for goods sold, which was partly secured by mortgage, but also charges representing subsequent sales, remittances made by plaintiff "for credit" did not constitute a direction that the remittances be applied in payment of the subsequent charges, as distinguished from the items secured. *Frutlig v. Trafton*, 83 Pac. 70, 71, 2 Cal. App. 47.

#### FOR HER OWN USE

Where testator devised to his wife all his property, to have and to hold, sell, lease, and otherwise dispose of for her own use during her life, with power to dispose of the household fixtures and personal property by will, and all property remaining at her death to be distributed in a specified manner, and the decree of distribution distributed the

property to the widow for the term of her natural life, with power to sell and convey the same in fee as she might see fit "for her own use" with remainder over, it was held that the widow was only entitled by the words "for her own use" to sell the property for her personal use, and maintenance during life, and she only acquired a life estate subject to a valid limitation over. *Luscomb v. Fintzelberg*, 123 Pac. 247, 251, 162 Cal. 433.

#### FOR HERSELF AND CHILDREN

A will devising unto testator's wife, "for herself and all her children," all testator's real estate, the wife does not take all the property with power to sell and convey free of any interest of her children, but she and they take as tenants in common. *Kyte v. Kyte*, 67 Atl. 933, 73 N. J. Eq. 220 (citing *Gordon v. Jackson*, 43 Atl. 98, 58 N. J. Eq. 166, 169).

#### FOR HIRE

See Depositary for Hire.

#### FOR HIS OWN USE AND BENEFIT

The provision in Pol. Code, § 3495, that an applicant for the purchase of school lands must state in his affidavit that he desires to purchase the same "for his own use and benefit, and for the use and benefit of no other person," and that he shall have made no contract or agreement to sell the same, does not mean that the applicant must go into possession and occupy the land and personally devote it to the uses of which it is capable. It simply means that, when one makes application to purchase, he does so with the intention and purpose of deriving whatever profit or advantage may accrue through such purchase for himself alone, as contradistinguished from a purchase for the profit and advantage of some other person. As an element entering into that benefit, he may properly have in contemplation a sale of the land at a profit, some time after he has obtained the certificate of purchase, and when the law expressly authorizes such a sale. *Henshall v. Marsh*, 90 Pac. 395, 693, 151 Cal. 289.

#### FOR HIS SERVICES

In a statute declaring that the county treasurer shall receive as compensation "for his services" an annual salary, the words "for his services" mean for all his services, for the entire and complete performance of his official duties. *People ex rel. Conline v. Steuben County*, 75 N. E. 1108, 1110, 183 N. Y. 114.

#### FOR INJURY DONE

When it is said that damages are given as compensation "for the injury done," the injury done to the plaintiff and not to some other person is meant. *Bass v. Postal-Telegraph Cable Co.*, 56 S. E. 465, 467, 127 Ga. 423, 12 L. R. A. (N. S.) 489.

**FOR LIFE**

Under Ky. St. 1903, § 2342, providing that, unless a different purpose appeared by the express words or necessary inference, every estate created by will, without words of inheritance, shall be deemed a fee simple, a will whereby testator gave to his wife all his estate "for her lifetime, to manage and dispose of as she may see cause," without making any gift over or mentioning any other person, gives to the wife an estate in fee, though, if the will ended with the words "her lifetime," she would take only a life estate. *Alsip v. Morgan* (Ky.) 109 S. W. 312.

A deed conveying land to one "for and only for her natural life," and to the heirs of her body begotten, in fee simple, indicates clearly a purpose to confine the estate granted to the first taker to a life use. *Ault v. Hillyard*, 115 N. W. 1030, 1031, 138 Iowa, 239.

**FOR OTHER PURPOSES**

See Other Purposes.

**FOR OUR OWN BENEFIT**

Where a corporation was organized for the purpose of establishing and maintaining a library at a health resort, and the Constitution presented with the petition for the organization recited that "we whose names are annexed, desiring to form an association to organize a \* \* \* library for own benefit, and that of \* \* \* people who visit" the resort, it was held that the corporation was a charitable trust; the phrase "for our own benefit" not being understood as confined to the persons who signed the petition for a charter, but intended to embrace all persons who should thereafter contribute to the support of the library. *Fordyce & McKee v. Woman's Christian Nat. Library Ass'n*, 96 S. W. 155, 157, 79 Ark. 550, 7 L. R. A. (N. S.) 485.

**FOR THE PRESENT**

Where one interested in a corporation agreed with an advertising agent that advertising for the corporation might be charged to him "for the present," it meant so long as there was no termination of the contract by notice, for a period of an indefinite length, with an implied condition that it should not be unreasonably long. *Lewis v. Worrell*, 71 N. E. 73, 185 Mass. 572.

**FOR THE PURPOSE OF**

An admission made at a former trial "for the purposes of the suit" that defendant was a city of the fourth class was an admission of that fact throughout all the stages of the suit, and was binding on defendant at a retrial in another jurisdiction. *York v. City of Everton*, 116 S. W. 490, 491, 135 Mo. App. 607.

**FOR SALE**

Intrusted for sale, see Intrust.

The employment of a broker to sell lands—that is, to procure purchasers—does not of itself or prima facie confer authority to bind the owner to sell by a contract in writing, and such authority is not usually to be inferred from the use by the principal and agent in that connection of the terms "for sale" or "to sell" and the like; such words in that connection usually meaning no more than to negotiate a sale by finding a purchaser upon satisfactory terms. *Stengel v. Sergeant*, 68 Atl. 1106, 1110, 74 N. J. Eq. 20.

**FOR STATED TIME**

In statutes relating to the publication of notices where a continuous publication is intended, this is indicated by the requirement that it shall be made "for a stated time." A requirement that at least three days' notice in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set. *Harrison v. Newman*, 80 Pac. 599, 600, 71 Kan. 324.

**FOR SUCCESSIVE ISSUES**

Where the notice required by section 726, Comp. Laws 1909, fixing the time for hearing objections to the report of appraisers, was published in a daily newspaper of general circulation in the city on the 19th, 21st, 22d, 23d, and 24th of June, 1909, the 20th being Sunday, on which date the paper was not published, held, that the notice was sufficient; the same being published in "five successive issues," as required by law. *Weaver v. City of Chickasha*, 128 Pac. 305, 308, 36 Okl. 226.

**FOR THAT**

A statement "for that" A. B. did a particular thing is considered to be a direct and positive averment. *Bennett v. Benson*, 25 N. J. Law, 166, 170 (citing 1 Chit. Pl. [11th Am. Ed.] 387; 2 Id. [Am. Ed.] 846, 847; *Collier v. Moulton* [N. Y.] 7 Johns. 109; *Coffin v. Coffin*, 2 Mass. 358).

**FOR THAT WHEREAS**

A statement commencing "for that whereas" is not a positive averment, but a statement by way of recital. *Bennett v. Benson*, 25 N. J. Law, 166, 170 (citing 1 Chit. Pl. [11th Am. Ed.] 387; 2 Id. [Am. Ed.] 846, 847; *Collier v. Moulton* [N. Y.] 7 Johns. 109; *Coffin v. Coffin*, 2 Mass. 358).

**FOR THE TIME—FOR THE TIME BEING**

The expressions "for the time" and "for the time being" are equivalent to "temporarily." Each constitutes a good definition of that word. Acts 1900, p. 67, No. 95, relating to the licensing of auctioneers, pro-

vides that the statute shall not apply to sales made by one in the county where he resides. A complaint, under the statute, for sales at the city of B., alleged defendant as temporarily of the city of B. Held, that the complaint was insufficient, since the word "temporarily" did not show defendant not a resident. *State v. Cunningham*, 55 Atl. 654, 75 Vt. 332.

In a prosecution under Rev. Codes, § 8385, making it unlawful for any owner, licensee, manager, clerk, agent, bartender, or other employé, having "for the time being charge or control of any saloon, \* \* \* to suffer or permit any female person to be or remain in such saloon \* \* \* for the purpose of being there supplied with any kind of liquor whatever," an information, charging defendant with "then and there" having charge and control of a certain saloon, sufficiently charges him with being in control "for the time being," as under Rev. Codes, § 9155, words used in a statute to define a public offense need not be strictly pursued in the information, but other words conveying the same meaning may be used. *State v. Conway*, 98 Pac. 654, 38 Mont. 42.

Between the adoption of Const. art. 20, an amendment disincorporating the former city of D. and several other municipal corporations, and merging them into the new city and county of D., and the adoption by the new municipality of a charter and ordinances, it possessed not merely the ordinary general governmental powers of a city necessary to its preservation and perpetuity, but special powers, so that it could create sidewalk districts, and assess the cost of building sidewalks; the new corporation, by Const. art. 20, § 1, succeeding to all the rights of the former city, section 3 making certain existing officers and boards of the former city, officers and boards of the new corporation, to hold till their successors were elected and qualified, and section 4 providing that the charter and ordinances of the old city, as they shall exist when such amendment of the Constitution takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the new corporation, "for the time being" meaning the aforesaid interim, and "so far as applicable" having reference to said article 20, and meaning so far it does not make said charter and ordinances inapplicable. *Hallett v. City and County of Denver*, 104 Pac. 1038, 1039, 46 Colo. 487.

#### FOR THE USE

See Held for the Use.

A trust, the object of which is to yield to the settlor monthly installments for his support during his life out of the entire corpus of the estate, and to effect a disposition of any residue at his death as he may appoint by will, and, failing such appointment, then on the further trust to pay to settlor's wife

monthly installments, and on the death of both to pay the balance to their children, and if there be none, then to pay the balance to the next of kin, so far as it transfers personality is a conveyance "for the use of the person making the same," notwithstanding that after the making of the trust settlor cannot immediately subject the entire estate to his use, within 2 Gen. St. p. 1604, § 11, declaring conveyances of personality for the use of the person making the same void as against creditors. *Ward v. Marie*, 68 Atl. 1084, 1088, 73 N. J. Eq. 510.

#### FOR USE AS EVIDENCE

Under Election Law, § 114, authorizing a re-examination of ballots "for use as evidence," ballots may not be re-examined merely to find out whether the ballot boxes contain evidence to substantiate petitioner's claim; but the term contemplates the opening of boxes in court, to offer the actual ballots in evidence if necessary. In *re Ulrich*, 123 N. Y. Supp. 381, 383.

#### FOR VALUE

See Holder for Value.

#### FOR VALUE RECEIVED

See Value Received.

#### FOR A YEAR

"For a year" should be understood as implied in St. 1898, c. 577, § 1, prohibiting the making of loans secured by mortgage or pledge, at a rate of interest greater than 12 per cent., without a license, but failing to designate the period of time for which the charge over 12 per cent. is made unlawful. *Commonwealth v. Morris*, 56 N. E. 896, 897, 176 Mass. 19.

#### FOR YEARS

See Lease for Years.

### FORBEAR

#### FORBEARANCE

"A suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of 'forbearance,' and has always been considered a sufficient and valid consideration." *Goodman v. Simonds*, 20 How. 343, 370, 15 L. Ed. 934.

Payment of a commission of more than 6 per cent. for a loan of government bonds which are subject to market fluctuations and are bought and sold on the market as other securities was not in violation of the New York usury law, prohibiting the payment of more than 6 per cent. interest for the loan or forbearance of any money, goods, or any other things in action, and did not render the loan usurious, since the terms "interest" and "forbearance," as used in the usury law (Consol. Laws, c. 20, § 373), are applicable only

to a loan of money. *Title Guaranty & Surety Co. v. Klein*, 178 Fed. 689, 691, 102 C. C. A. 189, 29 L. R. A. (N. S.) 620.

## FORCE

See *Be in Force*; *Constructive Force*; *Continuance Force*; *Distinct Force*; *In Force*; *Irresistible Force*; *Police Force*; *Superior Force*; *Unit of Force*.

Any force, see *Any*.

As element in trespass, see *Trespass*.

As violence, see *Violence*.

Element of robbery, see *Robbery*.

### In burglary

The "force" required to constitute burglary under Pen. Code, art. 842, may be by lifting the latch of a closed door, by raising a window, by entry at a chimney, or other unusual place, the introduction of a hand or any instrument to draw out the property through the opening made by the burglar for that purpose. *Winkler v. State*, 126 S. W. 1134, 1136, 58 Tex. Cr. R. 564.

The "forcible bursting or breaking" of an outer shutter or window, or shutter of a window, as an ingredient of burglary, means something more than merely the removing of a wire screen of an outer window of a dwelling house. *State v. Wilson*, 125 S. W. 479, 483, 225 Mo. 503 (citing *State v. Tutt*, 63 Mo. 595).

### In forced marriage

"Force," as applied to a forced marriage, implies physical constraint of the will. *Avakian v. Avakian*, 60 Atl. 521, 529, 69 N. J. Eq. 89 (citing 1 Bish. Marriage, Divorce & Separation, § 514).

### In forcible entry and detainer

The mere opening of a gate on entering premises is not such force as will constitute a "forcible entry." The definition of "forcible entry and detainer," given in Code 1896, § 2126, requires more than a mere opening of a door to constitute the offense, and under section 2149 the distinction was drawn between a peaceable entry and an entry by force. The word "force" carries with it necessarily the idea of violence exercised, and it may include a putting in fear by threats, but it cannot include a mere entry by the ordinary means of entrance without any breaking and without any threat of violence to the person.—*Fowler v. Prichard*, 41 South. 667, 670, 148 Ala. 261.

### Fraud distinguished

See *Fraud*.

### In rape

"The definition of 'force,' as applicable to assault and battery, applies also to the crime of rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case." *Cotton v. State*, 105 S. W. 185, 187, 52 Tex. Cr. R. 55.

Under Pen. Code 1895, art. 634, which declares that the degree of force applicable to the crime of rape must be such as would reasonably be supposed to overcome resistance, taking into consideration the circumstances of the case, defendant in a prosecution for assault with intent to commit rape cannot complain of a charge as to that element of the offense which substantially follows this definition of force. An instruction that, to constitute an assault with intent to commit rape, there must be an assault, and which defines assault and battery and assault, and charges that the injury intended might be either bodily pain, constraint, or a sense of shame or other disagreeable emotions, is not objectionable as authorizing a conviction where the injury intended is merely constraint or a sense of shame. An instruction in a prosecution for an assault with intent to rape that the force to be proven was such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the circumstances of the case, without stating that the force intended "must be," etc., is a sufficient compliance with Pen. Code 1895, art. 634, which defines the degree of force applicable to an assault with intent to commit rape. An instruction in a prosecution for an assault with intent to rape that it must be shown that defendant assaulted prosecutrix and then and there had a specific intent by actual force to have carnal knowledge of her without her consent, is not objectionable by the omission of the word "will." *Conger v. State*, 140 S. W. 1112, 1125, 63 Tex. Cr. R. 312.

Force is not a necessary element in rape on a female under the age of consent, but it is a necessary element where the female is above that age. The "force" to constitute rape, where force is a necessary element, is that by which the dissenting woman is subjected to and put under the power of the assailant so that he is able notwithstanding her opposition to have intercourse with her. Pen. Code 1895, art. 634, defining force in rape, does not apply to the part of article 633 which relates to rape on a female under the age of consent, since, to constitute rape on a female under that age, her consent and the absence of force are immaterial. *Crommeans v. State*, 129 S. W. 1129, 1131, 59 Tex. Cr. R. 611.

It is the law that, if the rapist coerces the female into yielding through fear caused by what he threatens or does, her will is as completely subdued by "force" as if he violently took hold of her and held her against her will. The use of the word "force" has reference solely to the will of the female. Though force was used, if she does not object, being conscious of the act and purpose, or finally consent without coercion, it is not criminal. *Darrell v. Commonwealth (Ky.)* 88 S. W. 1060, 1061.



Under Pen. Code 1895, art. 640, providing that if it appears, on a trial for rape, that the offense, though not committed, was attempted by the use of any of the means stated in articles 634, 635, and 636, but not so as to make it an assault to commit rape, the jury may find accused guilty of an attempt to commit rape, and article 634, making the definition of "force" in assault and battery applicable to the crime of rape, in which case it must be sufficient to overcome resistance, considering the relative strength of the parties, etc., in order to constitute an "attempt to commit rape," there must have been an intent to use such force as would constitute rape or an assault to commit rape, but the attempt to apply the force must have failed, so that it did not amount to rape or an assault to commit rape. *Holloway v. State*, 113 S. W. 928, 933, 54 Tex. Cr. R. 465.

Under Pen. Code 1895, art. 633, providing that "rape is constituted by the carnal knowledge of a woman without her consent, obtained by force, threats or fraud," and article 634 providing that the "force" "must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case," where prosecutrix was a passenger in a sleeping car occupied by 18 white people, and during the night had arisen and was sitting in her berth, awaiting transfer to another car, acts of the porter of the car in catching hold of a watch pinned on her breast and laying his hand on her wrist and asking her to follow him to the ladies' dressing room would not constitute force sufficient to authorize conviction of assault with intent to commit rape. *Collins v. State*, 107 S. W. 852, 853, 52 Tex. Cr. R. 455.

#### **In robbery**

The "force" necessary to constitute a robbery implies actual personal violence, a struggle, and a personal outrage. *Moran v. State*, 53 S. E. 806, 125 Ga. 33 (quoting and adopting definition in *Long v. State*, 12 Ga. 329).

The word "force," in the statutory definition of robbery, is the same as the word "violence" in the common-law definition. *Johnson v. State*, 57 S. E. 1056, 1 Ga. App. 729.

Where prosecuting witness was knocked down by two men and the money squeezed from his hand, the money was forced from him, within Pen. Code, § 211, defining robbery to be the taking of personal property from the person of another accomplished by "force" or fear. *People v. Ortega*, 94 Pac. 869, 870, 7 Cal. App. 480.

Pen. Code 1911, art. 1327, defines robbery as an assault, or violence, or putting in fear of life or bodily injury, by which one fraudulently takes from another any property with intent, etc., and permits capital punishment where a firearm or other deadly weapon is

used. Code Cr. Proc. 1911, art. 460, declares that the words "with force and arms" are not necessary to the validity of an indictment, and that an indictment which charges the offense in ordinary and concise language so as to enable a person of common understanding to understand it is sufficient. An indictment under section 1327 alleged that accused, "with force and arms" by unlawfully using a firearm, fraudulently took personal property from the owner without his consent and with intent to appropriate the same to his own use. Held, that "violence" was a general term including all sorts of force, synonymous with physical "force," and used interchangeably in relation to assault; that "violently" meant by or with "force"; that "violent" meant impelled with "force"; and hence that the term "with force and arms" sufficiently alleged that the robbery was effected by "violence" as used in the statute. *Robinson v. State (Tex.)* 149 S. W. 186, 188.

#### **FORCE ACCOUNT**

Where the assignee of a construction contract was not paid in accordance with the contract price, but hired men and teams to do the work by the day and was paid on the basis of the time they were employed, it was a "force account." *Hottel v. Poudre Valley Reservoir Co.*, 92 Pac. 918, 920, 41 Colo. 370.

#### **FORCE AND ARMS**

The use of the words with "force and arms," in an indictment, clearly would not make the offense robbery by a person who was not armed. Such use would not necessarily indicate that the indictment was drawn under or attempted to describe the offense defined by Rev. St. c. 164, §§ 34-37, relating to offenses by persons armed, but could easily be under other provisions referred to in chapter 165, § 15, relating to offenses of larceny by stealing from the person of another. *Schanz v. State*, 17 Wis. 251, 252.

#### **FORCE AND VIOLENCE**

An information alleging a robbery to have been committed "forcibly and by violence" sufficiently describes the offense characterized by St. 1898, § 4378, requiring the assault to be "by force and violence"; the two phrases being substantially the same. *Gillotti v. State*, 116 N. W. 252, 253, 135 Wis. 634.

#### **FORCE FEED LUBRICATOR**

A "force feed lubricator" is a pumping device for supplying oil to an engine, where pressure is required, in order to positively force the oil from the source of supply to the parts to be lubricated. The operating piston of the lubricating pump is operatively connected with some moving part of the engine. *Greene v. Buckley*, 135 Fed. 520, 522, 68 C. C. A. 70.

**FORCED HEIR**

Although a husband is estopped from denying that property purchased during marriage belongs to the wife when the title was taken in her name, and he declared in the authentic act in which it was purchased that it was bought with her paraphernal funds, his children, being in law his "forced heirs," are relieved entirely from the estoppel by the provisions of Act No. 5, p. 12, of 1884, and permitted to show the actual facts of the case by parol evidence. *Westmore v. Harz*, 35 South. 578, 581, 111 La. 305.

**FORCED SALE**

Under Const. 1866, art. 7, § 22, which provided that a homestead should not be subject to forced sale for any debt, and that a married man owning a homestead could not alienate it without the consent of his wife, it was permissible to mortgage the homestead; and a power of sale, given in a mortgage duly executed by the husband and wife, was enforceable, since such a sale was not a "forced sale." *Wiener v. Zwieb*, 141 S. W. 771, 777, 105 Tex. 262.

The sale of a homestead in partition under Statute of Descents and Distributions, § 6 (Gen. St. 1901, § 2508), providing for a division of the homestead under certain conditions, between the widow and children, is not a "forced sale," within the meaning of the term as used in Const. art. 15, § 9, providing that a homestead shall be exempt from any forced sale under any process of law. *Towle v. Towle*, 107 Pac. 228, 232, 81 Kan. 675, 27 L. R. A. (N. S.) 550.

**FORCIBLE AND VIOLENT ENTRANCE**

Defendant by its policy of insurance agreed to indemnify plaintiffs for direct loss by burglary by any person who has made "forcible and violent entrance" upon the premises or exit therefrom, of which force and violence there shall be visible evidence. The policy further provided that the company shall not be liable unless there are visible marks upon the premises of the actual force and violence used. After plaintiffs' store had been opened by their clerks, and the door to the loft unlocked, two persons entered the loft by opening the unlocked door, assaulted one of plaintiffs' clerks, and robbed the store of a quantity of merchandise, and left the premises in the same manner as they entered. Held, that the goods were "feloniously abstracted" by a "forcible and violent entrance" upon the premises, and defendant would be liable on its policy, although there were no visible marks upon the premises of the actual force and violence used in making entry or exit. *Rosenthal v. American Bonding Co. of Baltimore*, 124 N. Y. Supp. 905, 906.

**FORCIBLE DEFILEMENT**

Under Code, § 4757, providing that if any person take a woman unlawfully and against her will and by force, etc., compel her to mar-

ry him or be defiled, he shall be fined, etc., the gist of the offense is the taking of the woman unlawfully and against her will and defiling her by means of force, menace, or duress thus exercised, and it differs from "rape," which involves only a violation of her person by force, and all the acts of defilement during the continuance of the duress following the unlawful taking are elements of one continuous criminal transaction, and may be proven under one indictment; and the state need not elect on which of several acts of intercourse it relies on to sustain a conviction. *State v. Dean*, 126 N. W. 692, 694, 148 Iowa, 566.

**FORCIBLE DETAINER**

See Forcible Entry and Detainer.

See, also, Unlawful Detainer.

A "forcible detainer" implies the use of force or threats of violence by words or conduct inspiring fear of bodily harm or terror to some degree, and to make out a forcible detainer the guilty person must be wrongfully on the premises or wrongfully in temporary possession thereof. *In re Munro*, 195 Fed. 817, 819.

Under Civ. Code Prac. § 452, declaring that a "forcible detainer" is the refusal of a tenant to give possession to his landlord after expiration of his term, or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will, it is necessary, to maintain the writ, that the relation of landlord and tenant exist in some form, but it is not important in what form this relation exists, nor is it required that the tenant in possession shall have entered or hold the premises under a direct contract with the landlord. One who takes possession of premises under a tenant, whose lease for five years contains an agreement that there should be no sublease or assignment of the term, on failure to pay rent, may be dispossessed by an action of forcible detainer. *Haase v. Schickner* (Ky.) 92 S. W. 949, 950.

Under Civ. Code Prac. § 452, subsec. 4, providing refusal of one who has made forcible entry on possession of a tenant for a term to deliver possession to the landlord, on demand, after the term expires, is a "forcible detainer," one entering with or without the tenant's consent and refusing to vacate on the landlord's demand after the term expires is guilty. *Johnson v. Gordon* (Ky.) 118 S. W. 372, 373.

Where defendant went into possession under an agreement with the lessee in a lease, which by its provisions could not be assigned without the consent of the landlord, and no such consent was obtained, and subsequently plaintiff obtained a lease from the landlord, and thereafter defendant paid rent to plaintiff, plaintiff might maintain unlawful detainer under Laws 1891, p. 179, c. 96, as

amended, providing that any person is guilty of "forcible entry" or "forcible detainer" who, without the permission of the owner and without having any color of title thereto, enters upon the land of another and fails or refuses to remove therefrom after three days' notice in writing. *Stahl Brewing & Malting Co. v. Van Buren*, 88 Pac. 837, 838, 45 Wash. 451.

Where a third person forcibly takes possession of a part of leased premises without the consent of the lessee, the lessor at the expiration of the term may maintain forcible entry proceedings under Civ. Code Prac. § 452, subsec. 4, defining a "forcible detainer" as the refusal of a person who has made a forcible entry on the possession of a tenant for a term to deliver possession to the landlord, on demand, after the term expired. *Willis v. Whayne*, 134 S. W. 150, 151, 142 Ky. 194.

A person who took possession under a contract to purchase was not a tenant at will or at sufferance, so as to authorize the vendor to maintain "forcible detainer," under *Sayles' Ann. Civ. St.* 1897, art. 2519, providing that, where such a tenant withholds possession after termination of the landlord's will and after demand in writing, he shall be guilty of "forcible detainer." *Francis v. Holmes*, 118 S. W. 881, 883, 54 Tex. Civ. App. 608.

#### FORCIBLE ENTRY

See Forcible Entry and Detainer.

See, also, Peaceable Entry.

A "forcible entry" is an entry without the consent of the person having the actual possession, and an entry accomplished by threatened violence was forcible, though no blows were struck. *Clark v. Langenbach*, 130 Fed. 755, 759, 65 C. C. A. 181 (quoting and adopting definition in Civ. Code Prac. Ky. 1900, § 452).

When one person in the nighttime comes upon a lot occupied by the building of another person, breaks into the building, destroys it, and removes it from the premises, such an entry is a forcible entry within the meaning of section 3347 of *Mansfield's Digest*, in force in the Indian Territory prior to statehood, and, when the evidence of these facts is undisputed, it is not error for the court to instruct a verdict. *Turner v. Moore*, 127 Pac. 487, 34 Okl. 1.

"Forcible entry" is defined by Civ. Code Prac. § 452, as the refusal of a tenant to give possession to his landlord after the expiration of his term. To maintain the writ of forcible detainer, the relation of landlord and tenant must exist. The reservation of rent in some form and allegiance to the title are the distinguishing characteristics of a contract by which the relation of landlord and tenant exist. *Alexander v. Gardner*, 96 S. W. 818, 819, 123 Ky. 552, 124 Am. St. Rep. 378.

Under Civ. Code Prac. § 452, subsec. 1, defining a "forcible entry" as an entry without the consent of the person having the actual possession, to entitle one to maintain an action for forcible entry he must show that at the time of the entry he was in the actual and peaceable possession of the premises in question. Where a tenant leaves the property, consenting that the legal owner either in person or by his tenant should take possession of the property, the landlord, by doing so, does not become guilty of a forcible entry. *Robinson v. Marshall (Ky.)* 78 S. W. 904, 905.

Civ. Code Prac. § 452, defines a "forcible entry" as an entry without consent of the persons having actual possession; and section 469 provides that no inquisition of "forcible entry" shall be taken after two years from the "forcible entry" complained of. Before 1892, plaintiffs' father, since deceased, claimed that a division fence between him and C. was not on the true line, and it was then agreed that the fence should there remain, provided C. should keep it in repair. After C.'s death the land passed to defendants, who, in 1892, built a dwelling house thereon, and have since resided there continuously. In 1903, plaintiffs reasserting the claim of their father, arbitrators were appointed, who made an award that defendants should keep the land, but should pay \$35 therefor, which they refused to do. Held, that defendants' refusal to abide by the award was not a new "forcible entry," changing defendants' possession which occurred in 1892, and that plaintiffs' right to maintain such action was barred by limitations. *Hord v. Sartain (Ky.)* 86 S. W. 692, 693.

Where plaintiffs and defendant had a deed for a vacant lot, and plaintiffs took possession and fenced it, and defendant took possession forcibly, though plaintiffs' agent in charge forbade him so to do, defendant was guilty of "forcible entry, under Civ. Code Prac. § 452, subsec. 1, defining a "forcible entry" of land to be an entry without the consent of the person having actual possession. *Check v. Reiter (Ky.)* 102 S. W. 287, 289.

"A 'forcible entry' is not proved by evidence of a mere trespass. There must be proof of such force, or at least such show of force, as is calculated to prevent any resistance." There is no such force or violence used as is necessary to make one guilty of forcible entry and detainer where defendant, in the absence of prosecutrix, merely unlocked and took off the lock she had put on, and then put his own lock on, without breaking anything or doing any violence, and committed no violence on the return of the prosecutrix. *State v. Leary (N. C.)* 48 S. E. 570, 571, 136 N. C. 578 (quoting 2 Bish. Cr. Law, 509).

The mere opening of a gate on entering premises is not such force as will constitute a "forcible entry." The definition of "forcible entry and detainer," given in Code 1896, § 2126, requires more than a mere opening of a door to constitute the offense, and under section 2149 the distinction was drawn between a peaceable entry and an entry by force. The word "force" carries with it necessarily the idea of violence exercised, and it may include a putting in fear by threats, but it cannot include a mere entry by the ordinary means of entrance without any breaking and without any threat of violence to the person. *Fowler v. Prichard*, 41 South. 667, 670, 148 Ala. 261.

Where in ejectment defendant claimed title to the land in controversy, the fact that defendant entered into possession by taking down a fence without plaintiff's permission was not a "forcible entry" within B. & C. Comp. Laws, § 5745, creating a right of action for forcible entry and detainer, defendant's possession being unlawful only in case he was without right or title. *Sommer v. Compton*, 96 Pac. 124, 126, 52 Or. 173.

To constitute "forcible entry," within Comp. Laws, § 11,153, providing that, in cases where entry is given by law, a person shall not enter with force, but only in a peaceable manner, it is not necessary that the actual invasion of the premises should be attended by circumstances requisite to give it the character of a forcible entry; but where an entry is obtained by stealth, or without real violence, and the party entering evinces a purpose to expel the party in possession, followed by actual expulsion by means of personal threats, or violence, or superior force, there is a forcible entry. *McIntyre v. Murphy*, 116 N. W. 1003, 1004, 153 Mich. 342, 15 Ann. Cas. 802.

Under *Sayles' Ann. Civ. St.* 1897, art. 2519, making one guilty of forcible entry who makes entry into any lands except where entry is given by law, or makes such entry by force, and article 2520, defining a forcible entry or an entry not given by law as one without the consent of the person having actual possession, one who was in the actual possession of premises and was forcibly ejected therefrom, under an execution which did not include the premises taken, by another who entered and held possession, was entitled to maintain forcible entry and detainer to recover possession. *Granberry v. Storey* (Tex.) 127 S. W. 1122, 1123.

"Forcible entry" is the violently taking possession of lands and tenements with menaces, force and arms, and without authority of law." *Pen. Code Ga.* 1895, § 338. To constitute forcible entry, there need be only such a number of persons or show of force as is calculated to deter the person in possession from undertaking to send them away or retain his possession. It is not necessary that the party in pos-

session should offer such resistance that the entry was accomplished by actual violence. The object of the statute is to prevent a breach of the peace, and it is sufficient if the circumstances are such as to show a terror tending to a breach of the peace. *Williams v. State*, 48 S. E. 149, 150, 120 Ga. 488 (citing *Chambers v. Collier*, 4 Ga. 196; *Lissner v. State*, 11 S. E. 500, 84 Ga. 669, 20 Am. St. Rep. 389; *Lewis v. State*, 26 S. E. 496, 99 Ga. 692, 59 Am. St. Rep. 255; *Blackwell v. State*, 74 Ga. 816).

An action for "forcible entry" cannot be maintained where defendants were in possession at the time plaintiff's alleged possession began. *Barnwell v. Stephens*, 38 South. 662, 663, 142 Ala. 609.

While the action of "forcible entry" requires that an ouster shall be forcible, no great degree of force or of personal violence is required to be used or threatened to constitute a "forcible entry." *Wilson v. Campbell*, 88 Pac. 548, 549, 75 Kan. 159, 8 L. R. A. (N. S.) 426, 121 Am. St. Rep. 366, 12 Ann. Cas. 766.

Where defendant went into possession under an agreement with the lessee in a lease, which by its provisions could not be assigned without the consent of the landlord, and no such consent was obtained, and subsequently plaintiff obtained a lease from the landlord, and thereafter defendant paid rent to plaintiff, plaintiff might maintain unlawful detainer under Laws 1891, p. 179, c. 96, as amended, providing that any person is guilty of "forcible entry" or "forcible detainer" who, without the permission of the owner and without having any color of title thereto, enters upon the land of another and falls or refuses to remove therefrom after three days' notice in writing. *Stahl Brewing & Malting Co. v. Van Buren*, 88 Pac. 837, 838, 45 Wash. 451.

A complaint alleging that plaintiff was in possession of certain described lands, engaged in cultivating them as a homestead settlement, and that defendant forcibly and without right entered and ejected plaintiff, states a cause of action for a forcible entry, under the statute, declaring that every person who enters on real property by any kind of violence or circumstance of terror is guilty of a "forcible entry." *Spellman v. Rhode*, 81 Pac. 395, 396, 33 Mont. 21.

## FORCIBLE ENTRY AND DETAINER

See, also, Force.

Code 1896, § 2126, defines a forcible entry and detainer as when, among other things, one enters peaceably on land, but by unlawful refusal keeps the party out of possession. Held, that where it appeared that plaintiff rented the premises for a certain year and subrented them, and that after

the expiration of the year, when the subtenant moved out, defendant moved in, it was a good defense that defendant moved in under a lease from the owner. *Sprouse v. Story*, 42 South. 23, 24, 144 Ala. 542.

Under Code 1896, § 2126, defining forcible entry and detainer as entering peaceably, and then by unlawful refusal, or by force or threats, turning or keeping the party out of possession, where one took peaceable possession of a building and refused to deliver possession on demand, he is liable in an action of forcible entry and detainer. *Lorah v. Emmerson*, 45 South. 228, 154 Ala. 145.

Under Code 1907, § 4262, defining "forcible entry and detainer" as an entering peaceably and then, by unlawful refusal, turning or keeping out of possession, there can be no recovery against one who goes into possession under and by virtue of a contract with his landlord, then in possession as plaintiff's tenant, because the defendant has not intruded, peaceably or otherwise, upon any prior actual possession. *Victor Realty Co. v. Argumanian*, 55 South. 621, 622, 172 Ala. 108.

Under *Mills' Ann. St.* § 1970, providing that if any person shall enter on lands with force or strong hand, or multitude of people, or by threats of violence to the party in possession, or by such words as naturally tend to excite fear, shall gain possession of lands and hold the same, he shall be deemed guilty of "forcible entry and detainer," it is unnecessary, to make out a cause of action of forcible entry, to show that force or appearances tending to inspire a just apprehension of violence were used in obtaining possession; and it is not sufficient to show an entry against the will of the possessor by employees of defendant, unarmed, and without force or threats, either in taking or retaining possession, who merely engage in seeding the land, and do not enter plaintiff's residence, or disturb his possession thereof. *Goad v. Heckler*, 76 Pac. 542, 19 Colo. App. 479.

Under *Kirby's Dig.* § 3629, which provides that any person entering on any land and retaining it without right or claim of title, or who shall enter with such words and actions as tend to excite fear or apprehension of danger, or by entering peaceably and then turning out by force, shall be guilty of a "forcible entry and detainer," the gist of the action is force, the remedy being given to protect actual possession, whether rightful or wrongful, and it must be shown that defendant entered without the consent of the possessor, and subsequently held with force, implied force, as where defendant enters peaceably, though unlawfully, being insufficient. *Miller v. Plummer* (Ark.) 152 S. W. 288, 290.

### Unlawful detainer distinguished

A complaint alleging "forcible entry and detainer" cannot be amended so as to allege unlawful detainer. "'Unlawful detainer' is a remedy provided by statute for the benefit of landlords against tenants who held over after the expiration of their terms. It is founded on the breach of a contract implied by law, if not expressed, that the tenant shall restore a permissive possession to the hands from which it was received. But a 'forcible entry and detainer' is a tort pure and simple. Force is the gist of the action. It is a remedy designed to protect the actual possession, whether rightful or wrongful." *Crawford v. Alexander*, 82 S. W. 707, 708, 5 Ind. T. 161 (quoting and adopting definition given in *Johnson v. West*, 41 Ark. 536).

### FORCIBLE ENTRY AND DETAINER (Action of)

As civil case, see Civil Action—Case—Suit—etc.

The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by defendant; the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. *Gore v. Altice*, 74 Pac. 556, 557, 33 Wash. 335 (citing *McCauley v. Welles*, 12 Cal. 500).

Proceedings in "forcible entry and detainer" are not "civil cases," within the purview of section 17, art. 6, of the Constitution, which provides that "appeals to the district courts from the judgments of county courts shall be allowed in all criminal cases, on application of the defendant; and in all civil cases, on application of either party, and in such other cases as may be provided by law." The statutory summary proceeding in forcible entry and detainer comes rather under the "other cases" referred to in the section quoted than under the head of "civil cases," as the latter phrase is used therein. It is true the proceeding is a civil one, in the sense that it is not criminal, although to some extent criminal in form. Proceedings in forcible entry and detainer are intended to provide a speedy and more or less summary remedy, and belong in a class apart with other special and summary proceedings. *Adkins v. Andrews*, 96 N. W. 288, 1 Neb. (Unof.) 810.

"Forcible entry and detainer" is a proceeding at law, and the right to possession is the sole question involved, and evidences of title are only material in so far as they tend to show right of possession, and no equities of parties can be determined. *Vansellous v. Huene*, 108 Pac. 1102, 26 Okl. 243.

"Forcible entry and detainer" was originally a criminal proceeding. The earlier statutes giving a civil remedy were directed against those who made unlawful and forcible entry into lands and tenements and detained them. Under Code Civ. Proc., §§ 1019-1032, the remedy extends to tenants holding over their terms, to defendants in judgments upon which judicial sales are had, and to all cases where the defendant is a settler or occupier of lands or tenements without color of title to which the complainant has the right of possession. In cases where the gravamen of the action is force in entry or detention, the occupying claimants' act does not apply; but, where a claimant would otherwise be entitled to relief under that act, the fact that he was ejected in proceedings under the forcible entry and detainer act do not deprive him of the right. *Wells v. Cox*, 120 N. W. 433, 434, 435, 84 Neb. 26.

The statutory provisions relating to proceedings in "forcible entry and detainer" are to be construed to include proceedings in unlawful detainer. Proceedings in unlawful detainer, in which the rules of evidence relating to forcible entry and detainer are made applicable, are limited to those cases where the relation of landlord and tenant exists, and in which such defenses only can be recognized as are available to the tenant against the landlord. To sustain an action for unlawful detainer, proof of a mere quasi tenancy is not sufficient, but there must be either an express letting or proof showing, by implication, defendant's occupancy of the land as plaintiff's tenant. *Richmond v. Superior Court of Los Angeles County*, 98 Pac. 57, 58, 9 Cal. App. 62.

"An action of 'forcible entry and detainer' is strictly possessory in its nature, and, unless otherwise expressly provided by the statute, a person who has never been in possession of land cannot maintain the action to obtain possession. If he has any interest in the land, he must seek to establish it in some other form of action. Generally speaking, plaintiff, in order to maintain this form of action, must allege and prove that he was in peaceful and exclusive possession of the premises in controversy, and that he has been forcibly ousted, or that possession was peaceably obtained and forcibly withheld by defendant. *Chezum v. Campbell*, 85 Pac. 48, 50, 42 Wash. 560, 7 Ann. Cas. 921 (quoting and adopting definition in 19 Cyc. 1128).

At common law "forcible entry" and "forcible detainer" were distinct actions, criminal, and not civil. The statute providing for their trial as civil actions confined them to two conditions of fact; the one when a tenant wrongfully held over after the expiration of his term and refused to surrender after demand, and the other where a stranger by force and violence wrongfully and unlawfully gained possession. The question of

title is not involved in the action, and it is immaterial, except so far as tending to show plaintiff's right of possession. The complaint in the action must show that either the relation of landlord and tenant exists between plaintiff and defendant, or that defendant by force and arms ousted plaintiff from possession. *Folsom v. Hunter*, 98 S. W. 156, 158, 6 Ind. T. 453.

"Forcible entry and unlawful detainer" is an action to protect the actual possession, not involving the question of title to the land in question. *Watson v. Scarbrough*, 40 South. 672, 673, 147 Ala. 689.

### FORCIBLE MANNER

Under Code Civ. Proc. § 1669, which provides that a person put out of real property "in a forcible manner" may recover treble damages of the wrongdoer, the term "in a forcible manner" means force of an unusual kind which tends to bring about a breach of the peace, such as an injury with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life and limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession, and hence an entry upon premises held by a sublessee under a warrant valid only against the lessee is free from the imputation of willful and reckless conduct, and, where made after the officer's statement that he had come to put them out, is not an entry in a forcible manner. *Fults v. Munro*, 95 N. E. 23, 25, 202 N. Y. 34, 37 L. R. A. (N. S.) 600, Ann. Cas. 1912D, 870.

### FORCIBLE TRESPASS

"Forcible trespass" is the invasion of another's actual possession, done in his presence and under such circumstances as endangers the public peace, being an offense against possession and not against title, so that the question of whether title is in prosecutor or defendant is immaterial. "Forcible trespass" is the entering upon land in another's actual possession with such force or violence as is calculated to intimidate or alarm the possessor or tending to breach the peace; the amount of force necessary being such as to raise a reasonable apprehension in the mind of the possessor that he must give way to avoid a breach of the peace. *State v. Davenport*, 72 S. E. 7, 10, 156 N. C. 596.

The gist of the offense of "forcible trespass" is the violence and intimidation, and no assault need appear. Such violence, threats, and cursing towards a woman as to cause her against her will to sign a cancellation of a mortgage held by her against defendant is terror and violence constituting a "forcible trespass." Whenever a man, either by his behavior, or speech, gives those who are in possession cause to feel that he will do them some bodily harm if they will not

give way to him, he is guilty of forcible trespass. *State v. Tuttle*, 59 S. E. 542, 543, 143 N. C. 487 (quoting and adopting Arch. Cr. Prac. p. 1133).

### FORCIBLY

The word "forcibly" in an indictment for rape is not used as an equivalent or synonym for "against her will." Only such force as is incident to the physical character of the act of coition will meet the requirements of this term where the woman does not consent. *Beard v. State*, 97 S. W. 667, 671, 79 Ark. 293, 9 Ann. Cas. 409.

### FORCIBLY RAVISHING

By the term "forcibly ravish" is meant the carnal knowledge of a woman by a man forcibly and against her will. *State v. Miller*, 90 S. W. 767, 770, 191 Mo. 587.

### FORECLOSE

To "foreclose" means to shut out, to bar. *Squire v. Robertson*, 191 Fed. 733, 737.

### FORECLOSURE

See Exigible by Foreclosure; Strict Foreclosure.

Commencement of, see Commencement of Action.

#### As action

As action, see Action.

#### Expiration of time for redemption

A mortgage "foreclosure" is not complete so as to operate as a sale until the time allowed by statute for redemption has expired, and until then the title does not pass. *North Dakota Horse & Cattle Co. v. Serumgard*, 117 N. W. 453, 460, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

#### As judicial proceeding

See Judicial Proceeding.

#### Law day synonymous

"Foreclosure" and "law day" are synonymous in the sense that it is the time when the mortgagor declares a default and submits his case to a court of competent jurisdiction. The word "foreclosure," as used with reference to the rule under which a mortgage is discharged by a tender before foreclosure, must be taken in the meaning which is commonly and generally accepted by the laity, as well as by the bar; that is, the institution of a suit, or the "law day," as contradistinguished from the "law day" of the common law. *Murray v. O'Brien*, 105 Pac. 840, 844, 56 Wash. 361, 28 L. R. A. (N. S.) 998.

#### As proceeding in rem

See In Rem.

#### Sale

A "foreclosure" of a mortgage is not completed until the sale is confirmed. *Gerhardt v. Ellis*, 114 N. W. 495, 496, 134 Wis. 191.

### Sale under power of sale

Where a mortgage provided for "foreclosure" by sale under power, a decree providing that, in case complainants failed to pay the amount found due within a specified time, the holder of the mortgage should be at liberty to foreclose, authorized a foreclosure by sale, and did not limit the holders' right to foreclosure by suit in equity. *Silverman v. Shattuck*, 80 Atl. 184, 186, 33 R. I. 67.

### FORECLOSURE SALE

As judicial sale, see Judicial Sale.

A "foreclosure sale" under power in a mortgage which conveys the title of the mortgagor is, in a legal sense, the complete foreclosure proceedings beginning with the act of sale and terminating with the execution of the deed after expiration of the period for redemption and includes all the proceedings for the foreclosure of the right of redemption by sale and deed. *North Dakota Horse & Cattle Co. v. Serumgard*, 117 N. W. 453, 458, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

### FOREGOING

Pen. Code 1895, § 1114, provides that no subpoena for a nonresident witness for the state shall be issued, unless signed by the clerk of the court and the solicitor general of the circuit. Section 1118 declares that the "foregoing provisions" shall apply to defendant's witnesses, when in the discretion of the presiding judge the end of justice may demand it. Held, that the words "foregoing provisions," found in section 1118, apply only to the three sections immediately preceding relating to fees of witnesses, and not to section 1114, and that a subpoena for defendant's nonresident witnesses is not required to be countersigned, either by the presiding judge or the solicitor general, and hence a denial of a continuance on the ground that such a subpoena was not so countersigned was unwarranted. *Ivey v. State*, 62 S. E. 565, 566, 4 Ga. App. 828.

### FOREIGN

#### FOREIGN ATTACHMENT

"Foreign attachment" originated in the Custom of London, and did not exist at common law, or in this state until established by statutes in derogation of the common law. *Fowler v. Dickson* (Del.) 74 Atl. 601, 603, 1 Boyce, 113.

#### FOREIGN BANK

Under Sess. Laws 1907, p. 519, c. 225, § 7, mentioning the term "branch bank" three separate times in the following manner, "any corporation, branch bank or foreign bank who shall receive money on deposit \* \* \* every such corporation, branch bank or foreign bank receiving deposits \* \* \* existing banks, branch banks and foreign banks re-

ceiving deposits," and section 14 (page 523), referring to branch banks in substantially the same manner, the term "branch bank" refers to branches of domestic banking corporations only, and not to branches of foreign banking corporations, and the term "foreign banks" refers to branches in this state of foreign banking corporations. *State ex rel. Flumerfelt v. Engle*, 96 Pac. 1045, 1046, 50 Wash. 207.

### FOREIGN BILL OF EXCHANGE

A draft addressed by a firm doing business in New York to a firm doing business in Austria, requiring the drawee to pay on demand a specified sum to the order of the drawers and charge the same to a cargo shipped to the foreign firm by a specified steamship, is a "foreign bill of exchange" within the definition in Negotiable Instruments Law, Laws 1897, pp. 745, 746, c. 612, § 210, as amended by Laws 1898, p. 977, c. 336, § 25, and section 213. *Amsinck v. Rogers*, 82 N. E. 134, 139, 189 N. Y. 252, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450.

A draft drawn on a company without the state is a "foreign bill of exchange" under Negotiable Instruments Act (Laws 1905, p. 258) § 129 (Ann. St. 1906, § 463—129), providing that any bill except one which is or on its face purports to be both drawn and payable within the state is a foreign bill. *Bank of Laddonia v. Bright-Coy Commission Co.*, 120 S. W. 648, 653, 139 Mo. App. 110.

### FOREIGN BUILT

A yacht is "foreign built" within the meaning of Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112, imposing a tonnage tax on the use of such yachts owned by citizens of the United States, if it was originally built in a foreign country, so long as it retains its identity, so that if a registered vessel of the United States, it could not be renamed, under Rev. St. § 4179, without the consent of the Commissioner of Navigation; and short of such complete change of identity no amount expended thereon in this country for alterations, betterments, or even rebuilding, will convert it into a home-built vessel. *United States v. Blair*, 190 Fed. 372, 374.

### FOREIGN CAR

As applied to the operation of a particular railroad, what is known as a "foreign car" is one not owned by such road. *Gulf, C. & S. F. R. Co. v. Sliger (Tex.)* 100 S. W. 957, 958.

### FOREIGN CITIZEN OR SUBJECT

Defendant, a citizen of Missouri, having left that state to study music abroad, with an intention of thereafter residing abroad and not returning to the United States, finally took up her permanent residence in London, from whence she came to the United States while under a singing contract with complainant to deliver a concert in Kansas

City. Held that, since citizenship of the United States does not involve residence, but is the antithesis of alienage, defendant's mere residence abroad, even with an intention never to return, without any act of naturalization or step in that direction, did not constitute an act of expatriation, so as to terminate her citizenship of the United States, and render her a foreign citizen or subject, within Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1061, § 24, conferring jurisdiction on federal courts of suits between citizens of a state and foreign states, citizens, or subjects. *Hammerstein v. Lyne*, 200 Fed. 165, 171.

### FOREIGN COMMERCE

Where plaintiff sought to establish his banana business in Central America, and expended considerable money in his plant, it was engaged in "foreign commerce" when it began to move men, material, and supplies to and from the United States and Central American ports in furtherance of its business, and was therefore entitled to compel defendant to furnish transportation facilities on the same terms that defendant furnished such facilities to others. *American Banana Co. v. United Fruit Co.*, 160 Fed. 184, 187.

### FOREIGN CORPORATION

As corporation, see Corporation.

As merchant, see Merchant.

As resident, see Resident.

A corporation existing under the laws of another state is a "foreign corporation" in Florida within the statute providing conditions for doing business in the state. *Ulmer v. First Nat. Bank*, 55 South. 405, 408, 61 Fla. 460.

Where a Massachusetts railroad corporation and a Connecticut railroad corporation consolidated into a single corporation which was the creature of both states, and the single corporation operated a railroad extending into both states, and had the same capital stock to cover the property in both states and elected its officers and managed its business as a single corporation, the single corporation was a domestic corporation in each state and was not a "foreign corporation" in either. *Attorney General v. New York, N. H. & H. R. Co.*, 84 N. E. 737, 738, 198 Mass. 413.

### Incorporations by United States

"Foreign," as used in Rev. St. 1895, art. 1194, cl. 25, authorizing foreign corporations to be sued in any county where they may have an agency, representative, or principal place of business, does not embrace every corporation not created directly by domestic state authority and does not include a railroad corporation incorporated by act of Congress. *Texas & P. Ry. Co. v. Weatherby*, 92 S. W. 58, 60, 41 Tex. Civ. App. 409.

### FOREIGN COUNTRY

The treaty with Spain by which Porto Rico was ceded to the United States, al-



though signed December 10, 1898, and last ratified on March 18, 1899, did not become effective for the purpose of the tariff laws until the exchange of ratifications April 11, 1899, and, until that date Porto Rico was a "foreign country," and it was legal for the collector at the port of New York to impose duties on all merchandise brought into that port before midnight April 11, 1899, and on all importations of merchandise arriving from Porto Rico. *Armstrong v. Bidwell*, 124 Fed. 690, 693.

The definition given by Chief Justice Marshall that a "foreign country" was one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States has been reaffirmed; and the same doctrine, in a general way, has been announced in a large number of cases. The phrase "foreign country," as used in these decisions, and the phrase "other countries," as used in article 8 of the Cuban Treaty, prescribing on importations from Cuba treatment preferential in respect to like imports from "other countries," is not different. "Other countries" means countries other than the United States. To be a country other than the United States, that country must be a country foreign to the United States; that is, a country "exclusively without the sovereignty of the United States." The Philippine Archipelago is no more another country than Alaska, Hawaii, or Porto Rico. None of them are states of the American Union; but the government under which the people of each live is prescribed by the American Congress, and all are within the sovereignty of the United States. *Faber v. United States*, 157 Fed. 140, 141.

The Isle of Pines must be regarded as at least de facto under the jurisdiction of the Republic of Cuba, and hence, as a "foreign country" within the meaning of Dingley Tariff Act July 24, 1897, c. 11, 30 Stat. 151, since the United States has never taken possession of such island as included in the territory ceded by Spain to the United States in the treaty of peace, but, instead, through its legislative and executive departments, has recognized the Cuban government as rightfully exercising sovereignty over the Isle of Pines as a de facto government until the de jure status shall be determined. *Pearcy v. Stranahan*, 27 Sup. Ct. 545-549, 205 U. S. 257, 51 L. Ed. 793.

#### FOREIGN COURT

The federal courts are not "foreign courts," and as such hostile to the interest of the people of the states. They belong to the people of the states as well as the state courts, and were created for the express purpose of affording citizens of the various states facilities by which they might have their controversies speedily and satisfactori-

ly determined. *Parker v. Vanderbilt*, 136 Fed. 246, 251.

#### FOREIGN GUARDIAN

As guardian, see Guardian.

#### FOREIGN INSURANCE COMPANY

The words "foreign insurance company," as used in Rev. St. Me. c. 49, § 92, which declares that any person having a claim against any foreign insurance company may bring an appropriate suit thereon in the courts of the state, and that process may be served on the insurance commissioner, or on any duly appointed agent of the company within the state, apply only to foreign insurance companies which have complied with sections 79, 80, 84, and have obtained a license to do business in the state. *Greenleaf v. National Ass'n of Ry. Postal Clerks*, 130 Fed. 209, 211.

#### FOREIGN OFFICIAL DOCUMENT

A certified foreign death record, kept in accordance with the laws of the country in which the decedent died, is a "foreign official document" within B. & C. Comp. § 755, subd. S, providing that documents other than those previously referred to of a foreign country may be proved by the original, or by a copy certified by the legal keeper thereof, together with a certificate under the great seal of the country or sovereign thereof that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having legal custody of the original; it being sufficient that the copy is certified to be a true copy of the entry of the death of the person named in the records of the officer. *State v. McDonald*, 104 Pac. 967, 976, 55 Or. 419.

#### FOREIGN PORT OR PLACE

See Passenger from a Foreign Port.

A foreign-built vessel, owned entirely by a citizen of the United States, and entering a port of the United States from Manila, P. I., does not enter from a "foreign port or place," and is therefore not subject to tonnage duty under Rev. St. § 4219, as amended by Act June 26, 1884, c. 121, 23 Stat. 57, and Act June 19, 1886, c. 421, 24 Stat. 81, nor is she subject to such duty under Act March 8, 1902, c. 140, 32 Stat. 54, extending such duties to "foreign" vessels entering from the Philippine Archipelago, since, while not, "a vessel of the United States," because not entitled to registry, she is an American, and not a foreign, vessel, by virtue of the citizenship of her owner. *The Alta*, 136 Fed. 513, 516, 69 C. C. A. 289.

#### FOREIGN STATE

As state, see State.

#### FOREIGN VESSEL

An open clinker-built gasoline launch about 18½ feet long, arriving at Seattle from a port in British Columbia, and not shown

to be a foreign vessel or to contain merchandise, is not a "foreign vessel" within Rev. St. § 2774, requiring vessels from foreign ports generally to report to the customs officer of the port, or section 3109, which requires foreign vessels "laden or in ballast" to report; but is within Rev. St. § 3097, relating to commerce with contiguous countries which require only vessels containing dutiable merchandise, arriving at ports on the northern and northwestern frontier adjacent to foreign territory, to report. *United States v. One Gasoline Launch*, 133 Fed. 42, 43, 66 C. C. A. 148.

### FOREIGN WILL

"A 'foreign will' is a will executed in another state by a testator residing there, admitted to probate in such state after the death of the testator, and subsequently offered for ancillary probate in this state." *State ex rel. Ruef v. District Court of Twelfth Judicial Dist.*, 85 Pac. 866, 867, 34 Mont. 96, 6 L. R. A. (N. S.) 617, 115 Am. St. Rep. 510, 9 Ann. Cas. 418.

Under Code Civ. Proc. § 1294, requiring wills to be proved in the county of which the decedent was a resident at the time of his death, regardless of where he died, the words "all wills," used in section 1322, declaring that all wills duly proved in any other state or county may be allowed and recorded in any county where testator shall have left any estate, should be construed to mean "all foreign wills," and to include all wills, other than domestic wills, "duly approved and allowed in any of the United States or in any foreign country or state." *In re Clark's Estate*, 82 Pac. 760, 761, 148 Cal. 108, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

### FOREMAN

See, also, Vice Principal.

Acts 1905, p. 538, provides that the wages of a railroad employé shall continue after his discharge, where such employé requests his foreman or timekeeper to send his wages to any designated station and request is not complied with within seven days from the time it is made. Plaintiff, a station agent, on discharge, made demand for his wages to his successor. He did not designate the station at which the wages were to be sent. Held, that the division agent who appointed him was plaintiff's "foreman" or the "keeper of his time" within the statute, and since his request did not comply with the statute, he was not entitled to wages after discharge. *St. Louis, I. M. & S. Ry. Co. v. McClerkin*, 114 S. W. 240, 241, 88 Ark. 277.

While the words "superintendent," "foreman," "overseer," and the like do not necessarily import that the employé bearing such title was the vice principal of the master, this fact, in connection with the character

of the work and the character of the order given in reference to the operation of dangerous machinery, may be sufficient to raise a question for the jury as to whether such servant was, on the occasion in question, the vice principal of the master, or only a fellow servant of the plaintiff. *Moore v. Dublin Cotton Mills*, 56 S. E. 839, 840, 845, 127 Ga. 609, 10 L. R. A. (N. S.) 772.

The term "foreman" does not imply, *ex vi termini*, that it was the duty of the person so designated, or within his power simply as foreman of a gang of laborers, to employ laborers over whom he acted as foreman. *Langston v. Postal Telegraph Cable Co.*, 65 S. E. 1094, 1095, 6 Ga. App. 833 (citing *Words and Phrases*, vol. 3, p. 2892).

#### As laborer

See Farm Laborer; Laborer.

#### As managing agent

See Managing Agent.

#### As officer

See Officer (Of Corporation).

#### As printer

See Printer.

#### As publisher

See Publisher.

#### As servant

See Servant.

#### As superintendent

See Superintendent.

#### As workman

See Workman.

### FORESEEN

A wrongdoer is liable for such injuries as might reasonably have been anticipated to result from his wrongful act, it being inaccurate to say that he is only liable for such damages as he could have foreseen, the primary meaning of "foreseen" being to see or know beforehand, though it may also be sometimes used in the sense of "anticipate" or "expect." *St. Louis Southwestern Ry. Co. of Texas v. Alexander* (Tex.) 141 S. W. 135, 136.

In an action for injury to an employé while working at a machine, where the jury have found that the machine was not reasonably safe, and that the injury was the natural and probable result of its unsafe condition, the finding in the affirmative, in answer to the question, also evidently framed to cover the question of proximate cause, whether "such injury" ought to have been "foreseen" by a person of ordinary care and prudence, will be construed as meaning that "such an injury," or an injury of like nature, ought to have been "apprehended" or considered probable. *Coolidge v. Hallauer*, 105 N. W. 568-570, 126 Wis. 214.

## FORESIGHT

By foresight is meant not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent. *Rivers v. Pennsylvania R. Co.*, 83 Atl. 883, 884, 83 N. J. Law, 513.

The use of the word "foresight" in instructions as to a carrier's duty to safeguard passengers has been condemned as conveying the meaning that the carrier is bound to act as if it possessed foreknowledge that an accident would happen unless certain precautions were taken. *Fillingham v. St. Louis Transit Co.*, 77 S. W. 314, 318, 102 Mo. App. 573.

## FOREST

The word "forest," as used in *Forest, Fish, and Game Law*, § 228, providing that a railroad shall twice a year cut and remove all inflammable material from its right of way passing through forest lands or lands subject to fires, has a large and significant, not an insignificant, meaning, and does not embrace land only partly woodland. *Higgins v. Long Island R. Co.*, 114 N. Y. Supp. 262, 126, 129 App. Div. 415.

*Forest, Fish, and Game Law*, § 228, providing that every railroad company shall "on such part of its road as passes through forest lands or lands subject to fires from any cause" remove from its right of way inflammable materials, etc., when considered in connection with the other provisions of the act providing for the appointment of a forest, fish and game commissioner, who shall have the supervision of the forest preserve, and make rules for the care thereof and for the prevention of forest fires, etc., is applicable to forest lands whether within the forest preserve or not; a forest, being a tract of land covered with trees, a wood usually of considerable extent, a tract of woodland with or without inclosed intervals of open and uncultivated ground. *People v. Long Island R. Co.*, 110 N. Y. Supp. 512, 513, 126 App. Div. 477.

## FOREST LAND

See *Wild and Forest Lands*.

## FOREST MATERIAL

Laws 1911, p. 629, § 8, provides that no one shall burn any forest material within any county in the state in which there is a fire warden or ranger between June and September, inclusive, of each year, without first obtaining permission in writing from the forester, warden, or ranger, etc., and section 1 defines "forest material" to mean "forest slashing, chopping, woodland or brush land." Held that, where logs and stumps were located in defendant's dooryard, such yard was

located in a forest slashing, or woodland, and became forest material, which defendant had no right to burn without a permit from the forester, warden, or ranger, as provided by section 8. *State v. Hendricks*, 123 Pac. 1077, 1078, 68 Wash. 670.

## FORESTALLING

"Forestalling" consists of buying victuals on their way to market before they reach it, with intent to sell again at a higher price. *Dutton v. City of Knoxville*, 113 S. W. 381, 383, 121 Tenn. 25, 130 Am. St. Rep. 748, 16 Ann. Cas. 1028.

A declaration, which alleged a combination to exact and maintain a maximum schedule of prices for drugs and druggists' supplies existed between defendants and others in restraint of trade, stated the offense of "forestalling the market," which is defined to be every practice or device by act, conspiracy, words, or news to enhance the price of victuals and other merchandise. *Klingels' Pharmacy v. Sharp & Dohme*, 64 Atl. 1029, 1030, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184.

## FOREVER

See *Children Forever*; *Heirs Forever*; *Release, Remise, and Forever Discharge*.

The use of the word "forever" in the habendum of a deed to the grantees, "their lifetime, to them and their own use, benefit and behoof forever," did not prevent the grant being of an estate for life. *Johnson v. Barden*, 83 Atl. 721, 723, 86 Vt. 19.

The word "forever," as used in a will which, after making some specific bequests to relatives, bequeathed "all the residue of my estate, both real and personal, or of any other description, to my wife, forever, but charge this residue which I give my wife with the following bequests," adds but little if anything to the strength of the bequest. If the words following the word "forever" had been omitted and the testator had used no words showing his intention to limit the estate given his wife, she would have taken a fee therein, even though the word "forever" had been omitted. *McClelland's Ex'r v. McClelland*, 116 S. W. 730, 732, 132 Ky. 284.

A deed of land, habendum "with all the privileges and appurtenances to the same belonging excepting all the wood and trees on a certain island I reserve to the grantee his heirs and assigns forever," and concluding, "It is to be understood that the wood above mentioned is reserved to the grantor and his heirs forever," reserves to the grantor an estate of inheritance in the wood and trees only then growing, with a right in the soil for their growth and nourishment and

the privilege of entering to take them away. *Putnam v. Tuttle* (Mass.) 10 Gray, 48, 49.

Under Kirby's Dig. § 735, providing that a conveyance which by common law would create an estate tail in fee shall instead pass to the grantee an estate for his life only and the remainder in fee to the person to whom the estate tail would first pass according to the common law, the word "forever" used in a conveyance to the daughter of the creditor, "and unto her bodily heirs and assigns forever," relates to the grantee and not to the estate granted, and is presumed to have been used in its legal sense, and hence the words "and assigns forever," used in the deed did not operate to enlarge the life estate into a fee-simple. *Watson v. Wolff-Goldman Realty Co.*, 128 S. W. 581, 582, 95 Ark. 18, Ann. Cas. 1912A, 540.

The words "forever barred and foreclosed," as used in a mortgage foreclosure decree, mean shut out and excluded from all right, claim, title, or interest in the mortgaged premises. *Hope v. Seaman*, 119 N. Y. Supp. 713, 716.

#### FOREVER IN FEE SIMPLE

A deed from husband to wife conveyed the land described to the wife for the use of herself and the children she then had and those she might thereafter have by the grantor, and recited that the deed was meant to convey to the wife and her children by the grantor, to have and to hold the land unto the wife and her children, "to her during her life and to her children by her present husband forever in fee simple." Held, that the words "forever in fee simple" referred to the estate of the children, and was not equivalent to the words "to them and their heirs," and that the deed did not convey the fee. *McMillan v. Hughes*, 70 S. E. 804, 805, 88 S. C. 296.

#### FORFEIT—FORFEITURE

See Liable to Forfeiture; Nonforfeitable; Suit for Penalty or Forfeiture; Tax Forfeitures.

Forfeiture or otherwise, see Otherwise.

A "forfeiture" is where a person loses some right, property, privilege, or benefit in consequence of having done, or omitted to do, a certain act. *Meyers v. State*, 105 S. W. 48, 50, 47 Tex. Civ. App. 336.

"Forfeiture" usually signifies loss of property by way of compensation for injury to the person to whom the property is forfeited, as well as punishment. *Whitney v. Dewey*, 158 Fed. 385, 390, 86 C. C. A. 21.

A "forfeiture" is a penalty for doing or omitting to do a certain required act. *Jagoe v. Aetna Life Ins. Co.*, 96 S. W. 598, 599, 123 Ky. 510.

A "forfeiture" is a penalty imposed for misconduct or breach of duty, and in criminal

practice arises most frequently in proceedings upon bail bonds and recognizances, the terms of which have been violated. *Commonwealth v. French*, 114 S. W. 255, 256, 130 Ky. 744, 17 Ann. Cas. 601.

"The word 'forfeit' has a well-established meaning in the law. 'To forfeit' is 'to divest or to suffer divestiture of property without compensation in consequence of a default or offense; also to pay money as a mulct, or for a default or wrong.' And. Law Dict. 'Forfeiture has been defined as an involuntary transfer of a sum of money or property imposed by way of punishment for the commission of an offense against the law.' *Anglea v. Com.* (Va.) 10 Grat. 696. The term is also used synonymously with 'penalty.' 13 Am. & Eng. Enc. Law (2d Ed.) 1074. The primary use of the word 'forfeit' is to lose, and this is also its legal meaning. To forfeit a sum of money means to lose the right to it in favor of another party. *Eakin v. Scott*, 7 S. W. 777, 70 Tex. 445. 13 Am. & Eng. Enc. Law (2d Ed.) 54, treats forfeitures, fines, and penalties under a common head, saying it is deemed proper to so treat them as they are all included under the general head 'penalty.' *Casey v. St. Louis Transit Co.*, 91 S. W. 419, 423, 116 Mo. App. 235.

As defined by the Standard Dictionary, the term "forfeit" in law means "to lose and surrender to an individual or the state (something that belongs to one) for misconduct, or breach of duty; lose title to as a penalty." Where a testator devised all his real estate to his sons equally, and provided that none of the property should be sold until 10 years after his death, and that if any of his sons contracted habits of vice before the division he thereby forfeited his share, and if any of the sons died before division his share should go to the remaining heirs unless he left children, the devise vested in the sons the fee subject to divestiture or termination on any son's contracting habits of vice before division, which is a condition subsequent, defined by Civ. Code, § 1349. *Newlove v. Mercantile Trust Co. of San Francisco*, 105 Pac. 971, 973, 156 Cal. 657.

The word "forfeit" means to lose, and this is its legal meaning in Rev. Code 1899, § 4797, requiring the holder of a mechanic's lien to commence suit to foreclose within a certain time, and providing that the lien shall be forfeited in case of failure to do so. *Sheets v. Prosser*, 112 N. W. 72, 73, 16 N. D. 180.

The words "escheat" and "forfeiture" have a distinct and definite legal meaning, and can never be construed to mean "sale" and "purchase." *Woodrough v. Douglas County*, 98 N. W. 1092, 1094, 71 Neb. 354.

The phrase "forfeiture of the entire interest," in Rev. St. U. S. § 5198, providing

that the taking or charging a rate of interest greater than is allowed by law, when knowingly done, shall be deemed "a forfeiture of the entire interest," etc., means that interest shall not be allowed. *Wagoner Nat. Bank v. Welch*, 104 S. W. 610, 613, 7 Ind. T. 259.

Alien Chinese persons not of the exempt classes having no right to be or to remain in the United States, a deportation proceeding is a civil proceeding, not involving punishment for a crime, the imposition of a fine, or the enforcement of a "penalty" or "forfeiture"; and hence the defendant may not refuse to become a witness against himself. *United States v. Tom Wah*, 160 Fed. 207, 211.

The \$2 on each \$100 of premiums paid by foreign insurance companies doing business in the state, which is required to be paid into the state treasury, is no part of the 22 cents on each \$100 valuation of property or corporate franchises directed to be assessed for taxation for the school fund by Ky. St. 1903, § 4370, subd. 5, nor is it a "fine" "forfeiture" or "license" within subdivision 6, providing that a portion of such revenues be paid into the school fund. *Fuqua v. Hager*, 84 S. W. 325, 119 Ky. 407.

#### Abandonment distinguished

There is a distinction between "abandonment" and "forfeiture," as applied to oil and gas leases: abandonment resting on the intention of the lessee to relinquish the premises, which is a question of fact for the jury, while forfeiture is based on an enforced release. *Garrett v. South Penn Oil Co.*, 66 S. E. 741, 745, 66 W. Va. 587.

#### As costs

Costs as, see Costs.

#### Deprivation of office

"At common law a willful refusal to perform the duties of an office was required in order to work a forfeiture." Pol. Code, § 996, subd. 7, providing that an office becomes vacant by the ceasing of the incumbent to discharge its duties for three consecutive months, contemplates a voluntary abandonment or nonuser of the office, so that an involuntary failure to perform the duties of the office, caused by the incumbent's incarceration for a felony during the statutory period, did not operate as an abandonment of the office. *Bergerow v. Parker*, 87 Pac. 248, 249, 250, 4 Cal. App. 169 (citing *People v. Hartwell*, 67 Cal. 11, 6 Pac. 873).

#### Costs included

The words "fines and forfeitures," as contained in Const. art. 5, § 17, authorizing the Governor to remit such fines and forfeitures as may be prescribed by law, do not include costs in a criminal case. *Ryan v. State*, 95 N. E. 561, 178 Ind. 281.

#### As equivalent to fine

The words "fine" and "forfeiture," though sometimes used in a technical sense

and with restricted signification, at other times overlap and run together in meaning. *State v. Rose*, 97 Pac. 788, 789, 78 Kan. 600.

A fine may include a "forfeiture." *State v. Addington*, 57 S. E. 398, 399, 143 N. C. 683, 11 Ann. Cas. 314.

The word "fine," as used in St. 1898, § 3294, authorizing a civil action for a forfeiture, and defining a forfeiture to include any penalty in money or goods other than a "fine," does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violating their ordinances. *State v. Hamley*, 119 N. W. 114, 115, 137 Wis. 458.

#### As penalty or liquidated damages

Liquidated damages distinguished from penalty or forfeiture, see Liquidated Damages.

The words "penalty" and "forfeiture" are generally used synonymously, and a statute is penal when it inflicts a forfeiture by way of penalty for breach of its provisions. *Southern Ry. Co. v. Inman, Akers & Inman*, 75 S. E. 908, 910, 11 Ga. App. 564 (citing *Words and Phrases*, vol. 6, pp. 5272, 5273).

"Forfeiture" and "penalty" are sometimes used as synonymous and interchangeable terms. *Pennington & Evans v. Douglas, A. & G. R. Co.*, 60 S. E. 485, 489, 3 Ga. App. 665; *Casey v. St. Louis Transit Co.*, 91 S. W. 419, 423, 116 Mo. App. 235.

Provision in a contract that one party shall "forfeit" a certain amount if he breaches the contract does not necessarily imply that the sum specified is intended to be a penalty. *Ross v. Loescher*, 116 N. W. 193, 194, 152 Mich. 386, 125 Am. St. Rep. 418 (citing *Western Gas Const. Co. v. Dowagiac Gas & Fuel Co.*, 109 N. W. 29, 146 Mich. 119, 10 Ann. Cas. 224).

An action against a carrier to recover an overcharge, brought under a statute which fixes maximum freight rates and provides that for a violation of the act the company should "forfeit" to the person injured five times the charges illegally taken, is one to recover a statutory penalty, the essential idea of "forfeiture" being a loss of property inflicted by way of punishment. *Herriman v. B., C. R. & N. R. Co.*, 9 N. W. 378, 10 N. W. 340, 57 Iowa, 187.

With reference to penal actions the word "penalty" means the "forfeiture" inflicted by a penal statute. *State ex rel. McNamee v. Stoble*, 92 S. W. 191, 212, 194 Mo. 14.

A contract for the improvement of a city street provided for completion before October 1st, and for a failure to complete the contractor agreed to "pay and forfeit" to the city as "liquidated damages" the sum of \$25 per day after October 1st. Held that, though the word "forfeit" ordinarily means "penalty," in view of the fact that it was neces-

sary to complete such improvement in the summer months, and damages might reasonably flow from a failure to complete within the time limited, the damages will be considered liquidated damages, regardless of whether the city actually suffered damages by the delay. *Barber Asphalt Pav. Co. v. City of Wabash*, 43 Ind. App. 167, 86 N. E. 1034, 1036.

The term "forfeiture" in a contract does not necessarily exclude a purpose to make the sum named a penalty merely to which the parties may resort for the recovery of the actual damages resulting from breach of the contract. *McMillan v. First Nat. Bank of Bowie*, 119 S. W. 709, 710, 56 Tex. Civ. App. 45.

#### As punishment

"Forfeiture" of a corporate franchise for nonuser is taking from the corporation its property, its corporate rights which are a part of its property. Forfeiture is not only the taking of property, but its further punishment by putting to death the corporation itself. *State ex inf. Hadley v. Delmar Jockey Club*, 98 S. W. 539, 543, 200 Mo. 34.

"A 'forfeiture' is to be regarded as a punishment inflicted for a violation of some duty enjoined," and under Gen. St. 1902, § 324, imposing a penalty on an administrator for his unexcused failure to file an inventory for 12 months prior to the bringing of the action to recover such penalty, no penalty or forfeiture could be incurred by any delinquency before suit was in fact instituted to recover such penalty. *Atwood v. Buckingham*, 62 Atl. 616, 618, 78 Conn. 423 (quoting and adopting definition in *Maryland ex rel. Washington County v. Baltimore & O. R. Co.*, 3 How. [44 U. S.] 534, 552, 11 L. Ed. 714).

The "fines," "penalties," and "forfeitures" contemplated by Code Cr. Proc. § 332, providing that all fines and penalties imposed and all forfeitures incurred in any county shall be paid into the treasury to the support of common schools are all pecuniary; moneys which are paid into the treasury and placed in the school fund and altogether they make a single class; moneys recovered by some sort of punishment and not as damages by way of compensation or reparation. *State v. Rose*, 97 Pac. 788, 789, 78 Kan. 600.

#### Recovering on forfeited bail bond

A claim of the United States on a forfeited recognizance for bail in a criminal case is a "penalty" or a "forfeiture," within Bankr. Act July 1, 1898, c. 541, § 57j, 30 Stat. 560, which provides that debts due the United States as a penalty or forfeiture shall not be allowed in bankruptcy, except as to the pecuniary loss actually sustained. In *re Caponigri*, 193 Fed. 291, 292.

#### Revocation of license

A proceeding, authorized by Acts 31st Leg. c. 17, §§ 9a, 9b, 9c, 9f, 9g, for the revocation by the Comptroller of Public Accounts of liquor licenses for violations of the law by liquor dealers is not a suit by the state for a "forfeiture" or "penalty," within Const. art. 5, § 8, conferring on the district court exclusive jurisdiction of such suits; for, though an official act may be judicial as involving the exercise of discretion and judgment, yet, when discretion is conferred on an executive officer in the discharge of administrative or executive duties, the acts of the officer are not judicial. *Baldacchi v. Goodlet (Tex.)* 145 S. W. 323, 328.

The striking of the names of delinquent corporations and the notation by the Secretary of State that they were dissolved for failure to pay license fees under an act of 1907 (Rem. & Bal. Code, § 3715) and an act of 1909, extra session (Rem. & Bal. Code, § 3715a), as amended by Acts 1911, c. 41, and section 3715d, is not a "forfeiture of a franchise or charter," within Const. art. 12, § 3, which prohibits the Legislature from remitting the forfeiture of any corporate franchise or charter. *State ex rel. Preston Mill Co. v. Howell*, 121 Pac. 861, 863, 67 Wash. 377.

#### As self-executory

Where the statutes use the word "forfeit" or "forfeiture," they have usually been constructed to mean cause of forfeiture; and some proceeding or action must be had to effect it. *Woodcock v. Bolster*, 35 Vt. 632, 636.

Under a statute making it an offense to carry concealed weapons, and providing that all concealed weapons taken from persons violating the statute shall be "forfeited" to the county, a concealed weapon taken from a person is forfeited by the taking, and without conviction of the offense of carrying a concealed weapon. *McConathy v. Deck*, 83 Pac. 135, 136, 34 Colo. 461.

#### FORFEITED RECOGNIZANCE

Claim on as penalty, see Penalty.

#### FORGE

So-called machined forgings, being such as in addition to the forging process have been subjected to a machining process wholly or partly complete, are not within the provision in the Tariff Act for "forgings \* \* \* of whatever degree or stage of manufacture." *Thomas Prosser & Son v. United States*, 154 Fed. 721, 723. See, also, *Saltonstall v. Wiebusch Hilger*, 15 Sup. Ct. 476, 477, 156 U. S. 601, 39 L. Ed. 549.

#### FORGE (In Criminal Law)

The words "forged" and "counterfeited," as used in the statute creating the offense

of passing "forged, counterfeited or falsely altered" instruments, are synonymous, and the indictment may describe the instruments as "forged and counterfeited." *Hobbs v. State*, 9 Mo. 855.

# FORGERY

Raising a check as, see *Raise*.

See, also, *False Entry*.

Forgery was a common-law misdemeanor, and was defined as the fraudulent making or altering of a writing to another's prejudice. *State v. Anderson* (Del.) 74 Atl. 1097, 1098, 1 Boyce, 135; *Smith v. Markland*, 72 Atl. 1047, 1049, 223 Pa. 605, 132 Am. St. Rep. 747.

"Forgery" is "a false making; a making *malò animo*, of any written instrument for the purpose of fraud and deceit." *Bliddeford Nat. Bank v. Hill*, 66 Atl. 721, 722, 723, 102 Me. 346, 120 Am. St. Rep. 499 (citing *State v. Shurtliff*, 18 Me. 368; *Commonwealth v. Foster*, 114 Mass. 320, 19 Am. Rep. 353).

"'Forgery' at common law was but a common-law cheat, or attempt to cheat, set off from the rest and called by a separate name because of its special heinousness. *Williams v. Territory*, 108 Pac. 243, 244, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032 (quoting 2 Bishop, *Crim. Law*, § 148).

The essential ingredients of forgery are the making of some instrument, a fraudulent intent, and liability to injure another if the writing is genuine. *People v. Collins*, 90 Pac. 1109, 9 Cal. App. 622; *People v. McPherson*, 91 Pac. 1098, 1099, 6 Cal. App. 266; *People v. Johnson*, 93 Pac. 1042, 7 Cal. App. 127 (quoting and adopting definition in *People v. Munroe*, 35 Pac. 326, 100 Cal. 664, 24 L. R. A. 33, 38 Am. St. Rep. 323).

To constitute "forgery" there must be a false writing or alteration of an instrument, the instrument as made must be apparently capable of defrauding, and there must be an intent to defraud. *Goodman v. People*, 81 N. E. 830, 831, 228 Ill. 154. Cr. Code, § 105 (Hurd's Rev. St. 1908, c. 38), adopting in substance this definition of forgery, extends the offense to instruments unknown to the common law and abolishes the distinction between making an instrument with intent to prejudice and uttering and passing the same as true, and makes one who is guilty either of forging or uttering, or passing a forged instrument, guilty of forgery. One falsely representing to the maker of a note the loss thereof, and inducing him to execute a new note bearing the date of the original, and then passing the new note as the original, with intent to defraud, is not guilty of forgery. *People v. Pfeiffer*, 90 N. E. 680, 682, 243 Ill. 200, 26 L. R. A. (N. S.) 138, 17 Ann. Cas. 703.

To constitute a forgery, there must be a false making or other alteration of a written

instrument; the intent must be fraudulent, and the instrument such as can effect a fraud. *State v. Sturgeon*, 53 South. 703, 705, 127 La. 459.

To constitute forgery, the instrument must be uttered or published as true or genuine, accused must know that the instrument is forged or counterfeited, and he must entertain the intent to defraud the person to whom it is uttered. *State v. Webster*, 70 S. E. 422, 423, 88 S. C. 56, 32 L. R. A. (N. S.) 337.

To be the subject of forgery at common law, a writing must be false, and in such form as to be the means of defrauding another, and which, if genuine, would operate as the foundation of another's liability. Pen. Code, § 514, subd. 3, providing that any person who shall utter a writing purporting to have been written or signed by another, which writing the person uttering it knows to be false, forged, or counterfeited, and by the uttering of which the opinion, conduct, interests, or rights of the person purporting to have signed it shall be misrepresented or injuriously affected, shall be guilty of "forgery," makes three component parts of the crime of "forgery": (1) The uttering of a forged or false writing, (2) the knowledge of its falsity, and (3) the misrepresentation by the false writing of the sentiments, opinions, conduct, or rights of another person. An indictment which alleged that defendant feloniously uttered a false and forged letter purporting to have been written by an officer of a corporation introducing defendant as a friend of the management of the corporation, and stating that favors shown him would be duly appreciated by it and the writer, and that defendant knew said letter was false, did not charge forgery at common law, but was valid under the statute, though the indictment did not allege that the person whose name was forged had been injured, or that defendant was guilty of an intent to defraud. *People v. Abeel*, 91 N. Y. Supp. 699, 700, 703, 45 Misc. Rep. 86.

Under the statute (Wilson's Rev. & Ann. St. 1903, § 2442) declaring that one who sells, exchanges, or delivers for any consideration any forged note, etc., knowing the same to be forged, with intent to have the same uttered or passed, or who offers any such note for sale, exchange, or delivery for any consideration, with the like knowledge and intent, or who receives any such note on a sale, exchange, or delivery for any consideration, with the like knowledge and intent, is guilty of "forgery," the crime may be consummated: First, by a person actually selling, exchanging, or delivering for a consideration a forged instrument; second, by offering any such note or other instrument for sale, exchange, or delivery for a consideration; third, by receiving any such note or other instrument on a sale, exchange, or delivery for a considera-

tion. The gist of the offense is the sale, exchange, or delivery of the instrument with the knowledge that it is a forged instrument, and with the intent to cheat and defraud. *Connella v. Territory*, 86 Pac. 72, 73, 16 Okl. 365.

Pen. Code, § 470, makes any person guilty of "forgery" who, with intent to defraud, signs another's name to a lease, etc., knowing he has no authority to do so, or utters, the knowledge that it is a forged instrument, as true with intent to injure another, and section 115 makes every person guilty of felony who knowingly procures or offers any forged instrument to be recorded. An information alleged that accused willfully, fraudulently, etc., made and forged a lease, which was set out, and afterwards, knowing the instrument to be forged, and with intent to defraud, willfully and fraudulently uttered, published, and passed such instrument as true by offering it for record by the county recorder and having it recorded. Held, that the information only charged an offense under section 470, and not under section 115, the allegations as to the manner in which the lease was published being of evidential facts which may be disregarded as surplusage. *People v. Driggs*, 108 Pac. 62, 63, 12 Cal. App. 240.

An indictment which charges the defendant with having feloniously and falsely made and forged and uttered a certain affidavit purporting to be the affidavit of a person named, a pretended settler on unsurveyed public lands, and which sets out the affidavit, in which it is stated that affiant is such settler, has made improvements, etc., and then charges that it was so made by defendant with intent to file the same in the office of a Surveyor General of the United States to be used as a basis for letting a contract for surveying said lands described therein, and with the further intent that it should be transmitted to the General Land Office for the purpose of obtaining the approval of and payment for said survey, charges an offense of forging a writing for the purpose of obtaining, or enabling others to obtain, money from the United States. *Meldrum v. United States*, 151 Fed. 177, 179, 80 C. C. A. 545, 10 Ann. Cas. 324.

An information alleging that accused forged, counterfeited, and falsely made a note purporting to be the act of a third person named, by which a pecuniary obligation for the payment of a specified sum by the third person to accused or order was purported to be created, which forged, counterfeited, and falsely made instrument was of the tenor following, followed by a promissory note with intent to defraud, charges forgery of a pecuniary obligation of another, punishable by Rev. St. 1899, § 2009 [Ann. St. 1906, p. 1341]. *State v. Paul*, 102 S. W. 657, 203 Mo. 681.

Pen. Code, § 509, provides that a person is guilty of forgery in the first degree who, with intent to defraud, forges a deed or other instrument purporting to be the act of another, by which any right or interest in property is or purports to be transferred, conveyed, or in any way charged or effected. Where an indictment charged the forgery of a deed, it was not demurrable for failure to allege the particular manner in which the forgery was committed, whether by pen, pencil, or printing or by falsely making or counterfeiting any of the various signatures, or altering, erasing, or piecing together parts of genuine instruments. *People v. Hoyt*, 130 N. Y. Supp. 505, 508, 145 App. Div. 695.

#### Alteration, erasure, or addition

"Forgery" is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice." The figures in a check following the words denoting the sum called for are not a material part of the instrument; the words being controlling in determining its legal effect. *State v. Lotono*, 58 S. E. 621, 622, 62 W. Va. 310.

Any material alteration in an instrument evidencing a pecuniary liability is a "forgery," which the maker is not bound to anticipate and guard against by making such alteration difficult or impossible. *Lanier v. Clarke* (Tex.) 133 S. W. 1093, 1094.

Changing a writing from a nonnegotiable instrument into a negotiable note is such a material alteration as constitutes forgery, where done with a criminal intent. *State v. Mitton*, 96 Pac. 926, 929, 37 Mont. 366, 127 Am. St. Rep. 732.

Making an alteration or erasure in any material part of a true instrument whereby another may be defrauded is a "forgery" within Ky. St. 1903, § 1185, and it is not required that the whole instrument shall be false or fictitious. *Commonwealth v. Walls* (Ky.) 86 S. W. 684, 685.

Under Code Cr. Proc. 1911, art. 925, which denounces as forgery the alteration, without lawful authority, and with intent to injure or defraud, of an instrument in writing, etc., the raising of the figures on a voucher check would increase the pecuniary liability of its maker, and the person who raised such figures would be guilty of forgery, though he did not sign the receipt on the reverse side of the check. *Horn v. State*, 150 S. W. 948, 949.

#### Capability of affecting fraud

The crime of forgery is committed by making an instrument which may be capable of defrauding, although in and of itself it may be innocent, but in conjunction with other facts and circumstances may constitute forgery. *Lingafelter v. State*, 28 Ohio Cir. Ct. R. 800, 807.



Under Pen. Code, § 470, making guilty of forgery one who, with intent to defraud, counterfeits or forges the seal or handwriting of another, the document forged or counterfeited must not only be false and forged, but it must also be of such a character as to be available in law to work the intended injury or fraud. *People v. Di Ryana*, 96 Pac. 919, 920, 8 Cal. App. 333.

Under Code, § 1106, providing that every person who with intent to injure or defraud shall falsely make any writing purporting to be the act of another, by which any person may be affected or in any way injured in his person or property, shall be guilty of "forgery," an instrument purporting to be signed by a landlord stating that his tenant did not owe him anything, was all right, and had a good crop, was the subject of forgery, since it was one affecting the landlord's right in the crop. *France v. State*, 35 South. 313, 314, 83 Miss. 281.

A false indorsement of the name of the payee on the back of a warrant on the treasurer of a county made payable to the payee or bearer is a forgery, since after the indorsement the holder may look both to the county and the payee for payment of the warrant. *Saucier v. State* (Miss.) 59 South. 858, 859.

**As crime**

See Crime.

**False making**

Under Comp. Laws 1897, § 1168, defining "forgery" as the false making, altering, or counterfeiting of any public record, certificate, return, or attestation, etc., it is the false making of an affidavit which constitutes the offense and not the making of a false affidavit. *Territory v. Gutierrez*, 84 Pac. 525, 527, 13 N. M. 312, 5 L. R. A. (N. S.) 375.

**False statements with genuine signature**

Under Pen. Code, arts. 530, 539, 550, making it forgery to make a false instrument in writing without lawful authority in such manner that it would, if true, have created any pecuniary obligation, or transferred any property, or to make a written instrument by filling up over a genuine signature, or to make, alter, forge, or counterfeited any instrument in writing in relation to or affecting lands, a written instrument filled in over the genuine signature of the purported maker, agreeing to give defendant a sum of money for his equity in land for which the signer had sued, and agreeing not to dispossess defendant until the amount named is paid, is an instrument subject to forgery. *Wheeler v. State*, 137 S. W. 124, 125, 62 Tex. Cr. R. 370.

**Fraudulent intent**

Under Rev. St. 1870, § 833, defining "forgery" as the false making of certain instruments "with intent to defraud any person,"

it suffices if the forged instrument does or may prejudice the rights of another. The intent of the forger to profit by the act is not a necessary element of the offense. *State v. Laborde*, 45 South. 38, 40, 120 La. 136 (citing *State v. Anderson*, 30 La. Ann. 557; *State v. Boasso*, 38 La. Ann. 202).

To constitute "forgery" within a statute making every person who, with intent to defraud another, falsely makes, etc., the indictment or information must allege that the alleged wrongful act was done with intent to defraud another. *State v. Swensen*, 81 Pac. 379, 380, 13 Idaho, 1.

To constitute forgery, a false instrument must be made with intent to injure or defraud, and the injury must be such as affects one pecuniarily, or in relation to his property; but it is not necessary that the accused intended to injure or defraud any particular person, or that any particular person was injured or defrauded by the forgery. *Ashmore v. State* (Tex.) 150 S. W. 196, 197.

**Imitation of genuine**

Filling in a receipt, the signature not being in writing, or made to resemble manuscript, but being printed in bold type, is not "forgery," under White's Ann. Pen. Code, art. 533, providing that in order to come within the definition of "forgery" the signature, when made otherwise than by writing, must be made to resemble manuscript. *Heath v. State*, 89 S. W. 1063, 1064, 49 Tex. Cr. R. 49, 122 Am. St. Rep. 783.

**Instruments signed under false representations**

The procuring of the execution of a document by misrepresentation of its contents, or by misstatement of facts, is not "forgery." *State v. Mitten*, 92 Pac. 970, 971, 36 Mont. 376.

Where a person did not intend to sign a promissory note, but by fraud and deceit has been tricked into signing an instrument which afterwards proves to be a promissory note, such instrument was a "forgery," although the signature affixed thereto was genuine. *Biddeford Nat. Bank v. Hill*, 66 Atl. 721, 722, 102 Me. 346, 120 Am. St. Rep. 499.

**Kind of instrument**

A false entry made in a public record with intent to deceive and defraud is a "forgery." *State v. Zimmerman*, 60 S. E. 680, 682, 79 S. C. 289.

A bill of lading, purporting to be issued by the agent of a railroad company and to evidence a consignment of goods, is the subject of "forgery" within Pen. Code 1895, art. 530, making one guilty of forgery who, without lawful authority and with intent to injure or defraud, makes a false instrument in writing, purporting to be the act of another, in such manner that the false instrument, if true, would have created, increased, diminished, etc., any pecuniary obligation or trans-

ferred or affected property. *Fischl v. State*, 111 S. W. 410, 411, 54 Tex. Cr. R. 55.

Where a subscription paper is headed with merely the title, character, authorship, and price of a book, followed by the word "subscribers," a name written under "subscribers" clearly imports a promise to take a copy of the book and pay the price indicated, and constitutes a "writing obligatory" or "instrument in writing" within the meaning of *Burns' Ann. St.* 1901, § 2354, defining "forgery." *State v. Hazzard*, 80 N. E. 149, 150, 168 Ind. 163.

#### Legal efficacy of instrument

"Forgery" is the false making or material alteration of any writing which, if genuine, is of legal efficacy, or the foundation of a legal liability, and, if the writing is manifestly void, it is not the subject of forgery. *State v. Floyd*, 81 N. E. 1153, 1154, 169 Ind. 136 (citing 2 Bish. Cr. L. § 523; 19 Cyc. 1370).

"Legal forgery cannot be made out by imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon a legal crime, upon criminal breaches of perfect legal operation." *Pearson v. Commonwealth*, 78 S. W. 1128, 1129, 117 Ky. 731 (quoting *People v. Shall* [N. Y.] 9 Cow. 778).

To constitute "forgery," under the English or common-law definition, the instrument must be such that, if genuine, it would be apparently of some legal efficacy. *Huckaby v. State*, 78 S. W. 942, 944, 45 Tex. Cr. R. 577, 108 Am. St. Rep. 975. Thus under a statute providing that a person who with intent to defraud another, falsely makes, alters, forges, or counterfeits a county order or request for the payment of money, is guilty of forgery, it is not forgery to issue false jurors' certificates which are of no apparent legal validity because lacking the court seal required by law. *Ex parte Farrell*, 92 Pac. 785, 788, 36 Mont. 254. But it is no defense to a prosecution for forgery that the note forged does not bear a revenue stamp, and it is no defense that the one whose signature was forged was a married woman, where the note does not show that fact. *King v. State*, 57 S. W. 840, 842, 42 Tex. Cr. R. 108, 96 Am. St. Rep. 792 (citing 2 Bish. Cr. Law, p. 523).

To be the subject of "forgery," the instrument on its face must, if it were genuine, be of some apparent legal efficacy for injury to another, and, if on its face it is entirely valueless and of no binding force or effect for any purpose of harm, liability, or injury to any one, it cannot be the subject of forgery. An instrument alleged to have been forged was described as a lease, but no length of time was fixed for it to run, and no consideration therefor was expressed. It

recited that it was for "—— months," and provided that "on leaving the order for said goods —— dollars on the delivery of the same —— dollars, and every week thereafter the sum of —— dollars," etc. It purported to be for the rent of household goods and jewelry, which were nowhere set forth or included in the covenants or agreements contained in the instrument. It was also silent as to any mortgage debt, and while it referred to household furniture, wearing apparel, carpets, etc., there was nothing to identify the same. The instrument was void on its face either as a lease, chattel mortgage, or assignment, and was not the subject of "forgery." *State v. Cordray*, 98 S. W. 1, 2, 200 Mo. 29, 9 Ann. Cas. 1110.

Delivery of the instrument is unnecessary; the elements of the offense being false making or alteration of a written instrument, apparently valid, with fraudulent intent to use it to another's injury, and so it is immaterial to guilt of forging a bond to stay judgment that it was not filed with the clerk, as required by statute. *Holloway v. State*, 118 S. W. 256, 257, 90 Ark. 123.

Under Code, § 4853, making it forgery to falsely make "any instrument in writing being or purporting to be the act of another by which any pecuniary demand or obligation \* \* \* is or purports to be created," it is not necessary that there should have been a resolution by school officers directing the issuance of a school order to render the making of a false order forgery. *State v. Blodgett*, 121 N. W. 685, 687, 143 Iowa, 578, 21 Ann. Cas. 231.

#### Purport to be act of another

A "forgery" is "the false making of an instrument which purports to be that which it is not." A mortgage satisfaction which purports to be executed and acknowledged as the personal act of the person holding the mortgage, but which is executed and acknowledged by another person, is a "forgery." *People v. Shanley*, 117 N. Y. Supp. 845, 852, 132 App. Div. 821 (quoting and adopting definition in *People v. Filkin*, 82 N. Y. Supp. 15, 83 App. Div. 589).

#### Signing fictitious name

By the express provisions of Pen. Code, § 470, "forgery" may be committed by signing the name of a fictitious, as well as of a real, person to the instruments therein enumerated. *People v. Jones*, 106 Pac. 724, 725, 12 Cal. App. 129.

The essential elements of the crime of "forgery" are: First, a false making of some instrument in writing; second, a fraudulent intent; third, an instrument capable apparently of effecting a fraud. Thus where for the purpose of evading the law, application for purchase of state school lands is made in the name of R., a fictitious person, and a certificate of sale is issued, under B. & C.

Comp. § 3306, which by section 3309 may be assigned by an instrument executed in the same manner as a deed, an instrument signed in the name of R., reciting issuance of the certificate of the sale and assigning and transferring to K. all the rights, title, and interest of R. in and to the land and authorizing the state land board to execute to K. a deed of the land, is a deed within section 1858, declaring a penalty if any person shall with intent to defraud another forge any deed. *State v. Kelliher*, 88 Pac. 867, 869, 49 Or. 77.

#### Similarity of names

To constitute "forgery" the name signed must be that of some other person than he who executed the instrument, though it may be a person of the same name, if, by signing that name, he intends to defraud. It is not forgery to sign one's own name. *Murphy v. State*, 93 S. W. 543, 544, 49 Tex. Cr. R. 488.

Where there are two persons of the same name and one of them signs that name to a note with the intent that the note may be used in trade as the note of the other, the act is "forgery." One who signs his name to an instrument, though it be identical with the name of another, is guilty of "forgery," if the intent be to have it received as the instrument of such other person, and the instrument may be of legal efficacy. *Edwards v. State*, 108 S. W. 673, 674, 53 Tex. Cr. R. 50, 126 Am. St. Rep. 767 (citing *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49).

Where a draft intended for one person wrongfully comes into the hands of another person of the same name, who indorses his name thereon and receives the proceeds from an innocent third party, such an indorsement is a forgery. *Thomas v. First Nat. Bank of Gulfport*, 58 South. 478, 480, 101 Miss. 500, 39 L. R. A. (N. S.) 355.

#### Uttering forged papers

The offense defined in Crimes Act, § 133 (Gen. St. 1901, § 2126), providing that every person who shall sell, exchange, or deliver, or offer to sell, exchange, or deliver, for any consideration, any falsely altered or forged writing, knowing it to be forged, with the intention to have it uttered or passed, shall be guilty of forgery, is not the uttering or passing of forged paper, but is rather the procuring of another to pass a forged paper in the manner and for the purpose indicated. An information which charges the accused with the transfer and delivery of a forged promissory note to a bank, knowing it to be false and forged, with the intent to defraud the bank, and that it was transferred and delivered with the intention to have it uttered and passed to the bank, is sufficient, under Crimes Act, § 134 (Gen. St. 1901, § 2127), providing that every person who with intent to defraud shall utter or publish any forged writing, knowing it to be forged, shall be ad-

judged guilty of forgery. *State v. Calhoun*, 88 Pac. 1079, 1080, 75 Kan. 259.

To constitute forgery of a check, it is sufficient that the accused cashes the check knowing it to be forged, and not essential that the forgery on the check be his handiwork. *Moulton v. State* (Ark.) 152 S. W. 132, 133.

In a criminal prosecution on two counts for forgery and uttering a forged deed, where the deed was proved to be a forgery, and the uttering by defendant was conceded, under Pen. Code, § 521, the uttering constitutes forgery in the same degree as though forged by defendant, and it is immaterial under which count defendant was convicted. *People v. Browne*, 103 N. Y. Supp. 903, 905, 118 App. Div. 793.

The offense of "forgery" and that of "uttering a forged instrument" are distinct offenses. *State v. Blodgett*, 121 N. W. 685, 686, 688, 143 Iowa, 578, 21 Ann. Cas. 231.

#### FORGERY IN THE FIRST DEGREE

Where a warrant issued by a school district drawn on the county treasurer, directing the payment of a certain sum of money out of the teacher's fund for services rendered as teacher, was altered by inserting a figure therein, the offense came within Rev. St. 1899, § 1995 [Ann. St. 1906, p. 1336], providing that every person who shall falsely make, alter, forge, etc., any warrant, order, bill, etc., issued or purporting to have been issued under the authority of a state, or in any county, township, school district, or municipal corporation therein, by virtue of any law of the state by which payment of any money absolutely or upon a contingency shall be promised, with intent to defraud the state, county, township, city, school district, or other municipal corporation, or any public officer, or other person, shall be adjudged guilty of forgery in the first degree; section 9788 [Ann. St. 1906, p. 4491], making it the duty of a school district to draw a warrant on the county treasurer in favor of any party to whom the district has become legally indebted as teacher to be paid out of any moneys in the appropriated funds in the hands of the county treasurer. *State v. Tyree*, 100 S. W. 645, 647, 201 Mo. 574.

#### FORGERY IN THE SECOND DEGREE

Under Cr. Code 1896, § 4720, providing that a person who, with intent to injure or defraud, falsely makes, alters, forges, counterfeits, etc., any receipt for the payment of money or any instrument of writing being or purporting to be the act of another, shall be guilty of "forgery in the second degree," a receipt for the payment of taxes is a proper subject of forgery. *Sims v. State*, 46 South. 493, 494, 155 Ala. 96.

The expression "forge" is defined in Pen. Code, § 520, as the false making or counter-

felting of the signature of a party or witness or the placing or connecting together, with intent to defraud, different parts of several genuine instruments. One who, knowing that the name of the payee of a check appearing on the back thereof had been forged, deposited the same in his bank for collection and had the proceeds credited to his private account, is guilty of "forgery" in the second degree, under Pen. Code, §§ 511, 520, 521, declaring that a person who utters a forged instrument by which an obligation has been transferred, etc., shall be guilty of forgery in the second degree, etc. *People v. Mingey*, 103 N. Y. Supp. 627, 629, 118 App. Div. 652.

### FORGERY IN THE THIRD DEGREE

The essential element of the crime of forgery under Pen. Code, § 515, providing that a person who, with intent to defraud or conceal any misappropriation of money or property, either (1) alters or destroys an account, etc., belonging to the business of a corporation or partnership, or (2) makes a false entry in any such account, or (3) willfully omits to make true entry therein, is guilty of "forgery in the third degree," is the intent to defraud or conceal a larceny or misappropriation of money or property. *People v. Brown*, 126 N. Y. Supp. 322, 323, 141 App. Div. 638; *People ex rel. Hegeman v. Corrigan*, 113 N. Y. Supp. 513, 514, 129 App. Div. 75. The two essentials of this offense are the making of the false entries and the intent in so doing to defraud. The making of false entries in corporate books, through mistake or with a purpose to accomplish by appropriate fictitious entries a proper book-keeping result, or to deceive some one with no purpose of profit either contemplated or possible, is not forgery; but the making of false entries in corporate books with a view to conceal the evidence of a crime already committed or to render its detection impossible or more difficult, or to facilitate the commission of a future crime, or to defraud creditors, present or prospective, stockholders, or any other persons, is a "forgery in the third degree." *People v. Hegeman*, 107 N. Y. Supp. 261, 266, 57 Misc. Rep. 295. Where it appears that defendant made an entry for the purpose of concealing the wrongful taking of money, it is not necessary for the state to show that he himself took it. *People v. Curtiss*, 103 N. Y. Supp. 395, 396, 118 App. Div. 259. The omission of a merchant to enter in his account books a sale of merchandise, though in failing circumstances and shortly before being adjudicated a bankrupt in involuntary proceedings, and though the sale was for less than the goods cost him, does not constitute forgery in the third degree, within Penal Law (Consol. Laws, c. 40) § 889, making it such crime for one, with intent to defraud or conceal any larceny or misappropriation, willfully to omit to make true entry of any material particular in any book of accounts kept by him or under his

direction; it being essential that such person be burdened with the duty of keeping such book of accounts, or be one under whose direction it shall be done, and merchants not being required by law to keep books of account. *People ex rel. Isaacson v. Fallon*, 127 N. Y. Supp. 710, 711, 69 Misc. Rep. 550; *Id.*, 96 N. E. 96, 97, 202 N. Y. 456.

Under Pen. Code, § 515, declaring guilty of "forgery in the third degree" one who, with intent to defraud, alters or makes a false entry in an account appertaining to the business of a corporation, it is not necessary that by the entry a pecuniary demand or obligation be or purport to be created, increased, discharged, or affected. *People v. Herzog*, 93 N. Y. Supp. 357, 360, 47 Misc. Rep. 50.

### FORGERY IN THE FOURTH DEGREE

One who borrows money at a bank by giving, as security therefor, a note signed by himself, and on which he forged the names of several comakers, does not commit "forgery in the fourth degree" under Rev. St. Mo. 1899, § 2013 (Ann. St. 1906, p. 1342), providing that every person who shall sell, exchange, deliver, for any consideration, any falsely altered, forged, or counterfeited instrument in writing knowing the same to be forged, with intent to have the same uttered or passed, shall be guilty, etc. *State v. Standifer*, 108 S. W. 17, 19, 209 Mo. 264.

### FORGIVENESS

"Forgiveness" does not fully express the meaning of "condonation" in the law of divorce. A party may forgive in the sense of not meaning to bear ill will or not seeking to punish without at all meaning to restore to the original position. "Condonation" restores equality before the law. Where a wife condones the adultery of her husband, he can be divorced from her for a similar offense subsequently committed by her. *Talley v. Talley*, 64 Atl. 523, 524, 215 Pa. 281.

### FORGOTTEN

The word "forgotten," within the rule relating to "forgotten" inventions, means something more than simply out of mind; i. e., not consciously present in the mind at all times. *Buser v. Novelty Tufting Mach. Co.*, 151 Fed. 478, 496, 81 C. C. A. 16.

### FORM

See Due Form; Matters of Form; Same Form; Short Form; Usual Form.

The word "compactness" means the state or quality of being compact; firmness; close union of parts. While the word "form" refers to the external shape or configuration of a body; the figure as defined by lines and surfaces. *In re Sherill*, 81 N. E. 124, 139, 188

N. Y. 185, 117 Am. St. Rep. 841 (citing Cent. Dict).

#### Substance distinguished

The word "form" is used, in referring to laws and legal proceedings, as the antithesis of "substance," and Civ. Code, art. 3543, in proscribing against "informalities" in public sales, refers to irregularities and illegalities which do not reach matters that are of the essence of those contracts, or prejudicially affect the substantial rights of parties who may be interested therein. *Thibodeaux v. Thibodeaux*, 36 South. 800, 802, 112 La. 906.

#### FORM OF THE STATUTE

See Contrary to the Form of the Statute.

#### FORMAL DEFECT

The use of the name of a person and a name under which he is commonly known in an indictment may be amended as a "formal defect," although the defect was not "apparent on the face of the indictment" as expressed in Acts 1870, No. 5, § 1. *State v. Arnold*, 50 Vt. 731, 733.

#### FORMAL PARTIES

In a suit by a stockholder of a corporation on behalf of himself and all other stockholders to recover secret profits made by the promoters, the corporation is a "formal defendant." *Groel v. United Electric Co. of New Jersey*, 61 Atl. 1061, 1064, 70 N. J. Eq. 616.

#### FORMALITY

See Informality.

#### FORMATION

Gen. St. 1901, §§ 1251, 1252, entitled "An act providing for the formation of telephone companies," is not a violation of Const. art. 2, § 16, requiring the subject of an act to be expressed in the title; the word "formation" contemplating not only the right to incorporate, but all rights extending to a corporation so incorporated to engage in the telephone business. *City of Wichita v. Missouri & K. Telephone Co.*, 78 Pac. 886, 887, 70 Kan. 441.

#### FORMED

In Const. art. 11, § 3, providing that no new county shall be established which shall reduce any county to a population less than 4,000, nor shall a new county be "formed" containing a population of less than 2,000, the word "formed" means finally formed. *State ex rel. Chehalis County v. Superior Court, Pacific County*, 92 Pac. 345, 347, 47 Wash. 453.

In section 2330, Rev. Codes 1905, relating to the division of counties, the word "upon" means after, or following, and the section makes the qualifying of the commissioners a condition precedent to clothing the new county with legal existence. The word

"formed" means and relates only to the area of the county and has no reference to a county equipped with means of government, and therefore the voters are legal voters at a primary held before the appointment of the commissioners. *Murray v. Davis*, 128 N. W. 305, 306, 21 N. D. 64; *Willis v. Weatherwax*, 128 N. W. 307, 21 N. D. 69.

The words "created" and "formed," as used in Sess. Laws 1909, c. 19, by which a new county of a designated name was created and formed out of described territory forming part of an existing county, and which provided that after the county should have organized it should constitute a portion of a judicial district and be attached to the existing county for the purposes of legislative representation, are limited in their meaning by the other provisions of the act, and do not effect an immediate division of the existing county, but the act is in the nature of an enabling act under which a new county may be constitutionally formed. *Board of Com'rs of Big Horn County v. Woods*, 106 Pac. 923, 926, 18 Wyo. 316.

#### FORMALDEHYDE

"Formaldehyde" is an organic compound product of alcohol. An ordinance prohibiting the sale of milk containing a preservative is within the power to pass ordinances necessary or reasonably appearing to be necessary for the public health, though a preservative like formaldehyde, not injurious to the health, may be used. *City of St. Louis v. Schuler*, 89 S. W. 621, 624, 190 Mo. 524, 1 L. R. A. (N. S.) 923.

#### FORMER

The words "former wife," in Pen. Code 1895, art. 344, providing that any person having a "former wife" living who shall marry another shall be punished, etc., are used in contradistinction to the person then being taken to wife, and a man having a wife living, who marries another woman, violates the statute. *Burton v. State*, 101 S. W. 226, 227, 51 Tex. Cr. R. 196.

#### FORMER ACQUITTAL

See, also, Autrefois Acquit.

A plea of "former acquittal" or former conviction must be upon a prosecution for the identical act or crime. Unless the first indictment was such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second. Thus where one has been convicted of assault and battery with intent to kill, and his victim thereafter dies, and he is indicted for murder, he cannot plead former jeopardy as a defense. *Commonwealth v. Ramunno*, 68 Atl. 184, 219 Pa. 204, 14 L. R. A. (N. S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 813.

The test of whether a plea of "former acquittal" is a good bar depends upon whether the evidence to support the second indictment would have been sufficient to secure a conviction on the first. *Commonwealth v. Shoener*, 64 Atl. 890, 892, 216 Pa. 71.

#### FORMER ADJUDICATION

See, also, *Res Adjudicata*.

For a judgment to constitute a former adjudication, it must appear that the matter now in dispute was in that case put in issue and tried. *Squaw Creek Drainage Dist. No. 1 v. Turney*, 138 S. W. 12, 17, 235 Mo. 80.

#### FORMER CONVICTION

The term "former conviction," as used in criminal law, has reference to a conviction in a court having jurisdiction to try the offender for the particular offense and does not include the conviction, by a court-martial of a commissioned officer in the national guard of the state, of conduct unbecoming an officer and a gentleman and prejudicial to military discipline, under which he was sentenced to dismissal from the service, so as to bar a subsequent indictment for grand larceny founded on the same transactions. *People v. Wendel*, 112 N. Y. Supp. 301, 302, 59 Misc. Rep. 354.

An information for opening a theater on Sunday alleging that accused theretofore had on designated dates been tried and convicted of offenses of like character, charges "former convictions," within Pen. Code 1895, art. 1014, authorizing increased punishment on a second and third conviction for the "same offense"; the words "same offense" not meaning the identical offense, but one of like character. *Muckenfuss v. State*, 117 S. W. 553, 55 Tex. Cr. R. 216.

#### FORMER JEOPARDY

See *Autrefols Acquit; Jeopardy* (In Criminal Law).

#### FORMER OWNER

The term "former owner," in the statute as to the redemption of land sold for taxes, is the owner in whose name the land had been returned delinquent. *Harvey v. Hoffman*, 62 S. E. 371, 372, 108 Va. 626.

#### FORMER SPOUSE

A woman, whose husband had secured a divorce from her, was not granted by such decree a right to marry; but she did so while such divorced husband was living, he also having married again. Held, that such divorced husband was the "former spouse" of the woman, within the meaning of a statute making it a felony for one to marry while having a former spouse living. *Barfield v. Barfield*, 35 South. 884, 885, 139 Ala. 290.

#### FORMERLY

In an action for injuries to land by the obstruction of a water course by a fill pro-

vided with insufficient openings, the court charged that if the jury believed that defendant, when it built its railroad over the lands, constructed its roadbed so as to dam and hold the water back, and without sufficient openings to allow the water flowing on the land to pass off in times of ordinary rainfall to the extent "it formerly did," to the injury of the land, and by reason thereof the market value of the land had diminished to plaintiff's damage, the jury should find for plaintiff, and in another instruction charged that, if they believed from the evidence that plaintiff had suffered no injury and damage except such as was necessarily incident to the proper construction of the railroad, they should find for defendant. Held, that the word "formerly" in the first instruction when read in connection with the second should be construed as meaning before the defendant built its road, and therefore the instruction was not erroneous since the second instruction excluded all injuries except those which occurred from the improper construction of the railroad. *Madisonville, H. & E. R. Co. v. Wiar*, 138 S. W. 255, 257, 144 Ky. 206.

### FORNICATION

See *Did Commit Fornication*.

"Fornication" at common law was unlawful sexual intercourse between a man, either married or single, and an unmarried woman, and was not punishable unless accompanied by such circumstances as per se constituted a misdemeanor. *Richey v. State*, 87 N. E. 1032, 1033, 172 Ind. 134, 139 Am. St. Rep. 362, 19 Ann. Cas. 654.

"Fornication" alone is not a criminal offense in this state." *State v. Clemenson*, 99 N. W. 139, 140, 123 Iowa, 524.

"Fornication" is sexual intercourse between a man, married or single, and an unmarried woman. Under *Burns' Rev. St. 1894*, § 2090, declaring any female frequenting houses of ill fame, or associating with unchaste women, or committing fornication for hire, a prostitute, and authorizing punishment, an indictment charging a female, among other acts, with committing fornication for hire, defines an offense, though it does not set out the particular acts constituting the offense. *Stanton v. State*, 60 N. E. 999, 1000, 27 Ind. App. 105.

"The word 'fornication' is a word of long settled meaning and implies an act with an unmarried woman; so, where the statute simply makes 'fornication' a misdemeanor, the use of the word as descriptive of the act would seem to be sufficient." *State v. Sharp*, 66 Atl. 926, 927, 75 N. J. Law, 201.

A single act of sexual intercourse between a man and an unmarried woman does not constitute the crime of "fornication" within the meaning of *Gen. St. 1894*, § 6557,

which provides that if "any man and single woman cohabit together they shall be both guilty of fornication"; the word "cohabit" meaning to live and dwell together. *State v. Williams*, 102 N. W. 722, 94 Minn. 319.

The word "fornication" implies and expresses the act of sexual intercourse, and in a criminal prosecution "unlawful intercourse" must be held equivalent thereto, though neither the word "sexual" nor the word "carnal" is used. *United States v. Griego*, 72 Pac. 20, 21, 11 N. M. 392.

The uniform construction put upon Rev. 1905, § 3350, making the "fornication and adultery" of the husband ground for divorce, is that to constitute the offense the misconduct must be habitual. *Prendergast v. Prendergast*, 59 S. E. 692, 146 N. C. 225.

Under Cr. Code 1902, §§ 290, 292, defining "fornication" as intercourse with "each other," and providing that any person guilty of it shall be liable to indictment, does not prevent indictment of either party to the crime separately. *State v. Sauls*, 50 S. E. 17, 18, 70 S. C. 393.

Under Pen. Code 1895, art. 357, defining "fornication" as "the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried," an information should follow the statutory definition, and one merely charging habitual carnal intercourse was insufficient. *Cannedy v. State*, 125 S. W. 31, 58 Tex. Cr. R. 184.

#### Other sexual offenses distinguished

In all cases where one of the parties to the act of criminal intercourse is married and the other is not it is "adultery" in the married party and "fornication" in the unmarried party. *State v. Chafin*, 103 Pac. 143, 144, 80 Kan. 653.

The crime of "fornication" necessarily involves the idea of consent of both parties; and, while the female's consent in some instances may be procured by force to a certain degree, where force was used in the inception of the offense, it must at least be shown that consent was finally induced thereby. *Nephew v. State*, 63 S. E. 930, 931, 5 Ga. App. 841.

"Rape" is an act of sexual intercourse accomplished forcibly, and without the consent of the female. If it be, with her consent, though some coercion is used to procure consent, and the intercourse is illegal, the crime is "adultery" or "fornication," as the case may be. The law recognizes no intermediate degree of force in the accomplishment of an illegal act of sexual intercourse which is sufficient to accomplish the act contrary to the consent of the female, and yet not constitute the crime of rape. *Whidby v. State*, 49 S. E. 811, 121 Ga. 588 (citing *Mathews v.*

*State*, 29 S. E. 424, 101 Ga. 547; *Taylor v. State*, 35 S. E. 161 [6], 110 Ga. 150).

## FORTH

See Set Forth.

### FORTHCOMING BOND

A supersedeas bond, given by a defendant to obtain possession of property seized for sale in a mortgage foreclosure conditioned that he would hold the property "subject to the proper order and decree that may be entered finally in said cause," was a "forthcoming bond," and the obligors were liable thereon for the value of the property; it having been destroyed by fire pending the appeal which resulted in an affirmance of the foreclosure decree. *Perry v. Tacoma Mill Co.*, 152 Fed. 115, 119, 120, 81 C. C. A. 333 (citing *Omaha Hotel Co. v. Kountze*, 2 Sup. Ct. 911, 107 U. S. 378, 27 L. Ed. 609; *Dexter, Horton & Co. v. Sayward*, 79 Fed. 237; *Mahlman v. Williams*, 12 S. W. 335, 89 Ky. 282; *Hinkle v. Holmes*, 85 Ind. 405).

### FORTHWITH

See At Once.

"Forthwith," when used in reference to time, is generally construed to mean without delay. *Bottle Min. & Mill. Co. v. Kern*, 99 Pac. 994, 996, 9 Cal. App. 527.

There is no precise definition, so far as time is concerned, of the words "forthwith" and "immediately"; but the meaning depends on the circumstances of the case and the act to be performed. *Lewis v. Curry*, 103 Pac. 493, 496, 156 Cal. 93.

Jury Law (Acts 1909, p. 319) § 32, which requires service of a copy of the indictment and jury list in capital felonies "forthwith," is mandatory, and failure to make such service before February 21st, the day accused's case was set for trial, was fatal where the jury was drawn the 19th and the order for service was made that day; "forthwith," a relative term, meaning promptly, with all convenient dispatch, without delay. *Haisten v. State*, 59 South. 361, 362, 5 Ala. App. 56.

#### As reasonable time

"Forthwith" does not mean instantaneously, but requires action to be taken within a reasonable time. *Lucas v. Western Union Telegraph Co.*, 109 N. W. 191, 193, 131 Iowa, 669, 6 L. R. A. (N. S.) 1016; *Routt v. Dils*, 90 Pac. 67, 69, 40 Colo. 50; *Everson v. General Accident Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 88 N. E. 658, 660, 202 Mass. 169.

The term "forthwith" does not in all cases mean instant, but may and often does have a relative meaning and may mean all reasonable celerity, or all reasonable dispatch; with reasonable and proper diligence. Thus under *Detroit City Charter* providing that the tax roll shall be delivered July 1st, and

that "forthwith" six days' notice by publication shall be given which shall be a demand for payment, a publication on each of the first seven days of the month, except July 4th, is sufficient. *Walker v. City of Detroit*, 101 N. W. 809, 810, 138 Mich. 538.

The terms "forthwith," "immediately," etc., as used in contracts, are to be liberally construed, and they do not mean the absolute exclusion of any interval of time, but only that no unreasonable length of time shall intervene before performance. *Claus-Shear Co. v. E. Lee Hardware House*, 53 S. E. 433, 434, 140 N. C. 552, 6 Ann. Cas. 243.

As used in the unloading clause of a bill of lading, the word "forthwith" has been held to mean no more than without unreasonable delay. *Tweedle Trading Co. v. Pitch Pine Lumber Co.*, 156 Fed. 88, 89.

#### In insurance

One agreeing to procure "forthwith" insurance on the building of another is entitled, before becoming liable for a breach, to a reasonable time within which to procure insurance. And where one agreed to procure "forthwith" insurance on the building of another, and the building on the morning of the second day thereafter was destroyed by fire, and no insurance had been procured, the question whether the delay in procuring the insurance was reasonable or not was for the jury. *Rainer v. Schulte*, 113 N. W. 396, 397, 133 Wis. 130.

"The phrases 'immediate notice,' 'notice forthwith,' 'as soon as possible,' 'as soon as practicable,' used in policies of guaranty insurance providing that notice of loss shall be given to the insurer by the insured within a certain designated time, have practically the same meaning, to wit, that the insurer shall, with all promptitude considering the probable amount of the loss, and the probability of the 'risks' endeavoring to escape, give notice to the insurer of the occurrence of the loss." *Fidelity & Guaranty Co. of New York v. Western Bank (Ky.)* 94 S. W. 3, 5 (quoting and adopting definition in *Frost, Guaranty Ins.* § 104).

#### In reference to official duties

The construction generally given by the courts to the word, "forthwith" and "immediately," whether occurring in contracts or statutes, is that the act referred to should be performed within such convenient time as is reasonably requisite, and what is a reasonable time is to be determined by the facts of the particular case in hand. As used in a statute requiring a magistrate before whom one is charged with an offense to proceed "forthwith" to an examination or trial, it means reasonable time, determined by the facts of the case, and a prisoner brought before a magistrate and detained about an hour is not unreasonably restrained, where during that time she refused to submit to the magistrate's custody and by her conduct

contributed to the delay by obstructing him in taking proper action. *Meyers v. Dunn*, 104 S. W. 352, 354, 126 Ky. 548, 13 L. R. A. (N. S.) 881.

"There is no precise definition, so far as time is concerned, of the words 'forthwith' and 'immediately.' In every case the meaning depends upon the circumstances of the case and the act to be performed." St. 1906, p. 23, c. 19, § 3, requiring the Governor "forthwith," on the filing on or before September 15th of the list of corporations delinquent in payment of their license tax, to issue a proclamation that the charters of such domestic corporations and the right of such foreign corporations will be forfeited unless the tax be paid on or before November 30th, and section 4, requiring that the proclamation shall be filed in the office of the Secretary of State immediately and the secretary shall cause it to be immediately published in two daily newspapers of the state, is satisfied as to dispatch by the proclamation being issued September 18th and published September 21st. *Lewis v. Curry*, 103 Pac. 493, 496, 156 Cal. 93.

The requirements of Code Civ. Proc. § 3152, that the papers shall "forthwith" be sent to the justice to whom the transfer is made, and the plaintiff shall "forthwith" appear before him, indicate a purpose to have the order made at a time when, in the orderly course of the proceedings, the parties, or the plaintiff, at least, would be supposed to be before the justice, so that both parties would have notice that it was made, and so that on the receipt of the order by the justice to whom the action is transferred, it will be in a condition to be at once tried or further postponed as such latter justice shall determine. *De Zur v. Provost*, 90 N. Y. Supp. 1016, 1018, 99 App. Div. 14.

#### In service of writs or orders

A mittimus, directing the commitment of a girl to the state industrial school "forthwith," meant that she should be committed "as soon as may be," so that the fact that she was not committed because of a legal quarantine existing at the school when she was taken there by the officer would not require that she be released from custody. *In re Edson* 82 Atl. 664, 666, 85 Vt. 366.

Under Insolvency Act (St. 1880, p. 83, c. 87) § 7, providing that a copy of the order adjudicating one insolvent and appointing a time and place for a meeting of creditors shall be served "forthwith" by mail on all creditors, proof that the order was mailed four days after its making, but prior to the first publication thereof in a newspaper, and more than 30 days before the time fixed for the creditors' meeting, shows a compliance with the statute; the term "forthwith," like the term "immediate," not being construed as a time immediately succeeding, without an interval. *Newlove v. Mercantile Trust Co.* of



San Francisco, 105 Pac. 971, 976, 156 Cal. 657.

#### As to payment at tax sales

Where bids at a tax sale were made on November 15th, just before the close of the day, and the full consideration was paid on the next day, there was a compliance with Rev. Laws 1905, § 937, that the payment be "immediately" and "forthwith." *Minnesota Debenture Co. v. Scott*, 119 N. W. 391, 394, 106 Minn. 32.

### FORTUITOUS

A "fortuitous event," as defined in Code of 1825, is that which happens by a cause or force which we cannot resist. *Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 38 South. 873, 874, 115 Ga. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

A "fortuitous event" is an inevitable accident or a cause beyond human control, irresistible force, which means such an interposition of human agency as from its nature and power is absolutely uncontrollable. *Cook & Laurie Contracting Co. v. Denis*, 49 South. 1014, 1015, 124 La. 161 (citing *Bouvier "Casualty"*).

### FORTUNE TELLER

As disorderly person, see *Disorderly Person*.

Rem. & Bal. Code, § 2688, which defines one who practices "fortune telling" to be a vagrant, is constitutional, and extends to the vocation of professing to tell future events in one's life by casting horoscopes, etc., though the principles of astrology be followed. *State v. Neitzel*, 125 Pac. 939, 69 Wash. 567, 43 L. R. A. (N. S.) 203.

### FORWARD

See *Regularly Forward*.

"To forward," as used in a contract for the shipping of freight with a common carrier, the carrier agreeing "to forward" the freight from the point of shipment to destination, signifies to carry forward rather than to deliver to others for carriage. *Fatman v. Cincinnati, H. & D. R. Co.* (Ohio) 2 Disn. 248, 250 (citing *Blossom v. Griffin*, 13 N. Y. 569, 571, 67 Am. Dec. 75).

### FORWARD MOVEMENT

In ordinary speech the "forward movement" of a car implies that the car was in a state of repose when the movement began. *Peterson v. Metropolitan St. Ry. Co.*, 111 S. W. 37, 42, 211 Mo. 498 (citing *Flaherty v. St. Louis Transit Co.*, 106 S. W. 18, 21, 207 Mo. 318).

### FORWARDER

A "forwarding merchant" or "forwarder" is one who ships or sends forward goods

for others to their destination by the instrumentality of third persons without himself incurring the liability of a carrier to deliver them, and neither includes a consignor or shipping goods nor a carrier engaged in transporting them. In re *Emerson, Marlow & Co.*, 199 Fed. 95, 98, 117 C. C. A. 635.

### FORWARDING AGENT

As person, see *Person*.

### FORWARDING CARRIER

In a bill of lading stipulating that the liability of a forwarding carrier for loss shall cease on delivery to the connecting carrier, and that of a delivering carrier on delivery at the station of delivery, the term "forwarding carrier" applies to all carriers who transport goods to the delivering carrier, and the term "delivering carrier" to the carrier who actually delivers the goods at their destination. *Brunk v. Ohio & K. Ry. Co.*, 105 S. W. 443, 444, 127 Ky. 304.

### FORWARDING MERCHANT

A "forwarding merchant" or "forwarder" is one who ships or sends forward goods for others to their destination by the instrumentality of third persons without himself incurring the liability of a carrier to deliver them, and neither includes a consignor shipping goods nor a carrier engaged in transporting them. In re *Emerson, Marlow & Co.*, 199 Fed. 95, 98, 117 C. C. A. 635.

### FOUND

See *Find—Found*; *Office Found*.

### FOUND WITH THE WILL

Where a will makes reference to a sealed letter "found with the will," any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody at any time after the will was executed and "found with the will," would each fully and accurately answer the reference. *Appeal of Bryan*, 58 Atl. 748, 749, 77 Conn. 240, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393.

### FOUNDATION OF ACTION

That petitioner, for a writ of partition attaches as an exhibit to the petition a copy of the deed under which he claims title to an undivided interest in the land sought to be partitioned does not make such deed the foundation of an action, within Civ. Code 1895, § 5066, providing that a party in his plea or answer cannot deny a deed which is the foundation of the action, unless he makes affidavit of the truth of such plea or answer at the time of filing it. *Webb v. Till*, 67 S. E. 1034, 1035, 134 Ga. 388.

### FOUNDED ON CONSTITUTION

A seller of a traction engine for use by the buyer in the performance of his contract

with the government under the reclamation act (Act June 17, 1902, c. 1093, 32 Stat. 388), who as mortgagee for the price remained the owner with right to possession for the failure of the buyer to pay at maturity the first note for the price, could, on the government taking possession, as authorized by section 7 of the act, of the contractor's machinery and completing the work, sue the government for the value of the use of the engine either on an implied contract to pay therefor, or on its constitutional obligation within the Tucker act (Act March 3, 1887, c. 359, 24 Stat. 505), authorizing actions on claims founded on the Constitution or on contracts, express or implied. *United States v. Buffalo Pitts Co.*, 193 Fed. 905, 908, 114 C. C. A. 119.

### FOUNDED UPON A CONTRACT

A claim for damages for breach of contract is one "founded upon a contract," within the meaning of Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562, and is provable in bankruptcy. In *re Frederick L. Grant Shoe Co.*, 130 Fed. 881, 882, 66 C. C. A. 78.

A claim arising out of the conversion by stockbrokers of shares purchased and held by them on a customer's account, charging him with commission and interest, and crediting him with amounts received as margins, is provable under Bankr. Act. July 1, 1898, c. 541, § 63a, as a debt "founded upon an open account, or upon a contract, express or implied." *Crawford v. Burke*, 25 S. Ct. 9-13, 185 U. S. 176, 49 L. Ed. 147.

### FOUNDLING

Under Civ. Code, art. 213, providing that "the foundling whom persons from charity have received and brought up cannot be claimed by its father and mother," a "foundling" must be considered as a child without parents and as standing on the same footing as a child whose parents are dead. *Succession of Dupre*, 41 South. 324, 325, 116 Ga. 1090.

### FOUNTAIN

As city purpose, see City Purpose.

### FOUNTAIN PEN

As penholder, see Penholder.

### FOUR

Four successive weeks, see, also, Successive.

Notice to nonresidents, inserted in a weekly newspaper September 14, 21, 28, and October 6, 1899, was published "four consecutive weeks," within the meaning of section 79 of the Code, providing that "the publication must be made four consecutive weeks in some newspaper." *Burr v. Finch*, 136 N. W. 72, 73, 91 Neb. 417.

Rev. Codes, § 6521, requiring summons by publication to be published once a week for four successive weeks, and making the service complete on the day of the fourth publication, does not require the publication to cover four full weeks; four publications being sufficient. *Smith v. Collis*, 112 Pac. 1070, 1071, 42 Mont. 350, Ann. Cas. 1912A, 1158.

Gen. St. 1901, § 6346, in force prior to 1909, providing that the county treasurer should offer school land for sale after giving "four weeks' notice thereof" in a newspaper, required that a publication should be made 28 days before the day of sale. *Jackson v. Guss*, 120 Pac. 353, 354, 86 Kan. 280.

### FOURTH

Quarter synonymous, see Quarter.

### FOWL

Any useful fowl, see Any.

As animals, see Animals.

All lexicographers give the primary definition of "fowl" as "any bird." "The word 'fowl' and 'bird' have been used interchangeably for all generations." *State v. Davis*, 61 Atl. 2, 3, 72 N. J. Law, 345.

### FRACTION

In a deed describing the property as "all that fraction of land lying east of lot eight (8) and south of the alley in B.'s subdivision in block one (1) of A.'s second addition to the town of E. as platted and recorded in the clerk's office of B. county, and extending east to the street now known as T. street," the word "fraction" does not limit the description to block one (1) where the grantor at the time owned a tract 34 feet and 8 inches wide and 131 feet long, so as to exclude from the conveyance a strip outside of the block of a wedge-shape, 11 feet at one end and 34 feet wide at the other. *Lamson v. Village of Elm Creek*, 114 N. W. 277, 278, 80 Neb. 369.

### FRACTIONAL

Two lots on a plat were "fractional lots," where the irregular south boundary of the plat cuts the end line and the side line of one of the lots, leaving it roughly triangular in shape, and cuts off the corner of the other lot, leaving it in the shape of a parallelogram with one corner lopped off. *Miller v. Lavelle*, 110 N. W. 421, 422, 130 Wis. 500.

The purpose of the statutory provision that in all cases of addition to or deduction from assessments by the board of equalization, the rate of per cent. of addition or deduction shall be "even and not fractional," is to facilitate the labor of computing the decrease or increase, and hence an increase of 12½ per cent. is authorized. *Clark v. Lawrence County*, 111 N. W. 558, 21 S. D. 254.

The process by which kapak was manufactured from crude elaterite ore was called "fractional distillation." *Elaterite Paint & Mfg. Co. v. S. E. Frost Co.*, 117 N. W. 388, 390, 105 Minn. 239.

### FRACTURE

See Colles' Fracture; Pott's Fracture.

Greenstick fracture, see Greenstick Break or Fracture.

"Fracture," as applied to a bone, means a break. *Standen v. Pennsylvania R. Co.*, 63 Atl. 467, 469, 214 Pa. 189, 6 Ann. Cas. 408.

### FRAME

Miniature frames not dutiable as articles commonly known as jewelry, see Articles Within Tariff Act.

"Frame," as applied to a building, means wooden. A "frame building" is one constructed with a timber frame covered with boards or shingles, and does not include a wooden building covered with corrugated iron. *Olmstead v. People*, for Use of Town of Littleton, 91 Pac. 1113, 41 Colo. 32 (quoting and adopting the definition in 19 Cyc. p. 1450).

The word "frame," as used in San Francisco Ordinance No. 31, § 3, prohibiting the erection of "frame buildings" within fire limits, means wooden. *Morton v. Wessinger*, 113 Pac. 7, 8, 58 Or. 80 (citing 3 Words and Phrases, p. 2929).

A contract of sale of "window frames set with glass" embraces the sashes in which the glass is set, and also the frames. *Way v. Ryther*, 42 N. E. 1128, 165 Mass. 226.

### FRAMEWORK

In the act abolishing grade crossings (St. 1906, c. 463), which provides that, where a public way crosses a railroad by an overhead bridge, the framework of the bridge shall be maintained by the railroad and the surface of the bridge by the town, the word "surface" is not employed in its geometrical sense, as signifying a plane, but includes some degree of thickness. It is used in contradistinction to "framework," and is tantamount to the flooring of the bridge considered as a whole. The word "framework," as applied to things built or constructed, means that which furnishes form or strength, or both, and is the antithesis of "surface"; and, in the division of the whole structure of the bridge into these two parts, the word "framework" has some tendency to point out that which constitutes the carrying strength of the bridge, while "surface" relates more nearly to that which in the limits of the carrying strength supports the immediate burden of travel. The word "surface" includes both layers of the flooring, for the repair of which the town is liable. *Sullivan v. Boston & A. R. R.*, 96 N. E. 347, 348, 210 Mass. 229.

### FRANCHISE

See Corporate Franchise; Creative Franchise; Each Special Franchise; Elective Franchise; Exercising Corporate Franchise; Ferry Franchise; General Franchise; Part of Franchise; Primary Franchise; Public Franchise; Right and Franchise; Sale of Franchise and Property; Secondary Franchise; Special Franchise.

Destruction of, see Taking (In Eminent Domain).

Situs of franchise, see Situs.

Use of franchise, see Use—Used.

A "franchise," according to the definition given by Blackstone, is a royal privilege or branch of the king's prerogative subsisting in the hands of the subject, and, being derived from the crown, must arise from the king's grant. Corporate franchises in the American states emanate from the government or sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic. *City of Chicago v. Rothschild & Co.*, 72 N. E. 698, 699, 212 Ill. 590 (quoting and adopting definition in *Chicago City R. Co. v. People ex rel. Story*, 73 Ill. 541, 547).

A "franchise" is a special privilege conferred by the government on individuals. *Southern Ry. Co. v. Greene*, 49 South. 404, 406, 160 Ala. 396; *Central of Georgia Ry. Co. v. Gaston*, 49 South. 412, 160 Ala. 671.

"A 'franchise' is simply a special privilege granted by the state directly or through one of its mandatories." *Crocker v. Scott*, 87 Pac. 102, 111, 149 Cal. 575.

A "franchise" is a grant or special privilege conferred by the sovereign power of the state. *People ex rel. Fitzhenry v. Union Gas & Electric Co.*, 98 N. E. 768, 771, 254 Ill. 395.

"A 'franchise' is a special privilege emanating from the government by a legislative grant and vested in an individual person or in a body politic or corporate." *Leatherwood v. Hill*, 89 Pac. 521, 523, 10 Ariz. 243.

"A 'franchise' is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest." *Norfolk & P. Belt Line R. Co. v. Commonwealth*, 49 S. E. 39, 40, 103 Va. 289 [quoting and adopting definition in *California v. Cent. P. R. Co.*, 8 Sup. Ct. 1073, 127 U. S. 1, 32 L. Ed. 150].

A franchise is a grant of right by public authority, the main element of which is, in general, "permission" to do something which otherwise the grantee would not have the

right to do. *Western Union Telegraph Co. v. Wright*, 185 Fed. 250, 253, 107 C. C. A. 356.

In common usage, the term "franchise" refers to any special privilege or right conferred by legislative power on corporations or persons. The corporate right to exist is often called a franchise. *State v. Farmers' & Mechanics' Savings Bank of Minneapolis*, 130 N. W. 445, 447, 114 Minn. 95.

A "franchise" is a special privilege conferred by the government on individuals which does not belong to the citizens of the country generally by common right. *City of New York v. Interborough Rapid Transit Co.*, 104 N. Y. Supp. 157, 160, 53 Misc. Rep. 126 (quoting and adopting *Bank of Augusta v. Earle*, 13 Pet. [38 U. S.] 579, 10 L. Ed. 274); *Consolidated Gas Co. of Baltimore v. City of Baltimore*, 61 Atl. 532, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584 (citing 2 Wash. Real Prop. 303).

A "franchise" is a right or privilege granted by the sovereignty to one or more parties to do some act or acts, which they could not do without this grant from the sovereign power. *South McAlester-Eufaula Telephone Co. v. State ex rel. Baker-Reidt Mercantile Co.*, 106 Pac. 962, 968, 25 Okl. 524. Familiar illustrations are the right to be a corporation, to hold property, to sue and be sued as such, the right to build a bridge, or to operate a ferry over a public stream and to collect tolls therefor, the right to construct and operate on and in the streets of a city a street railway, waterworks, gasworks, electric light works to supply the city and its inhabitants with transportation, water, gas, and electric lights, respectively, and to take tolls therefor. In this country the title of every lawful franchise is derelined from the nation or the state, and the city of Denver had no power to grant any franchise which the Constitution and the laws of the state of Colorado had not authorized it to give. It is not, however, every privilege or permission granted by state or city to occupy or to use public rivers, highways, or streets that rises to the dignity of a franchise. A privilege granted by a city to a private party to occupy or use a portion of a public street temporarily for the construction of a building upon an abutting lot, for a cab stand, an apple stand, or for any similar commercial purpose, is a license and not a franchise. The exact line of demarcation between franchises and licenses may not be clearly drawn, but their general characters and limits are so well known and so clearly established that it is not difficult to assign many rights granted to the class to which they belong. A right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city waterworks, or gasworks, and

to collect tolls therefor, is a "franchise." A right or privilege not essential to the general function or purpose of the grantee, and of such a nature that a private party might grant a like right or privilege upon his property, such as a temporary or revocable permission to occupy or use a portion of some public ground, highway, or street, is a license and not a franchise. A privilege of the latter character, such as a permission to lay and operate a railroad across or for a short distance upon a public street, is a grant of an easement or right of way. An easement or right of way is not necessarily a creation of or a grant by the sovereignty. A private citizen may confer it over his own land, and the permission by a city to exercise such a privilege on one of its streets is of even less efficacy than such a private grant, because it is subject to the rights of the abutting owners, while the private owner's grant confers the perfect right of way over his property. The word "franchise" does not include within its true significance a revocable permission granted by a city to a company incorporated and empowered to perform its corporate functions by a state, to use for its purposes certain streets or parts of streets in the municipality. *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 10-13, 15, 20, 87 C. C. A. 619 (citing *Bank of Augusta v. Earle*, 13 Pet. [38 U. S.] 595, 10 L. Ed. 274; *Denver & S. Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673, 682; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 6 Sup. Ct. 252, 115 U. S. 650, 659, 29 L. Ed. 516; *Walla Walla v. Walla Walla Water Co.*, 19 Sup. Ct. 77, 172 U. S. 1, 9, 43 L. Ed. 341; *City of Denver v. Denver City Cable Ry. Co.*, 45 Pac. 439, 22 Colo. 565; *Donahue v. Morgan*, 50 Pac. 1038, 24 Colo. 389, 390, 400; *Thomas v. City of Grand Junction*, 56 Pac. 665, 13 Colo. App. 80, 81; *City of Denver v. Denver Union Water Co.*, 91 Pac. 918, 919, 41 Colo. 77).

It is a "franchise" to be empowered to build a bridge or keep a ferry over a public stream, with a right to demand tolls or to build a mill upon a public river. *Consolidated Gas Co. v. City of Baltimore*, 61 Atl. 532, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584 (citing *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh [Va.] 42, 36 Am. Dec. 374).

#### As commodity

See Commodity.

#### As contract or property right

A "franchise" is a contract between a city and the party to whom it is granted which cannot be revoked or annulled as an ordinary ordinance may be. *Shugars v. Hamilton*, 92 S. W. 564, 566, 122 Ky. 600.

What is commonly termed the "granting" of a franchise by a city for a public utility, such as a telephone franchise, is in the nature of a contract by the city with

the grantee for the performance of a public service, and the primary object is not the revenue to be obtained for the city, but the securing of efficient service upon such terms as will promote the greatest good. *Louisville Home Tel. Co. v. City of Louisville*, 113 S. W. 855, 859, 130 Ky. 611.

Under Rev. St. Mo. 1889, § 1589, authorizing cities of the fourth class to grant an exclusive franchise to furnish electric light to the city and its inhabitants for a term not exceeding 20 years, an ordinance granting such right, duly passed, signed by the mayor and accepted by the grantee, constitutes a contract binding on the city. *Monett Electric Light, Power & Ice Co. v. Incorporated City of Monett, Mo.*, 186 Fed. 360, 364.

A franchise is property which may survive the corporation that received and exercised it. *Knickerbocker Trust Co. v. Tarrytown, W. P. & M. Ry. Co.*, 123 N. Y. S. 954, 956, 139 App. Div. 305.

A "franchise" is property, and like other property may be taken for public use. *State v. Suffield & Thompsonville Bridge Co.*, 70 Atl. 55, 57, 81 Conn. 56 (citing *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716).

A "franchise" to construct waterworks in a city and use the streets for that purpose is "property." *Adams v. Bullock*, 47 South. 527, 530, 94 Miss. 27, 19 Ann. Cas. 165.

An ad valorem tax laid on franchises of public service corporations is a property tax; their "franchises" being deemed "property." *Board of Councilmen of City of Frankfort v. Capital Gas & Electric Light Co. (Ky.)* 96 S. W. 870, 872.

The "franchise" of a water company to collect rates for water is "property," and its value, as well as whatever value attaches to its business as a going concern, is to be considered in determining the value of its property for rate-fixing purposes, but the burden of proving such values rests upon the company. *Spring Valley Water Co. v. City and County of San Francisco*, 165 Fed. 667, 676.

The corporate "franchise," the right to be a corporation, created by the laws of the state and to conduct its corporate business in the state, whatever value might attach to such right and its exercise, are "property" of the corporation frequently possessing great value. *Marion Nat. Bank of Lebanon v. Burton*, 90 S. W. 944, 947, 121 Ky. 876, 10 L. R. A. (N. S.) 947.

A gas "franchise" is property, a vested right protected by the Constitution, while a "license" is a mere personal privilege, and revocable, except in rare instances and under peculiar conditions. *Elizabeth City v. Banks*, 64 S. E. 189, 191, 150 N. C. 407, 22 L. R. A. (N. S.) 925.

A "franchise" to one and to such persons as he might associate with him to construct and maintain a turnpike road and to collect tolls thereon, subject to supervision by county officers, granting a right of way, and fixing a time for the completion of the road, is "property," within Civ. Code, § 1044, providing that "property of any kind may be transferred except as otherwise provided by this article," and as such is transferable by assignment or in any other authorized mode of transferring real property. *People ex rel. Spiers v. Lawley*, 119 Pac. 1089, 1090, 17 Cal. App. 331.

The tax law (Laws 1881, c. 293), defining the terms "land," "real estate," and "real property" as including "all surface, underground, or elevated railroads," and the value of all "franchises" to construct or operate railroads in, under, above, or through streets, is not limited to street surface railroads only, but includes long distance surface steam railroads; and hence a "franchise" granted by the state to a steam surface railroad for its road in, under, above, or through streets is "property," and a special franchise, and taxable. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 133 N. Y. Supp. 135, 139, 74 Misc. Rep. 130, 145.

A corporate "franchise," the right to be and exist as a corporation, may constitute a valuable property of the corporation within the meaning of the term "property," as used in Const. art. 13, § 1, requiring all property to be taxed in proportion to its value, but the tax imposed on corporations by act March 20, 1905, as amended, imposing a license tax on all domestic corporations with certain exceptions, and all foreign corporations doing business in the state, forfeiting the charter or right to do business in the state on failure to pay, is not a tax upon "property," within that section, being a license fee for the privilege of existing as a corporation in case of domestic corporations, and for the privilege of doing business within the state in case of a foreign corporation. *Kaiser Land & Fruit Co. v. Curry*, 103 Pac. 341, 346, 155 Cal. 638.

Laws 1907, p. 126, c. 107, imposing on each domestic and foreign corporation a progressive annual license tax based on its authorized capital, imposes a license tax on the privilege of existing as a corporation, and does not impose a license tax on the "franchise" to carry on a particular business, and is not in conflict with Const. art. 13, § 2, 3, providing that all property, including "franchises," shall be taxed in proportion to value, etc., since corporate franchises may be property, or may not be deemed as property; the intention of the statute being that it should not be treated as property in such case. *Blackrock Copper Min. & Mill. Co. v. Tingey*, 98 Pac. 180, 182, 34 Utah, 369, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850.

A street railway company's unexercised right to construct tracks was a franchise, which is not property of substantial value for direct taxation. *United Rys. & Electric Co. v. City of Baltimore*, 73 Atl. 633, 634, 111 Md. 264.

"Under the statutes of this state, 'franchises' must be classed as property subject to taxation. The franchises so assessable may be classified, as creative and special. The creation of a corporation, the grant of power to exist and act as such, is in itself a franchise, and it has been distinctly decided that such franchise is assessable as property. This creative franchise is inseparable from the being or personality of the corporate body, and hence it must have its situs wherever the corporate entity has its domicile or residence, and this, in law, is the place where its principal place of business is situated." This being true, it follows under the express mandate of the statutes that such franchise must be assessed and taxed in the county where its principal place of business is located. *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 84 Pac. 285, 286, 2 Cal. App. 593.

The grant by a municipality of a franchise to use its streets is the exercise by delegation of a power which resides in the state, and which is by its nature governmental; hence, if grounds for forfeiture arise, the state may alone enforce it, and may alone waive it; for a franchise may be said to be a grant from the state to a corporation of authority to occupy the city streets, "licenses" to be the designation by the city council of the streets to be occupied, and "contracts" the stipulated arrangements between the companies and the city as to the manner of occupancy. *State, on Inf. of Jones, ex rel. City of St. Louis v. Light & Development Co. of St. Louis*, 152 S. W. 67, 75, 246 Mo. 618.

A "contract" can arise only from the meeting of two or more minds upon the same proposition. The law of 1905, empowering cities to regulate the supply of gas and to fix, "by contract or franchise," the price thereof, does not empower a city to fix by ordinance the price at which a gas company, possessing a franchise, shall supply gas to its consumers; the ordinance not being a contract unless accepted by the company, and not a "franchise" because not granting to the company a new right or extending an existing one. *City of Richmond v. Richmond Natural Gas Co.*, 79 N. E. 1031, 1032, 168 Ind. 82, 11 Ann. Cas. 746.

#### As corporate franchise

A franchise is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment.

*Rhinehart v. Redfield*, 87 N. Y. Supp. 789, 792, 93 App. Div. 410 (citing *Woods v. Lawrence Co.*, 66 U. S. [1 Black] 386, 409, 17 L. Ed. 122).

A "franchise" is not essentially corporate, and it is not the grant of a franchise but of a corporate franchise that is prohibited by Const. art. 4, § 31, prohibiting special laws granting corporate powers and privileges. *In re Southern Wisconsin Power Co.*, 122 N. W. 801, 806, 140 Wis. 245.

#### Corporation and corporate capacity

The franchise of being a corporation is a "franchise," within the meaning of Const. art. 13, § 1, providing for the taxation of all nonexempt property, and defining property as including moneys, credits, franchises and all other matters and things capable of private ownership. *Bank of California v. City and County of San Francisco*, 75 Pac. 832, 833, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130.

A "franchise" to be a corporation and conduct business comes from the commonwealth and is different in kind from a "permit" or "location" to such corporation to use the streets of a city. A permit or location is inferior and subsidiary to the franchise. A franchise involves a greater or less degree of comprehensiveness and generality and its exercise something of time and development. A permit, specification, or location is narrow and definite, adapted to immediate or early use or service, and depending upon present conditions. *Metropolitan Home Tel. Co. v. Emerson*, 88 N. E. 670, 671, 202 Mass. 402.

The "franchise" to be a corporation is what constitutes an artificial person. That is, breath or being, and not property. *Georgia R. & Banking Co. v. Wright*, 132 Fed. 912, 919 (citing *City of Atlanta v. Grant, Alexander & Co.*, 57 Ga. 340-346).

Corporate capacity is a "franchise." Corporations can exercise only such powers as are either expressly included in their franchise, or are fairly incidental to the enjoyment of it, and an attempt to do that which is ultra vires is a usurpation of what would be a franchise, if the right to do it had been granted. *Malone v. New York, N. H. & H. R. Co.*, 83 N. E. 408, 410, 197 Mass. 194 (quoting *California v. Central Pacific R. Co.*, 127 U. S. 1, 41, 8 Sup. Ct. 1073, 32 L. Ed. 150).

The right to incorporation with power to sue and be sued and to hold property as a corporate body is a "franchise." *Consolidated Gas Co. v. City of Baltimore*, 61 Atl. 532, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584 (citing *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh [Va.] 42, 36 Am. Dec. 374).

The right to be a corporation is frequently called a "franchise," as it is in one sense,

but not in the sense that the grant of a right to build a railroad in a public street is a "franchise." The charter of a corporation is its general franchise, which can be repealed at the will of the Legislature pursuant to its reserved power to repeal, while a special franchise is the right granted by the public to use property for public use, but with private profit, and such a franchise, when acted on, is vested property and cannot be repealed unless power to do so is reserved in the grant that it may be condemned on making compensation. *Lord v. Equitable Life Assur. Soc. of United States*, 87 N. E. 443, 448, 194 N. Y. 212, 22 L. R. A. (N. S.) 420.

#### **Distinguished from license**

Permission given by a city ordinance for the exercise of a corporate franchise within the city is a "license" and not a "franchise." *People ex rel. Fitzhenry v. Union Gas & Electric Co.*, 98 N. E. 768, 771, 254 Ill. 395.

The right to construct a street railway within any municipality comes from the state as a "franchise," while the power to consent and designate the streets to be occupied comes from the municipality as a "license" or contract right. *Potter v. Calumet Electric St. R. Co.*, 158 Fed. 521, 527 (citing *Chicago City Ry. Co. v. People ex rel. Story*, 73 Ill. 541).

A gas "franchise" is property, a vested right protected by the Constitution, while a "license" is a mere personal privilege, and revocable, except in rare instances and under peculiar conditions. *Elizabeth City v. Banks*, 64 S. E. 189, 191, 150 N. C. 407, 22 L. R. A. (N. S.) 925.

A "franchise" is a privilege which emanates from the sovereign power of the state or government. A power conferred upon a railroad company by ordinance to locate and maintain a railroad in the streets of a city is a "license" which, after the road is built, may be irrevocable, but such ordinance does not create or confer on the railroad company, constructing the railroad in the street, a "franchise." The "license" granted by the ordinance is no more a "franchise" than would be a grant of right of way by a private citizen to the company to construct its road over his lands, and it is as competent for the city as for a private owner to extend the time of performance or to amend, modify, or annul the contract by mutual agreement. *City of Chicago v. Rothschild & Co.*, 72 N. E. 698, 699, 212 Ill. 590 (citing *Chicago City Ry. Co. v. People ex rel. Story*, 73 Ill. 541, 547; *Metropolitan City Ry. Co. v. Chicago West Division Ry. Co.*, 87 Ill. 317; *Board of Trade of Chicago v. People ex rel. Sturges*, 91 Ill. 80; *Mills v. Parlin*, 106 Ill. 60; *Chicago Municipal Gaslight & Fuel Co. v. Town of Lake*, 22 N. E. 616, 130 Ill. 42; *City of Belleville v. Citizens' Horse Ry. Co.*, 38 N. E. 584, 152 Ill. 171, 26 L. R.

A. 681; *People ex rel. City of Pontiac v. Central Union Tel. Co.*, 61 N. E. 428, 192 Ill. 307, 85 Am. St. Rep. 338; *Rostad v. Chicago Suburban Water & Light Co.*, 71 N. E. 978, 211 Ill. 248; *Davis v. City of New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Bank of Augusta v. Earle*, 13 Pet. 579, 10 L. Ed. 274; *City of Bridgeport v. New York & New Hampshire R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 800).

A right not essential to the general purpose of a grantee, and such that a private party might grant over his property, such as a revocable permission to occupy a portion of some public ground, highway, or street, is a license and not a "franchise." *McL'hee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 10, 87 C. C. A. 619.

A resolution of the board of trustees of a town to let a telephone company put up telephone poles on certain streets, though acted upon by the company, is not the grant of a franchise within Const. § 164, providing that no municipality shall grant any franchise for a term exceeding 20 years, and that, before granting such franchise, it shall first advertise for bids therefor, but is a mere license, which may be withdrawn at any time, and hence a license or occupation tax may be imposed on the company by the municipality. *Cumberland Telephone & Telegraph Co. v. City of Calhoun*, 151 S. W. 659, 661, 151 Ky. 241.

#### **As exclusive right**

Legislative "grants of franchises" to lay gas pipes and mains in highways, whether granted by special charters or under general laws, confer privileges which are necessarily exclusive in their nature, as against all persons upon whom similar rights have not been conferred. Any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power but operates as a direct invasion of the private rights of those upon whom the franchises have been so conferred. *Millville Gas Light Co. v. Vineland Light & Power Co.*, 65 Atl. 504, 505, 72 N. J. Eq. 305.

The exclusive privilege of incinerating house refuse and garbage in a city is in the nature of a "franchise," if not such in the strict sense of the term, which has several significations. *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 29, 40, 61 C. C. A. 91.

#### **Ferry**

Under Shannon's Code, §§ 1696-1699, 1703, empowering the county court to authorize the owner of a ferry landing, or the owner of land on each side of a river, to operate a ferry, etc., the operation of a ferry is a "franchise" which may be granted by the county court. *Gulnn v. Eaves*, 101 S. W. 1154, 1155, 117 Tenn. 524.

**As granted by contract**

A contract by which a company agreed to erect and maintain lamp posts and fixtures to light the streets of a city for a term of 10 years was not the grant of a franchise by the city. *City of Des Moines, Iowa, v. Welsbach Street Lighting Co. of Delaware*, 188 Fed. 906, 909, 110 C. C. A. 540.

Under Greater New York Charter (Laws 1901, c. 466) § 74, as amended by Laws 1905, c. 629, § 12, and chapter 630, prescribing the proceedings prior to a grant of a franchise by the city, and section 242, relating to the powers of the board of estimate, as amended by Laws 1905, c. 629, § 14, and Rapid Transit Act (Laws 1891, c. 4) § 5, as amended by Laws 1905, c. 631, the making of a contract by the city of New York merely for the construction of a subway, which is to be and remain the property of the city, does not grant to the contractor a "franchise" in the street, within the meaning of such charter provisions, requiring the independent approval of the mayor in certain cases. *Admiral Realty Co. v. Gaynor*, 132 N. Y. Supp. 220, 223, 147 App. Div. 719.

**Grant from government essential**

A "franchise" is a right or privilege granted by the sovereignty to one or more parties to do some act or acts, which they could not do without this grant from the sovereign power. *South McAllister-Eufaula Telephone Co. v. State*, 106 Pac. 962, 968, 25 Okl. 524; *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 10, 87 C. C. A. 619.

A "franchise" was originally a royal privilege or branch of the king's prerogative subsisting in the hands of the subject, and, being derived from the crown, arose only from the king's grant. *People ex rel. Abraham v. Perley*, 123 N. Y. Supp. 436, 437, 67 Misc. Rep. 471.

A "franchise" is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power; a privilege or immunity of a public nature, which cannot legally be exercised without legislative grant. *State v. Twin Village Water Co.*, 56 Atl. 763, 768, 98 Me. 214.

"A 'franchise' is a special privilege, conferred by grant from the sovereign power, not belonging to the citizen of common right. It must be derived from the laws of the state and emanate from the sovereign power, and it cannot be exercised by an individual on his own lands without the consent of the state." *Wilder v. Aurora, De Kalb & R. Electric Traction Co.*, 75 N. E. 194, 203, 216 Ill. 493 (quoting and adopting definition in *Goddard v. Chicago & Northwestern Ry. Co.*, 66 N. E. 1066, 1067, 202 Ill. 362, 368).

**Immunity from taxation**

A "franchise" is "a privilege or exemption from ordinary jurisdiction as for a corporation to hold pleas to such a value, etc., and sometimes it is an immunity from tribute, whether it is either personal or real" (quoting from *Jacob's Law Dictionary*). Though there are cases which seem to question this definition to its fullest extent, and which do not extend it to exemptions from taxation, still it is held by the highest authority that such an exemption is "part of the franchise" and often a valuable or essential part of it. *Columbia Water Power Co. v. Campbell*, 54 S. E. 833, 837, 75 S. C. 34 (citing *Wilmington & W. R. v. Reid*, 13 Wall. [80 U. S.] 264, 20 L. Ed. 568; *Gulf & S. I. R. R. Co. v. Hewes*, 22 Sup. Ct. 26, 29, 183 U. S. 67, 74, 46 L. Ed. 80).

**As incorporeal hereditament**

A franchise is an incorporeal hereditament, a privilege or authority vested in certain persons by grant of the state to exercise powers or to do and perform acts which without such grant they could not do or perform. It does not involve an interest in land, and is a privilege which may be owned without the acquisition of realty, and the use of a franchise may require the occupancy, or even the ownership of land without making the franchise itself an interest in land. *State v. Portland General Electric Co.*, 95 Pac. 722, 731, 52 Or. 502.

A franchise is a special privilege conferred upon individuals or corporations by governmental authority to do something that cannot be done of common right and is an incorporeal hereditament. *Leonard v. Baylen Street Wharf Co.*, 52 South. 718, 719, 59 Fla. 547, 31 L. R. A. (N. S.) 636.

The "franchise" extended by Const. art. 11, § 19, to lay pipes and conduits or erect poles, and supply the inhabitants of a city with artificial light, is an incorporeal hereditament, or real estate in the nature of an easement, pertaining to the streets of a city wherein it is exercised. *Stockton Gas & Electric Co. v. San Joaquin County*, 83 Pac. 54, 58, 148 Cal. 313, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511.

**As land**

See Land.

**As liability**

See Liability.

**Liquor license**

A liquor license is not a franchise which is a special privilege conferred by the government, and which has the legal character of property in which the holder has a vested right, and is under constitutional guaranties, and is not a contract between the state and the licensee, giving the latter vested rights, but is merely a permit to the licensee to carry on the sale of intoxicants under restrictions, and its validity cannot be tested by quo war-



ranto. *State v. Gibbs*, 74 Atl. 229, 82 Vt. 526, 24 L. R. A. (N. S.) 555, 18 Ann. Cas. 525.

A license to keep a dramshop is not a franchise, which can be tested or vacated by quo warranto. *Hargett v. Bell*, 46 S. E. 749, 750, 134 N. C. 394.

#### Permit or location distinguished

A "franchise" to be a corporation and conduct business comes from the commonwealth and is different in kind from a permit or "location" to such corporation to use the streets of a city. A permit or location is inferior and subsidiary to the "franchise." A franchise involves a greater or less degree of comprehensiveness and generality, and its exercise something of time and development. A permit specification or location is narrow and definite, adapted to immediate or early use or service, and depending upon present conditions. *Metropolitan Home Tel. Co. v. Emerson*, 88 N. E. 670, 671, 202 Mass. 402.

A privilege granted by a city to an ordinary railroad company to lay and operate its railroad across or along the streets of a city is termed a "permit," a "license," an "easement," or a "right of way," but never a "franchise." *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 15, 17, 87 C. C. A. 619 (citing *City of Denver v. Bayer*, 2 Pac. 6, 7 Colo. 113; *Denver Circle R. Co. v. Nestor*, 15 Pac. 714, 10 Colo. 403, 405, 415, 419, 420, 423; *Jackson v. Kiel*, 22 Pac. 504, 13 Colo. 378, 381, 6 L. R. A. 254, 16 Am. St. Rep. 207; *Jackson v. Ackroyd*, 26 Pac. 132, 15 Colo. 583; *People ex rel. Dyett v. McMurray*, 61 Pac. 226, 27 Colo. 277, 281; *Barber Asphalt Pav. Co. v. City of Denver*, 72 Fed. 336, 337, 19 C. C. A. 139; *Metropolitan City Ry. Co. v. Chicago W. D. Ry. Co.*, 87 Ill. 317, 322; *Lincoln St. Ry. Co. v. City of Lincoln*, 84 N. W. 802, 807, 61 Neb. 109, 126; *Crowder v. Town of Sullivan*, 28 N. E. 94, 128 Ind. 486, 13 L. R. A. 647; *People ex rel. Kunze v. Ft. Wayne & E. Ry. Co.*, 52 N. W. 1010, 92 Mich. 522, 16 L. R. A. 752; *Hayes v. Michigan Central R. R. Co.*, 4 Sup. Ct. 369, 111 U. S. 228, 229, 28 L. Ed. 410; *East Alabama Ry. Co. v. Doe*, 5 Sup. Ct. 869, 114 U. S. 340, 29 L. Ed. 136; *City of Knoxville v. Africa*, 77 Fed. 501, 507, 23 C. C. A. 252, 258; *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 64 Fed. 628, 633, 643, 12 C. C. A. 365, 370, 380, 26 L. R. A. 667; *City of Detroit v. Detroit City Ry. Co.*, 56 Fed. 867, 874; *Linden Land Co. v. Milwaukee Electric Railway & Light Co.*, 83 N. W. 851, 107 Wis. 493).

#### As real property

See Real Property.

#### As rights, privileges, and immunities

"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with 'rights,' 'privileges,' and 'immunities,' though of a personal and temporary character, so that, if any one of these

exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the 'franchises' of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The 'franchises' of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value, such as the 'franchise' to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to the purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." *Lake Drummond Canal & Water Co. v. Commonwealth*, 49 S. E. 506, 509, 103 Va. 337, 68 L. R. A. 92 (quoting and adopting the definition in *Morgan v. State of Louisiana*, 93 U. S. 217, 23 L. Ed. 860, and citing *Humphrey v. Pegues*, 16 Wall. [83 U. S.] 244, 21 L. Ed. 326; *East Tennessee, V. & G. Co. v. Hamblen County*, 102 U. S. 273, 26 L. Ed. 152; *Pickard v. East Tennessee, V. & G. R. Co.*, 9 Sup. Ct. 640, 130 U. S. 630, 32 L. Ed. 1051; *Keokuk & W. R. Co. v. Missouri*, 14 Sup. Ct. 592, 152 U. S. 301, 38 L. Ed. 450; *Chesapeake & O. R. Co. v. Miller*, 5 Sup. Ct. 813, 114 U. S. 176, 29 L. Ed. 121; *Norfolk & Western Ry. Co. v. Pendleton*, 15 Sup. Ct. 413, 156 U. S. 667, 39 L. Ed. 574; *Wicomco County Com'rs v. Bancroft*, 135 Fed. 977, 981, 70 C. C. A. 287 (quoting and adopting definition in *Chesapeake & O. R. Co. v. Miller*, 5 Sup. Ct. 813, 114 U. S. 185, 29 L. Ed. 121, which adopted definition in *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860).

The word "franchise," as used in *Cobbe's Ann. St.* 1903, § 10,477, relating to taxation, includes all rights and privileges granted to or exercised by a person, association, or corporation engaged in the express, telegraph or telephone business in the state. *Western Union Telegraph Co. v. City of Omaha*, 103 N. W. 84, 85, 73 Neb. 527.

#### Right to be or exist distinguished from powers

The word "franchise," as used in section 68 of the Public Service Commissions Law, providing that no electrical corporation shall begin construction or exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, without first having obtained permission of the proper commission, refers to the secondary franchise or consent of the local authorities and not to the primary franchise to be a corporation and do business as such, derived from the fact of incorporation. An electric franchise owned by

a corporation granted in 1887, and actually exercised by another company then owning it, by supplying electricity to customers in 1889 and 1890, when it was driven out of business, did not fall within either class of franchises referred to in such section 68 (Laws 1907, c. 429). *People ex rel. Long Acre Electric Light & Power Co. v. Public Service Commission for First District*, 122 N. Y. Supp. 641, 137 App. Div. 810.

The term "franchise" when applied to corporations has various significations, both in a legal and popular sense, and has two well-defined meanings, one pertaining to what is sometimes called the "primary franchise," or the right to exist as a corporation, and the other to the different rights, privileges, and powers which are obtained by the corporation, and which are not a prerequisite to corporate existence, such as the right to occupy and use public places for the operation of a system of water or gas works, electrical lighting plants, railroads, etc. *Cooper v. Utah Light & Ry. Co.*, 102 Pac. 202, 206, 35 Utah, 570, 136 Am. St. Rep. 1075 (citing 3 Words and Phrases, pp. 2929-2941; 19 Cyc. 1451).

The term "franchise," as applied to a corporation, means a special privilege conferred by the state which does not belong to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority. Corporations usually possess many powers which are not franchises or privileges in that sense, such as the right to receive money on general or special deposit, to lend money on securities, to discount or purchase bills, notes, or other evidences of indebtedness, and, as applied to banks of issue, the only franchise or privilege which they possess, aside from the mere right to exist and act as a corporation, is that of issuing their notes to circulate as money. *Northwestern Trust Co. v. Bradbury*, 127 N. W. 386, 388, 112 Minn. 76 (quoting and adopting the definition in *International Trust Co. v. American Loan & Trust Co.*, 65 N. W. 78, 632, 62 Minn. 501).

The "franchise" of a corporation comprises its existence, its activity, and its liability, the right to be, the power to do, and the liability of being acted upon; and these are sometimes called separate and independent franchises. The franchise to be is only one of its franchises. The franchise to do is a combination of independent franchises embracing all things which the corporation is given power to do, and may be denominated its active powers, those powers which, when properly exercised, render it successful and valuable. For the purposes of taxation, franchises to do may go wherever the work of the corporation is done, and, exercised in connection with the tangible property which it holds, create substantive matter of taxation to be asserted by every state in

which that tangible property is found. *Rhode Island Hospital Trust Co. v. Tax Assessors of Providence*, 55 Atl. 877, 879, 25 R. I. 355 (citing *Adams Exp. Co. v. Ohio State Auditor*, 106 U. S. 224, 225, 17 Sup. Ct. 604, 41 L. Ed. 965.)

The word "franchise" means the right of a corporation to exist as such, which right does not partake of the incidents of property, and it also means the right of an existing corporation to carry on a particular enterprise, which right is property, which may be sold as any other tangible property. *Blackrock Copper Min. & Mill. Co. v. Tingey*, 98 Pac. 180, 182, 34 Utah, 369, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850.

#### **Right to connect store with elevated railroad**

Where a city ordinance granted the right to maintain an elevated passageway connecting a store building with an elevated railroad, and limited the right to maintain such elevated road to a term of 50 years, such right was neither a "franchise" nor a "freehold interest"; and hence a writ of error, in a suit to restrain the city from interfering with the construction of the passageway, was not issuable direct from the Supreme Court in the first instance. *City of Chicago v. Rothschild & Co.*, 72 N. E. 698, 699, 212 Ill. 590.

#### **Right to construct and operate railroad**

It is the elementary definition of a "franchise" that it is a grant from a sovereign power, and a franchise to construct and operate a railroad is a grant from the state, although the consent of local authorities must be obtained. It may be granted to individuals and when granted becomes property and cannot be arbitrarily recalled unless power to do so is reserved in the grant, but it is subject to forfeiture by failure to exercise it within a reasonable time, if no time is specified, or by abandonment, after it has been exercised. *City of New York v. Bryan*, 89 N. E. 467, 469, 196 N. Y. 158.

Railroad Law, § 4, subd. 4, granting railroads the right to construct their roads across highways is a grant to cross streets subsequently opened, and such a grant is a "franchise" within the tax law, imposing a tax on special franchises to construct and operate railroads across and on streets. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 133 N. Y. Supp. 135, 143, 74 Misc. Rep. 130, 145.

#### **Right to construct and operate street railroad**

The right to construct and operate a street railway or other similar public utility is a "franchise" derived from the state. *State v. Des Moines City Ry. Co.*, 109 N. W. 867, 872, 135 Iowa, 694.

"A 'franchise' is a special privilege conferred by the government on individuals which does not belong to the citizens of a country generally by a common right. A special 'franchise' is the right granted to a corporation to construct, maintain, or operate in a public highway some structure intended for public use which, except for the grant, would be a trespass." *City of New York v. Interborough Rapid Transit Co.*, 104 N. Y. Supp. 157, 160, 53 Misc. Rep. 126 (quoting *People ex rel. Metropolitan St. Ry. v. Tax Commissioners*, 67 N. E. 69, 174 N. Y. 417, 63 L. R. A. 884, 105 Am. St. Rep. 674).

#### **Right to construct and operate telephones**

"A 'franchise' to operate a telephone is a privilege to operate a public business." *Lowther v. Bridgeman*, 50 S. E. 410, 411, 57 W. Va. 306.

The consent of a city granted by ordinance to a person and his successors and assigns to construct a telephone system within its limits is not a franchise, although such consent is necessary under the Constitution and statutes of the state. *Dakota Central Telephone Co. v. City of Huron*, 165 Fed. 226, 231.

#### **Right to maintain dam**

Rights granted by the Legislature as to maintaining a dam of a special height in a stream, which parties had and claimed, held to be in their essential nature "franchises," within the meaning of the law relative to quo warranto. *State ex rel. Attorney General v. Norcross*, 112 N. W. 40, 44, 132 Wis. 534, 122 Am. St. Rep. 998 (citing 3 Words and Phrases, p. 2929).

#### **Right to take tolls**

Const. Cal. art. 14, § 2, defines as a "franchise" the right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof. The value of such a franchise, then, is the monetary value of the right to collect water rates. *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667, 693.

#### **Right to use public streets**

A right to occupy the streets is a "franchise" for purposes of taxation. *Postal Telegraph-Cable Co. v. City of Los Angeles*, 128 Pac. 19, 20, 164 Cal. 156.

The word "franchise," as used with reference to the rights derived by Laws III. 1859, pp. 530, 532, as amended by acts of 1861 and 1865 incorporating the Chicago City Railways, and granting necessary rights in the streets selected and thereafter to be selected, means the grant from the city of authority to occupy the streets. *Govin v. City of Chicago*, 132 Fed. 848, 857.

The grant by a municipality of a franchise to use its streets is the exercise by

delegation of a power which resides in the state, and which is by its nature governmental; hence, if grounds for forfeiture arise, the state may alone enforce it, and may alone waive it; for a franchise may be said to be a grant from the state to a corporation of authority to occupy the city streets, "licenses" to be the designation by the city council of the streets to be occupied, and "contracts" the stipulated arrangements between the companies and the city as to the manner of occupancy. *State, on Inf. of Jones, ex rel. City of St. Louis v. Light & Development Co. of St. Louis*, 152 S. W. 67, 75, 246 Mo. 618.

Under a valid ordinance conferring on a subway company the right to the use of streets for the construction and operation of electrical conduits, at a semiannual rent, it is immaterial whether such grant be called a mere "consent" of the city to the exercise of a franchise already conferred by the state, or whether it is called a "franchise." *National Subway Co. v. City of St. Louis*, 69 S. W. 290, 293, 169 Mo. 319.

The grant by a city of the exclusive privilege to construct a waterworks plant and to use the streets for that purpose was the grant of a "franchise," within the narrowest definition of the word. It is the grant of a valuable right, constitutes property, and is taxable. It is distinct in its nature from any sort of property which may be described for purposes of taxation as "capital invested in merchandise and manufacturing." The grant by the sovereign power of any exclusive valuable right is a franchise and taxable property, whether it be in the form of a contract or some other manner of giving the right. *Adams v. Bullock*, 47 South. 527, 529, 94 Miss. 27, 19 Ann. Cas. 165.

The authority to use public streets for railroad purposes is a right or privilege, which, for convenience, is called a "franchise" and proceeds from the state. *Village of Phoenix v. Gannon*, 108 N. Y. Supp. 255, 256, 123 App. Div. 93.

Right to place gas pipes and mains in the streets of a city for distribution of gas for use is a franchise, the privilege of exercising which can only be granted by the state or by the city acting under legislative authority. *Elizabeth City v. Banks*, 64 S. E. 189, 191, 150 N. C. 407, 22 L. R. A. (N. S.) 925.

The right to occupy the public streets with a railway depends entirely upon legislative grant, and is therefore a "franchise," notwithstanding the fact that the terms of such grant and their acceptance constitutes also a contract. *State v. Des Moines City Ry. Co.*, 109 N. W. 867, 872, 135 Iowa, 694.

Under section 361a of the Civil Code, providing for the transfer of corporate "franchises," the term is aptly used to describe

the class of property belonging to quasi public corporations possessing rights and privileges which they had acquired and possessed after they became incorporated, and which they had devoted to public service. Where a water company had laid its pipes in the streets of a city, and was using the streets as a way through which to transmit water to the users, and had a right thus to do, this right, when made available by actual possession and use, is appropriately designated as "franchise." *City of South Pasadena v. Pasadena Land & Water Co.*, 93 Pac. 490, 493, 152 Cal. 579.

A right granted by ordinance to a corporation to operate an interurban railway on the streets of a city is a "franchise" within the meaning of Gen. St. 1905, § 5150, relating to quo warranto, and authorizing an action to be brought by a person claiming an interest in the franchise or any interest adverse to the same, so that a franchise may be annulled for proper cause in an action of that character. *City of Olathe v. Missouri & K. I. Ry. Co.*, 96 Pac. 42, 78 Kan. 193.

Under Code Civ. Proc. § 1948, providing that the Attorney General may sue a person who usurps, intrudes into, or unlawfully holds or exercises a franchise within the state, he may not sue a gas company to prevent further exercise of its rights in streets on ground that municipal grants or consents to their use have terminated by expiration of the period for which given, since such consents are not "franchises" within the statute, and, if they were, the matter is local, within control of the city, which may by appropriate proceedings effectuate withdrawal thereof. *People v. Consolidated Gas Co.*, 115 N. Y. Supp. 393, 396, 130 App. Div. 626.

The right to occupy streets with gas mains is a "franchise." *Consolidated Gas Co. v. City of Baltimore*, 61 Atl. 532, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584 (citing *State ex rel. Attorney General v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242).

Const. § 163, provides that no telephone company within a city or town shall construct its poles or other apparatus along, over, under, or across the streets, alleys, or public grounds of a city or town without the consent of its legislative authority, and section 164 prohibits the town from granting such consent, except on advertisement and sale to the highest bidder. Held, that a telephone franchise within such section was not the right to operate a telephone exchange in a city, but the right to occupy some portion of the public streets for the maintenance of such line. *Bland v. Cumberland Telephone & Telegraph Co. (Ky.)* 109 S. W. 1180, 1181.

The word "franchise," as used in the law of 1905, empowering cities to regulate

the supply of gas and to fix by contract or "franchise" the price thereof, refers to a grant by the municipality of a special right or privilege to use its streets, alleys, and public places for the purpose of supplying heat, light, or water. Such franchises are ordinarily granted by ordinance or resolution upon prescribed terms and conditions and for a specified term of years. An ordinance providing that it shall be unlawful for any person, company, or corporation using and occupying the streets and other public grounds of the city for the purpose of supplying gas, or for any officer, or agent, or employé of such person, company, or corporation, to charge more than 30 cents for each 1,000 cubic feet of gas is without any of these characteristics, since it neither grants a new right nor confirms or extends an existing one, but merely seeks to impose an existing right to the streets and alleys of the city. *City of Richmond v. Richmond Natural Gas Co.*, 79 N. E. 1031-1033, 168 Ind. 82, 11 Ann. Cas. 746.

#### Of corporation

Strictly speaking, the franchise of a corporation consists of the rights, powers, and privileges given by the act incorporating it, or the certificate of incorporation. *People v. Consolidated Gas Co.*, 115 N. Y. Supp. 393, 395, 130 App. Div. 626.

A corporate "franchise" is the right or privilege to exist and do business as a corporation, or its business opportunity and capacity. In *re Stevens*, 95 N. Y. Supp. 297, 313, 46 Misc. Rep. 623 (citing *People ex rel. Union Trust Co. v. Coleman*, 27 N. E. 818, 126 N. Y. 433, 437, 12 L. R. A. 762).

The word "franchises," in Const. art. 13, § 2, providing that all property defined to include franchises shall be taxed in proportion to value, when considered in connection with sections 3 and 12, and article 12, § 7, authorizing a franchise tax, and providing that no corporation shall alienate any franchise, etc., does not include the mere right of a corporation to exist as such, but means the right granted to an existing corporation to carry on specified business. *Blackrock Copper Min. & Mill. Co. v. Tingey*, 98 Pac. 180, 182, 34 Utah, 369, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850.

A tax on a corporate franchise is not a tax on the right to be a corporation, for the right to be a corporation is a right or franchise belonging to the individuals who compose the corporation, and not to the corporation itself; its "franchise" being the right to carry on the business for which chartered. *Southern Ry. Co. v. Greene*, 49 South. 404, 405, 160 Ala. 396; *Central of Georgia Ry. Co. v. Gaston*, 49 South. 412, 160 Ala. 671.

The term "franchise," as used in Ky. St. 1903, § 4077, imposing a franchise tax on corporations engaged in freight traffic, etc., is

not the right to do the thing, but the doing of it in fact, so it is no answer to a corporation's liability for such tax that its engaging in such business is *ultra vires*. *James v. Kentucky Refining Co.*, 113 S. W. 468, 470, 132 Ky. 353.

The word "franchise," in Ky. St. 1903, §§ 4077-4080, providing for the assessment of a corporation's franchise, embraces all the intangible property of the company, and is not used in its strict technical sense. *Commonwealth v. Chesapeake & O. Ry. Co.* (Ky.) 91 S. W. 672, 674.

#### Of railroad company

The intangible thing known as a corporate "franchise" has no local situs for the purposes of local taxation, but appertains to the whole road. *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 84 Pac. 771, 774, 149 Cal. 83.

#### Of street railroad company

A street railway franchise is a "franchise," within the meaning of Rev. St. 1898, § 3466, providing for actions in the name of the state by the Attorney General when any person unlawfully holds or exercises any franchise. *State ex rel. Vilter Mfg. Co. v. Milwaukee, B. & L. G. R. Co.*, 92 N. W. 546, 548, 116 Wis. 142.

#### Of telegraph or telephone companies

Under the amendment of 1900 to the Constitution, and Laws 1901, c. 26, providing for the taxation of franchises of telegraph or telephone companies, the word "franchise" should not be taken as meaning simply direct authority from the state to do business, thus excluding from taxation a railway company not having a separate franchise to do a telegraph business, but which has assumed such franchise and is doing such business, since it is estopped to deny that it has a franchise. *Minneapolis, St. P. & S. S. M. Ry. Co. v. Oppergard*, 118 N. W. 830, 832, 18 N. D. 1.

Where a "franchise" of constructing and operating telegraph lines along post roads had been granted to a corporation by Congress, a city ordinance purporting to grant to the corporation a franchise to use the city streets for its poles and regulating the manner of such use was a mere attempt to give what the company already had, and did not create a "franchise" which could be taxed. *Western Union Tel. Co. v. City of Visalia*, 87 Pac. 1023, 1025, 149 Cal. 744.

#### FRANCHISE REQUIREMENT

A law requiring as a test of party fealty that the elector shall subscribe an oath stating that he belongs to an organized political party and requiring him to designate it therein by name and making the required oath a condition precedent to the right of an elector to participate at the party primary election is not unconstitutional as prescribing an added "franchise requirement."

*State v. Flaherty*, 136 N. W. 76, 78, 23 N. D. 313, 41 L. R. A. (N. S.) 132.

#### FRANCHISE TAX

A "franchise tax" is a tax on the privilege of doing business under corporate organization. *State v. Clement Nat. Bank*, 78 Atl. 944, 949, 84 Nt. 167, Ann. Cas. 1912D, 22.

The words "franchise tax" have a special meaning, and signify the annual license fee exacted by the state for the privilege of doing business in corporate form. *City of Newark v. Tunis*, 78 Atl. 1066, 1071, 81 N. J. Law, 45.

In taxing a bank's intangible property which includes its capital not invested in taxable property, the tax is called a "franchise tax." *Marion Nat. Bank of Lebanon v. Burton*, 90 S. W. 944, 949, 121 Ky. 876, 10 L. R. A. (N. S.) 947.

The tax imposed by Rev. St. Me. 1883, c. 6, § 55, providing that express companies shall apply to the state treasurer for a license to do business and shall pay to the treasurer annually  $1\frac{1}{2}$  per cent. of the gross receipts of such business as shall be done in the state, including a pro rata part on all express business coming from other states or countries into this state and on all going from this state to other states or countries, section 56 requiring the making of an annual return by the corporations affected, and section 57, providing that the tax assessed shall stand in place of all local taxation, was a "franchise tax." *State v. Boston & Portland Exp. Co.*, 61 Atl. 697, 698, 100 Me. 278.

The "franchise tax" imposed by the act of 1900 (P. L. 1900, p. 502) is in the nature of a license tax and not a tax on property. *North Jersey St. R. Co. v. Jersey City*, 63 Atl. 833, 834, 73 N. J. Law, 481.

The tax on a corporate franchise does not depend on the profits or amount of the business of the corporation, but it is a payment for the privilege of doing business as a corporation. *New York Terminal Co. v. Gaus*, 124 N. Y. Supp. 200, 202, 139 App. Div. 347.

#### FRANCHISE VALUE

The words "franchise value," as used in Revenue Laws, § 78, are used in a broad sense, and really mean the value of the intangible property. This may or may not include "corporate franchise," since it may be either an individual or a copartnership or a corporation which conducts the business, and the "corporate franchise," if included, is only an incident and not the subject-matter which it was intended to tax. *Western Union Telegraph Co. v. City of Omaha*, 103 N. W. 84, 88, 73 Neb. 527.

#### FRANK

As commerce, see Commerce.

The commonly accepted meaning of the word "frank" is that it refers only to prop-

erty, telegrams, and the like. *United States v. Wells Fargo Exp. Co.*, 161 Fed. 606, 616.

The term "franks," as used in the Anti-Free Pass Law, means authority for free service. *Texas & N. O. R. Co. v. Wells Fargo Exp. Co.*, 110 S. W. 38, 40, 101 Tex. 564.

The word "frank," as used in section 161 of the Constitution of 1902 (Code 1904, p. cclix), prohibiting any state, county, district, or municipal officer from accepting a frank, free pass, or free transportation, is construed in section 153 (p. ccxlv) to mean a writing or token issued by a transmission company entitling the holder to some service free of charge. *Commonwealth v. Gleason*, 69 S. E. 448, 450, 111 Va. 383.

## FRATERNAL

### FRATERNAL ASSOCIATION

See Secret and Fraternal Society.

"As we understand it, the test of a 'fraternal beneficiary association,' within the meaning of the Missouri statute (Rev. St. 1899, § 1408), is that the association must be organized for the sole benefit of its members and not for profit. It should possess a lodge system and representative form of government, with a ritualistic form of work, and confine the issue of its benefit certificates to its members in favor of such beneficiaries, as they may from time to time designate, thus placing the benefit within the control of the member and precluding a vested interest of the beneficiary, which obtains with respect to regular life insurance." An association chartered by the state of Iowa, and conforming in other respects to the statutory requirements of this state, is a fraternal beneficiary association, "notwithstanding the fact that it has authority under its Iowa charter to issue certificates to classes of beneficiaries other than and distinct from those named in the Missouri statute." *Armstrong v. Modern Brotherhood of America*, 112 S. W. 24-27, 132 Mo. App. 171 (citing and adopting *Westerman v. Supreme Lodge Knights of Pythias*, 94 S. W. 470-477, 196 Mo. 670-701, 5 L. R. A. [N. S.] 1114; *Tice v. Supreme Lodge Knights of Pythias*, 100 S. W. 519, 123 Mo. App. 85-104).

An insurance association which has no lodge system, ritualistic form of work, or representative form of government is not within a statute defining a "fraternal beneficiary association" as a corporation, society, or voluntary association for the benefit of its members and their beneficiaries, and having a lodge system, with ritualistic form of work, and a representative form of government. *Western Commercial Travelers' Ass'n v. Tenant*, 106 S. W. 1073, 1075, 128 Mo. App. 541.

A "fraternal beneficiary association" shall mean a corporation, society, or voluntary association organized and carried on for the sole benefit of the members and their beneficiaries, but not for profit, and having a

lodge system and ritualistic form of work and representative form of government. Such associations are members of the class known as beneficiary associations; and hence a provision against the sale of endowment by beneficiary associations applies to fraternal beneficiary associations. *National Protective Legion v. O'Brien*, 112 N. W. 1050, 1051, 102 Minn. 15 (quoting the definition in Rev. Laws 1905, § 1594).

Rev. St. 1899, § 1408, defines a "fraternal beneficiary association" as one organized for the sole benefit of its members and their beneficiaries, and not for profit, operating on a lodge system with a ritualistic form of work and a representative form of government, making provision for the payment of benefits in case of death, sickness, temporary or permanent physical disability, etc. The section also declares that the fund for the payment of benefits and expenses shall be derived from assessments and dues collected from its members, and that payment of death benefits shall be to the families, heirs, blood relations, affianced husband or wife of, or to the persons dependent on the member, and that such association shall be exempt from the insurance laws of the state, etc., but may create, maintain, and disburse a reserve or emergency fund in accordance with its constitution and by-laws. Held, that a uniformed rank of the Knights of Pythias, which issued insurance only to members of its various lodges, had a representative form of government, worked according to ritual, and paid death benefits, etc., from a fund accumulated from assessments, dues, and a reserve fund, was a "fraternal beneficiary association" within such section, and not an old line life insurance company, and was therefore not subject to Rev. St. 1889, § 5855, making the defense of suicide unavailable to regular life companies. *Tice v. Supreme Lodge Knights of Pythias*, 100 S. W. 519, 524, 123 Mo. App. 85.

A fire insurance company operating on the assessment plan is not a "fraternal beneficiary order," within Civ. Code 1910, §§ 2866-2877, relating to such orders. *Puryear v. Farmers' Mut. Ins. Ass'n*, 73 S. E. 851, 852, 137 Ga. 579.

Where a foreign insurance organization was not a "fraternal beneficiary association," as defined by statute, it was immaterial that it called itself as such, and that the superintendent of insurance of the state issued to it the statutory license to do business as such. *Herzberg v. Modern Brotherhood of America*, 85 S. W. 986, 110 Mo. App. 328.

"Fraternal benefit associations," as defined by Cobbey's Ann. St. 1903, § 6483, are corporations, societies, or voluntary associations formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. *Soehner v.*

Grand Lodge of Order of Sons of Herman, 104 N. W. 871-874, 74 Neb. 399.

An Illinois corporation having a lodge system, with ritualistic form of work and a representative form of government, carried on for the sole benefit of its members and their beneficiaries and not for profit, is a "fraternal benefit society," within the meaning of Rev. St. Mo. 1899, § 1408, and Laws Ill. 1893, p. 130, § 1. *Loyd v. Modern Woodmen of America*, 87 S. W. 530, 535, 113 Mo. App. 19.

Where a foreign insurance society was authorized to issue insurance to the legal representatives of the insured, it was an "insurance company," subject to Rev. St. 1899, § 7890, providing that misrepresentations made by insured in obtaining the policy are no defense unless the matters misrepresented shall have actually contributed to the death, and not a "fraternal beneficiary society," authorized by section 1408 to issue certificates only for the benefit of "families, heirs, blood relatives, affianced husband, or affianced wife, or to person dependent upon the member." *Herzberg v. Modern Brotherhood of America*, 85 S. W. 986, 110 Mo. App. 328.

A society organized under a law providing for the organization of fraternal societies, and controlled by a national council, operating through a lodge system exclusively and paying no commissions for procuring members, is a "fraternal society" within the exception of Ky. St. § 679 (Russell's St. § 4400), which prohibits reception of a life policy or certificate in evidence unless a copy of the application, etc., is attached thereto, except as to fraternal societies. *Yeomen of America v. Rott*, 140 S. W. 1018, 1020, 145 Ky. 604.

### FRATERNAL ORDER

As life insurance company, see Life Insurance Company.  
Similar order, see Similar.

Where a benefit order having a central organization and local bodies throughout the United States and foreign countries had insurance features, and paid death and sick benefits from dues collected from members, etc., it was a fraternal order within Revisal 1905, § 4795, providing that every incorporated association, lodge, or society doing business in the state on the lodge system with ritualistic form of work and representative form of government, organized to pay benefits to members and their beneficiaries in case of disability resulting from disease, accident, or old age, is a fraternal benefit order, and subject to regulation by the state's authorities. *State v. Arlington*, 73 S. E. 122, 125, 157 N. C. 640.

The Ancient Order of United Workmen is a "fraternal organization." *Ancient Order*

of United Workmen v. Shober, 94 N. W. 405, 406, 16 S. D. 513.

### FRATERNITY

See Oath-Bound Fraternity; Secret Fraternity.

As literary institution, see Literary Institution.

As scientific institution, see Scientific Institution.

The word "fraternities," as used in St. 1909, p. 332, which prohibits secret fraternities in the public schools, includes organizations of both sexes, sororities, and clubs. *Bradford v. Board of Education of City and County of San Francisco*, 121 Pac. 929, 933, 18 Cal. App. 19.

### FRAUD

See Actionable Fraud; Actual Fraud; Constructive Fraud; Debt Created by Fraud; Deduction of Fraud; Extrinsic or Collateral Fraud; In Fraud of; Judgment for Fraud; Legal Fraud; Material Fraud; Positive Fraud.

Discovery of fraud, see Discovery.

See, also, Cheat; Deceit; False Representation; Fraudulent Misrepresentation; Fraudulent Representation; Misrepresentation; Simulation.

"Fraud" is "an intentional perversion of the truth for the purpose of obtaining some valuable thing or promise from another." *Bellevue State Bank v. Coffin*, 125 Pac. 816, 819, 22 Idaho, 210 (citing 3 Words and Phrases, p. 2943).

"Fraud" consists in deception effectually practiced in order to induce another to part with property or surrender a legal right. *Sallies v. Johnson*, 81 Atl. 974, 976, 85 Conn. 77, Ann. Cas. 1913A, 386.

"'Fraud' consists in one man endeavoring by deception or circumvention to alter another's rights." Such is the meaning of the word as used in the statute of limitations (Gen. St. 1889, par. 4095, subd. 3). *Cloud County v. Hostetler*, 51 Pac. 62, 63, 6 Kan. App. 286 (citing Bigelow, Frauds, 5).

Words and actions may be held to constitute fraud as to persons of weak intellect, or whose minds are enfeebled by disease, when they would not be regarded as such in favor of one in the full exercise of his faculties. *Porter v. United Rys. Co. of St. Louis*, 148 S. W. 162, 164, 165 Mo. App. 619.

"Fraud" is a deception practiced on one to obtain an unfair or unlawful advantage. It is hard to give a definition to fit all cases. Webster's definition is as follows: "Fraud is a deception deliberately practiced upon one to obtain an unfair advantage." *McCaskey Register Co. v. Keena*, 71 Atl. 898, 81 Conn. 656.

All surprises, trick, cunning, dissembling, and other unfair way that is used to cheat any one is considered as fraud. *Cooper v. Ft. Smith & W. R. Co.*, 99 Pac. 785, 789, 23 Okl. 139.

"'Fraud,' in its ordinary application to cases of contract, includes any trick or artifice employed by one person to induce another to fall into, or detain him in, an error, so that he may make an agreement contrary to his interest." *Board of Com'rs of Howard County v. Garrigus*, 73 N. E. 82, 85, 164 Ind. 589 (quoting and adopting the definition in *Bour. Law Dict.* p. 689).

"Fraud" is the successful employment of cunning, deception, or artifice used to circumvent, cheat, or defraud another. It is the doing by one's self or inducing another to do such things as lead the opposite party into error, and the intent to deceive is one of its main characteristics, and fraud may be perpetrated by misrepresentations, either by word or deed, as to material facts. *Bretthauer v. Foley*, 113 Pac. 356, 359, 15 Cal. App. 19.

A plaintiff suing for "fraud" must show that the false representation was intentionally made by defendant with intent that plaintiff should act on it, or so as to naturally induce him to act on it; that the representation was false, and was known to defendant to be false, or made as a fact of his own knowledge; that the representation was an expression of a past or existing fact and not of opinion; that it was material; and that plaintiff relied on it and was deceived, and thereby induced to act, to his damage. *Pierce v. Cole*, 85 Atl. 567, 568, 110 Me. 134.

"Fraud" is a name given by law to certain facts and to certain conduct of the accused party. The fact may be misrepresentation and deceit, and the term "fraud" is a legal epithet applied to such facts. Fraud may be actual or constructive. Where fraud in fact is relied on, the acts done must be set out, and, the intent being material, it must be inferred that they were done fraudulently or with intent to cheat and defraud; but, when an action is founded on constructive fraud, all that is necessary is to plead the acts from which the court will determine whether the doing of them worked a constructive fraud. *Barrie v. United Rys. Co. of St. Louis*, 119 S. W. 1020, 1057, 138 Mo. App. 557.

"Fraud" consists in artifice, trick, cunning, deception, or any unfair dealing by which another is cheated. Where one erected dams on certain lakes and streams, thereby diverting or keeping back the waters to which the plaintiff, in equity, claimed to have a legal right for his mills below such erections, it was held, not to be a case of "fraud," within the meaning of St. 1830, c. 462, extending the equity powers of the supreme judicial court. *Calvin v. Shaw*, 12 Me. 454, 457.

"Fraud," as used in an insurance policy providing, "This entire policy shall be void \* \* \* in case of any fraud or false swearing by the insured touching any matter relative to this insurance or the subject thereof, whether before or after a loss," covers frauds otherwise than by false swearing. "The distinction between actions based on fraud and fraud or false swearing, within the meaning of the clause in the policy in question which forfeits it, is clearly pointed out in *F. Dohmen v. Niagara Fire Ins. Co.*, 96 Wis. 56, 71 N. W. 74: 'No authority can be found, we may safely say, to sustain the contention that fraud which will avoid a policy under such a clause must have the elements necessary to constitute a cause of action based on fraud.'" *Meyer v. Home Ins. Co.*, 106 N. W. 1087, 1088, 1089, 127 Wis. 293.

The refusal of one who has made an oral contract for services not to be performed within a year to execute a written contract as agreed does not constitute "fraud," within the rule that the statute of frauds will not be enforced, where the effect would be to perpetrate a fraud. *Long v. Long*, 122 Pac. 1077, 1079, 162 Cal. 427; *Lieber v. Lieber*, 143 S. W. 458, 467, 239 Mo. 1.

The word "fraud," in Rev. St. 1899, § 8528, as amended, authorizing the board of dental examiners to revoke the license of any dentist for "fraud, deceit, or misrepresentation" in the practice of dentistry, means an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him or to surrender a legal right; and the word "deceit" means any trick or contrivance used to defraud another to his injury; and the word "misrepresentation" means untrue, improper, or unfaithful representation, such as a false statement of account or as a misrepresentation of one's motives; and the words, when so construed, prevent the statute from being invalid for uncertainty. *State ex rel. Williams v. Purl*, 128 S. W. 196, 201, 228 Mo. 1.

#### **As act involving breach of duty, trust or confidence**

"Fraud" in equity includes all acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence. *Dickinson v. Stevenson*, 120 N. W. 324, 325, 142 Iowa, 567.

Fraud includes all acts and omissions which involve a breach of legal duty injurious to others. *Wadsworth v. Board of Sup'rs of Livingston County*, 115 N. Y. Supp. 8, 19.

"Fraud," generally speaking, is any act or concealment which involves a breach of legal duty, trust, or confidence justly reposed and is injurious to another, or by which an undue and unconscientious advantage is taken of another. *Horton v. Smith (Tex.)* 145 S. W. 1088, 1093.



"'Fraud,' in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which undue or unconscientious advantage is taken of another." *City of Clay Center v. Myers*, 35 Pac. 25, 26, 52 Kan. 363 (quoting and adopting definition in *Myers v. Board of Education*, 32 Pac. 658, 51 Kan. 87, 37 Am. St. Rep. 263; 1 Story, Eq. Jur. § 187).

"'Fraud,' in the sense of equity, includes all acts, commissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another; and courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done." *Holliday v. Perry*, 78 N. E. 877, 880, 38 Ind. App. 588 (quoting and adopting definition in *Story's Eq. Jur.* § 187); *Johnson v. Sherwood*, 73 N. E. 180, 187, 34 Ind. App. 490 (quoting and adopting the definition in *Fetter's Eq.* p. 130, note 82); *Moore v. Sawyer*, 167 Fed. 826, 838; *Derby v. Donahoe*, 106 S. W. 632, 637, 208 Mo. 684 (quoting and adopting definition in *Kerr, Fraud & M.* pp. 42, 43); *Ewing v. Ewing*, 126 Pac. 811, 813, 33 Okl. 414 (quoting *Moore v. Crawford*, 9 Sup. Ct. 447, 130 U. S. 122, 32 L. Ed. 878).

While inadequacy of consideration is insufficient to warrant a court of equity in annulling a sale of land, yet, in connection with other facts, it may be considered in determining the question as to whether an actual fraud has been committed on the rights of an individual, or whether the conduct or acts of the parties have been of such a nature as are calculated to operate a fraud on those induced to act by reason of such conduct. *Derby v. Donahoe*, 106 S. W. 632, 637, 208 Mo. 684 (quoting and adopting definition in *Kerr, Fraud & M.* pp. 42, 43).

"A court of equity has original and inherent jurisdiction to declare and enforce trusts, and will interfere in cases of fraud to set aside acts done which involve a breach of a legal or an equitable duty or trust, which are injurious to another. 'Fraud,' as understood and defined in a court of equity, includes all acts which involve such breach of duty." The equity jurisdiction conferred on district courts by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, is limited to matters connected with the administration of bankrupt estates, and such court is without general equity jurisdiction to entertain a plenary suit by a third person to cancel the satisfaction of a mortgage and declare a trust in mortgaged property of a bankrupt which is not in the possession of his trustee, nor a part of the

estate for distribution, and in which his general creditors have no interest. *Brumby v. Jones*, 141 Fed. 318, 322, 72 C. C. A. 466 (citing *Brick. Dig.* p. 602; 1 Hill, *Mortg.* p. 525).

#### As actual fraud or fraud in fact

A judgment of a state court is rendered in "an action for fraud," so as to be exempted by Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550, from the operation of a discharge in bankruptcy, where such judgment, whatever may be the form of the action, was based upon actual, as distinguished from constructive, fraud of the bankrupt. *Bullis v. O'Beirne*, 25 Sup. Ct. 118, 123, 195 U. S. 606, 49 L. Ed. 340.

The "fraud" which saves a judgment from a discharge in bankruptcy, within Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 551, declaring that a discharge in bankruptcy shall release a bankrupt from provable debts, except judgments in actions for frauds, is fraud in fact, involving moral turpitude or intentional wrong. *Louisville & N. R. Co. v. Bryant*, 149 S. W. 830, 831, 149 Ky. 359.

The word "fraud," as used in the bankrupt law of 1867, meant positive "fraud" or intentional wrong, and not implied "fraud," such as may exist without any bad faith. *Flanders v. Mullin*, 66 Atl. 789, 80 Vt. 124, 12 Ann. Cas. 1010.

The word "fraud," within the meaning of the Bankruptcy Act 1867, is positive fraud or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud or fraud in law which may exist without the implication of bad faith or immorality. *Crosby v. Miller, Vaughn Co.*, 55 Atl. 328, 329, 25 R. I. 172 (citing *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586).

"Fraud," in the clause defining the debts from which a bankrupt is not relieved by proceedings in bankruptcy, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, which may exist without bad faith. *In re Collins*, 157 Fed. 120, 123 (quoting and adopting definition in *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586, and citing *Strang v. Bradner*, 5 Sup. Ct. 1038, 114 U. S. 555, 29 L. Ed. 248; *Noble v. Hammond*, 9 Sup. Ct. 235, 129 U. S. 65, 32 L. Ed. 621; *Ames v. Moir*, 11 Sup. Ct. 311, 138 U. S. 306, 34 L. Ed. 951; *Upshur v. Briscoe*, 11 Sup. Ct. 313, 138 U. S. 365, 34 L. Ed. 931).

Where a mortgagor failed to interpose a set-off in foreclosure and to avail herself of the plea of limitations, because of a promise made by the mortgagee to prevent the interposing of such defenses, and without intending to keep it, it was actual fraud, within the Code, defining "fraud" as consisting of the making of a promise without any intention of performing it, which entitled the mortgagee to have the judgment of foreclosure set aside.

*Flood v. Templeton*, 92 Pac. 78, 82, 152 Cal. 148, 13 L. R. A. (N. S.) 579.

#### **Bad faith synonymous**

"Good faith is the opposite of bad faith, and bad faith and 'fraud' are synonymous." *State ex rel. Millice v. Petersen*, 75 N. E. 602, 605, 38 Ind. App. 269 (quoting and adopting definition in *Stark v. Starr*, 1 Sawy. [U. S.] 15, 22 Fed. Cas. 1084).

#### **Concealment or suppression of facts**

A party to a contract, concealing any material fact peculiarly or exclusively within his own knowledge, knowing that the other party acts on the belief that no such fact exists, is guilty of "fraud." *Barrett v. Lewiston, Brunswick & Bath St. R. Co.*, 85 Atl. 306, 308, 110 Me. 24.

#### **As crime**

See Crime.

#### **As criminal offense**

"Fraud," in the statute (*Wilson's Rev. & Am. St.* 1903, § 2465), defining larceny as the taking of personal property, accomplished by fraud or stealth, and with intent to deprive another thereof, is the getting possession of property by means of falsehood, deception, or artifice. *Flohr v. Territory*, 78 Pac. 565, 573, 14 Okl. 477.

"Fraud," within Rev. St. § 5440, prohibiting conspiracy to defraud the United States, is not limited in fraud against property of the United States, but includes fraud against its rights of government. *Haas v. Henkel*, 166 Fed. 621, 625.

The words "fraud" and "dishonesty," in a fidelity bond insuring a corporation against loss through the "fraud or dishonesty" of an employé, are not restricted to such conduct as imports a criminal offense. An act entailing a financial loss to another may be both fraudulent and dishonest, and yet not fall within the definitions of embezzlement and larceny. The liability on the bond is not limited to such losses as result from the employé's criminal act, but includes losses resulting from any acts which show want of integrity or a breach of trust. *United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co.*, 148 Fed. 353, 355, 78 C. C. A. 345.

#### **Damage must result**

"The law does not regard or treat as a 'fraud' a deception so intangible as not to cause damage. To amount to a legal fraud, it must both deceive and damage." A fraudulent alteration of books submitted by the insured on adjustment of its loss will not defeat the adjustment, unless the insurer was injured thereby. *Commercial Bank of Milwaukee v. Firemen's Ins. Co.*, 58 N. W. 391, 392, 87 Wis. 297.

It is not essential to charge or prove an actual financial or property loss to es-

tablish a "fraud" against the United States, within Rev. St. § 5418, and an indictment charging the forgery of vouchers required on examination by the Civil Service Commission of the United States certifying to the character, physical capacity, etc., of an applicant, and for presenting the same to the Commission, charges an offense. *United States v. Plyler*, 32 Sup. Ct. 6, 222 U. S. 15, 56 L. Ed. 70.

#### **Dishonesty synonymous**

"Fraud" and "dishonesty" are synonymous terms. *Ex parte Hollman*, 60 S. E. 19, 27, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

"Fraud" and "dishonesty" are synonymous terms. Whatever is dishonest is fraudulent in *foro conscientiae*. If one acts unjustly and unlawfully, he acts fraudulently. An unjust man is a fraudulent man. *Ex parte Drayton*, 153 Fed. 986, 991.

#### **Duress and undue influence synonymous**

An instruction in a will contest that the words "fraud," "duress," and "undue influence," as used in the instructions, generally meant the same thing, to wit, undue influence, was not erroneous; the statement being for the guidance of the jury, and furthermore the words being frequently used synonymously in contests of this kind. *Pickler v. Wise*, 132 N. W. 815, 817, 152 Iowa, 644.

#### **Error or mistake**

Where a seller by mistake drew on the purchasers for less than the price, the failure of the purchasers to notify him of the mistake was not legal fraud, within 2 *Balinger's Ann. Codes & St.* § 4800, subd. 4 (*Pierce's Code*, § 285), providing that, in an action for relief on the ground of fraud, the cause of action shall not be deemed to have accrued until the discovery of the facts constituting the fraud. *Evert v. Tower*, 99 Pac. 580, 51 Wash. 514, 22 L. R. A. (N. S.) 950.

#### **As fact to be proved**

"Fraud" is not a fact. It is a name given by law to certain facts, to certain conduct of the accused party. The fact may be misrepresentation, deceit, specifically stated; and the term "fraud" is the legal epithet applied to such facts. *Tibbitts v. Miller*, 60 Pac. 95, 96, 9 Okl. 677 (quoting *Bliss*, *Code Pleadings*, § 211).

#### **Force distinguished**

"Force implies physical restraint of the will, while 'fraud' implies an overruling moral necessity by which a certain state of the will is brought about which could not have been so without deceit." *Avakian v. Avakian*, 60 Atl. 521, 529, 69 N. J. Eq. 89 (quoting and adopting definition in 1 *Bish. Marriage, Divorce, and Separation*, § 514).

**Intention and act**

"Fraud" is complex and involves a mental state as well as an open act. The mental state has three elements: Knowledge, intent, and design. *Crosby v. Wells*, 67 Atl. 295, 302, 73 N. J. Law, 790.

Misstatements by which one is deceived, though without fraudulent intent, are embraced within the word "fraud." *Fidelity Mut. Life Ins. Co. v. Miazza*, 46 South. 817, 819, 93 Miss. 18, 136 Am. St. Rep. 534.

Intention to deceive is a characteristic of "fraud." *Rowell v. Ricker*, 66 Atl. 569, 570, 79 Vt. 552.

"Fraud" is a willful, malevolent act directed to perpetrating a wrong to the rights of another, and such an act in a vendor is actionable as against the mere negligence or inadvertence of the purchaser in failing to prevent fraud. *Judd v. Walker*, 114 S. W. 979, 980, 215 Mo. 312.

"Fraud" is a willful wrong, and the word implies the doing of a wrong willfully. Sometimes, without part of the actual evil purpose, the law will imply fraud, but only so in the case where one has been so oblivious of his duty, showing such a disregard for the rights of others, as to make his contract as bad as if actuated by a desire to do wrong. An agent owes his principal perfect good faith and may not take on himself the character of an agent where, because of his relations to others or his own personal interest, he will be compelled to assume inconsistent duties and obligations, and, as a general rule, the contracts procured by an agent who has an interest in the subject-matter of the agency, which is undisclosed to his principal, are voidable, in an action for that purpose, and, in a suit to avoid such a transaction, much less is required to sustain the charge of fraud than in an action at law for fraud. *Wann v. Scullin*, 109 S. W. 688, 702, 210 Mo. 429.

"Fraud," on the part of a corporation may consist of an act done without the authority of law and against the provisions of the charter, though the act may be innocently done, and therefore it may be said to be a fraud as to creditors for a corporation to insert in its articles of incorporation a provision that the stock shall be sold at 50 cents on the dollar, and, when that is paid, the stock shall be issued as fully paid and non-assessable, since such an act would result in giving the stock a fictitious value. *Security Trust Co. v. Ford*, 79 N. E. 474, 477, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263.

**As injury to property**

See Injury to Property.

**Knowledge of falsity of misrepresentation.**

"Fraud" is proved when it is shown that a false representation has been made knowingly, without belief in its truth, or reck-

lessly, carelessly, whether it be true or false. *Hartford Life Ins. Co. v. Hope*, 81 N. E. 595, 598, 40 Ind. App. 354.

Defendant, having stated as a fact what he knew was false with a fraudulent intent to deceive plaintiff and thereby induce him to purchase a farm, perpetrated a "fraud." *Sipola v. Winship*, 66 Atl. 962, 966, 74 N. H. 240.

"Fraud" means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in an action for deceit, although the representation turned out to be entirely untrue. *Bartles v. Courtney*, 98 S. W. 133, 138, 6 Ind. T. 379.

Civ. Code 1895, § 4026, declaring misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake or innocently, to constitute fraud, is found under chapter 10 of title 10 dealing generally with fraud, and its provisions are not all necessarily essential to an action for deceit, and that part of it which relates to fraud by mistake or innocently could hardly be applicable to an action for deceit where knowledge is an essential element. *Camp v. Carithers*, 65 S. E. 583, 585, 6 Ga. App. 608.

An instruction that if a person represents a material fact to be true to his own personal knowledge, where he does not know whether it is true or not, instead of merely expressing an opinion or belief, and the representations are untrue, he is guilty of falsehood and "fraud," even though he may think it true, is correct. *McCabe v. Desnoyers*, 108 N. W. 341, 343, 20 S. D. 581.

Fraud in representations of fact may be either in the knowledge of their falsity, or, without knowledge of their truth or falsity, in coupling the representations with an express or implied affirmation of the knowledge of their truth. *Crosby v. Wells*, 67 Atl. 295, 299, 73 N. J. Law, 790.

What will constitute "fraud," in an action for deceit, has been considered by the English courts. The leading case upon the subject is *Derry v. Peek*, 14 App. Cas. 337, decided in the House of Lords in 1889. The complainant in that case charged the defendants with knowingly making false representations. It was found in the court of first instance that the representations had been honestly made, believing them to be true; and the Court of Appeal (37 Ch. Div. 541) held that, notwithstanding this fact, the representations must be taken to be fraudulent because the defendants had no reasonable ground for that belief. The question, therefore, which was presented for the consideration of the House of Lords when the case came before that body in 14 App. Cas. 337, was whether a statement honestly

made and believed to be true should be treated as fraudulent because those who made it had no reasonable ground for entertaining that belief. In the House of Lords the decision of the Court of Appeal was reversed, and it was there held, in conformity with the universally recognized rule, that an action of deceit is based upon fraud; that an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could not be maintained; that want of reasonable ground for believing a representation to be true might be evidence of fraud, if the circumstances indicated such recklessness or negligent disregard for the truth as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud; that, notwithstanding a court or jury might find that the speaker had no reasonable ground for believing his representations were true, he may nevertheless have honestly entertained such belief; and consequently that fraud could not be predicated upon such a finding. Lord Herschell, who delivered the leading judgment in the case, said (page 374): "I think the authorities establish the following propositions: First. In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly. If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." In *Angus v. Clifford* (1891) 2 Ch. 449, 465, 466, Lindly, L. J., in commenting upon this statement of Lord Herschell, said: "You may have \* \* \* a false statement made, but without the matter being present to your mind, and made carelessly; and, if that is the fact, that is not fraud, but carelessness, for which an action will not lie. \* \* \* The passages about knowledge, knowingly making it, and making a statement without believing its truth, are based upon the supposition that the matter was really before the mind of the person making the statement; and if the evidence is that he never really intended to mislead, that he did not see the effect, or dream that the effect of what he was saying could mislead, and that that particular

part of what he was saying was not present in his mind at all, that, I should say, is proof of carelessness rather than of fraud. I base my judgment \* \* \* on the \* \* \* ground that \* \* \* an action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is willful recklessness, by which I mean willfully shutting one's eyes, which is, of course, fraud." In *Le Lievre v. Gould* (1893) 1 Q. B. 491, 498, Lord Esher, M. R., states: "A charge of fraud \* \* \* against a man \* \* \* cannot be maintained in any court unless it is shown that he had a wicked mind. \* \* \* If a man tells a willful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind." And Bowen, L. J., in the same case, says (pages 500, 501): "But his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case it is the knowledge of the falsehood, in the second it is the wicked indifference which constitutes the fraud. There seems to have been some sort of idea that \* \* \* whether the man had made the representation, not knowing and not caring whether his statement was true or false, the expression 'not caring' had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false. It meant not caring in the man's own heart and conscience whether it was true or false, and that would be wicked indifference and recklessness." It is apparent from the views expressed by the judges in these cases that to establish "fraud" you must prove a dishonest mental state or condition of mind on the part of the speaker with reference to the truthfulness of his statement; that when he makes a statement of fact, intending it to be relied upon, he of necessity affirms his belief in its truth (*Smith v. Chadwick*, 9 App. Cas. 187, 203; *Angus v. Clifford*, supra, 470); that if his statement was untrue and he knew it, or he made it without belief in its truth, or with a conscious indifference, not caring whether it was true or false, the wickedness of his mind is manifest, and the fraudulent character of his act established. *Shackett v. Bickford*, 65 Atl. 252, 253, 74 N. H. 57, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933 (citing *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401; *Hanson v. Edgerly*, 29 N. H. 343; *Pettigrew v. Chellis*, 41 N. H. 95; *Springfield v. Drake*, 58 N. H. 19; *Rowell v. Chase*, 61 N. H. 135; *Stewart v. Stearns*, 63

N. H. 99, 56 Am. Rep. 496; *Spead v. Tomlinson*, 59 Atl. 376, 73 N. H. 46, 61, 68 L. R. A. 432; *Pearson v. Howe*, 1 Allen [Mass.] 207; *Litchfield v. Hutchinson*, 117 Mass. 195; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284; *Andrews v. Jackson*, 46 N. E. 412, 168 Mass. 266, 37 L. R. A. 402, 60 Am. St. Rep. 390; *Salisbury v. Howe*, 87 N. Y. 128; *Haddock v. Osmer*, 153 N. Y. 604, 609, 47 N. E. 923; *Cummings v. Cass*, 18 Atl. 972, 52 N. J. Law, 77; *Lamberton v. Dunham*, 30 Atl. 716, 165 Pa. 120; *McKown v. Furgason*, 47 Iowa, 637; 1 Blg. Frauds, 509, 511, 513).

#### Misrepresentation

To constitute deceit and fraud by the use of language, the language need not affirm the existence or nonexistence of something which is untrue. It is sufficient if the language of one party misleads the other as to the existence of a fact and induces him to contract. *Marietta Fertilizer Co. v. Beckwith*, 61 S. E. 149, 150, 4 Ga. App. 245.

To constitute fraud, a misrepresentation must be of a specific material fact that is untrue and known to be so, and stated for the purpose of inducing another to act, upon which statement the other relies in acting to his injury. *Allen v. United Zinc Co.*, 60 South. 182, 64 Fla. 171.

To constitute "fraud" growing out of representations, the representations must not only knowingly have been false, but they must have been material, and relied on as an inducement to the making of the contract alleged to be vitiated by fraud. *Becker v. Colonial Life Ins. Co.* (N. Y. Sup.) 138 N. Y. Supp. 491, 493, 153 App. Div. 382.

Three elements must concur to constitute "fraud by false representations": First, there must be a knowingly false representation; second, the plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and, third, that such representation was a matter relating to the contract about which the representations were made, which if true would have been to plaintiff's advantage, but, being false, caused him damage and injury. *Anderson v. Adams*, 74 Pac. 215, 217, 43 Or. 621.

Under Rev. Codes, § 5063, providing that a party to a contract may rescind, if his consent was obtained by fraud, or if, through the fault of the other party, the consideration fails, and section 4978, which defines "fraud" as the positive assertion, in a manner not warranted by the information of the party making it, of what is not true, or any act fitted to deceive, a purchaser of land may rescind, where the vendor unintentionally represented that all of the land to be sold, save a few acres, was on one side of a road, while in reality a large part of it was on the other side of the road, and was rocky land, and not so valuable as the land pointed out by the vendor. *Post v. Liberty*, 121 Pac. 475, 479, 45 Mont. 1.

A false statement as to title and ownership of land is such "fraud" as will entitle the party deceived to rescind. Actual fraud consists in the suggestion as a fact of that which is not true, made by a party to the contract who does not believe it to be true and with intent to deceive another party thereto or to induce him to enter into the contract. *Sonnesyn v. Akin*, 104 N. W. 1026, 1036, 14 N. D. 248 (dissenting opinion, citing Rev. Codes 1899, § 3848).

Misrepresentation, to amount to fraud authorizing equity to rescind a contract, must relate to a fact material to the interests of the other party, and must be a representation as to the subject-matter which if true would add substantially to the value or promise of that subject-matter. *Crooker v. White*, 50 South. 227, 228, 162 Ala. 476.

To constitute a representation a "fraud," there must be a statement or representation as to a fact existing in the present or the past. An expression of opinion as to what will take place in the future is wanting in all the essential elements which constitute a fraud. *Guthrie & Western R. Co. v. Rhodes*, 91 Pac. 1119, 1122, 19 Okl. 21, 21 L. R. A. (N. S.) 490.

To constitute fraud by false representations, representation must be of an alleged existing fact, be false in fact, be made with intent to deceive, and the person to whom made must believe it. *Scarsdale Pub. Co. v. The Colonial Press v. Carter*, 116 N. Y. Supp. 731, 735, 63 Misc. Rep. 271.

"Fraud" consists in false representation of things as facts which are not such or in deceitful concealment of existing facts. A promise is not itself a false and deceitful representation; performance may have been intended when the promise was made. *Lowry Nat. Bank v. Hazard*, 72 Atl. 889, 890, 223 Pa. 520 (quoting *Grove v. Hodges*, 55 Pa. 504).

A representation to constitute in law a "fraud" must relate to an existing fact, as distinguished from a promise, and representations regarding existing facts must be relied upon to constitute fraud. Defendant's statement that he would send plaintiff a check on his return home and his failure to do so are a breach of contract, but not such a false representation as to constitute fraud, though he obtained possession of certain lands purchased from plaintiff. *Mathews v. Eby*, 129 S. W. 1016, 1017, 149 Mo. App. 157.

Where a policy provides that it shall be void in case of any "fraud" or false swearing, an intentional overvaluation of the loss, or any other artifice or deception practiced by the insured with the object of securing some advantage in the adjustment of the loss, and liable to have that effect, avoids the policy. *F. Dohmen Co. v. Niagara Fire Ins. Co.*, 71 N. W. 69, 73, 96 Wis. 38.

An instruction, in an action for "fraud," which defines "fraud" as "a false statement or statements made for the purpose of inducing another to part with money or other valuable things, which statements are calculated to influence the person to whom they are made, and which statements do actually deceive the person to whom they are made and thereby induce him to part with money or other valuable things," correctly defines "fraud" as against the objection that it omits to state that the representation must be material and relate to a fact either present or past. *McDonald v. Smith*, 102 N. W. 668, 673, 139 Mich. 211.

An allegation that certain representations were made by the grantee, that they were false, and made with intention to deceive plaintiff, and that he relied upon the representations and promises, and therefore executed a conveyance, brings the case within section 1572 of the Civil Code, defining "fraud." *Chamberlain v. Chamberlain*, 95 Pac. 659, 660, 7 Cal. App. 634.

"Fraud," within the contemplation of the law, is such as will justify rescission of a contract upon its discovery, the elements of which are said to be that, where one makes a false representation of a material fact, knowing it to be false, with intent to induce a person to whom it is made to rely on it, and this person does rely on it, and is deceived, and pecuniarily damaged, it is "deceit" which will avoid the contract. *First Nat. Bank of Wellington v. Person*, 111 N. W. 730, 731, 101 Minn. 30 (quoting and adopting definition in *Riggs v. Thorpe*, 69 N. W. 891, 67 Minn. 217).

"Fraud," as used in equity, arises where one person procures from another a promissory note upon a verbal promise or pledge that it shall not be enforced, and thereafter invokes the rule against varying the terms of a written instrument by oral evidence. *O'Brien v. Paterson Brewing & Malting Co.*, 61 Atl. 437, 442, 69 N. J. Eq. 117.

"A promise made with the intention of not performing it constitutes a 'fraud' for which a contract may be rescinded or avoided." *Glass v. Glass*, 88 Pac. 734, 735, 4 Cal. App. 604 (quoting and adopting definition in *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 52 Pac. 995, 120 Cal. 530, 65 Am. St. Rep. 186).

A company was selling stock under a scheme whereby it represented it would insure the maturity of the certificates at certain times and on which the holders could secure, in advance of that period, loans from the company thereon, with the result that the owners of some certificates would probably not receive anything thereon. The secretary and president of the company offered to sell certain certificates to a buyer; but the buyer wished a loan before the time that the certificate offered would entitle him to a

loan, whereupon they represented that they could secure, from a certificate holder, earlier certificates, on which a loan would earlier mature, if the buyer put up a bonus. The buyer put up the bonus, but received no loan or any part of the money paid in. The certificates sold the buyer were not purchased from any one else, but were unsold certificates. Held, that the transaction was fraudulent and within the rule that false representations must be made with reference to present existing or past facts before fraud can be predicated of them. *United States Home Co. v. O'Connor*, 110 Pac. 74, 75, 48 Colo. 354.

By Code, § 1620, fraud in deceiving the public, or individuals as to a corporation's condition is a misdemeanor, and section 1621 makes the diversion of corporate funds, if any person is injured, and payment of dividends leaving insufficient funds, a fraud within the preceding section. Section 1622 provides that the intentional violation of the two preceding sections shall work a forfeiture of the corporate privileges. Section 1640 empowers courts of equity to close up the business of any corporation on good cause shown and to appoint a receiver therefor. Acts 30th Gen. Assem. 1904, pp. 57, 58, c. 66, § 1, provides that the term "association" as used in the act shall mean any corporation, etc., which issues stock on the installment plan, and the term "stock" shall mean contracts, etc., of any kind upon the installment plan. Section 2 prohibits such an association from issuing stock unless it has procured from the state auditor a certificate and requires it to file with him a statement to procure the certificate, which statement shall be laid before the executive council, which body, by section 3, may direct the issuance of the certificate. Section 4 requires compliance with the act within 60 days after it takes effect. Section 6 requires such association, before doing business, to deposit a bond or securities for performance of contracts, and at the end of the year to deposit with him securities equal to the amount of its liabilities. Section 7 makes any member of such association guilty of a misdemeanor who transacts business without complying with the act. Defendant corporation issued a large number of installment land contracts without complying with chapter 66, and also published false and misleading statements as to its capital and assets, and falsely advertised that it had deposited securities with the state auditor. The money received under the contracts was not invested according to its advertised plan, and its expenses were very largely out of proportion to its revenue. Defendant had no substantial business other than the land contract business, and, while it bought and sold some land, it did not have enough funds to pay its outstanding land contracts, and it did not appear that creditors and stockhold-

ers could not be protected upon the dissolution of the corporation. Held, that chapter 66 contemplated the dissolution of an association not complying with its provisions, and, in view of the violations of Code, §§ 1620, 1621, shown, and its failure to comply with chapter 66, the business of the association should be wound up in a suit for that purpose by the state. *State ex rel. Mullan v. Syndicate Land Co.*, 120 N. W. 327, 328, 142 Iowa, 22.

A representation that an option to purchase property at a specified price has been obtained when in fact a rebate from such price is to be made constitutes a "fraud and deceit" where such representation induces others to join in the joint purchase of such property. *Vennum v. Palmer*, 123 Ill. App. 619, 620.

#### **All modes included**

Duress and deceit are simply different methods by which "fraud" is consummated. The same remedies are available to the injured party. *Neibuhr v. Gage*, 108 N. W. 884, 887, 99 Minn. 149.

Fraud has been defined to be any kind of an artifice by which another is deceived. All surprise, trick, cunning, dissembling, and other unfair way by which another is cheated, is fraud. Collusion in a court of equity is fraud. In short, fraud is infinite. The suppression of the truth is equivalent to the utterance of a falsehood, and both are fraud. *Holt v. King*, 47 S. E. 362, 365, 54 W. Va. 441.

#### **Moral turpitude**

There can be no "fraud," misrepresentation, or concealment without some moral delinquency. There is no actual "fraud," "legal fraud," which is not also a moral "fraud." This immoral element consists in the necessary guilty knowledge and consequent intent to deceive, sometimes designated by the technical term "scienter." No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity or under such circumstances that the law must necessarily impute such knowledge to the party at the time he makes it. *Mason v. Moore*, 76 N. E. 932, 936, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240 (citing *Pomeroy*, *Equity Jurisprudence*, vol. 2, § 884).

The "frauds" which destroy the effect of a discharge in bankruptcy, within Bankruptcy Act July 1, 1898, c. 541, § 17, 30 Stat. 550, providing that a discharge in bankruptcy shall not release judgments in actions for fraud or obtaining property by false pretenses or representations, are those connected with the obtaining of property by false pretenses or false representations involving moral turpitude or intentional wrong; and implied fraud, existing without the imputation of bad faith and immorality, is insuffi-

cient. *Cooper Grocery Co. v. Gaddy* (Tex.) 141 S. W. 825, 827.

#### **Negligence distinguished**

See Negligence.

#### **Official misconduct or bad faith**

Under Act June 22, 1874, c. 391, § 21, 18 Stat. 190, making the settlement of duties final in the absence of "fraud," it was not fraud by the government, where subordinate customs officers, without notice to importers or instructions from their superior officers, made a change in the method of assessing duties, after years of uniform practice. *Gulbenkian v. United States*, 175 Fed. 860, 865.

#### **As personal injury**

See Personal Injury.

#### **As rendering award void**

There are two kinds of "fraud" which will avoid an award of arbitrators: Positive "fraud," as by some act that can be proved, or inferential "fraud," as where the circumstances so strongly point to dishonesty that the court will consider the fact of its existence to be clearly indicated, a common case of which is when the award is obviously and extremely unjust. *Perry v. Greenwich Ins. Co.*, 49 S. E. 889, 890, 137 N. C. 402 (citing *Morse*, Arb. 539).

#### **As rendering conveyance void**

"Fraud," in fraudulent conveyances, is defined as "an act unwarranted in law to the prejudice of third persons, and not that crafty villainy and grossness of deceit to which it is applied in common language." *Daugherty v. Bogy*, 53 S. W. 542, 549, 3 Ind. T. 197 (quoting and adopting definition of *May*, *Fraud. Conv. p. 94*).

The term "fraud" as used in the law of fraudulent conveyances, means facts tending to throw suspicion on a transaction calling for an explanation, an act made to hinder and defraud creditors. In *re Duggan*, 182 Fed. 252, 255.

The "fraud" contemplated by a statute authorizing an attachment upon the ground of a fraudulent conveyance or disposition of property is actual fraud and not that denominated "fraud in law," or constructive fraud, and an offense which, if fraudulent at all, is constructively so only under the provisions of a statute is not ground for attachment, where it affirmatively appears, from the finding of the trial court, that the sale was made in good faith, and no actual fraud was contemplated or practiced. *Williams v. Fourth Nat. Bank of Wichita, Kan.*, 82 Pac. 496, 498, 15 Okl. 477, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

#### **As rendering debtor liable to arrest**

Under Code Civ. Proc. § 479, subd. 4, providing for the arrest of a defendant in a civil action when he is guilty of "fraud," where an affidavit or order for arrest avers

that defendant in a foreign country presented to plaintiff a forged check, and obtained coin of the value of \$6,260, and shortly afterwards took passage for the United States under an assumed name, it sufficiently appears that the defendant has been guilty of fraud, so as to authorize the issuance of an order for defendant's arrest. *Ex parte Howitz*, 84 Pac. 229-231, 2 Cal. App. 752.

#### As rendering instrument void

Fraud, in the inducement of a will, consists of willful, false statements of fact which are intended to and do induce testator to execute the instrument which he does execute with full knowledge of its nature and contents, and, where fraud is in the inducement as distinct from the execution, the same considerations apply to the validity of the will obtained thereby as to a will executed under a mistake of fact. *Sanger v. McDonald*, 112 S. W. 365, 368, 87 Ark. 148.

"'Fraud' is so multiform as to admit of no rules or definitions, and hence equity leaves the way open to punish frauds and redress wrongs perpetrated by means of them in whatever form they may appear" (quoting and approving *Bigelow*, *Fraud*, 14). "In each case of fraud dependence must be had upon the special circumstances surrounding it, and no definite rule can be laid down as to what degree of ignorance or condition of mind will vitiate a contract." But where defendant, an experienced business man, falsely represented to plaintiff, an ignorant woman, that a mortgage on her property, not yet due, was about to be foreclosed, so that the property would be lost, and because of plaintiff's reliance on such representations induced her to convey to him for \$800 property which was worth \$1,800, he was guilty of "fraud" justifying the cancellation of the deed. *Schaeffer v. Blanc* (Tex.) 87 S. W. 745, 746.

"Fraud" which would relieve a party who has signed a contract without reading it, as he was able to do, must be "fraud" which prevented him from reading. Failure to read was not excused because the contract was in the form of a booklet covering 10 or 12 pages which would have taken some time to read. *Stoddard Mfg. Co. v. Adams*, 50 S. E. 915, 916, 122 Ga. 802.

#### As rendering judgment void

"Fraud," which will vitiate a judgment, must be "fraud" in procuring the judgment, and not "fraud" in the account upon which the cause of action is instituted. *Boldenweck v. Bullis*, 90 Pac. 634, 635, 40 Colo. 253.

The "fraud" for which a judgment may be set aside must be actual fraud involving intentional wrong, as distinguished from legal or constructive fraud. One against whom a decree quieting title has been rendered upon publication service and without actual notice cannot, after the lapse of three

years, have the judgment set aside as fraudulent merely by showing that plaintiff's title was based solely upon a tax deed which showed upon its face that it was not effective as a conveyance. *Wagner v. Beadle*, 108 Pac. 859, 860, 82 Kan. 468.

"Fraud" is of two kinds with reference to judicial proceedings: Fraud in obtaining the decree by false evidence, and fraud which gives the court colorable jurisdiction over the defendant's person. In the case of fraud of the former kind, the usual rule is that the decree can only be attacked in the original cause and cannot be impeached in a separate and independent proceeding, though it may be attacked collaterally in an independent proceeding where the fraud goes to the jurisdiction of the court. *Pratt v. Griffin*, 79 N. E. 102, 103, 223 Ill. 349 (citing *Caswell v. Caswell*, 11 N. E. 342, 120 Ill. 377; *Evans v. Woodsworth*, 72 N. E. 1082, 213 Ill. 404).

The "fraud" in obtaining a foreign judgment for which equity will enjoin execution of a domestic judgment, founded on the foreign judgment, does not relate to the cause of action, or to evidence adduced before the foreign court, but to deception and downright "fraud" in procuring jurisdiction, or in preventing defendant by fraudulent means from presenting his defense. *Wilson v. Anthony*, 66 Atl. 907, 908, 72 N. J. Eq. 836.

The "fraud" which authorizes equity to grant relief against a judgment obtained through fraud means the perpetration of an intentional wrong, or the breach of a duty growing out of a fiduciary relation; and it is necessary to show that the fraud was practiced or participated in by the successful party, and that it was actually effective in bringing about the judgment, and that the party seeking equitable relief has a good defense to the action on the merits, and has no other adequate means of obtaining relief against the judgment, and that his situation is not due to his own negligence. One falsely claiming to be a creditor of a decedent procured the appointment of an administrator, and he purchased land belonging to decedent's son at an administrator's sale, and obtained a judgment in ejectment against the son, who was an infant, by his guardian ad litem making no defense. The guardian ad litem did not consult with the son or his mother in regard to his interests in the land. Held, that the probate proceedings resulting in the administrator's sale and the judgment in ejectment were vitiated by fraud, and equity, at the suit of the son, would set the same aside as a cloud on his title. *Bowsman v. Anderson*, 123 Pac. 1092, 1095, 1096, 62 Or. 431.

Where a party, by a statement concerning a transaction with a person since deceased, shown by the party's books to be false, misled another into reliance on the statement in prosecuting an action against



the party, who thereby procured a judgment releasing himself from an obligation which otherwise would have been enforced, the party was guilty of "fraud," within Code, § 4091, authorizing the vacation of a judgment for fraud practiced in obtaining the same, justifying the granting of a new trial. *Griffith v. Merchants' Life Ass'n*, 127 N. W. 1079, 148 Iowa, 727.

"'Fraud' perpetrated by means of a judgment is entitled to no more immunity than a fraud perpetrated by any other means. If a judgment, founded upon a just debt, is entered, not for the purpose of securing or collecting the debt, but for the purpose of being used for a cover to protect the defendant's property from his other creditors, the court will denounce it as a 'fraud' and set it aside, as it would any other fraudulent contrivance." *Turner v. Kuehnle*, 62 Atl. 327, 329, 70 N. J. Eq. 61 (citing *Mechanics' Nat. Bank at Newark v. H. C. Burnet Mfg. Co.*, 33 N. J. Eq. 486; *Squier v. Mechanics' Nat. Bank of Newark*, 35 N. J. Eq. 344; *Kirkpatrick v. Corning*, 40 N. J. Eq. 241).

Under Sand. & H. Dig. § 4197, par. 4, authorizing judgments to be vacated after the term of their rendition for fraud practiced in obtaining the judgment, where a husband leads the wife to believe that he will not prosecute a pending divorce suit, and she, relying on such assurances, makes no defense, it is a fraud "in obtaining the judgment," within the statute, for him to thereafter prosecute the suit to judgment without giving her further opportunity to defend it. *Womack v. Womack*, 83 S. W. 937, 938, 73 Ark. 281 (citing *Nels. Div. § 1052*; *Scanlan v. Scanlan*, 41 Ill. App. 449; *Nicholson v. Nicholson*, 15 N. E. 223, 113 Ind. 131; *Thelin v. Thelin*, 8 Ill. App. 421).

#### As rendering marriage void

That a party to a marriage contract represented himself to be 21 years of age, when in fact he was but 20 years and some months, and that he stated to the other party prior to the marriage ceremony that she need not leave her home; that the fact of marriage would make no difference in her circumstances or condition, and that she could always continue to reside at her home as formerly, did not constitute such fraud as to authorize an annulment of the marriage, under Domestic Relations Law (Consol. Laws 1909, c. 14) § 7, subd. 4, declaring a marriage void from the time its nullity is declared if either party consent to the marriage by reason of force or fraud, and Code Civ. Proc. § 1743, giving an action for the annulment of such a marriage. *Williams v. Williams*, 130 N. Y. Supp. 875, 71 Misc. Rep. 590.

#### Undue influence distinguished

"Undue influence is not the same thing as fraud. One may exist without the other. Undue influence may, however, be exerted by means of fraud. 'Fraud,' is a distinct head

of objection from importunity and undue influence. Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud.'" In *re Snowball's Estate*, 107 Pac. 598, 600, 157 Cal. 301 (citing *Davis v. Calvert* [Md.] 5 Gill. & J. 269, 25 Am. Dec. 282; *Powell v. Plant* [Miss.] 23 South. 399; *Eckert v. Flowry*, 43 Pa. 46; *Robinson v. Robinson*, 53 Atl. 253, 203 Pa. 400).

"'Fraud' on a testator consists in making that which is false appear to him to be true, and so affecting his will. Fraud need not be attended with undue influence, except in so far as the misrepresentation amounts to influence. There need be no pressure such as is necessary to constitute influence. *Wetz v. Schneider*, 78 S. W. 394, 396, 34 Tex. Civ. App. 201 (quoting and adopting definition in 1 *Bigelow, Frauds*, p. 571).

Generally the same considerations control when a testator is unduly influenced by misrepresentations and artifices usually comprehended by the term "fraud," although in strictness "fraud" and "undue influence" are distinguishable more often than otherwise, it is a mere matter of choice of terms. In the one case the mind of testator is so overmastered that another will is substituted for his own. In the other he is in a sense a free agent, but is deceived into acting upon false data. Something sinister is involved which perverts the testator's will by overcoming his power truly to express his real desires. To destroy the validity of a will, the "undue influence" must amount to coercion, compulsion, or restraint, which destroys the testator's free agency, and by overcoming his power of resistance obliges him to adopt the will of another instead of exercising his own. *Ginter v. Ginter*, 101 Pac. 634, 640, 79 Kan. 721, 22 L. R. A. (N. S.) 1024 (citing *Terry v. Bullington*, 11 Ga. 337, 56 Am. Dec. 423; In *re Shell's Estate*, 63 Pac. 413, 28 Colo. 167, 53 L. R. A. 387, 89 Am. St. Rep. 181).

#### FRAUD IN FACT

"There is no difference in principle between 'fraud in fact' and 'fraud in law.' Where the direct and inevitable consequence of an act is to delay, hinder, or defraud creditors, the presumption at once conclusively arises that such illegal object furnished one of the motives for doing it, and it is upon this ground held to be fraudulent." Pub. St. c. 206, § 9, authorizing a writ of arrest to issue against a debtor who has committed fraud in the concealment or disposition of his property, applies whether the fraud is actual or constructive. *Eichenberg v. Marcy*, 26 Atl. 46, 48, 18 R. I. 169 (quoting with approval from *Bump, Fraud. Conv.* [Ed. 1872] p. 71).

#### FRAUD IN LAW

A "fraud in law" is a false affirmation of a fact, and not a mere promise or matter of

intention, and a statement of a matter in the future must, to be a fraud, amount to an assertion of a fact and not an agreement to do something in the future, so that one making a promise to do something in the future at a time he did not intend to perform is not guilty of fraud in law. *Miller v. Sutliff*, 89 N. E. 651, 652, 241 Ill. 521, 24 L. R. A. (N. S.) 735.

In order to constitute presumptive fraud, or "fraud in law," as against a creditor of a donor, three elements must be proved: A voluntary gift; a then existing or contemplated indebtedness against the donor; and that the donor did not retain sufficient property to pay his indebtedness. *State Bank of Clinton v. Barnett*, 95 N. E. 178, 181, 250 Ill. 312.

To impeach a transaction for fraud of one of the parties, it is not necessary that the fraud complained of be the sole cause of the making of the contract, but it is sufficient if it forms one factor in the transaction; and in an action for personal injuries, and to set aside a settlement as having been fraudulently obtained through misrepresentations as to extent of plaintiff's injuries, an instruction to find for defendants, if plaintiff was induced to make the settlement and execute a release because of his financial need and anxiety to go home to his family, is properly refused, where there was evidence of misrepresentations as well as of matters covered by the requested instruction, for "fraud in law" does not consist alone in false representations, but is as varied as the conditions under which it may rise. *Texas & P. Ry. Co. v. Jowers* (Tex.) 110 S. W. 946, 951.

"Fraud in law" is of two kinds: Actual and constructive. The former arises from deception practiced by means of the misrepresentation or concealment of a material fact; the latter from a rule of public policy, or the confidential or fiduciary relation which one of the parties affected by the fraud sustained towards the other. It is a constituent of actual fraud that the party alleged to have been defrauded was deceived. No positive dishonesty of purpose is required to show constructive fraud. *Parsons v. Balson*, 109 N. W. 136, 138, 129 Wis. 311 (citing *Forker v. Brown*, 30 N. Y. Supp. 827, 828).

### FRAUD IN MANAGEMENT

The phrase "fraud in management," *Laws 1894, c. 235, § 5*, providing that a joint-stock association shall not be dissolved except in pursuance of its articles of association, or by consent of all its stockholders, or by judgment of a court, for "fraud in its management," or for good cause shown, was obviously meant to refer to a case of fraud in the management which would tend to defeat the rights of the stockholders in violation of and contrary to the spirit of the

agreement of association, or result in a wrongful diversion or spoliation of the assets. *Colton v. Raymond*, 85 N. Y. Supp. 210, 214, 41 Misc. Rep. 580.

### FRAUD OF CREDITORS

See Assignment in Fraud of Creditors; Money Paid in Fraud of Creditors.

### FRAUDULENT—FRAUDULENTLY

See Deem Fraudulent.

"Fraudulent" means using fraud, trickery or deceit; dishonest. *Adams v. Barber*, 139 S. W. 489, 494, 157 Mo. App. 370.

"It is a general rule of pleading that, in alleging fraud, the facts which constitute such fraud must be stated. To characterize an act as 'fraudulent' does not in legal effect charge it as fraudulent unless some circumstance or fact be charged which shows in what the fraud consists, and how it has been effected." An allegation in a complaint in a suit to restrain the collection of taxes that the board of equalization without inquiry arbitrarily raised plaintiff's assessment with the design of forcing him to pay an unequal portion of the taxes, but without averring an excessive valuation of his property, does not allege a legal fraud. *County of Cochise v. Copper Queen Consol. Min. Co.*, 71 Pac. 946, 949, 8 Ariz. 221.

Where a person states of his own knowledge material facts with an intent that the other party shall act upon such statement, the statement, if false, is fraudulent both in morals and law. *Atlas Shoe Co. v. Bechard*, 66 Atl. 390, 393, 102 Me. 197, 10 L. R. A. (N. S.) 245.

The words "fraud" and "fraudulently" have a well-defined and known meaning in law, and defendant, in a prosecution under Ky. St. 1903, § 1228, making it an offense for any one to fraudulently or willfully destroy a corner tree or corner stone of a survey, is presumed to and must have been known that by the use of the word "fraudulently," in an indictment under such statute, he was charged with destroying the corner tree with the wrongful intent and purpose of obtaining an unfair advantage and securing for himself or another the lands or property of some other person. *Commonwealth v. Gregory*, 89 S. W. 477, 121 Ky. 458.

The terms "fraudulent," "false," and "willful," in Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135, providing for forfeiture of imports entered by means of a fraudulent or false invoice, imply the necessity of a guilty scienter and intent to constitute the offense, and, where merchandise is mistakenly entered by a person on an invoice fraudulently made out by the foreign shipper, a forfeiture is not warranted. *United States v. Twenty Boxes of Cheese*, 163 Fed. 369, 371.

Pertinacious zeal to secure the payment of a just debt is not "fraudulent." *Van Valkenburgh v. Oldham*, 108 Pac. 42, 44, 12 Cal. App. 572.

That a hotel corporation was unable to pay its debts as they became due when bonds issued by it and given to subscribers of its stock at par as a bonus to secure the subscriptions did not make the issuance of the bonds fraudulent as to creditors, under Civ. Code, § 3442, providing that a voluntary transfer or incumbrance of property without valuable consideration by one while insolvent, or in contemplation of insolvency, shall be fraudulent as to existing creditors. *McKee v. Title Ins. & Trust Co.*, 113 Pac. 140, 144, 159 Cal. 206.

Act March 3, 1839 (5 Stat. 354, c. 88, § 7), relating to patents, provides that the same shall be void if the invention covered thereby was in public use more than two years before the application was filed, and under the statutes the invalidity is brought about by such use unless it appears that the use was "fraudulent." Held, that the word "fraudulent" means fraudulently obtained; obtained by suppression or concealment of facts; surreptitious. The word "fraudulent," in this connection, means acts done clandestinely, treacherously, and by means of falsehood or breach of trust. *Eastman v. City of New York*, 134 Fed. 844, 852, 69 C. C. A. 628.

The words "unlawfully," "willfully," "fraudulently," and "feloniously," in an indictment, include the word "wrongfully." *State v. Pellerin*, 43 South. 159, 161, 162, 118 La. 547 (citing *State v. Brown*, 6 South. 541, 41 La. 345; *Marr's Criminal Jurisprudence of Louisiana*, verbo "Indictment," p. 865, subd. "The Words of the Statute").

The word "fraudulently" in an indictment alleging that accused unlawfully, wrongfully, fraudulently, etc., took certain property from the owner by force, implies an intent to steal. *Holland v. State*, 68 S. E. 861, 862, 8 Ga. App. 202.

Under Kirby's Dig. § 1726, making guilty of forgery one who, with intent to defraud, shall "make any false entry" or shall "falsely alter any entry" in the books of account of a banking corporation, an indictment charging that defendant did feloniously alter, etc., the books, etc., and that "said felonious, fraudulent changes," etc., were made, etc., was defective in not charging that the entry was falsely altered; the word "false" distinctly characterizing a wrongful act known to involve an error or untruth, while the word "fraudulent" relates, not to the act done, but to the intent with which it was done, and the word "falsely" as used in the statute not only imparting an element of fraud or bad faith, but also relating to the act done. *Quertermous v. State*, 127 S. W. 951, 952, 95 Ark. 48.

Where a clerk in the office of the Commissioner of the Five Civilized Tribes in Muskogee, Ind. T., appointed by the commissioner acting for and on behalf of the Secretary of the Interior, who kept the Creek roll in his office, took the roll from the office with the intent to make a copy thereof, the taking was fraudulent within the meaning of Rev. St. U. S. § 5408, providing a punishment for any officer having the custody of any record filed in his office, or deposited with him, or in his custody, who fraudulently takes it away or destroys it. *Martin v. United States*, 104 S. W. 678, 680, 7 Ind. T. 451.

The word "fraudulently," as used in Rev. St. § 2987, providing that if any warehoused merchandise shall be fraudulently concealed in or removed from any public or private warehouse, etc., means that the acts must be done with an intent to evade the law; the intent being fully alleged. *United States v. Ehr Gott*, 182 Fed. 267, 270.

An attempt or an intent to injure the rights or interests of another, or an effort to so injure or alter some of them, is essential to a fraud, and, without such an attempt or effect, an act cannot be done "fraudulently" under Rev. St. § 5408. *Martin v. United States*, 168 Fed. 198, 204, 93 C. C. A. 484.

An information sufficiently charged the offense of fraudulently attempting to vote within the primary election law (Laws 1901, p. 149 [Ann. St. 1906, §§ 7162—1 to 7162—26]), where the offense was charged in the language of the statute, specified the essential details concerning the election, the ward, election district, date, and particular polling place, and substantially charged that accused unlawfully and willfully attempted to vote on the name of a specified person who resided at a specified place as though accused were a duly registered and qualified voter residing at such place. *State v. Doe*, alias *Hill*, 129 S. W. 713, 714, 150 Mo. App. 185.

#### FRAUDULENT AFFIDAVIT

Where the statements made in an affidavit in support of a pension claim are true, it is not a "false or fraudulent affidavit," the making of which constitutes a crime, under Rev. St. § 4746, merely because it was not in fact sworn to on the date shown in the notary's certificate. *United States v. Wood*, 127 Fed. 171, 173.

#### FRAUDULENT CERTIFICATE

Alteration of a certificate for an independent nomination for a public office without the signers' consent by pasting over the name of the proposed candidate a sticker containing the name of another person constituted a fraudulent and forged certificate within Election Law (Consol. Laws 1909, c. 17) § 123, rendering the certificate void, though the person first named in the certificate was discovered to be ineligible and the

chairman of the county committee acted in good faith and under the advice of the law committee of his party in making the alteration, and though the certificate purported to authorize a certain committee to fill vacancies. In re Shook, 137 N. Y. Supp. 834, 836, 78 Misc. Rep. 89.

The duplication of names, whether intentional or not, upon the sheets filed for an independent certificate of nomination, is fraudulent within Election Law (Consol. Laws 1909, c. 17) § 123, providing that no separate sheet comprising an independent certificate of nomination shall be received and filed if 5 per cent. of the names thereon are fraudulent, and such names cannot be counted in either place in which they appear. In re Objections to Nomination Certificate of Baillie for Mayor of City of Cohoes, 137 N. Y. Supp. 957, 958, 78 Misc. Rep. 84.

#### FRAUDULENT CLAIM

A "fraudulent claim" against the government is a false or fictitious claim, gotten up or contrived by some person or persons with the design or purpose to deceive or defraud the government or its departments or officers in Washington, or to present it for approval or payment. *Bridgeman v. United States*, 140 Fed. 577, 594, 72 C. C. A. 145.

#### FRAUDULENT CONCEALMENT

Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to discover them to the other. *Arkins v. Arkins*, 77 Pac. 256, 257, 20 Colo. App. 123.

"There may be such relations between the parties that silence or the nondisclosure of a material fact will be a 'fraudulent concealment.' If a person standing in a special relation of trust and confidence to another has information concerning property and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided. Mere silence under such circumstances becomes fraudulent concealment." *Pitman v. Holmes*, 78 S. W. 961, 963, 34 Tex. Civ. App. 485 (quoting *Perry, Trusts*, § 178).

"A 'fraudulent concealment' is the suppression of something which the party is bound to disclose. To constitute fraud the intent to deceive must clearly appear. The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases." In an action against a surety on a bond conditioned on the principal therein performing his agreement as an agent of the obligee, the surety alleged that his signature was obtained by the misrepresentation of the obligee as to the character of the principal and the fraudulent concealment of the fact that the principal, while in the employ of the obligee, had committed forgery. The evidence failed to show that the principal had committed forgery,

and the obligee had no knowledge of the fact that the surety was to be a surety on the bond until after it had been delivered. As the obligee was not bound, in the absence of inquiries from a surety, to communicate to him the circumstances that might affect his undertaking, there was no concealment sufficient to discharge the surety. *Wright v. German Brewing Co.*, 63 Atl. 807, 808, 103 Md. 377 (quoting and adopting definition in *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 23 L. Ed. 699).

A "fraudulent concealment" is the suppression of something which the party is bound to disclose. *Sherman v. Harbin*, 100 N. W. 629, 631, 125 Iowa, 174 (citing *Magee v. Manhattan L. Ins. Co.*, 92 U. S. 99, 23 L. Ed. 699).

A fraudulent concealment is the intentional concealment of some fact known to defendant which it is material for plaintiff to know to prevent being defrauded; the concealment of a fact which one is bound to disclose being the equivalent of an indirect representation that such fact does not exist, and differing from a direct false statement only in the mode by which it is made. *T. C. Power & Bro. v. Turner*, 97 Pac. 950, 955, 37 Mont. 521.

While a purchaser, who stands on an equal footing with the seller as to access to means of obtaining knowledge of the value of the thing sold, is not bound to disclose any knowledge he may have on the subject, if in addition to keeping silent as to such knowledge he makes any statement which tends affirmatively to the suppression of the truth, or is calculated to deceive the seller, or to distract his attention from the real facts, his concealment becomes fraudulent and will afford ground for a rescission of the sale. Defendant purchased from the receiver of a national bank for \$25 a judgment held by the bank against a deceased debtor, amounting to over \$9,000. At the time of the sale, the bank held, as collateral to the judgment, an assignment of a claim in favor of the debtor against an insolvent firm whose assets were being administered by the court, which was of considerable value, and on which a dividend had been declared, and was then payable, amounting to nearly \$900. Defendant knew of this collateral, but the receiver did not, having succeeded prior receivers who had lost the evidence of the transfer, and there being nothing on the receivers' books to put him on inquiry. Nor did the record in the insolvency case show that the bank was the owner of the claim. The receiver lived at a distance, and the negotiations for the purchase were conducted by correspondence, in which defendant made no mention of the collateral, but stated his understanding that the debtor had died insolvent after going through bankruptcy, and suggested that the claim would soon be barred by limitation, and that if handled at

once a small sum might be realized, but even that was very doubtful. Held, that such statements and suggestions amounted to an active and "fraudulent concealment" of the facts, and entitled the receiver to a rescission of the sale. *Files v. Rankin*, 153 Fed. 537, 541, 82 C. C. A. 491.

In order to establish a fraudulent "concealment" by a bankrupt of property belonging to his estate from his trustee, which will deprive him of his right to a discharge under Bankr. Act July 1, 1898, c. 541, §§ 14b (1), 29b (1), 30 Stat. 550, 554, it must appear that the property in fact belonged to him at the time of the bankruptcy. The fact that it had previously been fraudulently transferred, if the transfer was actual, and not colorable, and placed it beyond the reach of the bankrupt, is not made by the act a ground for refusing a discharge. In *re Hammerstein*, 189 Fed. 37, 38, 110 C. C. A. 472.

#### Of cause of action

Where it was the duty of defendants to make known a breach of trust in paying funds to a receiver in violation of the order of the court and a failure to disclose such fact with fraudulent intent, it constituted a "fraudulent concealment" of the facts giving rise to the cause of action and tolled the statute. *American Nat. Bank of Macon v. Fidelity & Deposit Co. of Maryland*, 63 S. E. 622, 623, 131 Ga. 854, 21 L. R. A. (N. S.) 962.

The "fraudulent concealment" avoiding the running of the statute of limitations must go beyond mere silence, and must be something actually done or said which is directly intended to prevent discovery. *State ex rel. Bell v. Yates*, 132 S. W. 672, 674, 231 Mo. 276; *Same v. Grant*, 132 S. W. 676, 231 Mo. 292.

Under Code, § 3448, providing that, in actions for relief on the ground of fraud or mistake, the cause of action shall not be deemed to have accrued until the fraud complained of shall have been discovered by the party aggrieved, "fraudulent concealment" by a trustee is the same as active fraud, and where the fiduciary relation exists, as in the case of the promoters of a corporation and the company, mere silence upon the part of the agent or trustee is "fraudulent concealment" and will be deemed as continuing to avoid the statute of limitations. *Caffee v. Berkley*, 118 N. W. 267, 269, 141 Iowa, 344.

A mere statement that a holder had no knowledge of the existence of the cause of action does not amount to a statement that the person liable has "fraudulently concealed the cause of action," within Hurd's Rev. St. 1901, c. 83, § 22, providing that, if a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced any time within five years after the person entitled to bring the same discovers he has such cause of action, and

therefore such statement is not sufficient to prevent the application of the statute of limitations. *Parmelee v. Price*, 70 N. E. 725, 730, 208 Ill. 544 (citing *Conner v. Goodman*, 104 Ill. 365).

#### FRAUDULENT CONTRACT

A "fraudulent contract," within the statute making a "fraudulent contract" a ground for divorce, is not necessarily one rendering the marriage void ab initio. The fraud which makes the contract fraudulent is a fraud in law and upon the law, and hence one induced by fraudulent concealment to marry an epileptic, forbidden by Pub. Acts 1895, p. 667, c. 325, to marry, is entitled to a divorce on the ground of "fraudulent contract." *Gould v. Gould*, 61 Atl. 604, 607, 78 Conn. 242, 2 L. R. A. (N. S.) 531.

#### FRAUDULENT CONVERSION

Where, on a trial for a violation of Pen. Code 1895, § 194, providing that, if any person intrusted with money shall fraudulently convert the same, he shall be punished as therein prescribed, the court repeatedly instructed that the evidence must show, beyond a reasonable doubt, the "fraudulent conversion" of the money intrusted to defendant, it was not necessary to go beyond the statutory definition, and further charge that the conversion must have been with intent to steal; a "fraudulent conversion," in the statutory definition of the offense, being synonymous with "taking with intent to steal" in ordinary larceny. *Hagood v. State*, 62 S. E. 641, 744, 5 Ga. App. 80.

A foot race was arranged between H. and W.; one T. being H.'s backer, and defendant G. being W.'s backer. Prosecutor gave T. a sum of money to bet on the race, on the latter's promise that it, or an equivalent sum, should be returned, whatever the outcome of the contest; prosecutor not intending to part with his money. The money was placed in a satchel, and after the race G. and W. claimed the same, and it was turned over to them. Held, that such acts constituted "theft," as defined by White's Ann. Pen. Code, art. 858, and not "swindling" or "fraudulent conversion by a bailee," though the money was obtained by fraudulent pretext. *Glasgow v. State*, 100 S. W. 933, 935, 50 Tex. Cr. R. 635.

#### FRAUDULENT CONVEYANCE

The "fraud" contemplated by a statute authorizing an attachment upon the ground of a "fraudulent conveyance" or disposition of property is actual fraud and not that denominated "fraud in law," or constructive fraud, and an offense which, if fraudulent at all, is constructively so only under the provisions of a statute is not ground for attachment, where it affirmatively appears, from the finding of the trial court, that the sale was made in good faith, and no actual fraud was contemplated or practiced. *Williams v.*

Fourth Nat. Bank of Wichita, Kan., 82 Pac. 496, 498, 15 Okl. 477, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

It is the intent and purpose with which the debtor acts that renders the conveyance "fraudulent," and this must be determined by the facts of each particular case. *Peyton v. Webb* (Ky.) 96 S. W. 839, 840 (citing *O'Kane v. Vinnedge*, 55 S. W. 711, 108 Ky. 34; *Rose v. Campbell* [Ky.] 76 S. W. 506; *Frazier v. Frisbie Furniture Co.* [Ky.] 86 S. W. 539).

The term "fraudulent conveyance," as used in Rev. St. 1909, § 6360, providing that when any person shall testify, either as a party or as a witness, in any suit or proceeding, his testimony shall not be used as evidence to prove any fact in any suit or prosecution against him for any penalty for violating any law in relation to fraudulent conveyance of property, referred only to fraud of a grantor or vendor against the right of his creditors or purchasers from him, and such section did not preclude the introduction in evidence, in a prosecution for false pretenses in securing a deed, of a deposition given by him in a civil suit to set aside a deed wherein he did not object to testifying on the ground that his answers might incriminate him. *State v. Marlon*, 188 S. W. 491, 497, 235 Mo. 359.

The legal effect of Const. 1874, art. 9, § 3, providing that the homestead of a husband or head of a family shall not be subject to the lien of any judgment, etc., is that fraud cannot be predicated of a conveyance of the homestead, for the creditor could not have reached that with his execution if it had been retained. As to exempt property, there are, within the meaning of the statute of frauds, no creditors, and, as there is no restraint upon the debtor against selling or conveying such property, the motives with which such transfers are made do not concern the creditor. The debtor may sell, exchange, or give it away, and his creditor has no just cause of complaint, for, being exempt, it is no more beyond his reach after transfer than it was before. In such alienations there may be a bad motive, but no illegal act constituting a "fraudulent conveyance" as to the creditor. *Gibson v. Barrett*, 87 S. W. 435, 75 Ark. 205.

Under Ky. St. 1903, § 1907, declaring that a transfer of any of his estate by a debtor without valuable consideration shall be null as to his then existing liabilities, a voluntary conveyance by one indebted at the time is presumptively a "fraudulent conveyance" as to the existing creditors, irrespective of the intentions of the debtor or the amount conveyed, but, as to subsequent debts, a creditor assailing voluntary conveyance must show circumstances justifying the presumption that the intent of the conveyance was fraudulent before the land conveyed can be

subjected to the payment of subsequent debts. *Standifer v. Baker* (Ky.) 101 S. W. 365, 366.

A conveyance by a debtor of property in which his creditors have and can have no interest or concern is not fraudulent as to such creditors; hence a conveyance by a debtor and his wife of property bought with the wife's money, the title to which was taken in the husband's name, is not "fraudulent" as to the husband's creditors. *Matador Land & Cattle Co. v. Cooper*, 87 S. W. 235, 236, 39 Tex. Civ. App. 99.

A "fraudulent conveyance" is no conveyance as against the interests intended to be defrauded. *Salemonson v. Thompson*, 101 N. W. 320, 324, 13 N. D. 182 (quoting and adopting language of *Chancellor Kent* from *Sands v. Codwise* [N. Y.] 4 Johns. 536, 4 Am. Dec. 308).

A "fraudulent conveyance" is no conveyance against the interest intended to be defrauded, and a creditor recovering judgment and levying on and selling land fraudulently conveyed by the debtor prior to the rendition of the judgment may recover the land in ejectment by virtue of his deed of purchase at the execution sale, without first going into equity to set aside the fraudulent conveyance. *Ward v. Sturdivant*, 98 S. W. 690, 692, 81 Ark. 73.

A creditor's bill to reach the debtor's property alleged a large overdue indebtedness by the principal defendant and a conveyance by him of his property upon an inadequate consideration and a distribution of large sums of money out of this consideration among other defendants without account to him, and either without any indebtedness to them or an indebtedness grossly insufficient to justify the payments to them, that a specific intent to defraud tainted every part of the transaction, and that it resulted from the execution of a design in which all the defendants participated with the purpose of profiting out of property which ought to have gone to payment of debts of the principal debtor, who, during the execution of the scheme, was secreted from his creditors. Held, on demurrer, that the bill alleged a "fraudulent conveyance," within R. L. c. 159, § 3, cl. 8, allowing a suit in equity to reach and apply in payment of a debt property conveyed by a debtor to defraud creditors. *Hutchins v. Nickerson*, 98 N. E. 791, 793, 212 Mass. 118.

Where, by force of a statute, the effect of a conveyance is to create a statutory lien in favor of a particular creditor, and the conveyance is otherwise valid and sufficient to pass a title to the purchaser, such a transfer cannot properly be denominated a "fraudulent conveyance" or a conveyance which is held void as against creditors of such debtor by the laws of the state. *Sellers v. Hayes*, 72 N. E. 119, 122, 163 Ind. 422.

**FRAUDULENT INTENT**

"It does not necessarily follow that a party intends fraud because he deliberately commits an unlawful act for the purpose of injuring another. The 'unlawful act' may be an act of personal violence intended simply to injure the person, or it may be intended only to injure the character and in no way directed at the property or property rights of the person. In any of these instances it would be very difficult to adduce a 'fraudulent purpose' from the act." *People v. Jackson*, 71 Pac. 566, 567, 138 Cal. 462.

A false representation does not amount to fraud at law unless it be made with a "fraudulent intent." There is, however, a "fraudulent intent" if a man, either with a view of benefiting himself or misleading another into a course of action, makes a representation which he knows to be false or which he does not believe to be true. In *re Collins*, 157 Fed. 120, 126 (quoting and adopting definition in *Cooper v. Schlesinger*, 4 Sup. Ct. 360, 111 U. S. 148, 28 L. Ed. 382).

"Fraudulent intent" is a mere state or condition of mind and constitutes an ultimate fact in the definition of any offense of which it is made an ingredient. *Burns' Ann. St. 1901*, § 7254A, declaring a punishment against any person who shall obtain food, lodging, entertainment, or other accommodations at an inn with intent to defraud the owner or keeper thereof, shows that the subject-matter to which the fraudulent intent relates is the price or value of the accommodations. *Clark v. State*, 84 N. E. 984, 985, 171 Ind. 104, 16 Ann. Cas. 1229.

**FRAUDULENT MISREPRESENTATION**

See, also, False Representation; Fraud; Fraudulent Representation; Misrepresentation.

"It is said in *Bigelow on Frauds*, 466, that a 'fraudulent misrepresentation' is made up of five elements: (1) A false representation. (2) Knowledge by the person who made it of its falsity. (3) Ignorance of its falsity by the person to whom it was made. (4) The intention that it should be acted upon. (5) Acting upon it, with damage. An action at law for damages for deceit requires all these elements. In equity a case may be made without the second, and sometimes without the fifth. Very nearly the same enumeration of the elements going to make up a fraudulent misrepresentation is given in 2 Pom. Eq. Jur. 357." *Pomeroy* lays down this rule (2 Pom. Eq. Jur. 357): "A misrepresentation, in order to constitute fraud, must contain the following essential elements: (1) Its form as a statement of fact. (2) Its purpose of inducing the other party to act. (3) Its untruth. (4) The knowledge or belief of the party making it. (5) The belief, trust, and reliance of the one to whom it is made. (6) Its materiality." The same rule is announced in *Lahay v. City Nat. Bank*, 25 Pac. 704, 15

*Colo.* 339, 22 Am. St. Rep. 407, and *Connell v. El Paso Gold Min. & Mill. Co.*, 78 Pac. 677, 33 *Colo.* 30. The rule is thus stated in 8 *Enc. Pl. & Pr.* p. 901: "As a general rule, false representations not being fraudulent or actionable unless made with knowledge of their falsity, or stated as the truth when the person has no knowledge on the subject, scienter must be expressly alleged in a declaration or complaint for false representation and deceit, or specific allegations must be used which sufficiently import knowledge." And cases cited. The specific allegations referred to in the last above quotation, which will import knowledge upon examination of the cases cited, are found to be allegations to the effect that the defendant falsely and fraudulently represented, etc.; it being held that the word "fraudulently" included scienter. *Colorado Springs Co. v. Wight*, 96 Pac. 820, 821, 44 *Colo.* 179, 16 *Ann. Cas.* 644 (quoting *Wheeler v. Dunn*, 22 Pac. 827, 833, 13 *Colo.* 428, 436).

If a statement of fact actually untrue is made by a person who honestly believes it to be true, but under such circumstances that the duty of knowing the truth rests upon him, which if fulfilled would have prevented him from making the statement, such misrepresentation is fraudulent in equity. *Tolley v. Poteet*, 57 S. E. 811, 819, 62 *W. Va.* 231.

**FRAUDULENT PREFERENCE**

"To constitute a 'fraudulent preference' by an insolvent debtor, the preference must be an advantage actually given to one or more creditors over the others, with the knowledge of his situation and the intent to accomplish this end; and there must be guilty collusion." *Bacon v. Merchants' Bank*, 40 *South.* 413, 146 *Ala.* 521 (quoting and adopting definition in *Brandenburg, Bank*, 344).

**FRAUDULENT REPRESENTATION**

See, also, False Representation; Fraud; Fraudulent Misrepresentation; Misrepresentation.

While a promise to do an act in the future cannot be untrue at the time it is made, if made in bad faith and with no intention of performing, it constitutes a "fraudulent representation." *McLaughlin v. Thomas*, 85 *Atl.* 370, 372, 86 *Conn.* 252.

A representation "fraudulently" made is one made both with intent to deceive and to defraud. "To defraud" necessarily includes "to deceive," and one cannot be defrauded unless he is deceived in some respects. *Isaacs v. State*, 68 S. E. 338, 339, 7 *Ga. App.* 799.

"The general principles applicable to cases of 'fraudulent representation' are well settled. \* \* \* The representation must be in regard to a material fact, must be false, and must be acted upon by the other

party in ignorance of its falsity, and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were approximate, immediate, and material. If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations." Where defendants, who had knowledge of engineering, before contracting to construct certain waterworks went on the ground, occupied a month in making investigations, preliminary surveys, etc., and were afforded every opportunity to acquire knowledge of the exact conditions, they were not entitled to defend an action for breach of the contract on the ground that they were induced to make it by plaintiff's false representations. *Smith & Benham v. Curran & Hussey*, 138 Fed. 150, 157 (quoting with approval from *Farrar v. Churchill*, 10 Sup. Ct. 771, 135 U. S. 609, 34 L. Ed. 246; citing *Farnsworth v. Duffner*, 12 Sup. Ct. 164, 142 U. S. 43, 35 L. Ed. 931; *Shappirio v. Goldberg*, 24 Sup. Ct. 259, 192 U. S. 232, 48 L. Ed. 419).

The essentials of "fraudulent representations" are that the representations shall not only be false but fraudulent, and they must be made by one who either knows them to be false or else, not knowing, asserts them to be true, and made with intent to have the other party act on them to his injury, and such must be their effect. A vendor of goods who, with design to cheat the vendee, changes the price marks on the goods, or, knowing that they do not correctly show the cost, falsely represents to the vendee that they do correctly show such cost, is liable where the vendee, relying on such representations, is deceived to his injury, though the latter, by proper diligence, could have discovered the imposition. *Mason v. R. M. Thornton & Co.*, 84 S. W. 1048, 1049, 74 Ark. 46 (citing *Louisiana Molasses Co. v. Ft. Smith Wholesale Grocery Co.*, 84 S. W. 1047, 73 Ark. 542).

A fraudulent representation is one which is either knowingly untrue or made without belief in its truth, or recklessly made, and in each case made for the purpose of inducing action upon it. *Sallies v. Johnson*, 81 Atl. 974, 976, 85 Conn. 77, Ann. Cas. 1913A, 386.

A statement to be "fraudulent" must not only be false, but the party making it must have known that it was false when he made it, and made it with the design to influence action by another who relied thereon. *Security Sav. Bank of Wellman v. Smith*, 122 N. W. 825, 828, 144 Iowa, 203.

Before a representation will be considered "fraudulent" in law so as to give a right of action, it must be made relative to a matter susceptible of accurate knowledge, must be a statement importing knowledge on the

part of the person making the representation, and it must be relied on as such. *Ryan v. Batchelor*, 129 S. W. 787, 788, 95 Ark. 375.

An allegation, in an accusation for being a common cheat and swindler, that representations were fraudulent, is a sufficient statement that such representations were made with intent to defraud. *Crawford v. State*, 62 S. E. 501, 504, 4 Ga. App. 789.

Where a person states to another that which he knows to be false, or recklessly states that which he does not know to be true concerning a material matter, and the person to whom the statement is made is justified by the circumstances in relying on it without further investigation or inquiry, it is in law a "fraudulent representation." *Goodwin v. Fall*, 66 Atl. 727, 730, 102 Me. 353.

Where defendant represented monthly dividends to be about \$72, and made remittances as such by personal checks in amounts greater even than this, which amounts plaintiff accepted for, and believed were, the actual dividends, when in fact the actual dividends were about \$40; a purchase of additional stock upon such belief was upon "fraudulent representations." *Gilluly v. Hosford*, 88 Pac. 1027, 1029, 45 Wash. 594.

"Fraudulent representations" sufficient to authorize the cancellation of a deed made pursuant to a contract must be material to the contract or transaction to be avoided and must be made by one who either knows them to be false, or, not knowing, asserts them to be true, and they must be made with intent to have the other party act on them to his injury, and such must have been their effect. *Evatt v. Hudson*, 133 S. W. 1023, 1025, 97 Ark. 265.

Under the statute making it swindling to acquire property by any false or deceitful pretense or device or "fraudulent representation," an indictment for swindling, that does not allege that defendant knew the representation was false, was defective, though it characterized the representation as false and "fraudulent." *Doxey v. State*, 84 S. W. 1061, 1062, 47 Tex. Cr. R. 503, 11 Ann. Cas. 830.

## FRAUDULENT TAKING

On a trial for theft, an instruction that by "fraudulent taking" is meant that the person taking knew at the time of taking that the property was not his own, that the property was taken without the consent of the owner, and with intent to deprive the owner of the value thereof and to appropriate it to the use or benefit of the person taking, was correct. *McCoy v. State*, 120 S. W. 858, 859, 56 Tex. Cr. R. 551.

## FRAUDULENT TRANSFER

A "preference," within the bankruptcy act, is not the same as a "fraudulent transfer" of a bankrupt's assets. In a preferen-



tial transfer, the fraud is technical and infringes the rule of equal distribution among all creditors which it is the policy of the court to enforce when all cannot be fully paid, while in a "fraudulent transfer" the fraud is actual in that the bankrupt has secured an advantage for himself out of what should belong to his creditors. Where a bankrupt with knowledge of insolvency assigns certain accounts to secure advances from a banker and at once uses the money so obtained to pay favored creditors, the transaction while constituting a "preference," shows no intent to defraud except inferentially by a preferential payment, and therefore is not a "fraudulent transfer" prohibited by Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564. *Van Iderstine v. National Discount Co.*, 174 Fed. 518, 519, 521, 98 C. C. A. 300 (4), (5).

In a "fraudulent transfer" of a bankrupt's assets, within the bankruptcy act, the fraud is actual, in that the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, while a preferential transfer consists in the infraction of the rule of equal distribution among all creditors. *Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co.*, 133 S. W. 412, 415, 152 Mo. App. 401.

#### FRAUDULENT USE OF THE MAILS

The fact that a circular sent out by mail by a commission merchant to advertise his business contained some exaggerations as to his facilities for handling property consigned to him, or that he failed to settle with some of his patrons, is not sufficient to establish a scheme or artifice to defraud, which will support an indictment under Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873, for "fraudulent use of the mails." *Faulkner v. United States*, 157 Fed. 840, 841, 85 C. C. A. 204.

#### FRAUDULENTLY

See Knowingly and Fraudulently.

#### FREE

The word "free," in a contract of sale which requires the buyer to pay a specified price f. o. b. cars at his place of business in this country, or laid down at his place of business, or "free" at his place of business, duty unpaid, must be construed according to the universal understanding of merchants and importers throughout the United States and the foreign country, and the universal understanding is that the buyers should pay import duties; and the buyer must pay such duties without deduction from or credit on the price. *Steldtmann v. Joseph Lay Co.*, 84 N. E. 640, 642, 234 Ill. 84.

Where testator declared his wife to be his sole heir with the "free disposal" of all his property, the words "free disposal" gave

her the right to do therewith as it might please her and were not qualified by a subsequent provision that she should leave the same to the children "when the time comes." *Bollentin v. Bollentin*, 109 N. Y. Supp. 212, 213, 57 Misc. Rep. 250.

Under Bal. Ann. Codes & St. § 739, granting to cities the power to control the use of their streets, an ordinance, making it unlawful to drive an automobile on the street at a greater speed than six miles per hour, is valid, notwithstanding *Sess. Laws 1905*, p. 293, c. 154, providing that no driver in charge of an automobile shall permit it to be driven in the thickly settled portion of any city at a greater speed than one mile in 5 minutes, nor over any crossing faster than one mile in 15 minutes, and also providing that cities shall have no power to pass any ordinance requiring of any operator of an automobile any license or permit to use their streets or prohibiting any automobile the "free use" of such streets; the word "free" being used for the purpose of prohibiting a city from collecting any additional license or fee from owners of automobiles kept for private use, or making the payment of the same a condition precedent to the use of its streets. *City of Bellingham v. Clisna*, 87 Pac. 481, 482, 44 Wash. 397.

#### As without compensation

"Free medical treatment," guaranteed by contract to members of the relief department of a railroad company, means without cost to the disabled member; and the place of treatment, "one of the hospitals under its control," as between the member and the company, means the hospital to which the member is taken by the medical examiner of the company. *Gainesville & Alachua County Hospital Ass'n v. Hobbs*, 69 S. E. 79, 81, 153 N. C. 188.

A trust created in testator's residuary estate that it should constitute a fund the income from which fund when it should amount to \$75,000 should be used for the maintenance of a hospital where the unfortunate might receive care and skillful treatment, and that, if the hospital should not have been built, when the fund should amount to the sum named, then \$25,000 of the principal might be used for building a hospital, provided a sufficient sum was guaranteed for its maintenance, is not void as impossible of fulfillment on the ground that testator's purpose was to establish a hospital absolutely free, not a hospital some branch of which might be free or which might provide a certain number of free beds to charity patients, and that, if \$25,000 was taken to build such a free hospital, the income of the remaining \$50,000 would be entirely inadequate to maintain it, for the word "free" means "thrown open or made accessible to all," and does not preclude receiving a compensation from those able to pay. *Webber Hospital Ass'n v. McKenzie*, 71 Atl. 1032, 1035, 104 Me. 320.

**As unobstructed**

In a deed conveying a lot of land and "a free right of way for an alleyway 12 feet wide, extending from the rear end of said lot across another lot owned by said K. to the alley running to L. street," the word "free" qualifies and relates to "right of way" and is descriptive of the right of way, the thing granted, and not of the use to be made of the right of way. According to *Webst. Dict.*, the word "free," when used in relation to a thing to be enjoyed or possessed, means "thrown open, or made accessible to all; to be enjoyed without limitations; unrestricted; not obstructed, engrossed, or appropriated; open." Applying that definition, the word "free," as used in the deed, indicates the condition and character of the right of way, which is the thing granted, and the thing to be enjoyed and possessed, and, as thus interpreted, it means an unobstructed right of way as far as any future act of the owner of the servient lot is concerned. *Flaherty v. Fleming*, 52 S. E. 857, 859, 58 W. Va. 669, 3 L. R. A. (N. S.) 461.

**FREE ELECTION**

An election conducted under the supervision of the military power is not a "free and equal election," within the meaning and spirit of the Constitution. *Scholl v. Bell*, 102 S. W. 248, 259, 125 Ky. 750.

The election is "free and equal" where all of the qualified electors of the precinct are carefully distinguished from the unqualified, and are protected in the right to deposit their ballots in safety and unprejudiced by fraud. The election is not free and equal where the true electors are not separated from the false, where the ballot is not deposited in safety, or where it is supplanted by fraud. A voter is "free" when he is left in the untrammelled exercise of his right or privilege. The vote of an elector is "equal" when it is counted at the same value as the vote of every other qualified elector exercising the privilege. When persons not legitimately qualified are permitted to vote, the legal voter is thereby denied his adequate proportionate share of influence in the election. The election as to him is unequal. *Rouse v. Thompson*, 81 N. E. 1109, 1122, 1123, 228 Ill. 522.

The election is not "free and equal" where a third of the electors are prevented from voting because of an insufficient supply of ballots. *Hocker v. Pendleton*, 39 S. W. 250, 100 Ky. 726.

The guaranty of a "free and equal election" signifies that elections shall not only be open and untrammelled to persons endowed with the elective franchise, but shall be closed to all not enjoying such privilege under the Constitution. *Ex parte Wilson*, 125 Pac. 739, 746, 7 Okl. Cr. 610.

**FREE FROM ARTIFICIAL COLORATION**

Oleomargarine made to look like butter of a shade of yellow by the use of one-half of 1 per cent. of palm oil, a vegetable oil recognized as a possible ingredient by Act Aug. 2, 1886, c. 840, § 2, is not "free from artificial coloration" within the meaning of the proviso in section 8 of that act, as amended by Act May 9, 1902, c. 784, § 3, imposing a lesser tax on oleomargarine when free from artificial coloration that causes it to look like butter of any shade of yellow, although the addition of such palm oil may give the product a slightly better grain of texture, and a slightly better physiological effect upon those who eat it, where, but for its coloring power, it probably would not have been used. *Wm. J. Moxley v. Hertz*, 30 Sup. Ct. 305, 216 U. S. 344, 54 L. Ed. 510.

**FREE FROM CONTRIBUTORY NEGLIGENCE**

The expression "the employé injured being free from contributory negligence" is the equivalent of the provision of *Burns' Ann. St.* 1901, § 7083, requiring an allegation that the employé was at the time of the injury complained of in the exercise of due care and diligence. *Pittsburgh, C., C. & St. L. R. Co. v. Collins*, 71 N. E. 661, 662, 163 Ind. 569 (citing *Indianapolis Union Ry. Co. v. Houlihan*, 60 N. E. 943, 137 Ind. 494, 498, 54 L. R. A. 787; *Pittsburgh, C., C. & St. L. Ry. Co. v. Lighthouse*, 71 N. E. 218, 163 Ind. 247).

**FREE FROM FAULT**

Where it is said that, before a homicide can be treated as justifiable, it must appear that the slayer was "free from fault" or did not provoke the difficulty, it is to be understood, not that he must not have done anything which might in the ordinary sense of the word be regarded as provocation, but that the provocation must not have been such as would in law be sufficient to justify the attack against which he was defending himself when the homicide was committed. *Smarrs v. State*, 61 S. E. 914, 917, 131 Ga. 21 (quoting *Butler v. State*, 19 S. E. 51, 92 Ga. 601).

**FREE FROM INCUMBRANCE**

An agreement to convey land "free from incumbrances" calls for a marketable title. *Van Keuren v. Siedler*, 66 Atl. 920, 921, 73 N. J. Eq. 239.

Where a vendor engaged to convey full fee-simple title, the further terms, "free and clear from any taxes, mortgages or other liens of any character," did not by enumeration of incumbrances of a particular class exclude the idea that the title was to be free from all other incumbrances such as an easement to maintain water ditches or pipes thereon. *Wingard v. Copeland*, 116 Pac. 670, 672, 64 Wash. 214.

Plaintiff, who was interested in options on mining claims, associated H. with him, who expended considerable money in developing the property. A corporation was formed of which plaintiff was elected secretary and H. president. Plaintiff asserted an interest in the company to the extent of 100,000 shares of the capital stock, under an agreement with H. in which the latter agreed to "protect all present subscribers to the extent of assessing 750,000 shares fully 15 cents before any further assessments shall be levied against those of such subscribers who shall pay their full subscription to said stock, that is, 15 cents per share, fully guaranteeing to carry free from all assessment or incumbrance 100,000 shares of said stock of (plaintiff), who shall not be assessed for said 100,000 shares until all the aforesaid 750,000 shares shall have paid into the treasury fully 15 cents per share." Held, that the words "free of incumbrance" cannot be construed as meaning free from any charge or payment; but the agreement would be construed to mean that plaintiff would not be called upon to pay any assessment upon, or any part of the purchase price of, the stock until H. had paid in full for the 750,000 shares. *Cunningham v. Independence Consol. Mining Co.*, 108 Pac. 956, 959, 58 Wash. 371.

#### **FREE FROM PARTICULAR AVERAGE**

See Particular Average.

#### **FREE MARKET**

The "right to a free market" "is the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not, as they may voluntarily elect. Thus recognition is accorded to the interest that one man has in the freedom of another. The tort exhibited by the violation to free market consists in coercing the market; i. e., interfering with the right of a particular dealer to enjoy the advantages of freedom to deal with him on the part of all who may voluntarily desire to deal with him." *Alfred W. Booth & Bros. v. Burgess*, 65 Atl. 226, 229, 72 N. J. Eq. 181.

#### **FREE OF ALL CHARGES**

An act permitting telegraph companies to construct, operate, and maintain their lines in the streets in consideration of such companies rendering certain services for the right of way over public property imposes a charge for the privilege, so that a further provision that they might construct their lines "free of charge" is without significance. *City of Memphis v. Postal Telegraph Cable Co.*, 139 Fed. 707, 713.

Anti-Free Pass Law March 26, 1907, § 1, provides a penalty where a carrier, etc., "shall" knowingly carry persons free of charge, or give free passes, franks, substitutes for use instead of regular fare or rate for

transportation, or sell transportation for anything except money, etc., except as otherwise provided. Section 3 imposes penalties upon those who "shall" use or attempt to use free passes, franks, etc. A contract made between an express company and railway companies before the passage of the act required the railway companies to furnish cars for the transportation of express matter, to carry, "free of charge," the express company's messengers, property, etc., to furnish passes for the free transportation of the express company's officers, etc., when traveling on business for the company, and to transmit, "free of charge," business messages, etc. The express company is required to make a specified payment, and to carry, "free of charge," remittances, business packages, etc. Held, that the contract is not impaired by the act; the act being prospective in its operation, the mutual services to be performed by the contracting parties being valuable considerations for their respective obligations, and the term "free of charge" and similar expressions used in the contract meaning that no specific additional charge should be made for such services. *Texas & N. O. R. Co. v. Wells-Fargo Express Co. (Tex.)* 110 S. W. 38; *Gulf, C. & S. F. R. Co. v. Same (Tex.)* 110 S. W. 41.

An allegation that certain rents and property were given by an insolvent to his children "free of charge as advancements" sufficiently charges that the gifts were voluntary; the phrase "free of charge as advancements" meaning that there was no charge for the gifts and no valuable consideration other than love and affection. *Patton v. Walker's Trustees (Ky.)* 118 S. W. 312, 314.

#### **FREE ON BOARD**

See, also, F. O. B.

The letters "f. o. b.," in contracts of sale, mean "free on board" the cars, and this means free of expense to the buyer. A seller contracting to deliver goods free on board cars impliedly agrees to supply the cars necessary. *Elliott v. Howison*, 40 South. 1018, 1026, 146 Ala. 568.

The abbreviation "f. o. b." for "free on board," used in the sale of goods, denotes the duty of the seller to deliver them free from all charges on board the vehicle or vessel of the carrier. *Harman v. Washington Fuel Co.*, 81 N. E. 1017, 1019, 228 Ill. 298.

The abbreviation "f. o. b." has a well-defined business meaning, and, as applied to the sale of merchandise destined for shipment, means that it will be placed on a car or vessel free of expense to the buyer. *Manganese Steel Safe Co. v. First State Bank of Leola*, 125 N. W. 572, 573, 25 S. D. 119.

In a contract of sale, the phrase "these prices are f. o. b. California" means that the purchaser is to pay the freight from California to the place of destination. *Phœ-*

nix Packing Co. v. Humphrey-Ball Co., 108 Pac. 952, 954, 58 Wash. 396. .

The expression "f. o. b. at R." is equivalent to the expression "laid down at R." *Steldtmann v. Joseph Lay Co.*, 84 N. E. 640, 642, 234 Ill. 84.

An agreement to sell property at a certain time for a stated price "f. o. b." at a distant place implies that the seller will ship and place the property on the cars at the designated point free of any expense to the buyer. *Hunter Bros. Milling Co. v. Kramer Bros.*, 80 Pac. 963, 965, 71 Kan. 468.

The expression "f. o. b. cars," used on a sale of goods means a delivery without charge for drayage or other expenses previous to loading, and has nothing to do with fixing the time or place of payment of the agreed purchase price, and does not bind the purchaser to pay at the place of shipment, but merely binds him to accept the property delivered on board the cars at that point. *Russell & Co. v. F. W. Heitmann & Co. (Tex.)* 86 S. W. 75, 76.

A parol sale at a specified price of certain wheat then in a storehouse, delivered "f. o. b. cars" at a named point under a custom that the words "delivered f. o. b. cars" meant that the grain was to be delivered by the seller on board the cars before title passed, without any payment made on the price, was within the statute of frauds. *Peacock Mill Co. v. Honeycutt*, 103 Pac. 1112, 1113, 55 Wash. 18.

The phrase "f. o. b. cars," when used in a contract between a buyer and a seller of commercial commodities, where the use of a common carrier is necessary, means that the seller will secure the cars, load them, and do whatever may be required to accomplish the shipment and consignment to the buyer, free of expense. *Hurst v. Altamont Mfg. Co.*, 85 Pac. 551, 553, 73 Kan. 422, 6 L. R. A. (N. S.) 928, 117 Am. St. Rep. 525, 9 Ann. Cas. 549 (citing the definitions in *John O'Brien Lumber Co. v. Wilkinson*, 94 N. W. 337; 117 Wis. 468).

"F. o. b." denotes that the seller has agreed to deliver on cars or vessels "without costs to the buyer for packing, portage, cartage, and the like," and "in such a contract the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made." A contract by which a coal company sold a quantity of coal, to be delivered during a series of months "f. o. b. cars at the mines," did not cast upon it an obligation to provide cars, but only to be ready to load the same when supplied. *Evanston Elevator & Coal Co. v. Castner*, 133 Fed. 409, 410 (quoting and adopting the definition in *Bouv. Dict.*).

Acceptance of an order for shipment "f. o. b. cars" means that the goods shall be

delivered free on board of cars and loaded without expense to the purchaser, and implies that the seller shall procure the cars for loading. Statements in the seller's acceptance of an order that they "accept and enter the same for shipment," and "anticipate making shipment," implied that the seller was to furnish the cars for loading. *R. J. Menz Lumber Co. v. B. J. McNeeley & Co.*, 108 Pac. 621, 623, 58 Wash. 223, 28 L. R. A. (N. S.) 1007.

The term "f. o. b." cars, in mercantile contracts, means "free on board" cars at the place of shipment. Such term means that the seller will, without expense or act of the buyer, deliver to the latter the subject of the sale on cars at such place. All the authorities declare that a sale f. o. b. cars so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars, ready to be taken out by the carrier, that the term is not open to construction. *Vogt v. Shlenebeck*, 100 N. W. 820, 822, 122 Wis. 491, 67 L. R. A. 756, 106 Am. St. Rep. 989, 2 Ann. Cas. 814.

The ordinary effect of a purchase of coal at a specified price "f. o. b. mines" is that title shall pass on delivery of the coal to the carrier. Where defendant requested plaintiffs to ship to defendant, at a specified place, 50 cars of coal of a specified kind at \$2.25 f. o. b. mines during the first week in April, 1906, shipping date guaranteed and defendant accepted regardless of conditions, weighing the coal was not a condition precedent to the passing of title. *Hoffman v. Gosline*, 172 Fed. 113, 117, 96 C. C. A. 318.

A contract required plaintiff to furnish defendant with its entire consumption of coal between specified dates at \$2.40 per long ton f. o. b. Philadelphia; the Eastern Coal Company, or any other mutually satisfactory concern, to freight, insure, unload, and haul to defendant's works for \$1.35 per long ton, defendant's total payment to both parties being \$3.75 per long ton delivered in defendant's yard at such times and in such quantities as defendant might direct, and plaintiff to have at least 1,000 tons constantly in defendant's yard and 3,000 tons on dock at Providence and in transit. Held, that the contract required delivery of the coal at defendant's yard; the words "f. o. b. Philadelphia" being used merely to fix the price up to that point. *Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co.*, 162 Fed. 848, 851, 89 C. C. A. 520.

Where a coal company contracted to sell the output of its mine, and the buyer agreed to accept, receive, and pay at a specified rate "f. o. b." at the place, where the mine was situated, that place, and not the buyer's place of business, or other place to which the coal was to be shipped, was the place of delivery. *Tuttle-Chapman Coal Co.*

v. Coaldale Fuel Co., 113 N. W. 827, 829, 136 Iowa, 382.

A contract to deliver hay on the track at a certain town should be considered the same as a contract to deliver it f. o. b. there, so that the place of shipment was the place of delivery. *National Warehouse & Storage Co. v. Toomey*, 129 S. W. 423, 425, 144 Mo. App. 516.

A contract to deliver lumber "free on board cars" at the destination is unambiguous, and not open to construction by proof of custom or otherwise; the provision requiring the seller to deliver on board cars at the destination free to be taken by the buyer without impediment, and there was no such delivery when to take possession the buyer was bound to pay the freight. *Chandler Lumber Co. v. Radke*, 118 N. W. 185, 186, 136 Wis. 495.

Under Civ. Code, § 1245, requiring a contract to be interpreted to give effect to the mutual intent, an agreement to accept a secondhand safe and time lock, f. o. b. Leola, in part payment for a new safe, meant that the secondhand safe and time lock were to be delivered to the manufacturer of the new safe free on board the cars, notwithstanding the omission of the word "cars." *Manganese Steel Safe Co. v. First State Bank of Leola*, 125 N. W. 572, 573, 25 S. D. 119.

Where a writing evidencing a contract for sale of hay stated, "sold my hay to A. for \$10.50 per ton, f. o. b.," the letters "f. o. b.," without designation of place, meant delivery on board at the usual place of shipping such freight from that locality. *Adams v. Janes*, 75 Atl. 799, 800, 83 Vt. 334.

The natural meaning of the words "free on board" is that the goods are to be furnished by the seller on board free of all charges and expenses up to and including the loading. Some courts have followed the rule applicable in other cases that, where one makes an agreement to perform an act, whatever is necessary to the performance of the act is a part of his agreement, and it is implied that he will secure the means necessary to the accomplishment of the act. Courts adopting that rule hold that the seller must furnish cars. Other courts have held that the duty to furnish cars rests upon the purchaser. The term in question was frequently inserted in contracts for sale and delivery of goods free on board a vessel, and it was held that the seller was under no obligation to act until the purchaser should name the ship on which delivery was to be made, for the reason that, until the seller knew the ship, he could not put the goods on board. It was held that the seller was entitled to know on what ship and where he was required to deliver the goods, but that rule is manifestly unsuited to shipments

by rail under present conditions, at least unless the sale is made to a railroad company, or the means of transportation contemplated is under the control of the purchaser. A contract for the sale of coal required the seller to furnish a specified number of tons from the date of contract, June 1st to April 1st, at a specified price per ton, "free on board" cars at mine; shipments to be made at the rate of one to two cars per day, subject to car supply, etc. The seller furnished a part of the coal and the cars for the shipment thereof without asking the buyer to furnish cars. In view of this construction placed on the contract by the parties, together with the stipulation regarding car supply, the buyer was not required to furnish cars, notwithstanding the phrase "free on board cars at mine." *Harman v. Washington Fuel Co.*, 81 N. E. 1017, 1019, 228 Ill. 298.

Though an agreement to sell goods f. o. b. cars at a designated place will ordinarily be regarded as an agreement to deliver the goods at that place, the meaning of the term depends on the connection in which it is used, and, if the meaning is doubtful, the construction placed on the contract by the parties will be adopted, and, where a contract of sale of piling "f. o. b." cars at the final destination provided for the stopping of the shipment at an intermediate point for the piles to be treated by a creosoting company at the expense of the buyer, the term "f. o. b." should be construed to mean nothing more than that the price of the piling should include the freight charges to the destination. *Barnett & Record Co. v. Fall* (Tex.) 131 S. W. 644, 649.

The phrase "f. o. b.," in a contract of sale, prima facie imposes on the purchaser the duty of furnishing the cars or vessel upon which the goods are to be transported from the place of delivery; yet the whole agreement, when taken with its attending circumstances, or the construction of the contract by the parties, may shift the obligation of furnishing the cars or vessel upon the seller. A contract of sale, providing for a number of successive deliveries, called for cement "f. o. b." at a certain point. The seller, in acting under this contract, always obtained the cars itself, and, in correspondence with the buyers concerning its failure to ship promptly, never alluded to the duty of furnishing the cars as resting upon the buyers. The buyers never obtained the cars, and both parties evidently regarded the duty of obtaining them as resting on the seller. Held that, in view of the construction placed upon the contract by the parties, it was the seller's duty to furnish cars for the shipment of the cement. *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274, 277.

Under a contract of sale of fruit requiring delivery "f. o. b.," such delivery was

a condition precedent to the sellers' right to demand payment of a draft with bill of lading attached; and hence the sellers are not entitled to recover the difference between the contract price and a lower price at which the fruit is resold, on the buyer's failure to pay the draft at sight, where the fruit was not actually shipped, but was placed with the carrier, with private instructions to hold until the seller heard from the draft. *Aspegren & Co. v. Wallerstein Produce Co.*, 60 S. E. 957, 958, 111 Va. 570.

A contract of sale of a machine which stipulates for its shipment f. o. b., and for the payment by the buyer of expenses of unloading, installing and operating the machine for demonstration to determine compliance with the seller's guaranty, and which provides that, on the failure of the seller to demonstrate fitness, it will remove the machine at its own expense, and refund any portion of payment received thereunder, and that the buyer waives any right for possible damages or expenses, is ambiguous on the question of liability for freight charges in case the sale falls because the machine does not comply with the guaranty, and parol evidence was proper that the seller agreed in that event to refund the freight paid by the buyer; the word "expense" waived by the buyer referring only to the expense of unloading, installing, and operating, and the words "f. o. b." contemplating payment of freight by the buyer in case of consummation of the sale. *Steenstrup v. Toledo Foundry & Machine Co.*, 119 Pac. 16, 18, 66 Wash. 101, Ann. Cas. 1913C. 427; *Elliott v. Same*, 119 Pac. 19, 66 Wash. 701.

#### FREE PASS

The definition of "free pass" in Acts 32d Gen. Assem. c. 112, § 1, prohibiting common carriers from giving free passes, and defining such to be any transportation for any other consideration than money at the rate open to all, is not ineffective as being mere "expository legislation," which has reference to those acts that purport to put a construction upon past enactments without making any amendments thereto. *Schulz v. Parker* (Iowa) 139 N. W. 173, 176.

A "free pass," within Const. 1902, § 161 prohibiting any state, county, district, or municipal officer from accepting a free pass, under penalty of forfeiture of his office, is "one which is not gained by importunity or purchase; gratuitous." *Commonwealth v. Gleason*, 69 S. E. 448, 449, 111 Va. 383.

Annual passes, issued pursuant to a contract by which a carrier agreed to issue an annual pass for life to one injured by it in settlement of his claim for damages, are not "free passes" within Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584, prohibiting any common carrier from directly or indirectly giving any interstate free pass or ticket for pas-

sengers except to employes, nor did the contract violate section 2, prohibiting carriers from charging any different compensation between points named in its tariff than the fare specified therein, or from extending to any person any privileges except as specified in its tariff; it not appearing that the contract discriminated in favor of the person injured. *Louisville & N. R. Co. v. Mottley*, 118 S. W. 982, 984, 133 Ky. 652; *Mottley v. Louisville & N. R. Co.*, 150 Fed. 406, 409.

#### FREE PUBLIC SCHOOL

"Free Public Schools" exempted from taxation by Pub. Laws, c. 533, April 14, 1876, are only schools which are established, maintained, and regulated under the statutory laws of the state, and hence real estate held by religious corporations and used by ecclesiastical officers to furnish gratuitous instruction in parochial schools is not relieved from taxation. *St. Joseph's Church v. Assessors of Taxes of Providence*, 12 R. I. 19, 20, 34 Am. Rep. 597.

#### FREE USE AND ENJOYMENT

See Full and Free Use and Enjoyment.

#### FREE WHITE PERSON

See White Person.

#### FREEDOM OF SPEECH

See Liberty of Speech and the Press.

#### FREEDOM OF THE PRESS

See Liberty of Speech and the Press.

#### FREEDOM TO CONTRACT

Interference with, see Interference with Freedom to Contract.

#### FREEHOLD

See Malicious Severance from Freehold. Involving a freehold, see Involve. Selsin importing, see Selsin. Standing timber as part of, see Standing Timber.

A "freehold" is an estate for life or in fee simple. *Bourn v. Robinson*, 107 S. W. 873, 876, 49 Tex. Civ. App. 157 (citing 1 Washb. Real Prop. 41, 42); *Harvey Coal & Coke Co. v. Dillon*, 53 S. E. 923, 930, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

A "freehold" is realty. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 492, 225 Mo. 414, 20 Ann. Cas. 1072.

"At common law the 'freehold' could not be in abeyance. The doctrine was the necessary sequence of feudal tenures, but our statute has provided for freehold estates commencing in the future." *Beatson v. Bowers*, 91 N. E. 922, 924, 174 Ind. 601.

By Rev. St. 1800, § 4596, an estate of "freehold" or inheritance may be made to

commence in future by deed in like manner as by will. At common law, a freehold estate in lands to commence in futuro could not be created because it could not arise without livery of seisin, which must, in its nature, take effect immediately or not at all, and, if it should take effect so far as to pass the freehold out of the grantor, the same would not be vested in anybody but would be in abeyance, contrary to the established policy of the law. *O'Day v. Meadows*, 92 S. W. 637, 646, 194 Mo. 588, 112 Am. St. Rep. 542 (quoting and adopting 2 *Minor's Institutes*, p. 270).

A "freehold," within the statute authorizing a direct appeal to the Supreme Court, is not involved in a suit to foreclose a deed of trust brought against party defendant who files a cross-bill praying for a decree compelling complainant to convey the premises to him, and an appeal from a decree dismissing the crossbill and foreclosing the deed must be taken to the Appellate Court; a "freehold" not including a mere right to do that which in equity will entitle a party to a freehold. *Hollinger v. Dickinson*, 96 N. E. 896, 252 Ill. 123.

The determination of the rights accruing under an ordinance authorizing a property owner to construct a platform on a sidewalk, the permission to cease at the end of 10 years, does not involve a "freehold" so as to give the Supreme Court jurisdiction of the appeal. *Chicago Cold Storage Warehouse Co. v. People ex rel. Stirling*, 74 N. E. 133, 134, 215 Ill. 225.

Where a city ordinance granted the right to maintain an elevated passageway connecting a store building with an elevated railroad, and limited the right to maintain such elevated road to a term of 50 years, such right was not a "freehold interest"; and hence a writ of error, in a suit to restrain the city from interfering with the construction of the passageway, was not issuable direct from the Supreme Court in the first instance. *City of Chicago v. Rothschild & Co.*, 72 N. E. 698, 699, 212 Ill. 590.

The right to go upon land and occupy it for the purpose of prospecting, if of unlimited duration, is a "freehold interest," but such interest, being vested for a specific purpose, becomes extinct when the purpose is accomplished, or the work is abandoned. *Watford Oil & Gas Co. v. Shipman*, 84 N. E. 53, 54, 233 Ill. 9, 122 Am. St. Rep. 144.

A purchaser at an execution sale of the title of the debtor in real estate, held by him and his wife as tenants by the entirety under a conveyance executed after the passage of the married woman's act, acquires a "freehold," and the sheriff's deed gives him the same title which a deed executed by the debtor would have given. *Bilder v. Robinson*, 67 Atl. 828, 829, 73 N. J. Eq. 169 (citing *Washburn v. Burns*, 34 N. J. Law, 18; *Den*

*ex dem. Wyckoff v. Gardner*, 20 N. J. Law, 556, 558, 45 Am. Dec. 388).

#### Easement

A perpetual easement in land is a freehold interest. *Funston v. Hoffman*, 83 N. E. 917, 918, 232 Ill. 360.

A "perpetual easement" involves a freehold, authorizing an appeal direct to the Illinois Supreme Court. *Espenscheid v. Bauer*, 85 N. E. 230-232, 235 Ill. 172.

#### Ground rent

A ground rent, being an estate of inheritance in the rent of lands, is a "freehold estate." *McCammon v. Cooper*, 69 N. E. 658, 659, 69 Ohio St. 366.

#### Homestead right

A homestead estate is a "freehold." *Gillespie v. Fulton Oil & Gas Co.*, 86 N. E. 219, 225, 236 Ill. 188.

#### Leasehold interest

An action to compel the assignment of the legal title to a leasehold interest in mining claims under a five-year lease does not relate to or involve a freehold so as to authorize an appeal under *Mills' Ann. Code*, § 388, since a lease of real estate for a term of years is not a freehold estate. *Equitable Mines Co. v. Maxwell*, 127 Pac. 243, 244, 23 Colo. App. 55.

#### Water right

See *Water Right*.

### FREEHOLDER

See *Bona Fide Freeholder*; *Reputable Freeholders*; *Resident Freeholder*.

A "freeholder" is one who holds land in fee or for life or for some indeterminate period. *Campbell v. Moran*, 99 N. W. 498, 499, 71 Neb. 615; *Maitten v. Barley*, 92 N. E. 738, 174 Ind. 620; *Porter v. Purdy*, 29 N. Y. 106, 110, 86 Am. Dec. 283. It is also defined as "an estate of inheritance or for life in real property." In order to be a freeholder, a person must have a property right in and title to real estate, amounting to an estate of inheritance, or for life, or for an indeterminate period. Thus a wife living with her husband on land, the title to which is in the latter, and which is occupied by them jointly as a family homestead, is not by reason thereof a "freeholder," within the meaning of *Cobbey's Ann. St.* § 7175, providing that village authorities may grant license to sell intoxicating liquors on petition signed by a designated number of resident freeholders; and the same is true as to a husband living with his wife on land occupied by them jointly as a homestead, the legal title to which is in her. *Campbell v. Moran*, 99 N. W. 498, 499, 71 Neb. 615 (quoting *Winfield's Adjudged Words and Phrases*).

The same technical strictness does not attach to the term "freeholder" when used in a statute authorizing road improvement pro-

ceedings, as in deeds and other instruments affecting title. Thus a tenant by the entirety is a "freeholder" within Burns' Ann. St. 1908, §§ 7711-7734, authorizing road improvement proceedings on petition by freeholders. *Maitten v. Barley*, 92 N. E. 738, 174 Ind. 620.

A petition for a liquor license must be signed by bona fide freeholders. In *re Cohn*, 121 N. W. 107, 108, 84 Neb. 230; *Colglazier v. McClary & Martin*, 98 N. W. 670, 671, 5 Neb. (Unof.) 332.

A resident of a village in which an application for a saloon license is made, who purchased and paid for property in the village, which he had occupied for three years prior to the application as a home, was a freeholder, though he received no deed until shortly before he signed the petition. In *re Shank*, 134 N. W. 269, 90 Neb. 732.

A husband, whose wife is seised in fee of real estate and is the mother of children by him, is a "freeholder" and eligible as a juror, notwithstanding Const. art. 10, § 6, providing that the property of any female acquired before or after marriage shall remain her separate estate, and may be devised, and with the written assent of her husband conveyed by her as if she were unmarried. *Hodgin v. Southern Ry. Co.*, 55 S. E. 413, 414, 143 N. C. 93, 10 Ann. Cas. 417 (citing *Thompson v. Wiggins*, 14 S. E. 301, 109 N. C. 510).

A person who owns a vested remainder in real estate located within the limits of a proposed borough, subject to a life estate, owned and enjoyed by some other person, is not a freeholder within the meaning of Act April 1, 1834, § 2 (P. L. 163), relating to the incorporation of boroughs and receiving the signatures of a majority of the resident freeholders. In *re Borough of Mountville*, 31 Pa. Super. Ct. 18, 21.

A resident of the borough and county in which goods are distrained, who owns real estate in fee in an adjoining county of a neighboring state, is a freeholder, not only at common law, but also within the meaning of Act March 21, 1772 (P. L. 370) § 1, providing that appraisers in distress proceedings for rent shall be "reputable freeholders." *Singer Sewing Mach. Co. v. Follett*, 39 Pa. Super. Ct. 429, 430.

Since at common law and by Comp. Laws, § 8787, estates of inheritance are freehold estates, and the estate of a vendee in possession under a land contract is an estate of inheritance, such a vendee in possession is a "freeholder," within Comp. Laws § 4319, requiring a petition for a drain to be signed by a certain number of freeholders. *Starkweather v. Chatfield*, 112 N. W. 1071, 149 Mich. 443. Every tenant by entireties is also a "freeholder," within the statute. *Hinkley v. Bishopp*, 114 N. W. 676, 677, 678, 152 Mich. 256. And so is a lessee for life.

*Bakker v. Fellows*, 117 N. W. 52, 53, 153 Mich. 428.

Sess. Laws 1903, c. 166, § 1, provides for the submission of the question of granting permits to sell intoxicating liquors at retail upon a petition signed by twenty-five legal "freeholders, voters of such township," etc. Civ. Code, § 245, provides that estates of inheritance and for life are called estates of freehold. Civ. Code, § 2444, provides that, whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. Held, that the word "freeholder," as used in Sess. Laws 1903, c. 166, § 1, contemplates any person who holds a life estate or any estate in realty which may be inherited, even though the class of persons who may take the estate be limited by the terms of the tenure or by the provisions of the laws of inheritance. *State ex rel. Dillman v. Weide*, 135 N. W. 696, 698, 29 S. D. 109. A voter whose wife is the owner of a homestead is not a competent signer, for a freeholder is one who has title to the property and not simply a contingent or expectant estate or right of occupancy or privilege with power to prevent alienation. *State ex rel. Cain v. Toomey*, 129 N. W. 563, 564, 27 S. D. 37, Ann. Cas. 1913D, 324.

The word "freeholders," as used in *Revisal*, § 4115, amended by Pub. Laws 1909, c. 525, and Pub. Laws 1911, c. 135, § 1, providing that special school districts may be formed upon a petition signed by one-fourth of the freeholders within the proposed special school district, does not embrace female owners of freehold estates, nor infants, nor non-residents, as the word "freeholder," when used with reference to political rights, or suffrage or governmental matters, has never been understood to include such persons. *Gill v. Board of Com'rs of Wake County*, 76 S. E. 203, 207, 160 N. C. 176, 43 L. R. A. (N. S.) 293.

#### Householder distinguished

"Householders" is not synonymous with "freeholders," as the latter term is used in a constitutional provision that compensation for property taken for public use shall be ascertained by a jury or board of not less than three "freeholders." *Grossman v. Patton*, 85 S. W. 548, 550, 186 Mo. 661.

#### FREEHOLDERS OF THE MUNICIPALITY

Under Laws 1903, c. 166, which provides that the petition calling for a vote upon the question of licensing the sale of intoxicating liquors within a municipality must be signed by 25 freeholder voters of such municipality, one who is a voter of such city and owns a freehold in the county is not a competent



signer. State ex rel. Cain v. Toomey, 129 N. W. 563, 564, 27 S. D. 37, Ann. Cas. 1913D, 324.

### FREELY

Where there was evidence that confessions of accused to the officers were induced by threats or promises of assistance, an instruction that unless the statements were

made voluntarily, and not induced by threats or promises, the jury could not consider them in the case, was sufficient, under Code Cr. Proc. 1895, arts. 789, 790, requiring that the confessions be made "freely" and without compulsion in order to be admissible as evidence, though it be conceded that "freely" and "voluntarily" are not synonymous. Cross v. State (Tex.) 101 S. W. 213, 214.

**FREEZE****FREEZE OUT**

To "freeze out" a stockholder in a corporation, within the meaning of the colloquial phrase, consists of conduct of those in control of the corporation, in manipulating and misrepresenting its affairs, so as to induce the stockholder to part with his holdings under the impression that they are less valuable than they really are. *Von Au v. Magenhelmer*, 110 N. Y. Supp. 629, 635, 126 App. Div. 257; *Theis v. Spokane Falls Gaslight Co.*, 74 Pac. 1004, 1006, 34 Wash. 23.

**FREIGHT**

See Local Freight; Personal Freight; Through Freight; Train for Both Passengers and Freight.

Perishable freight, see Perishable Property.

Handling freight, see Handle.

Tender of freight, see Tender.

"Freight" is the hire or compensation paid for the use of a ship for carrying goods. *The Norman Prince*, 185 Fed. 169, 171; *Buffalo City Bank v. Northwestern Ins. Co.*, 30 N. Y. 251, 252.

The word "freight" has two meanings, being used to denote the compensation paid to a carrier of goods and also the property carried. *The Nassau*, 188 F. 46, 48, 110 C. C. A. 184.

"Freight rate" is the net amount paid to the carrier by the shipper. The giving by a private car company of a rebate or an allowance to a shipper using its cars, although from its own funds and without the connivance or the knowledge of the carrier, is violation of the federal statute known as the "Elkins act." *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235, 238, 241.

**As cargo or goods carried**

The term "freight shipments," as commonly used, means those distinct from baggage to go by railroad carriers, and not by express carriers, who undertake to make delivery to the consignee personally though their lines of travel may be identical. *Baum v. Long Island R. Co.*, 108 N. Y. Supp. 1113, 1119, 58 Misc. Rep. 34.

The word "freights," as used in section 5 of the interstate commerce act (Act Feb. 4, 1887, c. 104, which provides that it shall be unlawful for any common carrier to enter into any contract, agreement, or combination with any other carrier for the pooling of freights of different or competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof, means the commodities carried, and not the compensation paid for such carriage. *Interstate Commerce Commission v. Southern Pac. Co.*, 132 Fed. 829, 838.

Rev. St. § 4472, prohibits passenger steamers from carrying as "freight" certain articles, including petroleum products or other like explosive fluids, except in certain cases and under certain restrictions. By Act Feb. 20, 1901, c. 386, the section was amended by adding the following provision: "Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel and the same be not relighted until after said vehicle shall have left the same. \* \* \*" Held, that gasoline contained in the tank of an automobile being transported on a steam vessel was carried as "freight," within the meaning of the statute. *The Texas*, 134 Fed. 909, 914.

**FREIGHT BRAKEMAN**

See Railway Freight Brakeman or Switchman.

**FREIGHT CAR**

"Freight cars are generally, if not universally, constructed so as to ride upon two four-wheeled trucks, upon which the cars are supported by means of devices called bolsters. One of these devices is attached to the bottom of the car body, and is called a body bolster. The other is attached to the truck, and is called the truck bolster. The body bolster rests upon the truck bolster, and at the point of contact there is a device called the centre bearing plate, which, acting in connection with a king bolt, permits the truck to conform to inequalities and curvatures in the track, regardless of the direction of the axis of the car body. Side supports \* \* \* are also furnished, to secure stability of the car upon the track, and prevent any tendency to upset, by limiting the rocking of the car body. Ordinarily, though, the weight is carried upon the centre bearing plate, that the swivelling may be done as easily as possible, in order to avoid friction between the car and the side bearings, especially in hauling a heavy train around a curve." *McCarty v. Lehigh Valley R. Co.*, 16 Sup. Ct. 240, 242, 160 U. S. 110, 40 L. Ed. 358.

A statute requiring coupler devices on each end of every freight car, etc., does not require such devices on the tenders of locomotives. *Blanchard v. Detroit & M. R. Co.*, 103 N. W. 170, 171, 139 Mich. 694.

Safety Appliance Act March 2, 1893, c. 196, provided that within 90 days after the passage of the act the American Railway Association was authorized to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, for

each of the several gauges of railways in use in the United States, and should fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. The section then requires all common carriers engaged in interstate commerce to conform their cars thereto, and imposed a penalty for the use in interstate commerce after July 1, 1895, of cars not conforming to the standard. Held, that the term "freight cars," as used in such section, included the locomotive at the head of the train and the caboose at the other end, so that the use of a locomotive with a drawbar on the front end not conforming to the specified height constituted a violation of the act. *Chicago, M. & P. S. Ry. Co. v. United States*, 196 Fed. 882, 883, 116 C. C. A. 444.

### **FREIGHT DEPOT**

See Depot.

### **FREIGHT ON BOARD**

See On Board.

### **FREIGHT PENDING**

The annual subsidy paid to the vessel, and the passenger and freight receipts earned on her sailing from Havre to New York need not be surrendered as "freight then pending" for the voyage, within the meaning of Rev. St. U. S. §§ 4283, 4284 (U. S. Comp. St. 1901, p. 2943), in proceedings for the limitation of liability for claims arising out of the sinking of the vessel as a result of a collision occurring on the vessel's return trip from New York to Havre. But sums prepaid for freight and passage on the voyage, under an absolute agreement that such sums are, in any event, to belong to the owner of the vessel, must be surrendered as "freight then pending" on the voyage, within the meaning of the statute. *Deslions v. La Compagnie Générale Transatlantique*, 28 Sup. Ct. 684, 679, 210 U. S. 95, 52 L. Ed. 973; *La Bourgoigne*, 139 Fed. 433, 435, 71 C. C. A. 489.

Where, at the time of an injury which gave rise to proceedings for limitation of liability, the vessel surrendered was employed in raising a sunken vessel under a contract by which the petitioner received a stated sum for the service, such sum may properly be considered as "freight pending" within the meaning of the statute, which must also be surrendered, and no deduction can be made therefrom on account of other vessels or appliances also used in the service, but which the petitioner did not surrender. *The Captain Jack*, 162 Fed. 808, 809.

### **FREIGHT RECEIPT**

As contract, see Contract.

### **FREIGHT TRAIN**

A "freight train" is primarily for the carriage of freight. *Southern Ry. Co. v. Cunningham*, 50 S. E. 979, 981, 123 Ga. 90.

A "freight train," not intended for both passengers and freight, within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on such trains, is one on which passenger business is subordinated to the carriage of freight. *White v. Illinois Cent. R. Co.*, 55 South. 593, 595, 99 Miss. 651; *Thacker v. Same* (Miss.) 55 South. 595.

The carrying of passengers in a caboose car attached to a freight train, the only train operated on a branch line, does not change the train into a passenger train. Such train is simply a "freight train" within the exception contained in the separate coach law. *Southern R. Co. v. Commonwealth*, 110 S. W. 372, 378, 129 Ky. 87.

### **FREIGHTING**

The word "freighting" in a charter party, whereby the owner of a vessel agrees on the "freighting" and chartering thereof to the charterer for one voyage, means a loading with goods for transportation, and does not indicate a demise of the vessel to the charterer. *Grimberg v. Columbia Packers' Ass'n*, 83 Pac. 194, 197, 47 Or. 257, 114 Am. St. Rep. 927, 8 Ann. Cas. 491.

### **FREIGHTYARD**

A place where there were side tracks and where cars were unloaded and trains made up and which was used as a storing yard, and the tracks and such mode of use had been continued for 23 years, was a "freight-yard," across which a city had no power to lay out a street. *Paterson & R. R. Co. v. City of Paterson*, 60 Atl. 47, 72 N. J. Law, 112.

### **FREQUENT**

The term "frequent," as used in a provision of a surety company's bonds insuring the fidelity and honesty of factors that the principal should make "frequent audits and examinations," should be construed with reference to the situation of the parties, and means no more than with reasonable frequency, depending on the situation of the parties and the existing obligations of the contract with reference to accounts, etc. *T. M. Sinclair & Co. v. National Surety Co.*, 107 N. W. 184, 188, 132 Iowa, 549.

The fair meaning of an allegation in a bill for an accounting, that complainant "frequently" protested against statements rendered him, is that he protested from time to time. *Daab v. New York Cent. & H. R. R. Co.*, 62 Atl. 449, 452, 70 N. J. Eq. 489.

### **FRESH**

#### **FRESH MEAT**

The tax imposed by section 16, c. 5106, p. 9, Laws 1903, is upon the wholesale dealer in "fresh" meats only. Whether the same be either "packed or refrigerated," it must be, at the time that he sells it in the ordinary course

of his business, in that state where it can properly be termed "fresh meat," as contradistinguished from cured or salted meats, in order to render him liable to the occupational tax imposed by said section. Meats technically known as "cured," from having been treated with salt, smoke, etc., keep in an edible condition indefinitely even in the warmest latitudes, whereas the same meats when untreated and fresh, though capable of being kept in their fresh and natural condition for long periods in a low temperature either natural or artificial, quickly spoil, become putrid, and unfit for food when subjected to high or even mean or ordinary temperatures. It is upon the wholesale dealer, in the last described commodity, that the said section 16, c. 5106, p. 9, Laws 1903, imposes the license tax, and not upon the dealers in cured or salted meats. *Florida Packing & Ice Co. v. Carney*, 41 South. 190, 192, 51 Fla. 190 (citing *Cross v. Seeberger* [C. C.] 30 Fed. 427).

### FRESH-WATER RIVERS

"A 'fresh-water river,' like a tidal river, is composed of the alveus, or bed, and the water, but it has banks instead of shores. The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow the banks; and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river." *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104 (quoting and adopting definition in *Gould, Waters*, §§ 41, 45).

### FRESHET

See Unusual Freshet or Storm.

### FRICTION

A "friction wheel" is one of the wheels in frictional gearing. "Frictional gearing wheels" are those which transmit motion by surface friction, instead of teeth. *Whiteley Malleable Castings Co. v. Wishon*, 85 N. E. 832, 835, 42 Ind. App. 288. See, also, *Meyer v. Kenyon-Rosing Mach. Co.*, 104 N. W. 132, 95 Minn. 329.

### FRIEND

A "friend" is one who entertains regard for another and takes active interest in his welfare. In *re Wagner*, 114 N. W. 868, 869, 870, 151 Mich. 74.

The word "friend," in *Insanity Law*, § 73 (Laws 1896, p. 501, c. 545), providing that any one in custody as an insane person is entitled to a writ of habeas corpus on a proper application made by him or some "friend" in his behalf, means one "favorably disposed." *People ex rel. Belro v. Bond*, 93 N. Y. Supp. 277, 104 App. Div. 47 (quoting *And. Law Dict.*).

The word "friend," as used in a letter reciting that a "fellow" used to be a "friend" of a certain woman, implies that the word was used with a defamatory meaning. *Irving v. Irving*, 105 N. Y. Supp. 609, 610, 121 App. Div. 258.

### FRIVOLOUS PLEADING

A "frivolous answer" is one which, assuming its truth, is so clearly bad as to require no argument to convince a court that it presents nothing worthy of adjudication. *Mills v. Territory*, 81 Pac. 447, 448, 13 N. M. 174.

Both denials and defenses may be "frivolous." A denial is frivolous when upon its face it is not a denial, and a defense is frivolous when upon its face it is not a defense. *Rochkind v. Perlman*, 108 N. Y. Supp. 224, 225, 123 App. Div. 808.

A "frivolous demurrer" is one which raises no serious question of law. The refusal to hold a demurrer frivolous and to render judgment accordingly is not appealable. *Morgan v. Harris*, 54 S. E. 381, 382, 141 N. C. 358 (citing in support of definition, *Johnston v. Pate*, 83 N. C. 110; *Dunn v. Barnes*, 73 N. C. 273; *Hurst v. Addington*, 84 N. C. 143; *Porter v. Grimsley*, 4 S. E. 529, 98 N. C. 550).

Where creditors seek to reach the beneficial interest of their judgment debtor in a voluntary trust which she had created for herself, an answer that the rents of the premises which were subject to the trust, after paying therefrom the interest on the mortgage, taxes, repairs, and insurance, were insufficient for the proper support and maintenance of defendant, and that there was no surplus income derived from the premises, is "frivolous." *Kene v. Hill*, 92 N. Y. Supp. 805, 102 App. Div. 370.

#### As pleading setting up no defense

A frivolous defense is one which at first glance can be seen to be merely pretensive, setting up some ground which cannot be sustained by argument. *Dominion Nat. Bank v. Olympia Cotton Mills*, 128 Fed. 181, 182.

A "frivolous answer" is one that contains no valid defense, and which is insufficient on its face. *White v. Calhoun*, 94 N. E. 743, 744, 83 Ohio St. 401.

A "frivolous answer" is one that does not, in any view of the facts pleaded, present a defense to the action. *State ex rel. Engelhard v. Webber*, 105 N. W. 490, 492, 96 Minn. 422, 113 Am. St. Rep. 630.

The defense of the want of corporate existence or power is not a "frivolous" one. A defense is only "frivolous" when it contains nothing that can affect the plaintiff's case. *Oregonian Ry. Co. v. Oregon Co.*, 22 Fed. 245, 248, 249.

An allegation of no knowledge or information sufficient to form a belief as to the

allegations of the complaint raises an issue, and such a defense cannot usually be regarded as a "frivolous defense." But an allegation that the defendant corporation has no knowledge or information sufficient to form a belief as to the entry of a judgment against it, and the issuing and return of an execution unsatisfied, states a frivolous defense, for the existence of a judgment against defendant is peculiarly within the knowledge of its officers, and the judgment and execution are matters of public record open to public inspection, and such want of knowledge and information arises from unwillingness to learn the facts. *W. J. Morgan & Co. v. Quo Vadis Amusement Co.*, 91 N. Y. Supp. 882, 883, 45 Misc. Rep. 130.

## FROG

The word "frog," as used in Ky. St. § 780, requiring every railroad company to block the frogs on its tracks to prevent the feet of its employes from being caught therein, means a device made of several rail sections secured to a plate or bolted together to form a connection of one track with another branching from or crossing it, and does not include the opening at the end of a guard rail, maintained opposite the frog and used to keep the wheel from slipping off the other rail while passing over the frog. *Commonwealth v. Louisville & N. R. Co.*, 136 S. W. 869, 870, 143 Ky. 501.

In railroad parlance, "frogs" are pieces of railroad iron joined together so as to constitute an appliance for rerailing derailed cars. *Pollard's Adm'x v. Kentucky & Ind. Bridge & R. Co. (Ky.)* 97 S. W. 735. Or for transferring cars from one track to another. *Morie v. St. Louis Transit Co.*, 91 S. W. 962, 116 Mo. App. 12.

## FROM

Ky. St. § 2282, creates the office of trustee of the jury fund, such trustee to be appointed by the circuit court in each county, and to hold his office for four years "from his appointment," and until his successor is appointed and qualified, and provides that the judge shall have power to remove the trustee and appoint another for the unexpired term whenever the public interest may in his opinion require it. Held, that the intent was to designate consecutive periods of four years following each other in regular order, the one beginning where the other ends, as the terms of office, and not that each incumbent should serve four years after his appointment; the words "from his appointment" merely designating the beginning of the term of the first incumbent under the act, and where an incumbent was reappointed from term to term, the time being permitted to lap over the expiration of the term, each reappointment was for the unexpired term,

and where a four-year term ended on January 9, 1910, and an appointment was made December 18, 1909, the appointee was entitled to hold only until such later date. *Castleman v. Meglemry*, 127 S. W. 1010, 1011, 138 Ky. 313.

### As exclusive or inclusive according to intent

The word "from" in its literal and restricted sense generally means exclusive, but it may be used in a connection that means inclusive. In construing it, therefore, the courts will take into consideration the context and subject-matter and construe it to mean either inclusive or exclusive, accordingly as it is influenced by its connection, *Baker v. Hammett*, 100 Pac. 1114, 1116, 23 Okl. 480; *McGee v. Corbin*, 70 S. W. 79, 80, 96 Tex. 35 (citing *Hazelwood v. Rogan*, 67 S. W. 80, 95 Tex. 295).

Whether the word "from" shall be construed as inclusive or exclusive of the terminus a quo depends on the context, or the subject-matter, and particularly on the expressed intention of the parties. *Budds v. Frey*, 117 N. W. 158, 159, 104 Minn. 481, 15 Ann. Cas. 24.

As the word "from," which is used with respect to place, may be either exclusive or inclusive, according to the context, the question whether an assurance that if anything happened it would be made all right, given to a servant hired "to ice cars from an ice-house," which consisted of a house and high platform, extended to the icing of cars from ice which was piled on the side of the ice-house, but which was brought to the platform the same as that from the icehouse, to be loaded into the cars, is a question for the jury. *Dailey v. Swift & Co.*, 84 Atl. 603, 607, 86 Vt. 189.

Const. Ala. 1901, § 116, which provides that the Governor shall hold office for four years "from" the first Monday after the second Tuesday in January next succeeding his election and until his successor shall be elected and qualified. Section 48 declares that the Legislature shall meet on the second Tuesday in January next succeeding their election, and section 115 provides that the returns of every election for Governor and other state officers shall be transmitted to the Speaker of the House, "who shall, during the first week of the session . . . open and publish them," and it was held that, since the word "week" in section 115 can only mean seven consecutive days, the returns might be opened as late as the Monday following the meeting of the Legislature, so that the word "from" contained in section 116, relating to the commencement of the term of office of the Governor, must be construed according to the context and subject-matter as a word of exclusion. *Oberhaus v. State ex rel. McNamara*, 55 South.

898, 900, 173 Ala. 483 (citing 4 Words and Phrases, pp. 2983, 2986).

"Instances are not rare in which statutes have been construed, not literally, but in accordance with the common use of the language employed by the lawmakers. Authority to construct a railroad or turnpike from A. to B., or beginning at A. and running to B., is held to confer authority to commence the road at some point within A., and to end it at some point within B. The words 'from,' 'to,' and 'at,' are taken inclusively, according to the subject-matter." Union Pac. R. Co. v. Hall, 91 U. S. 343, 348, 23 L. Ed. 428.

#### As exclusive as to time

In the computation of time, where a period is fixed as commencing "from" a named date, as a general rule of construction, the date named will be excluded, and by the same rule, when a period of time is to continue "until" a certain day named, such day is also excluded. Under a lease where the words "from" and "until" are used in connection with the other phrase, "a term of two years," as fixing the term granted, it may well be that either one or both of the dates named may be either included within the term or excluded therefrom. Thus where the term of a lease extends "from the first day of December, 1904, for and during and until the first day of December, 1906, a term of two years," it expires November 30, 1906, if possession is taken December 1, 1904, or December 1, 1906, if possession is taken December 2, 1904. I. X. L. Furniture & Carpet Installation House v. Berets, 91 Pac. 279, 280, 32 Utah, 454.

#### As inclusive as to place

In articles of incorporation of a railway company providing that it is to be constructed and operated "from" Covington to Erlanger, and such further points beyond as may thereafter be determined upon and over and along such streets, roads, etc., as may be acquired by due process of law, the expression "from" Covington means from within the city, and hence land within the city can be condemned for a right of way. Devon v. Cincinnati, C. & E. Ry. Co., 109 S. W. 361, 362, 128 Ky. 768.

The word "from," as used in an information under Comp. Laws, § 11,551, prohibiting larceny by stealing in any building on fire, which charged defendant with stealing goods from a building on fire, means "in"; the word "from" being often used interchangeably with "in." People v. Klammer, 100 N. W. 600, 137 Mich. 399.

### FROM AND AFTER

#### In devise of remainder

Adverbs of time, such as "upon," "then," "from and after," etc., in the devise or bequest of a remainder limited upon a life estate, are construed to relate merely to the time of enjoyment of the estate, and not to

the time of its vesting in interest. Staples v. Mead, 137 N. Y. Supp. 847, 850, 152 App. Div. 745.

The words "from and after," and similar expressions used in a devise of a remainder following a life estate, are not in and of themselves sufficient to justify the conclusion that a remainder is contingent and not vested. Such words, unless there is something else in the will to indicate the contrary, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest. Trowbridge v. Coss, 110 N. Y. Supp. 1108, 1111, 126 App. Div. 679 (citing Connelly v. O'Brien, 60 N. E. 20, 166 N. Y. 406; Hersee v. Simpson, 48 N. E. 890, 154 N. Y. 496; Nelson v. Russell, 31 N. E. 1008, 135 N. Y. 137; Davidson v. Jones, 98 N. Y. Supp. 265, 112 App. Div. 254); Davidson v. Jones, 98 N. Y. Supp. 265, 266, 112 App. Div. 254 (citing Connelly v. O'Brien, 60 N. E. 20, 166 N. Y. 406; Hersee v. Simpson, 48 N. E. 890, 154 N. Y. 496; Nelson v. Russell, 31 N. E. 1008, 135 N. Y. 137; Moore v. Lyons [N. Y.] 25 Wend. 119); McGraw v. McGraw, 176 Fed. 312, 322, 99 C. C. A. 650 (quoting and adopting Haug v. Schumacher, 60 N. E. 245, 166 N. Y. 506).

Testator's will gave his property to his wife for life, and it was then provided that "from and after" her death it should go to testator's surviving child or children. Held, that the expression "from and after" the death of my wife I give" was not a declaration of an intent that the title should vest only on the happening of the decease of the wife and therefore only in those of his children who should survive her, but the children of testator who survived him took on his death a vested interest in the remainder. Barnes Cycle Co. v. Haines, 61 Atl. 515, 517, 69 N. J. Eq. 651 (citing and following Howell v. Green, 31 N. J. Law, 572; Post v. Herbert's Ex'rs, 27 N. J. Eq. 544).

#### As exclusive as to time

A statute declared to take effect from and after a date named takes effect on the day after the day of the date named. State ex rel. Harness v. Roney, 92 N. E. 486, 488, 82 Ohio St. 376, 19 Ann. Cas. 918.

Under Const. art. 5, §§ 2, 17, providing that the Governor, Secretary of State, Controller, etc., shall be elected and shall hold office for four years "from and after" the first Monday after the first day of January, subsequent to the election, and article 20, § 20, providing that the terms of officers shall commence "on" the first Monday after the first day of January following their election, the official term of the state officers begins "on" the first Monday after the first day of January after the election. The phrase "from and after" does not have any certain meaning that can be accepted as a guide under all circumstances and is equivalent to the words "on and after," though as a gen-

eral rule, the phrase "from and after" a designated day requires the exclusion of the first day. *People ex rel. Mattison v. Nye*, 98 Pac. 241, 246, 9 Cal. App. 148.

Acts 33d Gen. Assem. c. 118, § 13, amendatory to laws relating to drainage districts, and relating to appeals under the act, was to take effect "from and after" its publication, and the Secretary of State certified that it had been published April 19, 1909, the same day as that on which the plaintiff filed notice of appeal, with a bond, in a drainage matter. Held, on motion to dismiss the appeal, that the act did not take effect on April 19th, but "from and after" that date, and after plaintiff's appeal had been taken. *Arnold v. Board of Sup'rs of Kossuth County*, 130 N. W. 816, 151 Iowa, 155.

#### As inclusive as to time

Statutes taking effect "from and after" a specified day take effect on that day. *Whittaker v. Mutual Life Ins. Co. of New York*, 114 S. W. 53, 54, 133 Mo. App. 664 (citing 4 Words and Phrases, p. 2980).

The phrase, "from and after the passage of this act," occurring at the beginning of an act, will not put the act into immediate effect, in the absence of the usual effective clauses generally observed in the state, and when a comprehensive view of the statutes makes it reasonably clear that the Legislature did not intend an immediate change in the existing law, and Act May 27, 1907, regulating the admission of attorneys containing such clause, does not become effective until 60 days from the date of its enactment. *In re Alexander*, 44 South. 175, 176, 53 Fla. 647.

Where a statute provides that it shall take effect "from and after its publication," in computing the time when it takes effect the day of its publication is to be included; but the precise time of its publication or taking effect may be shown, where an act is done on the same day of its publication, if the hour of publication affects such act in any way. *Leavenworth Coal Co. v. Barber*, 27 Pac. 114, 115, 47 Kan. 29.

A lease from quarter to quarter "from and after" a designated date includes that date; for, where the word "from" is used in connection with the creation of an estate, and it is not contrary to the expressed intent of the parties, the date named from which the estate is to exist is to be included, and the estate vests thereon. *Budds v. Frey*, 117 N. W. 158, 159, 104 Minn. 481, 15 Ann. Cas. 24.

Ballinger's Ann. Codes & St. § 5925 (Pierce's Code, § 6121), provides for the giving of a bond by a contractor for public work for the benefit of materialmen and contractors. Section 5927, as amended by Laws 1899, p. 172, c. 105, provides that such persons shall not have any right of action on the bond unless, within 30 days "from and after" the completion of the contract with and accept-

ance of the work by the board, they shall file with the board a notice in writing, etc. Held, that the statute only fixes the time after which notices may not be filed, and hence notice given before the work was completed or accepted was sufficient, the object of the statute being that notice of the claimant's intention of holding the surety be given him. *Cascade Lumber Co. v. Aetna Indemnity Co.*, 106 Pac. 158, 159, 56 Wash. 503; *Minneapolis Steel & Machinery Co. v. Aetna Indemnity Co.*, 106 Pac. 160, 56 Wash. 699 (citing 4 Words and Phrases, pp. 2986, 2987).

#### FROM AND THROUGH THE MOTHER

"From" and "through," as used in a statute making children capable of inheriting from and through their mother, and giving them the right to distributive shares of the personal estates of any of their kindred on the part of their mother, includes inheritance directly from the mother and indirectly from any one to whom or from whom kinship can be traced through her, either in ascending or descending line. By the use of the word "from" it was the intention of the Legislature to allow the child to inherit real property from the mother direct; the descent being direct on her death. *Berry v. Powell*, 105 S. W. 345, 348, 47 Tex. Civ. App. 599.

#### FROM AND TO

See From and To.

Where a written contract between attorneys and client provides for the payment, as a contingent fee for services, of a sum equal to "from 10 to 15 per cent." of the market value of the interest of the client recovered, the contract gives them the right to claim 15 per cent. and they cannot be restricted to 10 per cent. *Heiberger v. Worthington*, 23 App. D. C. 565, 566.

"From" is a term of exclusion, and the word "to" is inclusive. Under a statute making it unlawful to kill game except "from the 15th day of November to the 5th day of December," in computing the time or duration of the "open season" the first-named day should be excluded and the last-named day should be included, making the period of such open season 20 days. *State v. Elson*, 83 N. E. 904, 905, 77 Ohio St. 489, 15 L. R. A. (N. S.) 686.

In a lease providing for its termination on 60 days' notice, in the event of the landlord conveying his right, title, and interest in the premises "from the 1st day of May, 1909, to the 1st day of May, 1910," the clause quoted is the period within which a conveyance would give the landlord the right to terminate the lease, and does not mean the term for which the conveyance was to be made, and so require a notice of 60 days prior to May 1, 1909, the word "from" therein meaning the same as "between"; and, the

landlord having conveyed between the dates specified, the right to give the notice accrued to his grantees, so that the lease terminated 60 days after they gave notice on June 27, 1909. *Scheele v. Waldman*, 121 N. Y. Supp. 486, 488, 136 App. Div. 679.

#### FROM ANY CAUSE

See Any.

#### FROM ANY ORDER

See Any.

#### FROM BUILDING

The words "from any buildings," as used in a city ordinance providing that no person shall distribute in any public street or from any buildings handbills or papers of any description except newspapers, are clearly to be held as relating to the distribution of circulars, etc., from buildings into the public streets. *International Text-Book Co. v. Auburn*, 155 Fed. 986, 987.

#### FROM DATE

"Six months from date," as a time within which an act is to be performed by agreement, cannot by proof of any custom be extended or explained to mean or include a day or two before the particular date. *Lombardo v. Case* (N. Y.) 45 Barb. 95, 97.

#### FROM DAY TO DAY

An adjournment "from day to day" is from one day to its succeeding day. "Day by day," according to Webster, means daily, every day, each day in succession, continually, without intermission of a day. Although an act authorizing the sale of unseated lands for taxes provided for an adjournment of the sale "from day to day," yet a title was held good which was founded on a sale made by adjournment to a certain day which did not immediately succeed the first. *Burns v. Lyon* (Pa.) 4 Watts, 363, 366.

A provision in a city charter, directing a collector to continue the sale "from day to day" between the hours of 10 o'clock and 5 o'clock in the afternoon as long as there were bidders or until the taxes were paid, did not prevent the collector from adjourning the sale over Thanksgiving day. *Lynch v. Donnell*, 15 S. W. 927, 930, 104 Mo. 519.

Under statutes requiring a tax sale to begin on the second Tuesday of April, and if unfinished on that day to be continued on the next succeeding days till completed, where a sale began on the first day named, and was continued "from day to day" on the succeeding days, the statute did not require that it should have been continued for any given time on each day. If a single lot was sold on each day and the sale continued until the next day, this was held sufficient. *Wood v. Meyer*, 36 Wis. 308, 312.

Under a statute authorizing a sheriff as collector to sell land certified as delinquent

for taxes, and if the sale be not completed on the first day it shall be continued "from day to day (Sundays excepted)," a sheriff began his sale of lands December 2d, and then adjourned until January 9th, and made no sales between said dates, and completed his sales on the last-named date. Held, that the sheriff had the right to adjourn the sale if the same was not completed on the first day, but that the adjournment was required to be from day to day and not from time to time; consequently the sale was invalid. *Collins v. Sherwood*, 40 S. E. 603, 606, 50 W. Va. 133.

The expression "from day to day," in Code, § 50, providing that the police court shall hold a term on the first Monday of every month, and shall continue the same from day to day as long as may be necessary for the transaction of its business, suggests that it was not contemplated that the continued term would extend beyond the next term of the court; and it is doubtful whether the January term may be extended until November. *Harris v. Nixon*, 27 App. D. C. 94, 98.

#### FROM THE EVIDENCE

The words "from the evidence," used in an instruction requiring a finding from the evidence, means all the evidence in the case. *Little Rock & H. S. W. R. Co. v. McQueeney*, 92 S. W. 1120, 1123, 78 Ark. 22.

The phrase, "from all the other circumstances appearing in the trial," and the phrase, "all the evidence in the case," are not equivalents, and the use of the former instead of the latter, in an instruction in a criminal prosecution, is erroneous. *Ryan v. People*, 122 Ill. App. 461, 463.

It is not error to use in an instruction the words "from the evidence," as such a phrase performs the function of the words "from the preponderance of the evidence." *Hall v. Ditto*, 128 Ill. App. 187, 189.

#### FROM THE PERSON

See, also, Theft from the Person.

A robbery in the presence of a person is equivalent to an actual taking from his person, so that, though an information charged robbery "from the person," the proof was sufficient where it showed that the taking was in the presence of the prosecuting witness. *State v. Lamb*, 146 S. W. 1169, 242 Mo. 398.

The words "from the person of another," as used in our statutory definition of robbery, are used in the same sense and with the same meaning that these terms had acquired at common law at the time the statute was enacted, and the offense of robbery under our statute may be committed by violence or putting in fear and feloniously taking money or other thing of value from the person of, or in the presence and under the immediate control and possession of the person assault-



ed. *O'Donnell v. People*, 79 N. E. 639, 642, 224 Ill. 218, 8 Ann. Cas. 123.

### FROM PLACE TO PLACE

Rev. Laws, c. 25, § 24, provides that a city may make ordinances for the regulation of carriages and vehicles used therein. An ordinance of a city provided that no person should use or drive any vehicle for the conveyance "from place to place within the city" for hire of any goods, wares, or merchandise, without a license. Defendant was engaged in a business in a city which was conducted by taking orders for the purchase of merchandise in other cities, receiving a cash payment to cover the cost of the goods bought, and on arrival of the goods over the railroad, placing them in defendant's wagons, and delivering them in the city on payment of defendant's charges; the cost of the railroad transportation being paid by defendant. Held, that defendant's business was within the statute and ordinance. *Commonwealth v. Beck*, 79 N. E. 744, 745, 194 Mass. 14 (citing *Commonwealth v. Stodder* [Mass.] 2 Cush. 562, 48 Am. Dec. 679).

### FROM PORT OF THE UNITED STATES

The words "from ports of the United States" include all voyages, whether domestic or foreign, which begin in this country. *Knott v. Botany Worsted Mills*, 21 Sup. Ct. 30, 32, 179 U. S. 69, 45 L. Ed. 90; *The Tampico*, 151 Fed. 689, 691.

### FROM TIME TO TIME

A recognizance, binding an appellant in a criminal case to appear before the trial court "from time to time of the same," is not in compliance with a statute under which the recognizance should bind defendant to appear "from term to term." *Fulton v. State* (Tex.) 78 S. W. 227.

The term "from time to time," in a contract for the sale of real estate which provides that the price shall be paid "from time to time," is sufficiently definite and certain as to time of payment to justify performance of the contract. *Tingue v. Patch*, 101 N. W. 792, 794, 93 Minn. 437 (citing *Lankton v. Stewart*, 7 N. W. 360, 27 Minn. 346).

The words "from time to time" in such deed apply to the successive irrigation seasons, which may or may not be coextensive with the year, and the entire expense for such time or irrigation season is the expense incurred during the whole season, and cannot be determined, and is not payable until the close of the season, so that the average amount of water carried through the irrigating season is the proper denominator to determine the fractional amount which the grantor must pay. *Rogers v. West Riverside 350-Inch Water Co.*, 124 Pac. 447, 449, 18 Cal. App. 707.

The words "from time to time," in Const. art. 16, § 20, providing that the Legislature

shall enact a law whereby the voters of a county or such subdivision as may be designated by the commissioners' court may determine "from time to time" whether the sale of intoxicating liquors shall be prohibited "within the prescribed limits," do not prevent the Legislature from authorizing such an election in a subdivision of the county in part of which local option is in force, and in part of which it is not in force. *Griffin v. Tucker*, 118 S. W. 635, 638, 102 Tex. 420.

### FROM YEAR TO YEAR

See *Lease from Year to Year*.

### FRONT

See *In Front of*; *Ocean Front*; *Running Front Foot*.

#### As adjoining or bordering

Where a deed described defendant's lot as "fronting" 65 feet on a certain road in a straight line, and the road as it passed the premises curved, so that, if measured according to the margin of the road, the lot would be less than 65 feet in width, and prior to the construction of defendant's house plaintiff and defendant agreed that the lot should be 65 feet wide, according to a survey, and the marks made on the fences at the time of the survey gave a lot 65 feet wide at the front, and the grantee built to that line, the deed would not be construed as limiting the lot to 65 feet measured according to the margin of the road. *Webb v. Walters*, 87 S. W. 1051, 1052, 39 Tex. Civ. App. 623.

Under a statute authorizing the city council to order street work, including the construction of sidewalks, and providing that the expenses shall be assessed on the "lots and lands fronting thereon," etc., a lot fronting on one side of a street may be assessed for the cost of constructing a sidewalk along the opposite side thereof, though the owner of such lot has, in advance of any proceeding by the council and for his own convenience, laid a sidewalk along his property line without obtaining an agreement from the opposite owner to pay a half of the cost thereof. *Millsap v. Balfour*, 97 Pac. 668, 669, 154 Cal. 303 (citing and adopting *San Diego Inv. Co. v. Shaw*, 61 Pac. 1082, 129 Cal. 273).

A city charter provided that three-fourths of the cost of street grading should be assessed on all the property in the assessment district, to be established by drawing a line midway between the street to be improved and the next parallel or converging street on each side thereof, except that, if the property adjoining the street to be improved was divided into lots, the district line should embrace the entire depth of all lots "fronting on" such street, and if the line, when drawn midway, would divide a lot lengthwise, running within 25 feet of the nearer boundary thereof, then it should diverge and follow

such boundary. If there were no parallel or converging streets, the line was to be drawn 300 feet from the street to be improved, while, if a parallel or converging street existed only on one side, the line on the other side should be drawn equidistant with the line thus indicated. Throughout the charter the phrases "fronting upon or adjoining" and "fronting upon or bordering on" were used in reference to assessments on the linear basis, while sidewalk assessments were directed on abutting property. The charter defined "lot" as the lots shown by recorded plats; but if there were no such plat, or if the owners of the property had disregarded the lines of the lots as platted, and treated two or more or fractions thereof as one lot, then the whole should be regarded as one lot. An entire block, bordered by a street to be improved, was improved by the erection of a residence and outbuildings fronting on a street intersecting the former; the entrance to the property being on such intersecting street. The half of another block, which was vacant, extended lengthwise 817 feet on another intersecting street, with a depth of 225 feet on the street to be improved, and taxes had been assessed against it as fronting on such intersecting street, while residences on the other half of the block faced the parallel intersecting street. Neither tract had been platted as provided by the charter. Held, that drawing an assessment district line so as to include these entire tracts violated the charter. The words "adjoining" and "fronting" in the charter are not synonymous. *Collier's Estate v. Western Paving & Supply Co.*, 79 S. W. 947, 949, 180 Mo. 362.

St. Louis City Charter, art. 6, § 14, provides that the total cost of grading streets, etc., shall be ascertained, and one-fourth thereof shall be assessed on all property "fronting on or adjoining the improvement," in the proportion that the frontage of each "lot so fronting or adjoining" bears to the total aggregate frontage of all lots or parcels of ground "fronting on or adjoining" the improvement, and the remaining three-fourths shall be levied and assessed on all the property in the district to be defined and bounded by drawing a line midway between the street to be improved and the next parallel or converging street on each side of the improved street, provided that, if the property is divided into lots, the district line shall be so drawn as to include the entire depth of all lots "fronting" the street to be improved, and that the assessment shall be in the proportion that the area of each lot or parcel of ground, or a part of each parcel of ground, lying within the district, bears to the total area of the district, exclusive of streets and alleys. Held, that where a parcel of land sought to be assessed for a street improvement had never been divided into lots or platted, and such property fronted on a

street other than the one improved, the taxing district for the assessment of the three-fourths of the cost of the improvement should be ascertained by dividing it midway between the street improved and the next parallel street. The words "fronting" and "adjoining" in the charter are synonymous. *Meier v. City of St. Louis*, 79 S. W. 955, 956, 958, 180 Mo. 391.

Where, in 1875, the United States government built a dike, which follows the course of a bulkhead line established under Laws 1857, c. 763, along the north shore of Staten Island, substantially east and west in front of the uplands of plaintiff and defendant, and the waters within the dike, prior to the erection of a wharf and bulkhead upon defendant's neighboring uplands and fillings, were unnavigable for ordinary commercial purposes, and the bulkhead line, both legally and physically, indicates the line of deep water, plaintiff's riparian rights are determined with reference thereto; the "front" of plaintiff's lands, from which she has right of access to deep water, being that portion which is abreast of the bulkhead line, namely, its north shore. *Dooley v. Proctor & Gamble Mfg. Co.*, 137 N. Y. Supp. 737, 740, 77 Misc. Rep. 398.

#### As street frontage

The "front property line," within the restriction of deeds of property platted into lots that no building shall be erected within 20 feet of the front property line of any street, includes, in the case of a corner lot, the line of the street on which is the side of the lot, as well as the line of the street on which the lot faces. *Waters v. Collins* (N. J. Ch.) 70 Atl. 984.

#### FRONT DOOR

A return on substituted service that it had been served by posting and leaving on the "door" of the usual dwelling place of the person sought to be served was not equivalent to stating that it was left and posted on the "front door," as required by the Code. *King v. Davis*, 137 Fed. 198, 206.

#### FRONT FOOT

The mode of assessing property for sidewalk improvements, known as the "front foot rule," does not limit the amount of the assessment by the special benefits accruing to the property charged with the cost of the improvements. *Wilzinski v. Greenville*, 37 South. 807, 808, 85 Miss. 393.

#### FRONTAGE

A statute authorizing a special tax on the lots "on any street" for the improvement of the street, and providing for the apportionment of the cost upon the several lots according to the "frontage," contemplate that the property shall front on the street improved, and a city paving a street together with the area at the place of intersection with an-

other street cannot levy a special tax on property abutting on the latter street. *City of Chillicothe ex rel. Meek v. Henry*, 118 S. W. 486, 488, 136 Mo. App. 468.

A description in an assessment roll of property as the east half of a certain lot having 38 "feet front" and a depth of 66 feet, and situate on the east side of a certain street and north of the cross street, is misleading and inadequate, being made without reference to the map of the lots; the statement that the lot has a "frontage" suggesting that it is bounded on a street or some other open space, whereas the portion of the lot sought to be assessed abutted on the side of another lot, and not on a street; and there being nothing in the description of the assessment roll sufficiently apprising one of the location of the frontage, and therefore from what point the line of depth is to be measured. *Fulton v. Krull*, 93 N. E. 494, 496, 200 N. Y. 105.

#### FRONTAGE RATE

"In the city of Chicago the system prevails of charging what is known as a 'frontage rate' against every building which fronts upon a street, through or along which a water main has been laid. This 'frontage rate' is in addition to the charges made for instruments of service which may be used in the building. It is based upon the minimum of 12 feet front of a one-story building, and increases as the frontage increases and the number of stories in the building increases." *Denver v. Denver Union Water Co.*, 91 Pac. 918, 924, 41 Colo. 77.

### FRUCTUS

#### FRUCTUS INDUSTRIALES

"In no sense can trees, the natural and permanent growth of the soil, be regarded as partaking of the character of emblements or 'fructus industriales,' but are a part of the inheritance and can only become personal by actual severance, or by severance in contemplation of law, as the effect of a proper instrument of writing." *Slocum v. Seymour*, 36 N. J. Law, 138, 139, 13 Am. Rep. 432.

Crude turpentine in turpentine boxes in the pine trees in a state, to be dipped up, is personal property, and the turpentine crop is properly classed with "fructus industriales," as it requires annual labor and cultivation. *Richbourg v. Rose*, 44 So. 69, 74, 53 Fla. 173, 125 Am. St. Rep. 1061, 12 Ann. Cas. 274.

Where plaintiff leased a farm in January on which there was then a vineyard and crop of young grape plants, nearly a year old, attached to the parent vines, making no reservation as to crops, and on the following March, when the plants were ready for severance and transplanting and when it was necessary for them and for the vineyard that they be severed, the lessee severed them and appropriated them to his own use, where-

upon the lessor brought action for waste to recover treble damages under the statute. The plants were personal property, "fructus industriales," not belonging to the inheritance, and for their removal the lessor had no cause of action. *Deltenre v. Deltenre*, 133 S. W. 632, 633, 152 Mo. App. 487.

#### FRUCTUS NATURALES

Those crops which grow from perennial roots, and which do not require the natural labor of the owner to bring them into existence, are called "fructus naturales," and pass to the heir at law or devisee as a part of the real estate. *Simanek v. Nemetz*, 97 N. W. 508, 510, 120 Wis. 42.

### FRUIT

Fruit hermetically sealed in bottles, which is preserved by the sealing rather than by the sugar, etc., in the surrounding fluid, is dutiable as "fruits \* \* \* prepared," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 262, rather than as "fruits preserved in sugar," etc., under paragraph 263. *United States v. Reiss & Brady*, 166 Fed. 746, 747, 92 C. C. A. 408.

#### Cherries

Cherries which have been prepared by removing the stems and pits and washing away dirt, natural acid, etc., so as to prevent decay in transportation, and which are imported in a very weak saline solution, are dutiable as fruits in their own juices, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263. *A. L. Causse Mfg. Co. v. United States*, 143 Fed. 690, 691.

Cherries, which have been washed, pitted, and packed in salt water to preserve them in transit, are not dutiable as "fruits preserved \* \* \* in their own juices," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, but as "edible fruits \* \* \* prepared in any manner," under paragraph 262. *Causse Mfg. Co. v. United States*, 151 Fed. 4, 5, 80 C. C. A. 461.

Certain cherries imported in casks, in a surrounding fluid containing alcohol added for the purpose of resisting fermentation and decay, the cherries being an inedible variety, intended to be used in the manufacture of cherry juice, are specially provided for in paragraph 263, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, as "fruits preserved in \* \* \* spirits," and are not dutiable under paragraph 299, Schedule H, § 1, c. 11, of said act, either as "cherry juice" or as an unenumerated article similar thereto, "either in material, quality, texture, or the use to which it may be applied," under section 7 of said act. *Volght v. Mihalovitch*, 125 Fed. 78, 79, 81, 82, 83.

Certain fruit in spirits, consisting of cherries in maraschino, is not dutiable under paragraph 218, Tariff Act Aug. 27, 1894, c.

319, § 1, Schedule G, relating to "fruits preserved in sirup," but under section 3 of said act, as unenumerated manufactured articles. *United States v. Reiss & Brady*, 142 Fed. 1039, 73 C. C. A. 185.

#### Chutney

The article commercially known as "chutney," which consists of various fruits preserved with sugar and spices, is dutiable as "fruits preserved," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, rather than as "edible fruits \* \* \* prepared," under paragraph 262. *Park & Tilford v. United States*, 164 Fed. 910, 912.

#### As emblements

See Emblements.

#### Lemons

Halved lemons in brine are "fruits in brine" within paragraph 55a, in the Free List of the Tariff Act July 24, 1897, c. 11, Schedules G, N, and not dutiable as lemon peel preserves under paragraph 267, notwithstanding the brine renders the pulp inedible and the only value is in the peel. *Hill Bros. Co. v. United States*, 123 Fed. 477, 478, 59 C. C. A. 412.

#### Limes

Limes in brine held not to be dutiable as "limes" under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 266 [U. S. Comp. St. 1901, p. 1651], but to be free of duty under section 2, Free List, par. 556, of said act, as "fruits in brine, not specially provided for." *Brennan v. United States*, 136 Fed. 743, 744, 69 C. C. A. 395.

#### As merchandise

See Merchandise.

#### Olives

Ripe olives sometimes called "black olives," are free of duty under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 559, as "fruits in brine." *United States v. Zucca & Co.*, 175 Fed. 578, 579.

#### Pineapples

Pineapples preserved in cans in their own juice, with 3 per cent. of sugar added for flavoring, and not aiding substantially in the preservation, which is accomplished by the canning process, held dutiable as "pineapples preserved in their own juice," and not as fruit preserved in sugar, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263. *United States v. J. S. Johnson & Co.*, 152 Fed. 164, 165, 81 C. C. A. 416.

The addition of from 2.28 to 8.82 per cent. of sugar to pineapples preserved in cans in their own juice does not remove the fruit from the provision for "pineapples preserved in their own juice," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, to the provision in the same paragraph for "fruits preserved in sugar." *U. H. Dud-*

*ley & Co. v. United States*, 153 Fed. 881, 882, 82 C. C. A. 627.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, for "pineapples preserved in their own juice," held not to include pineapples in which sugar has been used as a preservative. They are dutiable under the provision in the same paragraph for "fruit preserved in sugar." *U. H. Dudley & Co. v. United States*, 148 Fed. 333, 334.

#### Watermelon

A "watermelon" is a species of fruit, and is also generically a vegetable. *Massey v. City of Columbus*, 70 S. E. 263, 264, 9 Ga. App. 9.

#### FRUIT DEALER

As merchant, see Merchant.

#### FRUIT JUICE

As medicinal preparation, see Medicinal Preparation.

#### FRUITS

##### Revenue synonyms

An affidavit in sequestration proceedings, stating that plaintiff fears that defendant will make use of his possession to convert to his own use the fruits "or" revenues produced by the property, was not rendered indefinite or uncertain by the use of the word "or"; the words "fruits and revenues," as used in the sequestration statute, being synonymous. *Hurlbut v. Gainor*, 103 S. W. 409, 411, 45 Tex. Civ. App. 588.

#### FUCK

Where, in a trial for homicide, accused testified that prior to the homicide his brother had informed him that deceased had stated that he would whip accused and his brother and "fuck" the whole family, a charge on manslaughter was not insufficient because it did not charge the jury that insulting conduct towards the female relatives of accused constituted adequate cause; for the word "fuck" only conveyed the idea of ill will towards the brother of accused, and a purpose to bring on a difficulty with him, especially in view of affidavits on a motion for a new trial averring that the word used meant "to whip, or beat, or chastise." *Lara v. State*, 95 S. W. 1083, 1084, 50 Tex. Cr. R. 163.

#### FUGITIVE FROM JUSTICE

See, also, Flee from Justice.

One found in another state on institution of prosecution against him who refuses to return voluntarily is a fugitive within the extradition law, though he left openly, not in flight or with any intent to avoid arrest; the manner of his leaving being immaterial. *Taylor v. Wise (Iowa)* 126 N. W. 1126, 1127.

One who is within the state at the time of the commission of a crime and thereafter leaves it, no matter for what reason, or under what belief, is a "fugitive from justice" of that state within the meaning of the Constitution and laws of the United States. A person indicted the second time for the same offense is none the less a fugitive from justice within the meaning of Const. U. S. art. 4, § 2, and Rev. St. § 5278, governing extradition, because, after the dismissal of the first indictment, on which he was originally extradited, he left the state with the knowledge of, or without objection by, the state authorities. *Bassing v. Cady*, 28 Sup. Ct. 392, 394, 208 U. S. 386, 52 L. Ed. 540, 13 Ann. Cas. 905.

A person who departs from the jurisdiction after having committed an act in furtherance of a crime subsequently consummated is a "fugitive from justice" and subject to extradition. *State ex rel. Rinne v. Gerber*, 126 N. W. 482, 484, 111 Minn. 132.

The belief of the accused, when leaving the demanding state, that he had not committed any crime against the laws of that state, does not prevent his being a fugitive from justice within the meaning of the provision of Const. art. 4, § 2, and Rev. St. § 5278, relating to extradition proceedings. *Appleyard v. Commonwealth of Massachusetts*, 27 Sup. Ct. 122, 123, 203 U. S. 222, 51 L. Ed. 161, 7 Ann. Cas. 1073.

To be a fugitive from justice within the meaning of the provisions of Const. art. 4, § 2, and Rev. St. § 5278, relating to extradition proceedings, it is only necessary that the accused, having been in the demanding state when the crime was committed, thereafter leave that state and be found within the territory of another. *Appleyard v. Commonwealth of Massachusetts*, 27 Sup. Ct. 122, 123, 203 U. S. 222, 51 L. Ed. 161, 7 Ann. Cas. 1073.

A fugitive from justice is one who commits a crime and withdraws himself from the jurisdiction of that state in which the offense was committed, and the deputy sheriff has no power to pursue such a fugitive into another state and claim his pay or compensation therefor from the county in which he is deputy. *Roberts v. Board of Com'rs of Custer County*, 105 Pac. 797, 798, 17 Idaho, 379.

A person who, after having been convicted of a crime committed within a state, when sought for, to be subjected to the sentence of the court, is found within another state, is a "fugitive from justice," within the meaning of the extradition statute. *Hughes v. Pfanz*, 138 Fed. 980, 981, 71 C. C. A. 234 (citing *Ex parte Reggel*, 5 Sup. Ct. 1148, 114 U. S. 642, 29 L. Ed. 250; *Roberts v. Reilley*, 6 Sup. Ct. 291, 116 U. S. 80, 29 L. Ed. 544).

"One may be a nonresident of the state and also a fugitive from justice, or a fugi-

tive from justice and still be a resident of the state," and the fact that an information charges that accused was a fugitive from justice during a certain time and during said time was not an "inhabitant or resident of this state" does not make such allegations repugnant or inconsistent, and since they are conjunctively pleaded, to prevent the bar of limitation, refusal to compel the state to elect as to which ground it would rely is not error. "It is not essential that he should leave the state before he could be regarded as a 'fugitive from justice.' One who commits an offense and conceals himself to avoid arrest is a 'fugitive from justice.' If he successfully hides or conceals himself so as to avoid punishment for his crime, although such concealment may be upon his own premises, he is as much a fugitive from justice as if he had escaped into Canada." *State v. Miller*, 87 S. W. 484, 487, 188 Mo. 370 (quoting and approving *State v. Harvell*, 89 Mo. 588, 1 S. W. 837).

#### Purpose or time of flight

"To be a 'fugitive from justice' in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense he has left its jurisdiction and is found within the territory of another." *Ex parte Dickson*, 69 S. W. 943, 947, 4 Ind. T. 481 (quoting and adopting definition in *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544).

One is a "fugitive from justice," within Rev. St. U. S. § 5278, which provides for the extradition of such fugitive, and a statute excepting, from the limitation of time for prosecuting crimes, "any person fleeing from justice," where he is within the state at the time the alleged offense was committed, and failed, for any reason, to remain therein until the bar of the statute was complete, even though he did not leave for the purpose of avoiding prosecution. *In re Bruce*, 132 Fed. 390, 391.

That petitioner remained in Alabama for some time after an alleged homicide, then moved to Georgia, remaining in constant communication with the Alabama authorities, and where his location was known to them when he moved to Texas, where he lived for a number of years before extradition proceedings were instituted, did not prevent him from being a "fugitive from justice" within the extradition law, which term includes any person who commits a crime in one state for which he is indicted, and departs therefrom and is found in an-

other state. *Ex parte Coleman*, 113 S. W. 17, 21, 53 Tex. Cr. R. 93.

It is not necessary that the person accused should have fled from the state in which the crime is alleged to have been committed or have left it in apprehension of a prosecution to constitute him a fugitive from justice within the meaning of the federal statute. If, having been within a state, he is accused of having committed while there that which by its laws constitutes a crime, and when he is sought to be subjected to criminal proceeding therefor he has left its jurisdiction and is found within another state, he is a fugitive from justice. It is not important whether the accused leaves the state to avoid prosecution or not. His motive does not affect his relation to the law. *Commonwealth v. Hare*, 36 Pa. Super. Ct. 125, 130.

To be a "fugitive from justice," within the meaning of Rev. St. U. S. § 5278, relative to the extradition of persons accused of crime, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another. *Depoilly v. Palmer*, 28 App. D. C. 324, 329.

## FULFILLED

Where a city clerk has examined a petition for the removal of a city officer, and certified that he had compared the names on the petition for removal with the great register and found the petition sufficient, it implies that the petition "fulfilled the requirements of the law." *Good v. Common Council of City of San Diego*, 90 Pac. 44, 47, 5 Cal. App. 265.

## FULL

See In Full.

The term "full," in a statute providing that an act shall be of "full" force and effect from a certain date, implies that the statute shall have some effect at once, where necessary to carry out the intention of the Legislature, and where Laws 1905, c. 703, created the office of county auditor and imposed on him, among others, certain duties previously laid on the register of deeds, some of which could not be performed during the incumbency of then existing officers, and further provided that the act should be in full force and effect from and after the expiration of the term of office of existing officers, the operation of the act was postponed till the expiration of such term of

office only as to those duties which could not be performed before that time by the new auditor, but as to other duties took effect at once. *Fortune v. Board of Com'rs of Buncombe County*, 52 S. E. 950, 953, 140 N. C. 322.

## FULL AND ENTIRE USE

Where defendant contracted to employ plaintiff, an individual shop owner, to produce certain drop forgings for plaintiff's plant, and plaintiff agreed to give defendant during the period specified the "full and entire use" of the plant with the exception of one machine, defendant was bound to keep the shop employed during the period. *Speirs v. Union Drop-Forge Co.*, 54 N. E. 497, 498, 174 Mass. 175.

## FULL AND FAIR CASH VALUE

See, also, Full Cash Value.

The term "full and fair cash value," as used in a statute requiring an assessor to fix the valuation of property at its full and fair cash value, contemplates the full and fair cash value at the time the valuation is made, with reference to all practicable uses to which the land with its buildings can be put. *Tremont & Suffolk Mills v. City of Lowell*, 39 N. E. 1028, 1029, 163 Mass. 283.

## FULL AND FAIR STATEMENT OF ALL THE FACTS

The term "full and fair statement of all the facts," as applied to the statement to counsel to obtain advice as to the commencement of a criminal prosecution, does not mean all the facts discoverable, but all the facts within the knowledge of the person making the statement. If he knows facts enough either personally or by credible information which, when fairly and fully stated, results in advice which is honestly followed in commencing the prosecution, that is sufficient. *King v. Apple River Power Co.*, 111 N. W. 668, 670, 131 Wis. 575, 120 Am. St. Rep. 1063, 11 Ann. Cas. 951.

Where one, before instituting a criminal prosecution, states to an attorney fully all the facts within his knowledge or of which he has reasonably reliable information, and acts upon the advice of such attorney, he has in the legal sense probable cause for his action rendering him immune from liability for malicious prosecution. The attorney consulted before a criminal prosecution need not be necessarily the public prosecutor, and the term "full and fair statement of all the facts" does not call for all facts reasonably discoverable or require the informer to make diligent inquiry in respect thereto. *Topolewski v. Plankinton Packing Co.*, 126 N. W. 554, 558, 143 Wis. 52.

## FULL AND FREE USE AND ENJOYMENT

A provision in a chattel mortgage of cordwood reserving to the mortgagor the

"full and free use and enjoyment" thereof does not authorize the sale of the wood by the mortgagor. *Meyer v. Munro*, 71 Pac. 969, 970, 9 Idaho, 46.

#### FULL AND TRUE VALUE

There is a marked distinction between the terms "full and true value" and "full and true cash value," as used in statutes relating to taxation. *Richardson v. Howard*, 120 N. W. 768, 769, 23 S. D. 86.

#### FULL ANSWER

Under section 77 of the Code of Civil Procedure, providing that a party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may at any time within three years of the date of the judgment or order have the same opened and be let in to defend, and, before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make application and shall file a "full answer" to the petition, the "full answer" mentioned must be interpreted to mean that the answer must be full and complete as a pleading by the defendant in the cause. It need not present a defense coextensive with the entire demand, or with every demand of the petition, and whatever defense it proposes must be complete and perfect in the sense of fully overcoming the portions of the plaintiff's claim against which it is directed, and it must subvert sufficient of the cause of action set forth in the petition to make it worthy of consideration in the doing of substantial justice between the parties. Hence an answer filed in connection with an application to open a judgment rendered upon publication service under the act of 1901, relating to the collection of delinquent taxes, on real estate, which is otherwise sufficient, is a full answer if it shows that one per cent. of the judgment consists of taxes intentionally levied for specific purposes not sanctioned by any provision of law, and interest on such taxes. *Williams v. Board of Com'rs of Kiowa County*, 88 Pac. 70-72, 74 Kan. 693 (citing *Durham v. Moore*, 29 Pac. 472, 48 Kan. 135).

#### FULL BENEFIT AND ENJOYMENT

An agreement by an employé to give his employer, who was a candy manufacturer, "the full benefit and enjoyment" of any and all inventions which he might make pertaining to the employer's business, imports an agreement for a shop right or license to use such inventions merely, and does not entitle the employer to an assignment of patents secured by the employé therefor. *Hildreth v. Duff*, 143 Fed. 139.

#### FULL CASH VALUE

See, also, Full and Fair Cash Value.

A statute requiring that a taxpayer desiring to attack the valuation in the assess-

ment of his property must, under oath, state the "full cash value" of his property, was not complied with in an objection to an assessment made in 1903 by stating that the property was assessed at a specified less figure in 1902 and that the assessed valuation in 1902 was a "fair valuation." *Humbird Lumber Co. v. Thompson*, 83 Pac. 941, 945, 946, 11 Idaho, 614.

Const. Cal. art. 13, § 1, provides that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value to be ascertained as provided by law. Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted by Pol. Code, § 3627, that all taxable property shall be assessed at its "full cash value," and by section 3617 that the terms "value" and "full cash value" mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor. *San Francisco Nat. Bank v. Dodge*, 25 Sup. Ct. 384, 385, 197 U. S. 70, 49 L. Ed. 669.

According to Pol. Code, § 3617, the terms "value" and "full cash value" mean the amount at which property would be taken in payment of a just debt due from a solvent debtor. *Crocker v. Scott*, 87 Pac. 102, 106, 149 Cal. 575.

The term "full cash value," as used in Pol. Code Cal. § 3627, requiring all taxable property to be assessed at its "full cash value," defined by Pol. Code, § 3617, to mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor, is synonymous with the requirements in the assessment of shares of stock that their market value must be the criterion; the general market value of stock being its true cash and selling value. *San Francisco Nat. Bank v. Dodge*, 25 Sup. Ct. 384, 386, 197 U. S. 70, 49 L. Ed. 669.

"Market value" is synonymous with the terms "value" and "full cash value," defined by Pol. Code, § 3617, as the amount at which the property would be taken in payment of a just debt from a solvent debtor, and the market value of stock, fairly represents its full cash value in absence of exceptional circumstances giving it an abnormal value, so that any inference of fraud by the placing of an excessive valuation on stock, taken as a basis for assessing a corporate franchise, is rebutted by a showing that the value of the franchise was ascertained by the approved method of deducting from the aggregate market value of its stock, the value of its tangible property, and taking the difference as the franchise value. *City of Los Angeles v. Western Union Oil Co.*, 118 Pac. 720, 721, 161 Cal. 204; *Western Union Oil Co. v. Los Angeles County*, 118 Pac. 721, 161 Cal. 718.

Laws 1901, p. 238, § 10, provides that all taxable property shall be assessed at its full cash value, and section 3, subd. 5, provides

that the term "value" in "full cash value" means the amount at which the property would be taken in payment of a just debt due from a solvent debtor. Held, that the words "cash," "fair," or "true" value of the property, as alleged in a complaint attacking an assessment, were not the same as the words "full cash value" used in the act, and therefore did not allege that the property was assessed at more than its full cash value. *Humbird Lumber Co. v. Thompson*, 83 Pac. 941, 945, 11 Idaho, 614.

### FULL COMPENSATION

When used to define damages recoverable, the words "full compensation" mean simply "compensation." In an action for personal injuries, an instruction authorizing the jury to assess plaintiff's damages at such amount as would "fully" compensate him was not erroneous, since, while plaintiff was entitled to recover only such damages as would fairly and reasonably compensate him, yet in contemplation of law, to be either a fair or reasonable compensation, the damages must be a full compensation for the injuries. *Texas & P. R. Co. v. McCarty*, 108 S. W. 764, 765, 49 Tex. Civ. App. 532.

### FULL CONTROL

See Under Full Control.

In a will containing five clauses, the first directing the payment of debts and funeral expenses, the second giving testator's dwelling house to his wife, "she to dispose of same at her pleasure," the third giving his wife moneys arising from collections which might be made, "she to dispose of same at her pleasure," the fourth providing, "All the rest of my estate I give her 'full control,'" and the fifth appointing executors, "full control" did not mean merely control during the wife's life, but the phrase implied complete dominion, and the wife took an absolute estate. *Welsh v. Gist*, 61 Atl. 665, 666, 101 Md. 606.

### FULL COPY

Rev. St. § 1695, providing that in case of a voluntary assignment a full and true copy thereof shall be filed by the officer taking the same in the office of the clerk of the circuit court, is sufficiently complied with by the filing of a duplicate original instead of a "copy." *Western Twine Co. v. Teasdale*, 73 N. W. 568, 570, 97 Wis. 652.

### FULL EVIDENCE

Under Pub. Laws 1866, p. 431, § 7, authorizing a town to appoint commissioners to designate the crossings and lines of streets and providing, that the records or maps or profiles filed by them shall be "full evidence" of the street, the term "full evidence" merely means prima facie. *Lathrop v. City of Morristown*, 47 Atl. 450, 65 N. J. Law, 467; *Id.*, 51 Atl. 852, 853, 67 N. J. Law, 247.

### FULL EXTENT

The instruction that the defense of contributory negligence involves the element that plaintiff knew and appreciated the full extent of the danger can, notwithstanding the words "full extent," mean nothing more than that plaintiff had full appreciation of the danger; and so is not erroneous. *Collier v. McClintic-Marshall Const. Co. (Iowa)* 138 N. W. 522, 523.

### FULL FAITH AND CREDIT

The "full faith and credit" commanded by section 1, art. 4, of the federal Constitution, to be given by each state to the judicial proceedings of every other state, does not mean that such proceedings shall be given any greater faith and credit in a sister state than they would be accorded in the state where taken. *Schuler v. Ford*, 80 Pac. 219, 221, 10 Idaho, 739, 109 Am. St. Rep. 233, 3 Ann. Cas. 336.

The requirement of the federal Constitution that "full faith and credit" shall be given by states to the judicial decrees of other states requires the other states to give a decree in one state the force and effect to which it was entitled in the state where rendered. The mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action. *Haddock v. Haddock*, 26 Sup. Ct. 525, 526, 201 U. S. 562, 50 L. Ed. 867, 5 Ann. Cas. 1.

Full faith and credit are not denied an Illinois judgment by Code Civ. Proc. N. Y. § 1780, which, as construed by the New York courts, precludes the maintenance of an action on such judgment by one foreign corporation against another, because it is not upon a cause of action which arose within the state. *Anglo-American Provision Co. v. Davis Provision Co. No. 1*, 24 Sup. Ct. 92, 191 U. S. 373, 48 L. Ed. 225.

The refusal of the courts of a state to adopt the construction of a life insurance contract made in the state by a foreign insurance company which adopted the form of the policy to conform with the laws of the state of its incorporation was not a failure to give "full faith and credit" to the laws of the state where the company was incorporated within the meaning of the constitutional provision that "full faith and credit" shall be given in each state to the public acts, records, and judicial proceedings of every other state. *Washington Life Ins. Co. v. Glover (Ky.)* 78 S. W. 146, 147.

The constitutional provision is as applicable to a decree of the Circuit Court in the Southern District of New York as to a decree in the state courts; but the constitutional pro-



vision does not preclude the courts of the state in which the judgment is presented from inquiry as to the jurisdiction of the court by which the judgment is rendered. Whether one is a privy to a judgment rendered in a sister state must be determined by the law of the state where the question arises, notwithstanding the full faith and credit clause of the federal Constitution, the purpose of which was not to enlarge or change the jurisdiction of the courts of the several states, but to prescribe the precise weight to be attached to foreign judgments. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 213, 214, 216, 203 Mass. 159, 40 L. R. A. (N. S.) 314 (quoting and adopting *Brown v. Fletcher's Estate*, 28 Sup. Ct. 702, 703, 210 U. S. 82, 88, 52 L. Ed. 966. Citing and adopting *Deposit Bank of Frankfort v. Frankfort*, 24 Sup. Ct. 154, 191 U. S. 499, 48 L. Ed. 276; *Central Nat. Bank v. Stevens*, 18 Sup. Ct. 403, 169 U. S. 432, 460, 42 L. Ed. 807; *Board of Public Works v. Columbia College*, 17 Wall. [84 U. S.] 521, 21 L. Ed. 687).

The "full faith and credit" clause of the federal Constitution does not prevent the courts of one state awarding on the then existing conditions the custody of minors, then living in the state with their mother, to their father though the decree of divorce of the court of another state had awarded custody to their mother. *Ex parte Stewart*, 137 N. Y. Supp. 202, 204, 77 Misc. Rep. 524.

#### FULL JURISDICTION

Const. 1890, § 159, which declares that the chancery court shall have full jurisdiction in all matters of equity, means that in whatever is a matter of equity the court's power to adjudge is full, and that, when the court takes hold of a subject, it ought to dispose of it fully and finally, the word "full" implying that nothing is reserved, and, as thus construed, the provision is broadly declaratory of the rule that, where equity has jurisdiction for one purpose, it acquires jurisdiction for all purposes, and a court of chancery, having statutory jurisdiction under Laws 1910, c. 134, to abate a liquor nuisance, may not only abate the nuisance, but may also render judgment for the statutory penalties. *State v. Marshall*, 56 South. 792, 796, 100 Miss. 626.

#### FULL LEGISLATIVE POWERS

In a statute conferring upon a board of school commissioners "full legislative powers," the expression quoted covers the entire field of legislation upon this subject, including the officers and agents to be employed, the mode and manner of their election or appointment, the tenure of their respective offices, their duties and compensation, and for what causes and by whom they may be suspended or removed from office. These and any other matters requiring legislation are necessarily embraced. It means ample,

complete, perfect powers, not wanting in any essential quality. *Mobile School Com'rs v. Putnam*, 44 Ala. 506, 537.

#### FULL-PAID STOCK

Building associations are authorized by statute to borrow money for temporary use when applications for loans exceed the accumulations in the treasury and when a series of stock has matured. The issuing by such associations of "full-paid stock" to serve the same purpose as borrowing is an enlargement of their scope of operations not inconsistent with their original design if properly restricted. *Folk v. State Capital Savings & Loan Ass'n*, 63 Atl. 1013, 1019, 214 Pa. 529.

#### FULL PARTICULARS

Under an accident policy requiring written notice of the happening of an accident, a letter stating that insured had been found dead at a specified town in the nighttime on a railroad track, and that apparently death had been caused by his being run over, was not fatally deficient; the requirement of notice being that the fact of death be stated and, as far as known at the time, the cause thereof, so that the insurer may inquire into the accident and the circumstances thereof, and the requirement that "full particulars" be given not meaning that all the details of the accident must be stated. *Correll v. National Acc. Soc.*, 116 N. W. 1046, 1047, 139 Iowa, 36, 130 Am. St. Rep. 294.

#### FULL POWER

Where a statute gave an independent commission "full power" to pave any street in an annex, the power was not conditional, nor did it mean power to pave only such streets as the council might name, but was a plenary power of an independent agency without restriction. *City of Baltimore v. Flack*, 64 Atl. 702, 708, 104 Md. 107.

The words "full power," in the Florida Constitution giving the Legislature full power to pass laws to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property or performing other services of a public nature, mean a power which cannot be cut down. *Tampa Waterworks Co. v. City of Tampa*, 26 Sup. Ct. 23, 24, 199 U. S. 241, 50 L. Ed. 170.

The Canadian joint-stock companies act provides that the affairs of a corporation shall be managed by a board of directors, who, in the absence of other provisions in a special act or in by-laws, shall elect the president. It also provides for by-laws regulating the number of directors, etc., and the appointment, functions, duties, and removal of all agents, officers, and servants, and their remuneration. The charter of a corporation organized thereunder provided for the appointment by the directors from among their number of an executive committee with such

powers as the by-laws should define, and a by-law provided that the directors should annually appoint from their number two directors, "who with the president shall form an executive committee, and said committee shall have full powers of the board of directors when said board is not in session." Held, that such "full powers" were limited to the conducting of the ordinary business operations of the corporation and did not include the general powers of the board of directors under the statute to amend the by-laws, change the number of members of the committee, remove a member by a majority vote, or to appoint or remove officers and fix their salaries. *Hayes v. Canada, Atlantic & Plant S. S. Co.*, 181 Fed. 289, 292, 104 C. C. A. 271.

### FULL SATISFACTION

"Full satisfaction" of the minds and consciences of the jury of the guilt of a defendant is no compliance with the rule which requires the jury to be convinced of guilt "beyond all reasonable doubt." *Jones v. State*, 36 South. 243, 84 Miss. 194.

### FULL STATE GOVERNMENT

The phrase "full state government," in the enabling act (Act Cong. Jan. 18, 1906, c. 3335, § 21 [34 Stat. 267]), providing that the constitutional convention may by ordinance provide for the election of officers for a "full state government," includes not only the state officers whose powers and duties are coextensive with the limits of the state, but includes all the officers whose duties in any manner are connected with the administration of the state government; and the constitutional convention had authority to provide for the election of all the officers provided for in the Constitution. *Frantz v. Autry*, 91 Pac. 193, 212, 18 Okl. 561.

### FULL TIME

A provision in a contract of employment by which the employé was to give his "full time to the company's service" is in its nature ambiguous. It does not require 24 hours a day nor every moment of his waking hours. On the other hand, it undoubtedly does require that he shall make that employment his business to the exclusion of the conduct of another business, such as usually calls for the substantial part of a manager's time or attention. Where the managing officer of a corporation devoted his entire business days, of approximately nine hours, and about one-half of his evenings, to the company's service, it could not be said that he failed to give his full time to the company, though he at the same time looked after his mother's estate and the finances of another company and occupied a place on the directorship of a bank. *Johnson v. Stoughton Wagon Co.*, 95 N. W. 394, 397, 118 Wis. 438.

### FULL TITLE

Where an entryman devised the land, and the devisees conveyed through mesne conveyance duly registered, to plaintiff, whose grantor had held adverse possession for more than 10 years, the title thereby acquired was superior to the title acquired by the entryman's heirs, to whom a patent was issued after his death, under Rev. St. art. 3347, declaring that, whenever the action of any person to recover land is barred by limitations, the person having peaceable and adverse possession shall have full title, precluding all claims; the "full title" meaning in such case all of the title which had emanated from the state. *Burton's Heirs v. Carroll*, 72 S. W. 581, 582, 96 Tex. 320.

### FULL, TRUE, AND CORRECT COPY

The phrase "full, true, and correct copy," in a certificate to a transcript reciting that it contains a "full, true, and correct copy" of the petition, demurrer, and journal entry, does not purport to be a full, true, and complete transcript of all the papers and proceedings in the case, as appears from the records in the office of the clerk of court; and in the absence of a complete record, where the cause is presented on a transcript, it will be presumed that the trial court took proper steps to and did correct any apparent errors appearing on the face of an incomplete transcript. *Wade v. Mitchell*, 79 Pac. 95, 96, 14 Okl. 168.

### FULL, TRUE, AND DETAILED ACCOUNT

To constitute a true account within Act March 5, 1906 (P. L. 78), requiring candidates for nomination to file a "full, true, and detailed account" of expenditures made to secure the nomination, the account must set forth each sum disbursed by the candidate, whether personally or by his agent for election expenses, the date of each disbursement, the name of the person to whom paid, and the purpose for which it was disbursed, and the account must be accompanied by vouchers for all sums exceeding \$10, and the filing of the receipts of the agents of the candidate for money placed in their hands does not meet the requirements of the act. *In re Umbel*, 80 Atl. 541, 542, 231 Pa. 94.

### FULL VALUE

The term "full value," as used in the rule that an implied warranty of title arises on the sale of a chattel for full value, means that there must be no such inadequacy of price as would warn a prudent buyer that the seller's acceptance of it was suspicious; not that the exact value must be paid. *Shultis v. Rice*, 89 S. W. 357, 358, 114 Mo. App. 274.

Under the employers' liability act of 1909, now Civ. Code 1910, § 2782, fixing the measure of damages for a negligent homicide

within the provisions of the act at the "full value of the life of the deceased," the quoted phrase means, as defined by Civ. Code 1910, § 4425, the full value of the life of the deceased, without deducting for necessary or other personal expenses of the deceased, had he lived. *Atkinson v. Hardaway*, 73 S. E. 556, 10 Ga. App. 389.

#### FULLY ADMINISTERED

Since property of a bankrupt conveyed in fraud of creditors is not property of the estate until the sale is set aside, the existence of a cause of action by the trustee to set aside such conveyance was insufficient to establish that the estate was not fully administered when it was closed, within Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 8, providing that estates shall be closed whenever it appears that they have been "fully administered," by approving the final accounts and discharging the trustees; and section 11, par. "d," declaring that suits shall not be brought by or against a bankrupt's estate after two years from the time the estate is closed. *Kinder v. Scharff*, 55 South. 769, 770, 129 La. 218.

#### FULLY DEVELOPED MINE

In a prosecution for obtaining money under false pretenses, by representing that the mine of a corporation in which defendant sold the prosecuting witness stock was a fully developed mine, the jury were instructed that "a 'fully developed mine' is a deposit of metals or minerals whose underground works or developments are of such an extent or nature as to permit of the extraction of the metals and minerals therein contained with profit without further waste work." Held, that the instruction, though incorrect as a general proposition, properly defined the meaning of the term "fully developed mine" as used by defendant in his representations to the prosecuting witness. To constitute a "fully developed mine," it is not necessary that the mine shall be in such a condition that the metals or minerals therein contained may be extracted with profit without further waste work, as it would be "fully developed" if the ore was sufficiently exposed and ready for extraction to permit active operations in the regular course of mining, although, owing to the barrenness of the ore, it would be impossible to work it with profit. *People v. Whalen*, 98 Pac. 194, 196, 154 Cal. 472.

#### FULLY DISTRIBUTED

Rev. Laws, c. 167, § 127, providing that, where an attachment has been dissolved by appointment of a receiver, the receiver shall not be discharged until all the assets which have come into his hands have been "fully distributed," precludes the remission of assets, as to which an attachment had been dissolved by the appointment of an ancillary

receiver, by the ancillary receiver to himself as receiver in another state; the requirement that the assets shall be "fully distributed" not being satisfied by a remission of assets to a receiver in another state, but demanding a division, apportionment, and delivery of the assets. *Second Nat. Bank of Pittsburgh v. J. C. Lappe Tanning Co.*, 84 N. E. 301, 302, 198 Mass. 159.

#### FULLY IN VIEW

An instruction, in an action for injuries at a railroad crossing, which declares that if the view was in any manner obstructed it was the duty of the plaintiff to stop, will be construed as equivalent to saying that if the track was not "fully in view," that is to say, if there was an obstruction of the view by a hill, bank, trees, or in any manner, due care requires the traveler on the common highway to stop and listen before attempting to cross. *State, to Use of Manfuso, v. Western Maryland R. Co.*, 62 Atl. 754, 756, 102 Md. 257.

#### FULLY PAID IN

The language of section 1765, Rev. St. 1898, "capital fully paid in," contains the idea of full payment of the authorized capital into the corporation, either in money or its equivalent in property, effecting an extinguishment of the subscription liability for the stock, and an actual addition to the capital of the corporation, not a mere agreement to contribute to the capital stock. *Williams v. Brewster*, 93 N. W. 479, 483, 117 Wis. 370.

#### FULLY SATISFIED

Defendant is given the full benefit of the doctrine of reasonable doubt by an instruction that the jury must be "fully satisfied" of defendant's guilt before they can convict him; and if not "fully satisfied" that he did the act charged they must acquit. *State v. Charles*, 76 S. E. 715, 716, 161 N. C. 286.

#### FUNCTION

See Executive Function; Governmental Function; Judicial Function; Legislative Function; Municipal Function; New Function.

With reference to patents, it is not always clear what is meant by the use of this elastic and indefinite word "function." But it is thought that the assertion of a new function or effect should only be sustained upon proof of novel or unexpected properties or uses capable of producing novel results. *General Electric Co. v. Yost Electric Mfg. Co.*, 139 Fed. 568, 570, 71 C. C. A. 552.

The phrase "functions of a machine," as used in the patent law, defined as that power or property of the machine of acting in the specific manner designed or intended by its construction; in other words, that which the machine is designed to do, as distinguished from the machine itself and from the product of its action on something external to it.

self. *American Steel & Wire Co. v. Denning Wire & Fence Co.*, 160 Fed. 108, 110; *Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey*, 169 Fed. 793, 798, 95 C. C. A. 259.

The "function of a court of justice" is to ascertain and declare the truth on the issues presented, and not to see that truth and error are treated with the same favor, and while reserving to the jury the right and duty of deciding upon facts according to their own conscience, the court should not hesitate, when in his opinion the occasion demands it, to make such comments on the evidence as he believes will direct the jury to right conclusions. *Desautelle v. Nasonville Woolen Co.*, 66 Atl. 579, 580, 28 R. I. 261.

## FUND

See Available Funds; City Improvement Fund; Contingent Fund; County Fund; Expense Fund; General Fund; Improvement Fund Tax; Money Order Funds; Paving Fund; Permanent Fund; Public Funds; Reserve Fund; Sinking Fund; Special Fund; Trust Fund.

Webster defines "fund" as follows: "(1) An aggregation or deposit of resources from which supplies are or may be drawn for carrying on any work, or for maintaining existence. (2) A stock or capital; a sum of money appropriated as the foundation of some commercial or other operation undertaken with a view to profit; that reserve by means of which expenses and credit are supported; as, the fund of a bank, commercial house, manufacturing corporation," etc. Under San Antonio City Charter, § 112, which provides that creditors of the city having established claims shall be entitled to warrants drawn on the city treasurer, which shall be numbered, "designating the fund out of which the same are payable," a judgment creditor of the city may refuse a back tax warrant in discharge of the judgment, where there is no back tax fund in existence; the word "fund" in the charter not including uncollected back taxes which may never be collected. *City of San Antonio v. Routledge*, 102 S. W. 756, 768, 46 Tex. Civ. App. 196.

In Acts 1885-86, p. 142, c. 1233, § 9, providing that churches and all property of seminaries, asylums, hospitals, infirmaries, and colleges, and all other funds devoted to charitable purposes, shall be exempt from taxation, the word "funds" is used in the sense of "capital." *City of Louisville v. Werne* (Ky.) 80 S. W. 224, 225.

Real estate obtained by an appropriation made by a fraternal benefit association from its reserve fund for a home office intended to be used for that purpose is not exempt from taxation as a part of such fund under Gen. St. 1909, § 4313. *Life & Annuity Ass'n v. Shilling*, 120 Pac. 548, 549, 86 Kan. 290.

## Checks, notes, bills, stocks, and bonds

Certificates of stock in a bank on which only 60 per cent. has been paid and which were held by the bank as security for the balance, are not moneys, funds, or credits of the bank within Free Banking Act, § 30 (Rev. St. § 3821-85), making it an offense for an officer of a bank to embezzle moneys, funds, or credits of the bank. *State v. Davis*, 96 N. E. 1022, 1025, 85 Ohio St. 43.

The word "funds," as used in Rev. St. § 3821-85, relating to embezzlement by bank officers, means permanent investment for income, stock of convertible use, or, perhaps in its broadest sense, it is merely synonymous with "assets," but a certificate of stock is not an asset when the real thing of which the certificate is only evidence of title is within complete control of the creditor company. *State v. Davis*, 96 N. E. 1022, 1025, 85 Ohio St. 43.

In Rev. St. § 5209, which makes it a criminal offense for any officer or agent of a national bank to embezzle, abstract, or willfully misapply "any of the moneys, funds, or credits of the association," the word "moneys" refers to the currency or circulating medium of the country; the word "funds" refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made; and the word "credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it. *United States v. Smith*, 152 Fed. 542, 544 (citing *United States v. Greve*, 65 Fed. 489).

The term "funds," as used in Code, § 1841, providing that savings banks may receive on deposit the savings and funds of others, is not limited to money. It is used in connection with "savings" and was evidently intended to include notes, bills, stocks, bonds, and other securities appropriate for deposit in such an institution, and which it has long been customary to leave there for safe-keeping. *Shetwood v. Home Sav. Bank*, 109 N. W. 9, 11, 131 Iowa, 528.

## Money

A "fund" is well defined as money or its equivalent gathered for or to be appropriated to a specific object. *McCammon v. Cooper*, 69 N. E. 658, 659, 69 Ohio St. 366.

A "fund," as generally understood and defined, means a sum of money, and the words "pay over" are commonly used with reference to money and never as the equivalent of a conveyance or a transfer of real estate. Where a testator directed his executor to divide his property into as many portions as there were children living at his decease or who, having previously died, had left lawful issue, and upon the death of his daughters directed the executor to pay over the portion or part of the "fund" then held for the benefit of such daughter, there was

an implied power of sale of the real estate. *Burnham v. White*, 102 N. Y. Supp. 717, 719, 117 App. Div. 515.

In the case of the division of a township and the establishment of a new township, the new township, under Rev. St. 1906, § 1377, providing that in case of a division of any township the "funds" in the treasury of such township shall be partitioned to the new township, is entitled not only to its portion of the money in the treasury of the original township at the time the new township is established, but also to money thereafter in the treasury to the extent the same was collected from the territory established into the new township. *Cooley v. State ex rel. Village of Bay*, 78 N. E. 369, 370, 74 Ohio St. 252.

#### FUNDAMENTAL ERROR

"Fundamental error," which will be considered, whether assigned or not, is that going to the foundation of the case, or taking from defendant a right essential to his defense. *Rea v. State*, 105 Pac. 386, 3 Okl. Cr. 281.

#### FUNDED DEBT

Village Law, § 41, subd. 2, permits women possessing the qualifications to vote for village officers, except that of sex, who own property assessed at the preceding assessment, to vote upon a proposition to "raise money by taxes or assessment." General Municipal Law, § 6, provides that a "funded debt" shall not be created by a municipal corporation, unless by a resolution passed by a two-thirds vote of the council adopting it, or on submission to the taxpayers of the village when required by law. A proposition was submitted to the voters of defendant village to issue village bonds to establish a waterworks system, to be paid by the annual levy and collection of taxes. Held, that the bonds would be a "funded debt," within section 6, which included all municipal indebtedness evidenced by a bond, the principal of which was payable after the current fiscal year, with periodical payments of interest, when provision for payment was made by future taxation, and the proposition to issue them was one to "raise money by taxes or assessment," within the village law, so that women were entitled to vote thereon, and the election was void. *Gould v. Village of Seneca Falls*, 118 N. Y. Supp. 648, 651.

Under General Municipal Law, § 5, the words "funded debt" include all municipal indebtedness embraced in or evidenced by a bond the principal of which is payable at a time beyond the current fiscal year of its issue, with periodical terms for the payment of interest, and when provision is made for the payment by raising necessary funds by future taxation and the quasi pledging in advance of the municipal revenue. Said sec-

tion 6 declares that a funded debt shall not be created, except by resolution or ordinance passed by a two-thirds vote of the members elected to the board or council adopting it, or submitted to and approved by the electors of the town or county, or taxpayers of the village or city, when required by law. Held, that women otherwise qualified, except for sex, were entitled to vote on the question of the levy of a tax to pay waterworks bonds under Village Law, § 128, subd. 6, providing that a woman who possesses the qualifications to vote for village officers, except the qualification of sex, who is the owner of village taxable property, may vote on the proposition to raise money by tax assessment. *Gould v. Village of Seneca Falls*, 121 N. Y. S. 723, 724, 137 App. Div. 417.

#### FUNDING

A corporation purchasing the property of another corporation, subject to a mortgage securing an issue of \$500,000 of bonds, of which \$425,000 were issued, executed a mortgage on such property and other property to secure an issue of \$1,500,000 of its bonds. The bonds to be issued under the mortgage were called "refunding mortgage bonds," while the bonds secured by the prior mortgage were called "underlying bonds." The refunding mortgage recited that it was subject to a prior mortgage, and that the mortgagor desired to "fund" the indebtedness thereby secured, and that \$500,000 face amount, of refunding mortgage bonds, should be reserved to be issued and delivered to take up at maturity, or before, the underlying bonds, and that, when the mortgagor tendered any underlying bonds, the trustee, in exchange therefor, should authenticate and deliver refunding mortgage bonds. Each of the bonds stated that it was one of a series of bonds secured by mortgage. Held, that the corporation was entitled to receive from the trustee refunding bonds in exchange for underlying bonds, whether canceled or not, or to exchange such bonds, whether canceled or not, for cash deposited in exchange for refunding bonds; the word "funding" meaning the process of collecting together a variety of outstanding debts against a corporation payable at short periods and substituting therefor a single form of indebtedness payable at periods comparatively remote. *Twin State Gas & Electric Co. v. Knickerbocker Trust Co.*, 120 N. Y. Supp. 764, 767, 135 App. Div. 467.

#### FUNDS OF A BANK

Where a bank receiving a deposit of county funds without giving the statutory bond therefor thereby became a trustee for the county for the amount of the deposit, the county, on the insolvency of the bank, which had commingled the money deposited with its funds and used it in its business as the funds of general depositors, could fol-

low the funds not only in the actual possession of the bank at the time it suspended, but also the funds held in correspondent banks, the expression "the funds of a bank" meaning all its funds, including deposits in correspondent banks. *Yellowstone County v. First Trust & Savings Bank of Billings*, 128 Pac. 596, 599, 46 Mont. 439.

### FUNDS OF ESTATE

On an appeal from a decree, construing a will, an order providing that costs of the appeal should be advanced out of the "funds of this estate" means the funds in the hands of the executor at the time, where the costs were required to be paid within the time allowed to prosecute the appeal. *Boyce v. McLeod*, 68 Atl. 135, 136, 107 Md. 1.

### FUNERAL

A "funeral" is merely the disposition of the bodies of human beings after death, with the accompanying rites and ceremonies. *People v. Ringe*, 110 N. Y. Supp. 74, 76, 125 App. Div. 592.

### FUNERAL EXPENSES

The term "funeral," in the law as to the liability of estates for "funeral expenses," includes many circumstances and may cover varied outlays. The term embraces not only the solemnization of interment, but the ceremonies and accompaniments attending according to the religious faith and sentiment of the friends of the deceased. Expenditures for a wake, made at the request of the widow of decedent who left no children, being reasonable, are recoverable of the executors as expenses of the funeral; they being proper in character. *McCullough v. McCready*, 102 N. Y. Supp. 633, 634, 52 Misc. Rep. 542.

Reasonable cost of keeping a burial plot and monument in repair is properly a part of the "funeral expenses," exempt from the transfer tax on an estate; and so a bequest of \$250. to be invested and the income used for such a purpose, is exempt. In *re Maverick's Estate*, 119 N. Y. Supp. 914, 915, 135 App. Div. 44.

#### As debt

See Debt.

### FUR

Manufactures of, see Manufactures—Manufactured Articles.

Pieces of fur sewn together continuously for convenience or safety, but not intended to be used as articles in that shape, are not articles made of "fur," under the Tariff Act of 1883, Schedule N, but are dutiable as "dressed furs on the skin," under the same schedule. *Fleet v. United States*, 148 Fed. 335.

Sheepskins, purchased indiscriminately and imported unsorted, without regard to

any particular use to which they might be adapted, and not shown to be used as furs, are not classifiable as "furs," or "fur skins," under Tariff Act July 24, 1897, c. 11, § 2, Free List. pars. 561, 562. *International Hide & Skin Co. v. United States*, 177 Fed. 602.

As to combings of loose or dead hair obtained in preparing rabbit or hare skins, which are commercially known as "hares' combings" or "fur waste," and which, after further treatment, are used as an adulterant in cheap hats, held, that they are dutiable as waste under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, and not as furs prepared for hatters' use under paragraph 426, nor free of duty as "furs, undressed," under section 2, Free List, par. 561. *United States v. Hatters' Fur Exchange*, 153 Fed. 595, 596.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 426, for "furs dressed on the skin," does not include dressed goose skins with the down on. Such articles are dutiable as "bird skins, \* \* \* dressed \* \* \* or manufactured in any manner," under paragraph 425. *Herskovitz & Roth v. United States*, 180 Fed. 631, 632.

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 561, providing for "furs, undressed," includes undressed clippings and detached portions of fur, used for the same purpose as the skin from which derived; and such material is therefore removed from the provision for "waste, not specially provided for," in section 1, Schedule N, par. 463. *Hatters' Fur Exchange v. United States*, 175 Fed. 588, 589.

### FURNACE

As appurtenance, see Appurtenance—Appurtenant.

The provision for "furnaces," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, does not include so-called arched Purves furnaces, consisting simply of corrugated steel cylinders or tubes, which are not furnaces in fact, but are intended to be used in the manufacture of furnaces. Such articles are dutiable under the provision in the same paragraph for boiler tubes or flues. *Thomas v. F. B. Vandegrift & Co.*, 162 Fed. 645, 646, 89 C. C. A. 437.

### FURNISH

Ordinarily to "furnish" means to deliver, or to supply, and, in the mechanic's lien law, to deliver or supply for use in the making of the improvement or erection of the building. *A. E. Shorthill Co. v. Aetna Indemnity Co. of Hartford, Conn. (Iowa)* 124 N. W. 613, 615.

The various expressions that the payor must "pay," or "furnish," or "advance" the consideration, used interchangeably in defining a resulting trust, all imply that the

payor does something and that he has the intention, in so doing, to acquire at least an equitable interest in the land. *Merrill v. Hussey*, 64 Atl. 819, 821, 101 Me. 439.

A contract by one to print and furnish to another illustrated advertising booklets is not a contract for particular personal services, but may be assigned; the word "furnish" meaning to supply or provide. *H. C. Browne & Co. v. Jno. P. Sharkey Co.*, 115 Pac. 156, 157, 58 Or. 480 (citing 4 Words and Phrases, p. 3010).

The word "furnish," as used in the charter of a corporation organized for the purpose of furnishing treatment for a certain disease and medical and surgical treatment for all other diseases, means to "supply." The corporation is entitled to contract with persons to supply medical treatment and to contract with physicians to render medical and surgical services. *State ex inf. Sager v. Lewin*, 106 S. W. 581, 582, 583, 128 Mo. App. 149.

A tender of a certificate of stock with an assignment upon its back and a power to the transferee to effect a transfer of the same on the books of the company is a compliance with a contract to "furnish shares of stock" thereby indicated. *Noyes v. Spaulding*, 27 Vt. 420, 423, 426.

A charterer who contracts to "furnish" certain towage to the chartered vessel cannot relieve himself from responsibility for the manner in which the service is performed by employing a tug to perform it but is liable for any damage or injury caused to the vessel through the negligence or fault of such tug. *The Naos*, 144 Fed. 292, 298.

It is not a violation of the statute, forbidding one to "furnish" intoxicating liquors for one who lives in a county in which the traffic in intoxicating liquors is prohibited, under the provisions of that statute, to go into a county where such traffic is not prohibited, and purchase intoxicating liquors in any quantity for his own use, and bring the same into the county where he lives, to be used therein by him as a beverage, and such a person may, under the statute, not only himself purchase intoxicating liquor, but he may also do so by another, whom he has constituted his agent for that purpose. *State v. Lynch*, 90 N. E. 935, 936, 81 Ohio St. 336, 28 L. R. A. (N. S.) 334.

That plaintiff brought planks to another employé, from which the latter constructed certain platforms, did not constitute a "furnishing" of the contrivance, within Labor Law (Laws 1897, c. 415, p. 467). *Madden v. Hughes*, 93 N. Y. Supp. 324, 326, 104 App. Div. 101.

The fact that the general contractor permitted a subcontractor to use its material for the construction of a scaffold, the breaking of which injured an employé of the subcontractor, did not make the scaffold the

general contractor's "property," or make it one "furnished" by it, within the Employer's Liability Law (Consol. Laws 1909, c. 31). *Keyser v. Reid-Palmer Const. Co.*, 138 N. Y. Supp. 452, 454, 78 Misc. Rep. 393.

#### Administer synonymous

Though, as applied to a physician administering intoxicating liquors to a patient, the word "furnish" is synonymous with administer, under Laws 1881, p. 235, c. 128, § 3, as amended by Laws 1885, p. 237, c. 149, § 2, permitting a physician to administer intoxicating liquors to a patient if necessary, an instruction is not erroneous because the word "furnish" is not used in defining "administer." *State v. Wilson*, 80 Pac. 565, 71 Kan. 263.

#### As deliver

The word "give" may be treated as synonymous with "deliver," which is the meaning of the word "furnish," in a statute making it an offense to "furnish" liquor to minors. *Southern Exp. Co. v. State*, 58 S. E. 67, 69, 1 Ga. App. 700.

A lease provided that "party of the first part agrees to furnish water, sufficient to irrigate land above described; said water to come from an artesian well located on land." Held, that the word "furnish" was used in the sense of "deliver"—that is, to provide with the right of possession and use—and the covenant was not complied with where the lessor had a well dug and the contractor locked it so that the lessee could not get water therefrom without breaking the lock, and thereby incurring danger of litigation, or by bringing legal proceedings. *Smith v. Hicks*, 98 Pac. 138, 140, 14 N. M. 560, 19 L. R. A. (N. S.) 938.

Where a person for the purpose of delivering or selling to others selects food, including oleomargarine, with an opportunity for examination and thereafter delivers such food to guests or patrons, he "furnishes" a substance so delivered within St. 1898, § 4607d, prohibiting the furnishing of oleomargarine to a guest or patron of a restaurant without first notifying him that the substance furnished is not butter. *State v. Welch*, 129 N. W. 656, 145 Wis. 86, 32 L. R. A. (N. S.) 746 (citing 4 Words and Phrases, p. 3010).

#### As give away

Giving away intoxicating liquor is within the inhibition of Acts 1902, p. 92, No. 90, forbidding "furnishing liquor," but not expressly forbidding giving. *State v. Tague*, 56 Atl. 535, 536, 76 Vt. 118.

#### As sold and delivered

To furnish materials for a building, there must be an actual or constructive delivery of the material at or near the building; the word "furnished" meaning to have sold and delivered. *Foster Lumber Co. v. Sigma Chl*

Chapter House of De Pauw University, 97 N. E. 801, 802, 49 Ind. App. 528.

#### **Furnish for manufacturing purposes**

See Water Furnished for Manufacturing Purposes.

#### **Furnish materials**

The word "furnished," as used in a mechanics' lien law, does not mean that the materials must be delivered at the building, in the construction of which materials are furnished. *McEwen v. Union Bank & Trust Co.*, 90 Pac. 359, 361, 35 Mont. 470.

Where the last item of charge but one of an itemized account and lien statement filed by a subcontractor, under Snyder's Comp. Laws 1909, §§ 6151, 6153, was for material furnished and used in a building, and the last item of charge was for material not actually so used, held, that the latter material was not furnished within the contemplation of the statute, and that the 60 days within which to file the lien statement ran from the date of the last item but one, and, it having run at the time of the filing of a statement, no lien attached. *P. T. Walton Lumber Co. v. Cox*, 116 Pac. 798, 799, 29 Okl. 237.

The mere delivery of material by a subcontractor to a contractor at the latter's place of business, the latter never incorporating it in the structure for which it was bought, or even delivering it on the premises or to the control of the owner of such structure, is not a "furnishing" of the material for, in, or about the construction of the improvement, within St. 1898, § 3315, giving the subcontractor a lien for materials so furnished; the intent in that respect being shown by the concluding sentence, imposing penalty on a principal contractor, who without consent of and with intent to defraud a subcontractor uses, or causes to be used, material for an improvement other than that for which it was represented to be bought. *Francis & Nygren Foundry Co. v. King Knob Coal Co.*, 126 N. W. 39, 40, 142 Wis. 619.

#### **Furnish work**

The contract of a subcontractor to carve and erect in place and finish exterior marble work on a building, employed because of his skill in that class of work, and who does the work in the sense of giving it intelligent direction, and who is responsible for its proper execution, brings him within the terms and reason of the statute as one "furnishing work" so as to entitle him to a lien. *Evans Marble Co. v. International Trust Co.*, 60 Atl. 667, 671, 101 Md. 210, 109 Am. St. Rep. 568, 4 Ann. Cas. 831.

#### **FURNISHINGS**

Cells in a jail, consisting of steel tanks or cages erected in, but independent of, the jail building, are not within Pol. Code, § 4041, subd. 8, requiring a county board to award contracts for public buildings to the lowest bidder, based on plans and specifica-

tions previously adopted, but are "furnishings," as to which there is no requirement. *Sarver v. Los Angeles County*, 103 Pac. 917, 918, 156 Cal. 187.

### **FURNITURE**

See Household Furniture; Necessary Furniture; Office Furniture; Ships' Tackle, Apparel, and Furniture.

As merchandise, see Merchandise.

Showcases are "furniture" within the ordinary meaning of the word, which governs in the construction of tariff schedules published for the information of the public, and are included in a commodity rate on "furniture (new) all kinds." *Chicago, B. & Q. R. Co. v. Feintuch*, 191 Fed. 482, 487, 112 C. C. A. 126.

#### **Of business**

An iron safe contained in a bank was "furniture" within a policy insuring the bank's furniture and fixtures. *Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin (Tex.)* 135 S. W. 1083.

#### **Of house**

"Household goods" is a wider term than "furniture," including everything about the house that is usually held and enjoyed therewith, and that tends to the comfort and accommodation of the household. *Webb v. Downes*, 101 N. W. 966, 967, 93 Minn. 457.

#### **Same—Piano**

Notice to insurer's agent that insured had other insurance on his "furniture" was notice of other insurance on a piano. *Utz v. Insurance Co. of North America*, 122 S. W. 318, 319, 139 Mo. App. 153.

#### **Of schoolhouse**

Under a statute authorizing school districts to issue bonds "for the purpose of erecting schoolhouses and furnishing the same," a district may issue bonds for the purpose of providing a heating plant for an old school building, as a heating plant comes within the meaning of the term "furniture," and the statute does not confine the power of the district to furnishing new schoolhouses, but under such provision they may furnish old schoolhouses. *State ex rel. Carrollton School Dist. No. 1, Tp. 53, R. 23 v. Gordon*, 133 S. W. 44, 52, 231 Mo. 547.

### **FURNITURE MOVER**

As private carrier, see Private Carrier.

### **FURNITURE OF WOOD**

In Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, providing for "furniture of wood, \* \* \* and manufactures of wood, or of which wood is the component material of chief value," the last clause as to chief value does not relate to the provision for furniture; and furniture, whose framework and principal bulk are of wood, is "fur-



niture of wood," within the meaning of the paragraph, though decorative metal may be the component of chief value. *O. G. Hempstead & Son v. United States*, 168 Fed. 450, 451.

Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208; includes under the provision for "furniture of wood" Buhl furniture, in which metal ornamentation is the element of chief value, but in which wood predominates in quantity. *United States v. O. G. Hempstead & Son*, 175 Fed. 966, 967, 99 C. C. A. 356.

Upholstered furniture with wooden frames is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, as "furniture of wood," though silk, and not wood, is the chief component in the completed articles. *United States v. A. J. Woodruff & Co.*, 175 Fed. 776, 99 C. C. A. 348.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, relating to "furniture of wood, \* \* \* and manufactures of wood, or of which wood is the component material of chief value," the furniture provision is not modified by the chief value clause; and upholstered furniture, whose frames are of wood, is dutiable under that provision, though wood is not the most valuable component. *A. J. Woodruff & Co. v. United States*, 168 Fed. 452, 453.

## FURTHER

The purport of the word "further," in a clause in a will declaring testator's "further meaning" as to prior provisions, is to amplify, to add to, not to negative. *Blair v. Scribner*, 60 Atl. 211, 213, 67 N. J. Eq. 583.

Where a will provided that, upon the marriage of the testator's son, the executors should pay over to him the sum of \$7,500 in quarter yearly payments, beginning from the date of such marriage; in case he should still be married and living with his wife at the end of 12 months, the sum of \$8,000 in quarter yearly payments from that date; in case he should be married and living with his wife at the end of 24 months from his marriage, the further sum of \$8,500 in quarter yearly payments—the word "further," as used in relation to the first two payments, cannot be construed as giving the son the last sum in addition to the amount directed to be paid. *United States Trust Co. v. Soher*, 85 N. Y. Supp. 266, 269, 88 App. Div. 506.

## FURTHER ANSWERING

The phrase "further answering," used by the defendant to introduce a paragraph of its answer, was not a statement that the paragraph set up a further defense. *Ells v. Dumary*, 82 N. Y. Supp. 531, 534, 84 App. Div. 105.

## FURTHER ASSETS

Rev. Laws, c. 142, § 10, relating to insolvent estates, provides that a creditor who does not present his claim for allowance to the commissioners, or to the court where no commissioners are appointed, within the time prescribed by that court, shall be barred, but that, if "further assets" come into the hands of executor or administrator after the decree of distribution, the claim may be proved and paid. Held, that the term "further assets" is substantially the same as "new assets," which belated creditors are permitted to reach under chapter 141, § 11, relating to solvent estates, and in general does not include property for which the administrator has been charged, or the property into which such property, or any part thereof, has been changed, or the natural increment of such property; and where an administrator did not include in the inventory, nor in his first nor second and final account, certain land, or the proceeds of the sale thereof, if he knew that the land belonged to his intestate long before the decree of distribution, and had it in his control well within the two-year period from his appointment, neither the land nor the proceeds of its sale would be "further assets," but, if his knowledge of intestate's interest in such tract did not come to him until after two years from his appointment, the proceeds of their sale would be "further assets." *Fay v. Haskell*, 93 N. E. 641, 642, 207 Mass. 207.

## FURTHER CONSTRUCTION

The words "further construction," as used in Acts 1845, p. 141, § 6, incorporating a canal company, and giving the power of eminent domain to obtain material necessary for "the further construction" of such canal, raceways, etc., refer to repair work on the canal which was authorized to be constructed by the act, as well as to work of original construction. *Alexander v. City Council of Augusta*, 68 S. E. 704, 706, 134 Ga. 849.

## FURTHER DEVELOPMENT

"Further development," in a contract providing that if, in making certain developments, more water was made to flow than plaintiff was entitled to, then plaintiff was to have the option of purchasing such excess of water, less the amount actually paid by it in making such further development, referred to the development further or beyond what was necessary to make up the deficiency. *Chapea Water Co. v. Chapman*, 77 Pac. 990, 992, 144 Cal. 366.

## FURTHER EMPLOY

The words "further employ," in Kirby's Dig. § 6649, as amended, requiring that railroads pay wages due discharged employees within seven days after demand, and on non-payment the wages shall continue from the date of the discharge or refusal to "further employ" at the same rate until paid, meant

employment of the same class and kind and in the same locality in which the wages were earned, and hence, in an action for a penalty, evidence that defendant offered plaintiffs other employment generally or at another place generally was inadmissible. *St. Louis, I. M. & S. R. Co. v. Bryant*, 122 S. W. 906, 998, 92 Ark. 425.

#### FURTHER LEASE

Where a written lease for five years contained a covenant for a further lease for six years at an advanced rent, on notice by the tenant that he desired a continuation of the lease, and the tenant gave the notice and remained in possession paying the advanced rent, it constituted an extension of the original term and a "further lease" provided for in the covenant. *Mattlage v. McGuire*, 111 N. Y. Supp. 1083, 1085, 59 Misc. Rep. 28.

#### FURTHER NOTICE

In a note secured by a pledge of collateral, reciting that it was secured by the pledge of the sureties mentioned, with the right to call for additional security should the same decline, and that, on failure to respond, this obligation should be deemed to become due and payable on demand, with full authority to sell "without further notice," the words "further notice" imply actual previous notice of the demand of the payment. *Smith v. Shippers' Oil Co.*, 45 South. 533, 539, 120 La. 640.

#### FURTHER PROCEEDING

Where the Supreme Court remanded a cause for "further proceedings," the plaintiff was entitled to a new trial on proper application therefor by him with showing that, under the opinion of the Supreme Court, it considered the findings insufficient to authorize entry of judgment, and this right was not waived by waiting two years. *Canosia Tp. v. Grand Lake Tp.*, 92 N. W. 215, 87 Minn. 347.

#### FURTHER SECURITY

"Further security," in the ordinary acceptance of the term, means additional, not substituted or superior, security. A grantee of mortgaged property executed a deed of trust thereon to the mortgagee, to secure the mortgage debt and the unsecured indebtedness, which recited that it was given "for the purpose of further securing any of said promissory notes which may now be secured by any mortgage," and provided that, in case a sale thereunder should not realize sufficient to pay the entire indebtedness, the creditor should "retain, have, and possess the same remedies to enforce the payment of said promissory notes or any of them which they would have or possess if this deed of trust had not been executed." The mortgagor whose note was secured by the mortgage consented to the giving of said deed. Held, that the mortgage was not merged in such

trust deed, and that the right of the mortgagor to have the proceeds of the property applied to the payment of her note was not affected thereby. *Crisman v. Lanterman*, 87 Pac. 89, 91, 149 Cal. 647, 117 Am. St. Rep. 187.

#### FURTHER TIME

As used in a bond given by the treasurer of a mutual benefit association during the first year of his election to that office and conditioned that he should perform his duties faithfully during the term for which he has been elected, and "during such further time as he should continue to hold said office," the phrase quoted applied to such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and was not intended to cover the time during which he might hold office under any subsequent election. *O'Brien v. Murphy*, 56 N. E. 283, 285, 175 Mass. 253, 256, 257, 78 Am. St. Rep. 487.

The words "further time," as used in the lease in which the covenant was to hold for a term of one year, and providing that the lessee should pay the rent "as above stated, and all taxes and duties levied or to be levied thereon during the term and for such further time as the lessee may hold the same," can have no other meaning than time beyond the stipulated time of one year. *Kanouse v. Wise*, 69 Atl. 1017, 76 N. J. Law, 423 (quoting *Salisbury v. Hale*, 12 Pick. [Mass.] 416).

#### FURTHERANCE

See In Furtherance of.

The word "furtherance," within the rule that no declarations except those made during the pendency of a conspiracy, and in "furtherance" of its objects, can be used against a co-conspirator, means an act, statement, or declaration which in some measure aids or assists towards the consummation of the object of the conspiracy. *People v. Smith*, 91 Pac. 511, 513, 151 Cal. 619.

#### FURTHERANCE OF BUSINESS

An instruction that the defendant master was not liable if the decedent was killed by the act of one of the employees of the defendant if such act was not done "in furtherance of the business of the employer" was improper, the words "in furtherance of the business of the employer" meaning simply in the discharge of the duties of the employment, and the jury were properly told that the defendant was not responsible for the injury if caused by the wrongful act of the employee while acting in the scope of his employment. *Stewart v. Cary Lumber Co.*, 59 S. E. 545, 551, 146 N. C. 47 (concurring opinion).

#### FURTHERANCE OF JUSTICE

"Furtherance of justice" is "such justice as the law administers when correctly applied." *Wells Fargo & Co. v. McCarthy*, 90

Pac. 203, 210, 5 Cal. App. 301 (quoting *Stringer v. Davis*, 30 Cal. 322).

## FUSE

See Double-Tape Fuse; String Fuse; Tape Fuse.

The "fuses" used in telephones are thin hair-like wires of low fusibility, which immediately melt, and prevent any excess current of electricity from being carried over the telephone wires into the house. *Dow v. Sunset Telephone & Telegraph Co.*, 106 Pac. 587, 588, 157 Cal. 182.

## FUSIONIST

The term "Fusionist" has a well-known meaning in Nebraska. It is descriptive of those individuals who support candidates for elective offices nominated by the joint action of electors of the Democratic and People's Independent Parties, or their representatives. *Sheibley v. Nelson*, 121 N. W. 458, 84 Neb. 393.

## FUTURE

See Immediate Future.

### FUTURE AGREEMENT

A contract employing an agent to solicit insurance in Oregon and Washington provided that the agent should give a bond for faithful performance "under this or any future agreement." The bond stipulated that it should remain in force so long as the agency should continue, "whether under his existing appointment or any future one and whether such present or future agency" be sole or in connection with others. Subsequently the agent was made soliciting agent in Utah, Colorado, and Wyoming. Held, that the sureties were liable for a breach of his duties in such subsequent employment; the term "future agreement" having reference to a future appointment. *Daly v. Old*, 99 Pac. 460, 465, 35 Utah, 74, 28 L. R. A. (N. S.) 463.

### FUTURE DATE

The word "future," in Laws 1905, p. 159, § 3, providing that an application for the purchase of school land shall be filed in the land office through the mail, in an envelope, and that, when the land is to come on the market at some "future date," the envelope shall have indorsed thereon the description, name of the grantee, date when the land is on the market, etc., and that on receipt of the same it shall be preserved by the commissioner without being opened until the day following the date indorsed thereon, did not refer to the date on which the statute was to take effect, but referred to those cases in which the lands would come on the market upon some day in the future, and the commissioner should offer them in advance for sale on that date, and it was not necessary

that an application made after the land came on the market should bear such indorsement. *Flores v. Terrell*, 92 S. W. 32, 33, 99 Tex. 575.

### FUTURE DELIVERY

See Selling for Future Delivery.

### FUTURE EARNINGS

An assignment by a contractor to construct a macadam roadway for a city of all sums due or to become due from the city is not an assignment of "future earnings," under St. 1905, c. 308, and St. 1906, c. 390, relating to assignments of "future earnings." *William Gilligan Co. v. Casey*, 91 N. E. 124, 125, 205 Mass. 26.

Where defendant contracted to build a stable for F., who was summoned as trustee in an action against defendant, and, at the time of an assignment of the balance due on the contract, defendant had fully completed the work, with the exception of putting the fastenings on six windows, the reasonable value of which would have been not more than 25 cents, and the setting of a sill cock, which had not been previously set by reason of the owner's failure to designate its position, and, notwithstanding defendant's failure to complete the building in such respects, the owner accepted, used, and enjoyed the same, the contract was substantially performed; and hence the balance due at the time of the assignment was not "future earnings," within Rev. Laws, c. 189, § 34, requiring an assignment of such earnings to be recorded in order to be valid as against attachment by trustee process. *Allen v. Mayers*, 69 N. E. 220, 184 Mass. 486.

A maker of monuments, who bought the rough material and then fashioned it into the required form, no part of the work of cutting the stone being either done by him or especially under his direction, but by his workmen, over whom he when present, and in his absence his working foreman, exercised general superintendence, contracted to furnish, and did furnish, a monument; his skill and personal services not being engaged and not entering into the contract. Held, that the price to be paid therefor was not his "future earnings," an assignment of which Rev. Laws, c. 189, § 34, requires to be recorded, to be valid against attachment by trustee process. *Chester v. McDonald*, 69 N. E. 1075, 1076, 185 Mass. 54.

### FUTURE ESTATE

See Property Right to be Owned in the Future.

"A 'future estate' is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." *In re Perry*, 96 N. Y.

Supp. 879, 884, 48 Misc. Rep. 285 (quoting Real Property Law, § 27).

Where testatrix devised rents to her father for his life, and after his death, to four persons and the survivor of them, at the death of whom the property was to be sold and the proceeds divided equally among the children of the four devisees and testatrix's half brothers and sisters then surviving, the estate attempted to be devised to the children of the four devisees and the half-brothers and half-sisters was a future estate within St. 1898, § 2060, providing that disposition of rents and profits of land to accrue after the execution of the instrument creating the disposition shall be governed by the rules established in the chapter (95) relating to future estates in land, and, as the persons to whom the estate was limited remained uncertain, it was a contingent future estate under section 2037. In re Adelman's Will, 119 N. W. 929, 930, 138 Wis. 120.

### FUTURE INJURY

Permanent injury and "future injury" are not expressions of the same thing. Much less is permanent injury and injury to future health. In an action for personal injuries, an instruction for defendant that there was no evidence of permanent injury, and an instruction that the jury might consider the injury to plaintiff's health in the future, were not contradictory. Wood v. Chicago, B. & Q. R. Co., 95 S. W. 946, 947, 119 Mo. App. 78.

### FUTURE INTEREST

"Future interests" or remainders are vested or contingent. Civ. Code, § 693. \* \* \* 'A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.' Civ. Code, § 695." Testator devised the remainder of his estate in trust to manage, control, and invest it, and to pay one half the income to his wife for her life and the remaining half to his daughter, each half to go to the survivor until her death, upon the death of the other, and the trust to cease upon the death of such survivor, and the trust property vest in the two children named of testator's daughter, and such other children as may be born to her, or in such of them as shall then be living, share and share alike. Civ. Code, § 694, makes a future interest vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession

of the property upon the ceasing of the intermediate estate; and section 696 makes a future interest contingent while the person to whom, or the event upon which, it is limited to take effect remains uncertain. Held, that the remainder to the children of testator's daughter was contingent, and would go to only such of the children as were living at her death. In re Washburn's Estate, 106 Pac. 415, 416, 417, 11 Cal. App. 735.

### FUTURE LOSS OF EARNINGS

"Future loss of earnings" signifies diminution of earning capacity in the future and may be shown without a special averment. Scholl v. Grayson, 127 S. W. 415, 417, 147 Mo. App. 652.

### FUTURE TIME

See Determinable Future Time; Payable at a Determinable Future Time.

### FUTURE WAGES

An assignment by a contractor to construct a macadam roadway for a city of all sums due or to become due from the city is not an assignment of "future wages," under St. 1905, c. 308, and St. 1906, c. 390, relating to assignments of "future wages." William Gilligan Co. v. Casey, 91 N. E. 124, 125, 205 Mass. 26.

### FUTURES

Dealing in Futures, see Deal—Dealing. As gambling contract, see Gambling Contract.

As gambling transaction, see Gambling Transaction.

As Wagering Contract, see Wager—Wager Contract.

The transaction termed "futures" is this: "One person says that I will sell you cotton at a certain time in the future for a certain price. You agree to pay that price, knowing that the person you deal with has no cotton to deliver at the time, but with the understanding that when the time arrives for delivery you are to pay him the difference between the market value of that cotton and the price you agreed to pay if cotton declines, and if cotton advances he is to pay you the difference between what you promised to give and the advance market price." Anderson v. State, 58 S. E. 401, 410, 2 Ga. App. 1, and Henry Hentz & Co. v. Booz, 70 S. E. 108, 110, 8 Ga. App. 577 (both quoting Cunningham v. National Bank of Augusta, 71 Ga. 403, 51 Am. Rep. 266).

## G

**GADUOL**

As Medicinal Preparation, see Medicinal Preparation.

**GAIN**

See Private Gain.

**GALL CURE**

The term "gall cure" is one descriptive of a medicine, and, standing alone, could not be monopolized as a trade-mark and, when used as such in connection with a picture, is not infringed by the use of the words as a part of the name of another remedy in connection with another and distinctive picture. *Bickmore Gall Cure Co. v. Karns Mfg. Co.*, 128 Fed. 573, 574.

**GALLERY**

See Rogues' Gallery.

**GALLON**

See Customs Gallon; Dry Gallon; One-Half Gallon; Wine Gallon.

The "gallon," under the Tariff Act, imposing a duty as various rates per gallon, is the wine or liquid gallon, and not the dry gallon, regardless whether the goods are imported dried or in brine. *J. M. Ceballos v. United States*, 146 Fed. 380, 381; *J. M. Ceballos & Co. v. United States*, 139 Fed. 705.

The description of merchandise in an invoice as contained in "gallon" tins is not to be taken as conclusive against the importers, as fixing the amount contained in the tins for the assessment of duty. Such descriptions do not purport to indicate exactly the amount so contained, and it is the duty of government officers to ascertain as nearly as possible the quantity imported. *United States v. Zucca & Co.*, 154 Fed. 172, 173.

**GALLOON**

See, also, Narrow.

"The dictionaries generally concur in defining 'galloon' as a 'narrow, tapelike fabric used for binding hats, shoes, etc.'" Certain woven articles from 1 to 2½ inches wide, chiefly used as hat bands for trimming men's hats, are not "galloons," within the meaning of that word as it is used in Tariff Act Aug. 28, 1894, c. 349, § 1, par. 263. *United States v. Walter H. Graef & Co.*, 127 Fed. 688, 689, 62 C. C. A. 414.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, for galloons or trimmings, includes narrow strips of silk having interwoven thereon ornamental de-

signs which are chiefly used to decorate and embellish women's apparel. *J. Loewenthal & Co. v. United States*, 180 Fed. 941, 942.

**GAMBLE**

To "gamble" is to play or game for money or other stakes. Hence, in a complaint for vagrancy under an ordinance denouncing as vagrants all persons who gamble, it is immaterial whether any game is specified, or if specified, what game it is. A complaint charging that defendant is a vagrant, being without visible means of support, who gambles at the game of draw poker for a living, is sufficient. *City of Shreveport v. Bowen*, 40 South. 859, 116 La. 522 (citing *Webst. Int. Dict.*). And so an ordinance punishing gambling generally as a crime is valid, though it does not define "gambling." *City of Lake Charles v. Marcantel*, 51 South. 106, 107, 125 Ga. 170 (quoting and adopting definition in *City of Shreveport v. Bowen*, 40 South. 859, 116 La. 523).

**GAMBLER**

See Common Gambler.

A "gambler" is "one who gambles, especially one who makes gambling his business" (*Stand. Dict.*). "One who practices gambling" (*Worcest. Dict.*). "One who games or plays for money or other stake" (*Webst. Dict.*). "One who gambles; one addicted to gaming or playing for money or other stakes" (*Cent. Dict.*). In common parlance a gambler is one who follows or practices games of chance or skill, with the expectation and purpose of thereby winning money or other property. Consequently a special agent of the excise department, who operates a slot machine for the purpose of securing evidence to establish a violation of law, is not a gambler. *Clement v. Belanger*, 105 N. Y. Supp. 537, 538, 120 App. Div. 662 (citing *Buckley v. O'Neil*, 113 Mass. 193, 18 Am. Rep. 466).

**GAMBLING—GAMING**

See Resort for Gambling.

See, also, Game.

"Gambling" means the playing of a game of chance or skill for stakes, or the betting on the result of the game, or gaming or playing for money. *Fleming v. State*, 53 S. E. 579, 125 Ga. 17 (citing *And. Law Dict.*).

"Gaming" includes bets or wagers made on any physical contest, whether on man or beast, when practiced to decide such bets or wagers. *James v. State (Okla.)* 113 Pac. 226, 228, 33 L. R. A. (N. S.) 827.

"Gaming" includes all contests of strength, skill, or chance, between men or beasts, on the result of which a wager is

laid. *Cheeves v. State*, 114 Pac. 1125, 1128, 5 Okl. Cr. 361.

It is not "gaming" or "gambling," within the statute, to play monte, poker, or craps, unless the same are played "for money, checks, credit, or some representative of value." *Proctor v. Territory*, 92 Pac. 389, 390, 18 Okl. 378.

"Anything which induces men to risk their money or property, without any other hope for return than to get for nothing any given amount from another, is 'gambling,' and demoralizing to the community, no matter by what name it may be called." *Anderson v. State*, 58 S. E. 401, 411, 2 Ga. App. 1 (quoting *Appeal of Brua*, 55 Pa. 298).

Where chance enters into a bet as an element, there is a case of "gambling," within Const. art. 1, § 9, forbidding pool selling, bookmaking, or any other kind of gambling. *Thomson v. Hayes*, 111 N. Y. Supp. 495, 496, 59 Misc. Rep. 425.

To constitute "gambling" within Rev. St. 1903, c. 129, § 20, it is not necessary that both parties should stand to lose as well as to win; it is enough that one party stands to win only, or to lose only. *Lang v. Merwin*, 59 Atl. 1021, 1022, 99 Me. 486, 105 Am. St. Rep. 293.

The word "gambling" is a word of very general application, and is not restricted to wagering on the result of any particular game or games of chance. *Appleton v. Maxwell*, 65 Pac. 158, 160, 10 N. M. 748, 55 L. R. A. 93 (citing *Joseph v. Miller*, 1 N. M. 621).

#### Contingent event

A bet by parties, not aware of the fact, involving the question whether a third person has a lease on designated real estate, refers to an event unknown to the bettors, and constitutes "gambling" within Const. art. 1, § 9, forbidding pool selling, bookmaking, or any other kind of gambling, and within Betting and Gaming Law, 1 Rev. St. (1st Ed.) p. 662, pt. 1, c. 20, tit. 8, §§ 8, 9, declaring that bets depending on any chance, "or unknown or contingent event," shall be unlawful, etc.; the word "unknown" referring to that which was unknown to the parties to a wager, the word "contingent" showing that the event referred to applies equally to existing or nonexisting events, the word "event" meaning that in which an action, operation or series of operations terminates and having reference to something that has taken place, the words "unknown event" meaning a past circumstance unknown to the parties, and the words "contingent event" referring to one that hereafter may or may not occur. *Thomson v. Hayes*, 111 N. Y. Supp. 495, 497, 59 Misc. Rep. 425.

#### Betting distinguished

See Bet.

#### Betting on horse race

Betting on a horse race is gaming, and, where any person conducts a place where the public are invited by means of any plan or device to bet on the result of a horse race, they are guilty of violating Comp. Laws 1909, § 2422. *James v. State* (Okl.) 113 Pac. 226, 228, 33 L. R. A. (N. S.) 827.

Betting upon a horse race is not "gaming," within Ky. St. 1903, § 1955, avoiding every contract in consideration of money lent or advanced for the purpose of gaming, but that word applies only to betting upon a game played with cards, dice, machine, wheel, or other contrivance. *McDevitt v. Thomas*, 114 S. W. 273, 274, 130 Ky. 805.

Pub. St. 1901, c. 270, § 6, provides that, "if any person keeps any house, shop, or place resorted to for the purpose of gambling or lets any such place for that purpose, or suffers any person to gamble in any way in any such place, which is under his care or control, he shall be fined \* \* \* or imprisoned." Section 18 defines a bet or wager as "any contract or agreement for the purchase, sale, loan, payment, or use of money or property, \* \* \* the terms of which are made to depend upon or are to be varied or affected by any uncertain event in which the parties have no interest except that created by such contract or agreement." Section 7 provides that, "if any person shall gamble or bet on the sides or hands of such as are gambling or playing at any game he shall be fined \* \* \* or imprisoned." By section 8 a gambler is defined as every person who plays at a game of chance or skill in a place which is resorted to for the purpose of gambling, unless it be shown that the game is for amusement only without a stake or possibility of gain or loss. Held, that gaming includes horse racing, and therefore betting on such races is illegal gaming. In re Opinion of the Justices, 63 Atl. 505, 507, 73 N. H. 625, 6 Ann. Cas. 689.

#### Buying or selling pools

Selling pools on horse races is "gambling," and maintaining a place where pools are sold is maintaining a gaming house, within the prohibition of the statute. *Moore v. State*, 99 N. W. 249, 252, 71 Neb. 522, 115 Am. St. Rep. 605.

#### Dealing in options

Under Code 1904, § 3837, providing that all laws for suppressing gaming shall be construed as remedial, which requires that such statutes shall be liberally construed, section 2837, providing for the recovery of money lost at gaming must be construed as including stock gambling, though such statute was first introduced into 1 Rev. Code 1819, c. 147, § 3, at a time when stock gambling was unknown. *McIntyre v. Smyth*, 62 S. E. 930, 934, 108 Va. 736.

**Gambling and gaming synonymous**

"Gaming" and "gambling" are synonymous. *Bentler v. Commonwealth*, 136 S. W. 896, 898, 143 Ky. 503.

The terms "gaming" and "gambling," in the administration and interpretation of criminal laws, are usually regarded as synonymous. *State v. Shanklin*, 97 Pac. 969, 970, 51 Wash. 35.

The terms "gaming" and "gambling," in their criminal sense, are synonymous. They have been used interchangeably in Rev. St. 1842, c. 220, §§ 3, 4, Gen. St. 1867, c. 254, §§ 6, 7, 8. The distinction between "betting" and "gaming" is that "gaming" always includes a wager, while "betting" is not gaming unless the wager be laid on a game. It is the betting on the game that constitutes gaming, and those game or gamble who thus bet. The word "game" is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid upon the chances of a game, and we have gaming. In re *Opinion of the Justices*, 63 Atl. 505, 507, 73 N. H. 625, 6 Ann. Cas. 689 (quoting Webster's Dict.; Century Dict.; and *People v. Welthoff*, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557).

Rev. St. 1899, § 432, authorizes the county court to license the keepers of billiard tables used for gaming. Section 438 prescribes a punishment for any one who shall keep such a table without a license. Section 2196, Rev. St. 1899 (Rev. St. 1879, § 1549), makes it a misdemeanor for an owner of a building to permit a billiard table to be set up or used for the purpose of gaming. Held, that the word "gaming," as used in section 432, is not synonymous with "gambling," and that a person may be convicted of violation of section 438, though he does not permit gambling upon his tables. *State v. Shotts*, 128 S. W. 245, 246, 143 Mo. App. 346.

**Keeping a gambling house distinguished**

"Keeping a gambling house and gaming are distinct offenses. A person guilty of keeping a gambling house may not be guilty of gambling and one may be guilty of gambling without having any connection with the house. The essence of the former offense is the keeping of the place for the purpose of gambling, or the permission of gambling in a place under the care or control of the accused, as appears from section 4962 of the Code, defining it," by declaring that if any person keep a house, shop, or place resorted to for the purpose of gambling, etc., the offender shall be fined, etc., and proof of participation in the play is not essential to a conviction, but under section 4964 of the Code, providing that, if any person play at any game for any sum of money or other property of any value, etc., he shall

be guilty of misdemeanor; but, in order to convict, he must be shown to have joined in the game or have participated in the betting or wagering of money or other property. *State v. White*, 98 N. W. 1027, 1028, 123 Iowa, 425.

**Larceny distinguished**

See Larceny.

**Playing poker**

The word "gambling," as used in the statute denouncing the same, means playing or gaming for money or other stakes; and draw poker is a gambling game, pure and simple, more widely recognized as such than any other game known to the American people. *City of Lake Charles v. Marcantel*, 51 South. 106, 107, 125 La. 170; *City of Shreveport v. Bowen*, 40 South. 859, 116 La. 522.

Draw poker is "gambling." *Town of Ruston v. Perkins*, 38 South. 583, 114 La. 851.

Conducting a poker game at which money is bet, won, and lost, and out of which the keeper receives a take-out, commission, or profit, in violation of Ky. St. § 1960 (Russell's St. § 3558), constitutes "gaming" within section 1973 (section 3569), exempting one from liability for gaming disclosed by his testimony in a trial against another, and also constitutes "gambling." *Bentler v. Commonwealth*, 136 S. W. 896, 898, 143 Ky. 503.

Playing poker with a three, five, and ten cent limit is "gaming," within the meaning of Code 1892, § 1126, forbidding owners, lessees, or occupants of any building to permit gaming to be carried on in the same. *Ford v. State*, 38 South. 229, 86 Miss. 123.

**Transaction to detect crime**

The operation of a slot machine, by a special agent, merely to secure evidence to establish the commission of a crime or a violation of a law, is not "gambling." *Clement v. Belanger*, 105 N. Y. Supp. 537, 538, 120 App. Div. 662.

**GAMBLING CONTRACT**

See, also, Gambling Transaction.

An agreement for the sale of any commodity for future delivery is void as a "gambling contract," where neither party intends an actual delivery of the property purchased or sold; but if one of the parties in good faith contemplated an actual delivery, and not a mere settlement by a payment of differences in the rise and fall of the market price, the contract was valid and enforceable. *Bailey & Graham v. Phillips*, 159 Fed. 535, 536.

A contract by a corporation to sell a certain quantity of bonds, which it had obtained the right to buy, to various subscribers to the agreement at a certain price, reserving to the corporation, however, the right to sell all or any of the bonds on account of the subscribers at a higher price than the subscribers

were bound to pay, provided its option was exercised before a certain time, which contract was executed by the actual delivery of the bonds to all but one of the subscribers, was not a "gambling contract." *Nes v. Union Trust Co. of Maryland*, 64 Atl. 310, 312, 104 Md. 15.

"Where one bought chips in a gambling house and used them in a game of poker, and the proprietor, after settling the account for chips, gave his check, it was given for a 'gambling debt,' within the statute making void every security, the whole or any part of the consideration for which shall be for money won by playing at a game." *Remer v. Ettinger*, 96 N. Y. Supp. 263, 48 Misc. Rep. 641.

A contract of sale of coal, whereby seller undertook to deliver buyer a minimum of 125 tons a day and a maximum of 200 tons a day, was not, to the extent of the 75 tons a day which buyer might order in excess of 125 tons, void as being a "gambling option," in violation of the statute relating to gambling contracts. *Consolidated Coal Co. of St. Louis v. Jones & Adams Co.*, 83 N. E. 851, 852, 232 Ill. 326.

#### Contract for future differences

A contract between a broker and his customer, whereby there is to be no other liability on either side than a settlement of differences, and under which the broker, as well as the customer, equally stand to gain or lose by the rise or fall of prices, and the parties have no other right or interest against each other under the entire contract than that resulting from the differences, is a "gambling contract." *Thompson v. Williamson*, 53 Atl. 602, 605, 67 N. J. Eq. 212.

A contract whereby a so-called purchaser of stock, in case of a decline in the market price, is to pay the difference between the contract price and the market price, with no intention that he shall receive and pay for the stock itself is a gambling contract, and no action can be maintained upon it. *Richter v. Poe*, 71 Atl. 420, 422, 109 Md. 20, 22 L. R. A. (N. S.) 174.

"Contracts in form for the sale or purchase of commodities, where neither party intends to deliver or accept the property nominally sold, but where it is intended by both parties that the transaction shall be settled by the difference in prices according to the rise and fall of the market, are 'gambling contracts.'" *Carson v. Milwaukee Produce Co.*, 113 N. W. 393, 395, 133 Wis. 85.

Where a contract between a stock broker and a customer is that, in case of a decline in the market price of the stock, the purchaser is to pay the difference between the contract price and the market price, and there is no intention that he shall receive and pay for the stock itself, the dealing is a "gambling contract," and the law does not permit an

action to be maintained thereon. *Dryden v. Zell & Merceret*, 65 Atl. 33, 34, 104 Md. 345 (citing *Billingslea v. Smith*, 26 Atl. 1077, 1082, 77 Md. 519).

No matter however explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that at the date stipulated the losing party shall pay to the other the difference between the market price and the contract price, this is a "gambling contract," and is null and void at common law. *State v. Clayton*, 50 S. E. 866, 867, 138 N. C. 732.

Under *Hurd's Rev. St.* 1905, pp. 698, 699, c. 38, § 130, providing that all contracts to have or give the option to sell or buy at a future time any grain or other commodity shall be considered "gambling contracts," and shall be null and void, all transactions in grain or other commodities are gambling transactions, when neither party understood that deliveries were to be actually made, but both intended that the purchase or sale should be adjusted by the settlement of differences. *R. E. Pratt & Co. v. Ashmore*, 79 N. E. 952, 954, 224 Ill. 587 (citing *Schneider v. Turner*, 22 N. E. 497, 130 Ill. 28, 6 L. R. A. 164; *Pope v. Hanke*, 40 N. E. 839, 155 Ill. 617, 28 L. R. A. 568; *Jamieson v. Wallace*, 47 N. E. 762, 167 Ill. 388, 59 Am. St. Rep. 302; *Irwin v. Willmar*, 4 Sup. Ct. 160, 110 U. S. 507, 28 L. Ed. 225).

#### GAMBLING DEVICE

Keeping gambling device, see *Keep*.

Other gambling device, see *Other*.

Setting up gaming device or table, see *Set Up*.

By the word "device," as used in *Snyder's Comp. Laws* 1909, § 2422, prohibiting the carrying on of gambling games by some "device," is meant the means, instrument, contrivance, or thing by which the banking or percentage game is played. *James v. State*, 112 Pac. 944, 946, 4 Okl. Cr. 587, 34 L. R. A. (N. S.) 515, 140 Am. St. Rep. 693.

An instrument which is adapted and designed for the purpose of playing a game of chance for money and property, and is so used, is a "gambling device," within *Kirby's Dig.* § 1732. *Johnson v. State*, 141 S. W. 493, 495, 101 Ark. 159.

A "device or apparatus for gambling" is a device or apparatus designed for carrying on actual gambling, or determining whether the player is to win or lose, like the wheel of fortune, in its manifold modifications, and contrivances of that sort. *People v. Engeman*, 114 N. Y. Supp. 174, 177, 129 App. Div. 462.

A table with poker chips and cards used for the purpose of gambling is a "gambling device." *State v. Turner*, 124 Pac. 424, 425, 87 Kan. 449.



The floor of a dwelling house occupied by one is not a "device," within 11 Del. Laws, p. 515, c. 454, § 1 (Rev. Code, p. 961, as amended in 1893, c. 132), punishing one who shall keep a gaming table, faro bank, or other "device" at which a game of chance is played. *State v. Hamilton* (Del.) 67 Atl. 836, 837, 6 Pennewill, 433 (citing *State v. Norton*, 33 Atl. 438, 9 Houst. [Del.] 586; 20 Cyc. 906; 4 Words and Phrases, p. 3033).

#### Billiard or pool table

A pool table kept for the playing thereon of Kelley pool is a "gambling device" within Kirby's Dig. § 1732, making it punishable to keep any gambling device adapted, etc., to the playing of any game of chance, etc., where it is understood by the keeper, as well as the players, that as a part of the game the loser shall pay the tolls of the players. *State v. Sanders*, 111 S. W. 454, 86 Ark. 353, 19 L. R. A. (N. S.) 913.

Under Rev. St. 1899, § 3018 (Ann. St. 1906, p. 1729), prohibiting a dramshop keeper from keeping a billiard table or other gaming table, the keeping of a billiard table in a licensed dramshop is the keeping of a "gambling device." *State v. Shotts*, 128 S. W. 245, 246, 143 Mo. App. 346.

#### Chuck-a-luck table

A chuck-a-luck table, although not specifically mentioned, is within the prohibition of Rev. St. 1899, § 2194, making it a felony for one to set up or keep, and to entice or permit any person to play on, any table or gambling device "commonly called A B C, faro bank, E O, roulette, equality, keno or any kind of gambling table or gambling device" adapted for the purpose of playing games of chance. *State v. Rosenblatt*, 83 S. W. 975, 977, 185 Mo. 114 (citing Gould's Dig. Ark. § 1, art. 3, c. 51, p. 369; *Portis v. State*, 27 Ark. 360; *Trimble v. State*, 27 Ark. 355; *Euper v. State*, 35 Ark. 629; *Bell v. State*, 32 Tex. Cr. R. 187, 22 S. W. 687; *Kelshorn v. State*, 97 Ga. 343, 23 S. E. 829; *Mims v. State*, 88 Ga. 458, 14 S. E. 712).

#### Crap table

A crap table is a "gambling device," within Rev. St. 1899, § 2194, making it a felony to set up or keep any table or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, or any kind of gambling table or gambling device designed for the purpose of playing any game of chance for money or property. *State v. Rosenblatt*, 83 S. W. 975, 977, 185 Mo. 114; *State v. Lockett*, 87 S. W. 470, 472, 188 Mo. 415. See, also, *State v. Holden*, 102 S. W. 490, 203 Mo. 581.

#### Dice

The phrase "gambling apparatus or device," in Burns' Ann. St. 1901, § 2181, punishing one keeping or exhibiting for gain, or to win or gain money or other property, any gaming table or any gambling apparatus or device, covers and includes any kind of

apparatus, table, or device kept or exhibited for gain, or to win or gain money or other property, and dice is within the statute. *White v. State*, 76 N. E. 554, 558, 37 Ind. App. 95.

#### Horse race

"A 'gambling device' is any contrivance by the operation of which chances are determined, whereby money or property is lost or won." The keeping of a house for selling pools on horse racing is not an offense, punishable under chapter 50, Deady's Gen. Laws, relating to the playing of games by gambling devices, since the winner is not determined by the manipulation of any device. *State v. Ayers*, 88 Pac. 653, 655, 49 Or. 61, 10 L. R. A. (N. S.) 992, 124 Am. St. Rep. 1036 (citing *Portis v. State*, 27 Ark. 360; *In re Lee Tong*, 18 Fed. 253; *State v. Herryford*, 19 Mo. 377).

#### Lottery

Lottery is a "gaming device," and the keeping of a house for the purpose of selling lottery tickets is within the spirit and intentment of a charter delegating power to prevent and suppress gaming and gambling houses or places where any game in which chance predominates is played for anything of value. *City of Portland v. Yick*, 75 Pac. 706, 709, 44 Or. 439, 102 Am. St. Rep. 633.

#### Poker table

The setting up of a poker table, on which are used poker chips and cards for gaming, is not within Rev. St. 1899, § 2194, making it a felony for any one to set up or keep any gambling device commonly called A B C, faro bank, roulette, equality, keno, or any kind of gambling table or gambling device. *State v. Etchman*, 83 S. W. 978, 979, 184 Mo. 193.

#### Slot machine

A slot machine so operated that the operator putting into it a nickel receives in any event a cigar of the value of his coin, and stands to win by chance additional cigars without further payment, is a gambling device. *Lang v. Merwin*, 59 Atl. 1021, 1022, 99 Me. 486, 105 Am. St. Rep. 293; *In re Cullinan*, 99 N. Y. Supp. 1097, 1098, 1100, 114 App. Div. 654 (overruling *Cullinan v. Hosmer*, 91 N. Y. Supp. 607, 100 App. Div. 148, and citing *People ex rel. Ellison v. Lavin*, 71 N. E. 753, 179 N. Y. 164, 66 L. R. A. 601, 1 Ann. Cas. 165; *Public Clearing House v. Coyne*, 24 Sup. Ct. 789, 194 U. S. 497, 512, 48 L. Ed. 1092; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171).

Slot machine so operated that the operator placing a coin therein and taking a chance on the result, whether to win or to lose, is a gambling device. *Mueller v. Wm. F. Stoecker Cigar Co.*, 131 N. W. 923, 924, 89 Neb. 438, 34 L. R. A. (N. S.) 573.

Slot machines, where the chances are unequal and in favor of the machine, are gam-

bling games, within Laws 1907, p. 25, c. 64, § 1, and are illegal. *Territory v. Jones*, 99 Pac. 338, 340, 14 N. M. 579, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128; *Same v. Gonzales*, 99 Pac. 1135, 15 N. M. 50.

As used in Laws 1901, p. 166, § 2, prohibiting the conduct of games of chance for "money," checks, credits, or any representative of value, or for any property or thing whatever, the word "money" includes all money; "checks" includes all kinds of articles embraced under that designation; "credits" is a term of universal application to obligations due and to become due; and the expression "any representative of value," together with these words, leave nothing of any of the classes of property enumerated. Hence, a nickel in the slot machine, involving in its operation the element of chance as to whether the player obtained in cigars more or less than the value of his money, was prohibited by such statute. *State v. Woodman*, 67 Pac. 1118, 1120, 26 Mont. 348.

A slot machine operated by the player depositing a nickel therein and then turning a crank, whereon the machine will automatically pay the reward, which will always contain a package of chewing gum of the retail value of five cents, and sometimes in addition thereto one or more checks which may be used in playing the machine in the same manner as nickels are used, is a gambling device, within *Burns' Ann. St. 1908*, § 2474, punishing the keeping of devices for gaming; though by means of indicators the player is informed as to what the record will be before each play, though there is no method of knowing what the reward will be as to subsequent plays. *Ferguson v. State*, 99 N. E. 806, 178 Ind. 568, 42 L. R. A. (N. S.) 720.

Relator maintained a slot machine with an indicator bearing the inscription "See what we give you for five cents," and a hand pointed to a space in which was shown to the depositor's view the goods procured for a nickel, consisting of a package of chewing gum and sometimes, also, two or more trade checks. While the depositor always knew exactly the number of checks which would be received for the first nickel, he would not know whether he might procure more or less trade checks by dropping in a subsequent nickel. Held, that the latter feature constituted an element of chance, which made the machine a "gambling machine," contrary to the statute. *People ex rel. Verchereau v. Jenkins*, 138 N. Y. Supp. 449, 450, 153 App. Div. 512.

A "slot machine," consisting of an upright box with some kind of machinery on the inside and a dial face with numbers on it and a crank to turn it, which was played by dropping money in the slot and turning the crank, the party playing it winning or not, dependent on where the hand stopped on the dial, which was used only for the pur-

pose of gambling and could be used for no other purpose, was a "gambling device," and was properly destroyed under *Sand. & H. Dig. § 1618*, authorizing circuit court judges to issue their warrants to peace officers directing them to search for gambling tables or devices and to publicly burn them. *Garland Novelty Co. v. State*, 71 S. W. 257, 258, 71 Ark. 138.

#### Stock ticker

A transaction in a "bucket shop," consisting of a fictitious sale or purchase of stocks, with the intention that there shall be no delivery, but a settlement according to the difference in market value, is not a "game of hazard," and a telegraph wire, blackboard, and ticker, used by the broker in obtaining and publishing the rise and fall of prices in the market, is not a "gambling device," within *Cr. Code*, § 214, allowing a person to recover his loss because of any gambling device or at a game of hazard.—*Ives v. Boyce*, 123 N. W. 818, 319, 85 Neb. 324, 25 L. R. A. (N. S.) 157.

#### GAMBLING HOUSE

As disorderly house, see *Disorderly House*.

Keeper of gambling house, see *Keeper*.

A "gambling house" is expressly defined by the Philippine Commission Act No. 1757, § 2, to be a building or structure, a vessel, or part thereof, in which gambling is frequently carried on. *Ong Chang Wing v. United States*, 31 Sup. Ct. 15, 16, 218 U. S. 272, 54 L. Ed. 1040.

One having charge of an ordinary game of cards played on a blanket in a shedroom to a barn by negroes as an attachment of a negro dance, and at which money was bet, is not running a "gambling house," within *Pen. Code*, art. 388a (*Acts 30th Leg. p. 108, c. 49*), punishing any person who shall exhibit for the purpose of gaming any gaming table, etc. *Hanks v. State*, 111 S. W. 402, 403, 54 Tex. Cr. R. 1, 17 L. R. A. (N. S.) 1210.

In *Acts 1909, c. 92, § 1*, prohibiting certain games for money by professional gamblers, and section 2 providing that if any proprietor, owner, or part owner, lessee, manager, or any person having management, supervision, or control, temporary or permanent, of any gambling house or other resort, maintained for gambling, or of any saloon, or of any building in which a saloon may be situate, shall permit any of such games to be played in such place, he shall be guilty of a misdemeanor, etc. The words "gambling house," or other resort maintained for gambling, mean any place where games are played, and not solely a place where games are carried on in the manner prohibited in section 1. *Schmidt v. Territory*, 108 Pac. 246, 247, 13 Ariz. 77.

A private residence may be a gambling house, within *Pen. Code 1895, art. 389*, im-

posing a penalty upon one who permits prohibited games in his house or upon his premises; the house being a public place. *Simons v. State*, 120 S. W. 208, 210, 56 Tex. Cr. R. 339.

Under Pen. Code 1895, art. 388f, as added by Acts 30th Leg. p. 109, providing that if any person shall go into and remain in any gambling house, or shall remain in any place where prohibited games are being played, etc., and further providing that by "gambling house" and "gaming house" is meant any place where people resort for the purpose of gaming, a person remaining in a private dwelling house, not shown to be a place frequented for the purpose of gaming, while a prohibited game was being played therein, is guilty of no offense, since "remaining in a place," etc., means in a place where gaming is being conducted in a sense continuously. *Walters v. State*, 125 S. W. 11, 12, 58 Tex. Cr. R. 240.

A place where futures are bought and sold on margins is a gaming house, notwithstanding "the contracts are telegraphed out of the state," if the actual wager or settlement of wagers takes place in this state. *Anderson v. State*, 58 S. E. 401, 410, 2 Ga. App. 1.

"The 'gaming house' or place which the common law regarded as a nuisance, and which at common law was indictable as such, was a 'common gaming house' or place." *State v. Carrick*, 61 Atl. 35, 78 Vt. 1.

#### **Pool room**

A pool room on one of the principal thoroughfares of a city in which persons daily congregate to bet upon horse races, reported to the proprietor by telegraph, is a "gaming house" punishable as a nuisance at common law and under B. & C. Comp. § 1930, providing for the punishment of any person who willfully and wrongfully commits any act which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to the public morals. *State v. Nease*, 80 Pac. 897, 898, 46 Or. 433.

One keeping a place where pool selling on horse races is carried on keeps a place where gambling is carried on within Ballinger's Ann. Codes & St. § 3006, declaring that places of resort where gambling is carried on are nuisances, and the persons carrying on the same shall be punished, though pool selling may not be covered by Ballinger's Ann. Codes & St. § 7260, defining gambling. *State v. Shanklin*, 97 Pac. 969, 970, 51 Wash. 35.

#### **GAMBLING TABLE**

See, also, Gambling Device.

The characteristics of the gaming table are: First, it is a game; second, there is a keeper, dealer, or exhibitor; third, it must be exhibited for the purpose of obtaining

bettors. *Mayo v. State (Tex.)* 82 S. W. 515, 516.

A table on which gambling games are played in a gambling place is a gaming table kept for gaming within Code 1907, § 6985, punishing the keeping of a gaming table for gaming. The state, on a trial for exhibiting a gaming table, need not show that accused operated the table for hire or reward, but it is sufficient to show that the table kept by accused was a gaming table kept for gaming purposes. *Martin v. State*, 56 South. 64, 65, 2 Ala. App. 175.

An indictment, charging in the alternative that accused bet at a certain "gaming table or bank, to wit, a pool table," was sufficient. *Moore v. State (Tex.)* 100 S. W. 1161.

#### **GAMBLING TRANSACTION**

See, also, Gambling Contract.

Purchase of stocks on margins is a "gambling transaction," and illegal. *Lancaster v. Ames*, 68 Atl. 533, 535, 103 Me. 87, 17 L. R. A. (N. S.) 229, 125 Am. St. Rep. 286.

A contract for the purchase of grain for future delivery, where both parties intend to settle by the payment of differences without any delivery, is a "gambling transaction," and insufficient to support a note given in settlement of losses. *Zeller v. Leiter*, 82 N. E. 158, 160, 189 N. Y. 361.

A contract made in good faith for the actual sale of grain deliverable within a specified time in the future is not a "gambling transaction," within Hurd's Rev. St. Ill. 1905, pp. 698-700, prohibiting gambling transactions in grain or other commodities for future delivery. *Zeller v. Leiter*, 82 N. E. 158, 160, 189 N. Y. 361.

A contract to operate in stocks, to be adjusted according to the difference in the market value thereof, is a "gambling transaction." *Ives v. Boyce*, 123 N. W. 318, 319, 85 Neb. 324, 25 L. R. A. (N. S.) 157.

Transactions between a customer and a stockbroker, which involve payments by the customer for margins on orders for buying and selling stocks, pursuant to an understanding that no stock shall be delivered to the customer, but that settlements of differences of profits and losses shall be made, are "gambling transactions." *Blessing v. Smith*, 70 Atl. 933, 934, 74 N. J. Eq. 593.

#### **GAME**

See Banking Game; Head to Head Game.

Any game, see Any.

Other banking game, see Other.

See, also, Gambling—Gaming; Lottery.

"Game" is defined as a contest for success or superiority in a trial of chance, skill, or endurance, or any two or all three of these combined (Century Dictionary), and is very comprehensive, and embraces every contri-

vance or institution which has for its object to furnish sport, recreation, or amusement. *State v. Prather*, 100 Pac. 57, 58, 79 Kan. 513, 21 L. R. A. (N. S.) 23, 131 Am. St. Rep. 339 (quoting 4 Words and Phrases, p. 3036); *In re Opinion of the Justices*, 63 Atl. 505, 507, 73 N. H. 625, 6 Ann. Cas. 689 (quoting Cent. Dict.).

The word "game," secondarily defined as a contest, physical or mental, for amusement, recreation, or for winning a stake, is not equivalent to the word "race." *State v. Hayes*, 93 S. W. 98, 100, 116 Tenn. 40.

#### **Baseball**

See Baseball

#### **Contract for delivery of futures**

The words "game or gambling device," as used in Rev. St. 1899, § 3424, providing that any person who shall lose any money or property at any "game or gambling device" may recover it by civil action, do not include a fictitious sale and purchase, though sections 2121, 2223, 2337-2342, declare fictitious sales and purchases to be gambling, and render all parties thereto particeps criminis. See *v. Runzl*, 79 S. W. 992, 993, 105 Mo. App. 435.

#### **Election**

An election does not fall within the definition of a "game," within the meaning of the statute prohibiting gambling. *Lassen v. Karrer*, 76 N. W. 73, 117 Mich. 512 (citing *Woodcock v. McQueen*, 11 Ind. 14).

#### **Horse race**

A horse race is not a game within Kirby's Dig. § 1740, making it criminal to bet "on any game of hazard or chance;" it being contemplated that the game shall be "played," as shown by section 1741, providing that it shall be unnecessary for the indictment to allege with whom the game was played. *State v. Vaughan*, 98 S. W. 685, 688, 81 Ark. 117, 7 L. R. A. (N. S.) 899, 118 Am. St. Rep. 29, 11 Ann. Cas. 277.

The word "game," as used in St. 1903, § 1977, punishing one engaging "in any hazard or game" on which money is bet, won, or lost, does not embrace a horse race. *Commonwealth v. Davis* (Ky.) 102 S. W. 327 (quoting and adopting the definition in *cheek v. Commonwealth*, 100 Ky. 2, 37 S. W. 152).

#### **Kelley pool**

Kelley pool, a pool game, the object of which is for a player to pocket the ball on the table corresponding in number with one which he holds in secret, in which event he wins, he losing on the ball being pocketed by another, is a game at which money or property may be won or lost within the gambling statutes. *State v. Sanders*, 111 S. W. 454, 86 Ark. 353, 19 L. R. A. (N. S.) 913.

#### **Pool selling**

The act of pool selling or betting by buyers on pools is not a "game," within Ky.

St. 1903, § 1978, prescribing a penalty for those suffering any game in which any property or money is bet, won, or lost in any house or in premises in their occupation. *City of Louisville v. Wehmoff*, 79 S. W. 201, 202, 116 Ky. 812.

#### **GAME OF CARDS**

"Poker" is defined to be a "game with cards," and evidence that defendant and others engaged in a game of poker is sufficient to support an information charging him with playing a game of cards. *Inman v. State*, 85 S. W. 796, 47 Tex. Cr. R. 609; *Mapes v. State* (Tex.) 85 S. W. 797.

#### **GAME OF CHANCE**

The game, practiced in aid of fairs and charities, of voting with tickets purchased at fixed prices for candidates, of whom one in whose name the most tickets are voted is to receive some article which the whole number of tickets pays for, is not a "game of chance" and is not illegal, either under the statute or at common law, in this state. *Dion v. St. John Baptiste Soc.*, 19 Atl. 825, 826, 82 Me. 319.

Throwing dice is purely a "game of chance," and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforeseen accident, usually called "luck." The test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game. *People ex rel. Ellison v. Lavin*, 71 N. E. 753, 755, 179 N. Y. 164, 66 L. R. A. 601, 1 Ann. Cas. 165; *United States v. McKenna*, 149 Fed. 252, 253.

#### **GAME OF HAZARD OR SKILL**

See, also, Hazard.

A transaction in a "bucket shop," consisting of a fictitious sale or purchase of stocks, with the intention that there shall be no delivery, but a settlement according to the difference in market value, is not a "game of hazard," and a telegraph wire, blackboard, and ticker, used by the broker in obtaining and publishing the rise and fall of prices in the market, is not a "gambling device," within Cr. Code, § 214, allowing a person to recover his loss because of any gambling device or at a game of hazard. *Ives v. Boyce*, 123 N. W. 318, 320, 85 Neb. 324, 25 L. R. A. (N. S.) 157.

#### **GAME OF SKILL**

See Game of Chance.

## GAME

See Wild Game.

Ownership of, see Ownership.

As the word "game" includes beasts, fowls, and fish, the title of an act declaring that it is for protection of "game" does not contravene the Constitution as embracing more than one subject because the act relates to the protection of fish, fowl, and quadruped. *McMahon v. State*, 97 N. W. 1035, 1036, 1037, 70 Neb. 722.

"Game" means animals *feræ naturæ*, or wild by nature, and the term "game animals," in the title of an act entitled "An act relating to the preservation, propagation and protection of game animals," etc., embraces all kinds of deer, whether tame or wild. *State v. Weber*, 102 S. W. 955, 956, 205 Mo. 36, 10 L. R. A. (N. S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382.

The title of the forest, fish, and game law (Laws 1908, p. 299, c. 130), entitled "An act for the protection of the forests, fish and game of the state," indicates that it was to protect wild animals so far as it relates to animals; the word "game" ordinarily not including domesticated animals. *Dieterich v. Fargo*, 87 N. E. 518, 520, 194 N. Y. 359, 22 L. R. A. (N. S.) 696.

"Game" is not the subject of private ownership, except in so far as the people may elect to make it so, and they may, if they see fit, absolutely prohibit the taking of it, or traffic or commerce in it; but the power of the Legislature only applies to "game" within the state, and no such power to interfere with the private affairs of individuals can effect the right of the citizen to sell or dispose of, as he pleases, "game" which has become a subject of private ownership by a lawful purchase in another state. *Cameron v. Territory*, 86 Pac. 68, 70, 16 Okl. 634.

## GAP

See Railroad Cattle Gap or Guard.

## GARAGE

See Public Garage.

As dwelling house, see Dwelling House.

As flat, see Flat.

As stable, see Stable.

As tenement house, see Tenement House.

Mass. Motor Vehicle Act 1909, § 1, defines "garage" to mean "every place where five or more motor vehicles are stored or housed at any one time for pay, except only such places in which motor vehicles are kept by the owners thereof without payment for storage." *Smith v. O'Brien*, 94 N. Y. Supp. 673, 674, 46 Misc. Rep. 325.

"The 'garage' is the modern substitute of the ancient livery stable." *Smith v. O'Brien*, 94 N. Y. Supp. 673, 674, 46 Misc. Rep. 325.

"The 'garage' keeper is like unto the livery stable keeper." *Smith v. O'Brien*, 94 N. Y. Supp. 673, 674, 46 Misc. Rep. 325.

"'Garages' occupy, with relation to automobiles, the same place that stables do with regard to horses." *Diocese of Trenton v. Toman*, 70 Atl. 606, 611, 74 N. J. Eq. 702.

## GARBAGE

"Garbage" is defined as refuse organic matter in general, or any worthless or offensive matter, and does not necessarily imply the presence of organic matter. *State, to use of Joyce, v. Flanagan*, 74 Atl. 818, 824, 111 Md. 481 (citing 4 Words and Phrases, pp. 3040, 3041).

Grease and cracklings rendered from the fat of fresh meat, cooked and carried away within 24 hours, is not "garbage" within the meaning of Police Regulations, art. 14, § 1, defining garbage to be the "refuse of animal and vegetable foodstuffs," and prohibiting persons other than the District garbage contractor from carrying garbage through the streets of the District. *Nash v. District of Columbia*, 28 App. D. C. 598, 601, 8 Ann. Cas. 815.

In an ordinance prohibiting the collection of garbage by persons not having a contract with the municipality therefor, though the word "garbage" involves a rejection of the material for use, it does not follow that it means a rejection of the material for all purposes, nor does the term involve the idea of filth, nor the commencement of fermentation of the material. *City of Rochester v. Gutherlett*, 133 N. Y. Supp. 541, 546, 73 Misc. Rep. 607.

A Cincinnati ordinance providing that no person other than the city contractor or its agents shall convey or transport through the streets or public places of the city any garbage, dead animals, etc., found within the city limits, and that the word "garbage" shall include all refuse of animal and vegetable matter which has been used for food, and all the refuse animal and vegetable matter which was intended to be so used, and includes condemned food, is repugnant to Const. U. S. Amend. 14. *Bauer v. Casey*, 26 Ohio Cir. Ct. R. 598, 599.

## GARBAGE DISPOSAL

As public work, see Public Work.

## GARBAGE TANKAGE

"Garbage tankage" is a dry powder, the result of the boiling, drying, and pressing of street garbage, and is packed in bags. *The Wm. J. Quillan*, 180 Fed. 681, 103 C. C. A. 647.

## GARDEN

See Beer Garden.

## GARNISHEE

The word "garnishee" is borrowed from the French language and is derived from garnishment or from "garnir," meaning to warn, to give notice to the debtor not to pay his indebtedness, but to answer the writ served. While the word "garnishee" is derived from the French, the proceedings in garnishment, however, are derived from English jurisprudence, which confers on the garnishee the same right in defense which he could plead in a direct action, if one were brought against him on a claim for which he had been garnished. *Monroe Grocer Co. v. J. A. Perdue & Co.*, 48 South. 1002, 1004, 123 La. 375 (quoting *Cross*, Plead. p. 335).

## GARNISHMENT

Subject to garnishment, see Subject To.

"Garnishment," as the proceeding is at present authorized by statute, partakes of the nature of, and is in all essentials, a separate action or suit against the person garnished. *Keene v. Smith*, 75 Pac. 1065, 1066, 44 Or. 525.

"Garnishment" is the institution of a suit by a creditor against the debtor of his debtor, and is governed by the general rules applicable to other suits adapted to the relative situation of the parties." *Roman v. Montgomery Iron Works*, 47 South. 136, 137, 156 Ala. 604, 19 L. R. A. (N. S.) 604, 130 Am. St. Rep. 106 (quoting definition in *Steiner Bros. v. First National Bank*, 22 South. 30, 115 Ala. 379).

A "garnishment" is correctly defined to be "a proceeding in the nature of an attachment or execution, by means of which creditors, property, or effects of a debtor in the hands of a third person may be subjected to the payment of the claims of the creditors of such debtor." It is a mode of attachment or execution. *Davis Bros. v. Choctaw, O. & G. R. Co.*, 83 S. W. 318, 319, 73 Ark. 120, 8 Ann. Cas. 658 (citing *Central Trust Co. v. Chattanooga, R. & C. R. Co.* [O. C.] 68 Fed. 685; *Henry v. Murphy*, 54 Ala. 246; *McGarry v. Lewis Coal Co.*, 6 S. W. 81, 93 Mo. 237, 3 Am. St. Rep. 522; *Rood*, Garnishment, § 1, and cases cited).

"Garnishment" is only a method provided by statute for a plaintiff to enforce judgment against defendant, who is his debtor." Hence it draws in controversy only so much of the garnishee's indebtedness to the defendant as is necessary to satisfy the plaintiff's claim. *Bank of Waldron v. Euper*, 125 S. W. 1022, 1023, 93 Ark. 609 (citing *Davis v. Choctaw, O. & G. R. Co.*, 83 S. W. 318, 73 Ark. 120, 8 Ann. Cas. 658).

### As a form of attachment

"Garnishment" is the admonition judicially given to the attachment defendant's debtor or holder of property, warning him against payment, or restoration to the de-

fendant, and bidding him hold the property or credit subject to the order of court. It is the process by which the garnishee is brought into court, and also that by which the defendant's credit or property is attached in the garnishee's hands. Its service is constructive seizure by notice. It is attachment in the hands of a third person. *Eagleson v. Rubin*, 100 Pac. 765, 767, 16 Idaho, 92.

### As creating a lien

"Garnishment" is an effectual attachment of the effects of the defendant in the garnishee's hands, differing in no essential respect from attachment by levy except that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold garnishee personally liable for it or its value and to restrain the garnishee from paying his debt to the defendant. From the time of garnishment the effects in the garnishee's possession are considered as in custodia legis, and the garnishee is bound to keep them in safety. *Longley Bros. v. McVann*, 119 S. W. 268, 269, 90 Ark. 252 (citing *Drake on Attachment* [7th Ed.] § 453).

"Garnishment process" is in the nature of an equitable attachment of assets belonging to a defendant held by a third person; the purpose of the attachment being to apply such assets in discharge of defendant's debt. The lien being created at the time the writs are served, and the judgment in the action not creating any other or additional lien, but merely providing for the enforcement of the liens already acquired, a garnishment, more than four months before an adjudication in bankruptcy, was not affected thereby, although the judgment was rendered within the four months. *Aetna Ins. Co. v. Evans*, 49 South. 57, 62, 57 Fla. 311.

### As a collateral proceeding

"Garnishment" is one of the modes pointed out by the statute by which the writ is executed and is not a new suit, but an incident or an auxiliary of the judgment and a means of obtaining satisfaction of the same by reaching the defendant's credits." *State ex rel. Stevenson v. Hughes*, 115 S. W. 1069, 1070, 135 Mo. App. 131 (quoting and adopting definition in *Tinsley v. Savage*, 50 Mo. 141). And consequently a judgment against a garnishee must be reversed on his appeal where the judgment against the principal defendant is void or has been reversed since there is no longer any judgment to sustain the garnishment. *Chicago Herald Co. v. Bryan*, 92 S. W. 906, 907, 195 Mo. 590, 6 Ann. Cas. 751.

"Garnishment proceedings" are always ancillary to a principal suit, which is either pending or determined. Thus, where the affidavit alleges that defendant is justly indebted to plaintiff on a judgment previously rendered, and for the recovery of such de-

mand plaintiff has commenced a suit before another court which is untrue, the affidavit is fatally bad and cannot be amended so as to base the garnishment proceedings on the judgment already obtained. *Heller v. People's Sav. Bank*, 101 N. W. 226, 227, 138 Mich. 192.

"Garnishment" and claim proceedings are collateral to the main suit, and in the claim proceedings a judgment that the claimant do have and recover of and from the garnishee the property mentioned in both the "garnishment" and claim proceedings is erroneous. *Florida Cent. & P. R. Co. v. Carstens*, 37 South. 566, 567, 48 Fla. 72.

**As proceeding**

See Proceeding.

**As a proceeding in rem**

A "garnishment" is a proceeding in rem. The property is in custodia legis. To obtain the property, and not a personal judgment against the garnishee defendant, is the primary object sought to be attained. *United States Fidelity & Guaranty Co. v. Hollenshead*, 98 Pac. 749, 750, 51 Wash. 326.

**GARNISHMENT LIEN**

Lien as including, see Lien.

**GARRET**

As building, see Building (In Criminal Law).

**GARTER**

As wearing apparel, see Wearing Apparel.

**GAS**

See Natural Gas.

Inhaling of gas, see Inhale—Inhalation.  
Production of gas as mercantile pursuit, see Mercantile.

Even if the word "gas" in St. 1905, c. 435, § 629, requiring a gas company on application to furnish gas, and authorizing recovery of damages for its failure to do so, means gas for lighting purposes, it is enough for a complaint founded thereon to use simply the word "gas," as it will be given therein the same meaning it has in the statute. *Fair v. Home Gas & Electric Co.*, 110 Pac. 347, 348, 13 Cal. App. 589.

A franchise granted by a city to a light company stipulated that the company would furnish illuminating gas of not less than 16 candle power at \$1.10 per 1,000 cubic feet, less a discount, and fuel gas of 452 heat units per cubic foot at \$1 per 1,000 cubic feet, less a discount, and that, in case a lower rate was made to either of two designated towns, the price in the city should be the same as so reduced. At the time of the granting of the franchise, the company supplied artificial gas

to the designated towns, but later one of the towns granted a franchise for natural gas at greatly reduced rates. Natural gas had from 5 to 7 candle power and 1,000 heat units per cubic foot. Held, that the franchise referred only to artificial gas, and the company could not be compelled to reduce its rates and the city could not compel the company to furnish natural gas except pursuant to another franchise. *Union Light, Heat & Power Co. v. Young*, 142 S. W. 692, 693, 146 Ky. 430.

**As mineral**

See Mineral.

**As property**

See Personal Property; Real Property.

**GAS COMPANY**

As public service corporation, see Public Service Corporation.

**GAS WELL**

Develop a gas well, see Develop.

**GAS WORKS**

Statutory power given a city "to construct and establish 'gas works,' or to regulate the establishment thereof" by others, is broad enough to authorize the city to contract for the purchase of a natural gas distributing plant, and the construction of the term "gas works" is not to be narrowed by the fact that, when the authority was granted, natural gas was not known to be a product available for use in the locality. *City of Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640, 642, 75 C. C. A. 442.

**GASKET**

A "gasket" in a vessel is a piece of leather or other packing inserted between flanges to make a tight joint. *Auten v. Bennett*, 84 N. Y. Supp. 689, 690, 88 App. Div. 15.

**GASOLINE**

What is commonly called "gasoline" is the fourth distillate of crude petroleum. This consists of what is termed naphtha, which in turn is subdivided into naphtha A, B, and C, and gasoline is the common term applied to naphtha C. It is so readily inflammable that it can scarcely be said to have any flash point. Flame coming in contact with it will almost inevitably and invariably ignite it without any appreciable period of previous heat. If gasoline is brought in contact with flame when the gasoline is unconfined within narrow limits, it will ignite without exploding, but, if the gasoline is confined and has been vaporized by coming in contact with the air, a gas or vapor is formed which explodes with all the incidents connected with the most dangerous character of explosion. Gasoline vaporizes almost instantly on coming in contact with oxygen, so that in common use, as soon as gasoline is exposed to the air,

some of it at least always goes off in the form of vapor, which, being heavier than the air, tends to sink. The gravest source of danger in handling gasoline is that, since vapor sinks, it is not readily perceptible to the one standing upright in a room, because it is along the lower levels and close to the floor, and, if it is not agitated by the atmosphere so as to dissipate and blow away out of the room, it may be ignited by coming in contact with flame; the ignition causing an explosion which is of sufficient force to cause great damage. The vapor, unless dispelled by a current of air and dissipated, is likely to travel considerable distance through a building, and will almost invariably ignite and explode on coming in contact with any flame. *O'Hara v. Nelson* (N. J. Ch.) 63 Atl. 836, 838.

### GASOLINE ENGINE

As mill, see Mill.

### GATE

As appliance, see Appliance.

As fence, see Fence.

As partition fence, see Partition Fence.

As used in Rev. Codes, § 2816, relating to fencing railroad rights of way, a "gate" is a contrivance in a fence, or a part of the fence made for the purpose of passing through the fence into or out of an inclosure. *Brown v. Oregon Short Line R. Co.*, 118 Pac. 768, 769, 20 Idaho, 364.

### GATHERING

See Public Gathering.

### GAVE NOTICE OF APPEAL

The phrase "gave notice of appeal" appearing in the exemplification of a record of a court of another state, is insufficient to show that an appeal was taken, and, in the absence of a showing that it is given a technical significance by the statute laws of such state, cannot be held to have a meaning equivalent to an order granting an appeal. *McCune v. Goodwillie*, 102 S. W. 997, 1004, 204 Mo. 306.

### GEARING

The word "gearing" is defined by Webster as the parts by which motion imported to one part of an engine or machine is transmitted to another. The friction wheel and rattlers between which an employé caught his hand being constructed with a friction surface so as to transmit motion to the rattlers by surface friction from the wheel, the wheel was within the class of appliances termed "gearing," required to be guarded for the protection of employés. *Whiteley Malleable Castings Co. v. Wishon*, 85 N. E. 832, 835, 42 Ind. App. 288. And so was a machine which was operated by means of two sets of gears.

*Tabinski v. A. Harvey's Sons Mfg. Co.*, 134 N. W. 653, 655, 168 Mich. 392. But not a machine known as a "liner," a heavy hollow, revolving iron roller, filled with steam of high temperature, with a smaller roller above, between which papers were passed by the operator. *Jenkins v. Lafayette Box Board & Paper Co.*, 87 N. E. 992, 43 Ind. App. 463.

The knives of the head of a machine used to surface different sized moldings are not within St. 1898, § 1636j, requiring the guarding of "shafting and gearing," and the statute does not require the master to guard such knives. *Kruck v. Wilbur Lumber Co.*, 133 N. W. 1117, 1119, 148 Wis. 76.

A sprocket wheel and chain are within St. 1898, § 1036j, requiring all belting, shafting, and gearing, so located as to be dangerous to employés in the discharge of their duties, to be securely guarded or fenced. *Schweikert v. J. R. Davis Lbr. Co.*, 130 N. W. 508, 509, 145 Wis. 632.

### GELATIN

Glue as including, see Glue.

Manufactures of, see Manufactures—Manufactured Articles.

"Finings" is an article consisting of "gelatin" containing a considerable proportion of sulphurous acid or sulphite as a preservative and is dutiable as "gelatin," under paragraph 23, Schedule A, § 1, c. 11, Tariff Act. *Somona Wine & Brandy Co. v. United States*, 123 Fed. 999, 1000.

### GELATIN CAPSULES

As medicinal preparation, see Medicinal Preparation.

### GENERAL

See Brigadier General.

### GENERAL

See, also, Special.

"General" is equivalent to "extensive" and is a relative term the meaning of which must be determined by a process of inclusion and exclusion. *Times Printing Co. v. Star Pub. Co.*, 99 Pac. 1040, 1042, 51 Wash. 667, 16 Ann. Cas. 414. See, also, *Puget Sound Pub. Co. v. Times Printing Co.*, 74 Pac. 802, 805, 33 Wash. 551.

### GENERAL ACCEPTANCE

A "general acceptance" of a draft is an agreement to pay according to the tenor of the bill, and if the draft is conditional the acceptance binds the acceptor to pay according to the conditions, and not otherwise. *Hannay v. Guaranty Trust Co. of New York*, 187 Fed. 686, 688.

### GENERAL ACT

See General Law



**GENERAL AGENCY OR AGENT**

See also, General Manager; General Superintendent; Special Agency or Agent.

A "general agent" is one who is authorized to do all the acts connected with a particular trade, business, or employment. *Manhattan Life Ins. Co. v. First Nat. Bank of Denver*, 80 Pac. 467, 471, 20 Colo. App. 529 (quoting and adopting *Story, Agency*, § 17); *Columbus Show Case Co. v. Brinson*, 57 S. E. 871, 872, 128 Ga. 487.

A person authorized to transact all the business of another at a particular place, and impliedly invested with discretion to determine the proper construction of the contract under which work was being done, is a "general agent." *Cleveland, C. & St. L. Ry. Co. v. Moore*, 82 N. E. 52, 57, 84 N. E. 540, 170 Ind. 328.

The term "general agent," as applied to one representing a corporation, does not necessarily import that the person designated is an officer of the corporation. *Vardeman v. Penn Mut. Life Ins. Co.*, 54 S. E. 66, 67, 125 Ga. 117, 5 Ann. Cas. 221.

In determining whether a person is a "general agent," the extent of territory in which he operates is not to be considered, since the term implies general power and is not used in the geographical sense, and therefore the question of general agency is dependent on the extent of the powers exercised by the agent. *Floars v. Aetna Life Ins. Co.*, 56 S. E. 915, 917, 144 N. C. 232 (citing *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 34 S. E. 503, 125 N. C. 397; *Berry v. American Cent. Ins. Co.*, 30 N. E. 254, 132 N. Y. 49, 28 Am. St. Rep. 548).

Where a corporation intrusts a principal officer or manager with general supervision of a particular branch of its business, it clothes such officer or manager with the authority of a "general agent," coextensive with the business intrusted to his care, which is not limited by private instructions so as to protect the corporation from liability for acts within the officer's ostensible authority, though in excess of such private instructions. *American Car & Foundry Co. v. Alexandria Water Co.*, 67 Atl. 861, 864, 218 Pa. 542 (*Adams Exp. Co. v. Schlessinger*, 75 Pa. 256; *Anderson v. National Surety Co.*, 46 Atl. 306, 196 Pa. 288).

A surety company, which appoints agents whom it calls "general agents," with authority to solicit business for it as a surety on excise bonds, receive applications, issue bonds, and receive premiums therefor, may not claim that they have not authority to make the agreement with the applicant for a bond, for which an extra premium is paid, that he shall not be liable for any amount the company may become chargeable with on account of the bond. In *re American Fidelity*

*ty Co.*, 104 N. Y. Supp. 711, 712, 54 Misc. Rep. 357.

**Insurance company**

An agent of a foreign insurance company who issues, cancels, indorses, and delivers policies, solicits and writes insurance, collects the premiums for insurer, remits them to it, and attends to its business generally, is a general agent of insurer, and has authority to waive conditions in a policy, though the company has a general agent for the state. *Bank of Anderson v. Home Ins. Co. of New York*, 111 Pac. 507, 509, 14 Cal. App. 208.

**Managing agent distinguished**

Where a statute (Code Civ. Proc. Neb. §§ 73, 75) provides that, when a defendant is a foreign corporation having a managing agent in the state, personal service of process may be had on such agent, and authorizes service on the managing agent of any corporation if certain officers are not found in the county, a return of service on a "general agent" of a foreign corporation does not show a compliance with the statute; a "managing agent" being one who manages or controls the corporate business in the state, and "general agent" not being an equivalent term. *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338, 342, 343.

**Special distinguished**

There is a wide distinction between a general, special, or particular agent. A "special agency" exists where there is a delegation of authority to do a single act, and a "general agency" exists where there is a delegation to do all acts connected with a particular trade, business, or employment. *Karns v. State Bank & Trust Co.*, 101 Pac. 564, 566, 31 Nev. 170 (quoting *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 20 Pac. 771, 12 Colo. 486, 13 Am. St. Rep. 204); *Belcher v. Manchester Building & Loan Ass'n*, 67 Atl. 399, 400, 74 N. J. Law, 833.

A "general agent" is one who is authorized to do all acts connected with a particular trade, business, or employment. A special agent is one who is authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. In short, the former imports, not an unqualified authority, but an authority which is derived from a multitude of instances, whereas the latter is confined to an individual instance. *Columbus Showcase Co. v. Brinson*, 57 S. E. 871, 872, 128 Ga. 487 (citing *Jesse French Piano Co. v. Cardwell*, 40 S. E. 292, 114 Ga. 340; *Butler v. Maples*, 9 Wall. [76 U S.] 773, 19 L. Ed. 822).

**GENERAL APPEARANCE**

See, also, Special Appearance.

A general appearance must be express or arise by implication from defendant's seek-

ing, taking, or agreeing to some step beneficial to himself or detrimental to plaintiff, other than one contesting the jurisdiction. A mere inquiry as to whether a continuance can be taken without waiver of service, or offer to move for a continuance, provided it can be done without such waiver, does not amount to a general appearance. *Fulton v. Ramsey*, 68 S. E. 381, 383, 67 W. Va. 321, 140 Am. St. Rep. 969.

Whether an appearance is general or special is governed by the object and purpose of the appearance; and any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a "general appearance." *Dailey v. Foster* (N. M.) 128 Pac. 71, 72.

A "general appearance" is the voluntary act of a party or his attorney, and is effectual to confer jurisdiction of the person without an order of court. *Multnomah Lumber Co. v. Weston Basket Co.*, 99 Pac. 1046, 1048, 54 Or. 22. Thus where, in a proceeding for the establishment of a private road, after defendant's plea to jurisdiction based on the insufficiency of the substituted service of notice was overruled, he contested the merits of the application, agreed to a continuance, and when defeated in the county court appealed to the circuit court from the judgment, his general appearance was a waiver of legal notice, and gave the court jurisdiction. *Allen v. Welch*, 102 S. W. 665, 666, 125 Mo. App. 278.

An appearance for any other purpose than to question the jurisdiction of the court is general. *Zobel v. Zobel*, 90 Pac. 191, 192, 151 Cal. 98; *J. S. Paterson Const. Co. v. First State Bank of Thebes*, 133 Ill. App. 75, 81; *Tagert v. Fletcher*, 83 N. E. 805, 232 Ill. 197 (citing 3 Cyc. 504); *Hanson v. Hanson*, 122 Pac. 100, 86 Kan. 622. Thus a motion to vacate or set aside judgment upon jurisdictional and nonjurisdictional grounds constitutes a "general appearance." *Barnett v. Holyoke Mut. Fire Ins. Co.*, 97 Pac. 962, 964, 78 Kan. 630; *Boulder, Colorado, Sanatorium v. Vanston*, 94 Pac. 945, 946, 14 N. M. 436. But where a deficiency judgment was rendered in a proceeding to enforce a vendor's lien against a defendant, who was served only by publication, the defendant's subsequent application to vacate such judgment did not constitute a general appearance sufficient to confer jurisdiction over his person. *Sweeney v. Tritsch*, 44 South. 184, 186, 141 Ala. 242.

In determining whether an appearance is special or general, the question of whether it is to deny the court's jurisdiction of the person controls, irrespective of any stipulation or statement that it was special, and irrespective of defendant's intention to make it so. *Sit You Gune v. Hurd*, 120 Pac. 1135, 61 Or. 185. Whether an appearance is general or special does not depend upon the form

of the pleading, but upon its substance. If a defendant invokes the judgment of the court upon any question, except that of the power of the court to hear and decide the cause, his appearance is general. *Haynes v. City Nat. Bank of Lawton*, 121 Pac. 182, 185, 30 Okl. 614. Thus where defendants by motion reciting that they were "appearing specially herein for the purposes of questioning the jurisdiction of this court, and for no other purpose," moved that "such judgment in the above-entitled action be set aside, that said action be dismissed, and that defendants have judgment against the plaintiff for their costs and disbursements, and for such other relief as to the court might seem just," and some of the affidavits in support of the motion set forth facts going to the merits of the controversy, their appearance must be construed to be "general." *Bain v. Thoms*, 87 Pac. 504, 44 Wash. 382 (citing *Teator v. King*, 76 Pac. 688, 35 Wash. 138; *Burdette v. Corgan*, 26 Kan. 102).

So, also, where certain orders were entered making allowances to a receiver of an insolvent bank, after which certain stockholders were granted permission to sue to vacate the orders, as granted ex parte, and without jurisdiction, and this suit was prosecuted to judgment, which was adverse to the plaintiffs, whereupon they brought a writ of error to review the original orders as improvidently entered and void for want of jurisdiction, it was held that, plaintiffs having proceeded in the trial court to set aside the orders, such proceeding constituted an appearance which cured the alleged jurisdictional defect. *In re Bank of Newcastle*, 89 Pac. 1035, 1037, 15 Wyo. 501.

An appearance for any other purpose than questioning jurisdiction for want of process, defect of process, defective service thereof, or because the action was commenced in the wrong county, etc., is general, and not special, though accompanied by the claim that the appearance is special; and hence an appearance to move to vacate a cause, or to dismiss or discontinue it, because plaintiffs' pleading does not state a cause of action, which is equivalent or analogous to a demurrer, amounts to a general appearance. *Norfolk & O. V. Ry. Co. v. Consolidated Turnpike Co.*, 68 S. E. 346, 348, 111 Va. 131, Ann. Cas. 1912A, 239. And where, on the application by the county collector for judgment for drainage taxes against delinquent lands, there was a variance between the delinquent list and the published notice of application for sale, and the owner appeared and filed an objection based upon the variance that the lands were not assessed in her name nor in that of any living person, such objection was not one which went to the jurisdiction of the court, and her appearance for the purpose of making such objection is a "general appearance" which waives the variance. *Waite v. People*, 81 N. E. 837, 838,

228 Ill. 173 (citing *McChesney v. People ex rel. Kochersperger*, 53 N. E. 356, 178 Ill. 542).

A defendant who, separately or in conjunction with a motion going only to the jurisdiction of the court over his person, invokes the power of the court on the merits, or moves to dismiss, appears generally. Thus a defendant, who not only asks for the dissolution of the attachment and quashing of the writ because of defective service of process on him, but asks for the dismissal of the cause, appears generally, for the court, by virtue of the express provisions of Mills' Ann. Code, § 44, acquired jurisdiction by the filing of the complaint, and the cause could not be dismissed because of the want of jurisdiction of defendant's person. *Everett v. Wilson*, 83 Pac. 211, 212, 34 Colo. 476. And in an action against a nonresident, if service is made in any manner not authorized by law, defendant may appear specially and move to quash the service, but if he prays for a dismissal, it is a "general appearance," as it invokes the power of the court on a question other than that of jurisdiction. *McKillop v. Harvey*, 114 N. W. 155, 156, 80 Neb. 264.

Where one pleads both to the merits and to the jurisdiction at the same time, it amounts to a "general appearance." And such appearance gives the court jurisdiction of the person, though the process or service thereof is insufficient. *Rhyne v. Manchester Assur. Co.*, 78 Pac. 558, 559, 14 Okl. 555. And so where a defect in service of process appears on the record, and a special appearance questioning the jurisdiction is overruled, if defendant answers over to the merits, he thereby enters a "general appearance." *Sampson v. Northwestern Nat. Life Ins. Co.*, 123 N. W. 302, 303, 85 Neb. 319.

A general demurrer, filed without protestation, is a "general appearance." *Pacific Selling Co. v. Albright-Prior Co.*, 59 S. E. 468, 469, 3 Ga. App. 143.

An appearance to apply for a continuance of a matter pending before a court is just as general as though for the purpose of invoking the action of the court in any other matter. *Zobel v. Zobel*, 90 Pac. 191, 192, 151 Cal. 98.

Where an appearance is properly restricted, it will stand as made until some inconsistent action is taken, and it is not necessary to state the precise purpose of the appearance on the docket, but its mere designation as "special" confines it to dilatory matters, and precludes a presumption of anything further; and hence a failure to file a motion to dismiss in time, after a special appearance, does not make the appearance "general." *Wade v. Wade's Adm'r*, 69 Atl. 826, 827, 81 Vt. 275.

The appearance of a defendant by filing a petition for a change of venue is a "general appearance," and gives the court juris-

diction of its person. *Cook v. Globe Printing Co. of St. Louis*, 127 S. W. 332, 346, 227 Mo. 471; *Julian v. Kansas City Star Co.*, 107 S. W. 496, 508, 209 Mo. 35.

A written stipulation filed in court, signed by the counsel of the parties, agreeing that the cause might be set for trial for a certain day of a certain term, was an unlimited "appearance," by the defendant, waiving a right to plead to the jurisdiction. *Markey v. Louisiana & M. R. R. Co.*, 84 S. W. 61, 64, 185 Mo. 348.

A stipulation for the continuance of a motion for a preliminary injunction filed by defendant constitutes a "general appearance," and cures any defect in the process. *Tagert v. Fletcher*, 83 N. E. 805, 232 Ill. 197. And a defendant, entering into a stipulation continuing the case and consenting that it may be tried on a designated date, waives irregularities and restores the jurisdiction of the court over the person of defendant, if lost; it being a "general appearance" for the purposes of the case at the date agreed on. *Hobbs v. German-American Doctors*, 78 Pac. 356, 357, 14 Okl. 236.

The prosecution of a writ of error from a judgment rendered on defective service operates as a general appearance when the cause is remanded, and further process is unnecessary. *Hayman v. Well*, 44 South. 176, 178, 53 Fla. 127.

A general appearance must be express or arise by implication from defendant's seeking, taking, or agreeing to some step beneficial to himself or detrimental to plaintiff, other than one contesting the jurisdiction. Thus a mere inquiry as to whether a continuance can be taken without waiver of service, or offer to move for a continuance, provided it can be done without such waiver, does not amount to a general appearance. *Fulton v. Ramsey*, 68 S. E. 381, 383, 67 W. Va. 321, 140 Am. St. Rep. 969. So where defendant appeared and filed pleas to the jurisdiction of the court, and after demurrers had been sustained thereto defendant elected to stand by the pleas and refused to plead further in the cause, and the court thereupon proceeded to hear the evidence and assess the damages, defendant objecting to the court taking jurisdiction for that purpose and excepting to the action of the court in assessing damages and to the rendition of judgment, after which defendant moved to expunge the judgment from the record for want of jurisdiction, it was held that defendant's proceedings after refusing to plead further on demurrers being sustained to the pleas, though unnecessary to preserve its objection, were consistent with the purpose of limiting defendant's appearance to the sole purpose of questioning the court's jurisdiction, and did not, therefore, amount to a "general appearance" waiving such objection. *Supreme Hive Ladies of Maccabees*

of the World v. Harrington, 81 N. E. 533, 537, 227 Ill. 511.

And defendant's service upon plaintiff of an order to show cause why an injunction issued on plaintiff's application should not be vacated was an appearance for the purpose of the motion only, and was not equivalent to a "general appearance," within Code Civ. Proc. § 421, requiring defendant's appearance to be made by serving upon plaintiff's attorney a notice of appeal, or a copy of a demurrer or answer, and requiring the notice or pleading to be subscribed by defendant's attorney, who shall add to his signature his office address, etc., so as to entitle defendant to notice of all subsequent proceedings, though the affidavit upon which the order was based contained the name and office address of defendant's attorney and the papers were indorsed with his name and address. *Regelmann v. South Shore Traction Co.*, 123 N. Y. Supp. 353, 354, 67 Misc. Rep. 590.

A motion for leave to amend a plea to the jurisdiction does not constitute a general appearance. *Pooler v. Southwick*, 126 Ill. App. 264, 267. And the same is true of the appearance of a nonresident defendant in a state court for the sole purpose of removing the cause. It does not preclude defendant from moving to quash the service in the federal court. *Carpenter v. Williard Case Lumber Co.*, 158 Fed. 697, 702. And the special appearance of a foreign corporation defendant in a state court for the single purpose of insisting that no valid service has been made upon it is not a submission to the claimed jurisdiction. *Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 150 Fed. 666, 670. And so also an agreement by the counsel for defendant that a case brought before a justice of the peace should be heard before the justice on a day subsequent to the return day, entered into prior to the return day, is not a "general appearance," and defendant may object to the insufficiency of the service of process. *Woodard & Woodard v. Tri-State Milling Co.*, 55 S. E. 70, 71, 142 N. C. 100.

The execution of a forthcoming bond in attachment, under B. & C. Comp. § 306, does not constitute a "general appearance," neither does a special appearance to move for dismissal for want of jurisdiction, nor a subsequent plea in abatement setting up the same ground, although an application to the court to discharge an attachment on giving an undertaking conditioned to pay any judgment in the action is an acknowledgment of the court's jurisdiction. *Winter v. Union Packing Co.*, 93 Pac. 930, 931, 51 Or. 97.

A motion by a defendant in error to strike out the bill of exceptions is a general "appearance," and is a waiver of a want of service of notice, as required by the statute,

of the issuing writ. *McNealy v. Bartlett* (Mo.) 95 S. W. 273.

Under Rev. Codes, § 7149, providing that a defendant "appears in an action" when he answers, demurs, or gives plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him, or has such appearance entered in open court, defendant's application, whether accompanied by an oral showing or without showing, for time in which to answer to the merits after denial of their motion to dismiss for want of jurisdiction of the person, constituted a general appearance, the effect of which could not be limited by a statement by counsel that he desired the record to show that his appearance was special. *State ex rel. Mackey v. District Court of Fifth Judicial Dist.*, 106 Pac. 1098, 1100, 40 Mont. 359, 135 Am. St. Rep. 622.

### GENERAL ASSEMBLY

See Next General Assembly.

The term "General Assembly," in Const. art. 14, which declares that the General Assembly may propose constitutional amendments, each amendment being embraced in a separate bill, by three-fifths of all members elected to each of the two houses, which bill shall be published by order of the Governor for a specified time before the election at which the amendment shall be submitted to the voters in a form to be prescribed by the General Assembly, does not include the Governor. Many provisions of the Constitution refer to the "General Assembly" in a manner indicating that the Governor is not included within the term. *Warfield v. Vandiver*, 60 Atl. 538, 539, 101 Md. 78.

The Constitution of the Presbyterian Church creates certain church courts. It declares that the government of the church is to be exercised in some certain and definite form, and by various courts, in regular gradation. These courts are denominated "Church Sessions," "Presbyteries," "Synods," and the "General Assembly." The jurisdiction of each of these courts is defined in the constitution. The Church Session has jurisdiction of a single church; the Presbytery has jurisdiction over the Church Session and jurisdiction within a prescribed district; the Synod has jurisdiction over three or more Presbyteries; and the General Assembly has jurisdiction over such matters as concern the whole church. Every court is declared to have the right to resolve questions of doctrine and discipline seriously and reasonably proposed; and, although each court exercises exclusive and original jurisdiction over all matters especially belonging to it, the lower courts are subject to the review and control of the higher courts, in regular gradation. The General Assembly has jurisdiction to review and decide all references and complaints regularly brought before it from the

inferior courts, and to decide all questions respecting doctrine and discipline, and to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and orders of the Church. So far as any controversies in reference to the doctrine are concerned, by the very terms of the constitution the General Assembly is made the highest court, and, of course, its judgment on the matter is final and conclusive. The General Assembly of the Cumberland Presbyterian Church has jurisdiction to determine whether the matter in controversy is within its jurisdiction, and also to determine the controversy itself. *Mack v. Kime*, 58 S. E. 184, 195, 129 Ga. 1, 24 L. R. A. (N. S.) 675.

### GENERAL ASSIGNMENT

#### As an act of bankruptcy

See Act of Bankruptcy.

#### Transfer to single creditor

A debtor conveyed about three-fourths of its property and the proceeds of any sale of the other fourth, which consisted in real estate of which the debtor retained possession and the right of use and disposition, to its principal creditor, in consideration of the discharge of the debtor's obligation and of the creditor's agreement to pay all other obligations out of the property conveyed. Held, the conveyance was not a general assignment for creditors, but its legal effect was that of a sale of the property to the assignee in consideration of its release of the debtor and its contract to pay the other debts. *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 283, 288, 91 C. C. A. 251.

#### As creating trust

A conveyance of his property by a debtor directly to his creditors for their benefit does not constitute a general assignment, because it raises no trust. *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 283, 288, 91 C. C. A. 251.

### GENERAL ASSUMPSIT

See, also, Assumpsit.

At common law the action of "assumpsit" was divided into "special assumpsit," or an action brought on an express promise; and "general assumpsit," or an action brought on an implied contract. *Board of Highway Com'rs, Bloomington Tp., v. City of Bloomington*, 97 N. E. 280, 284, 253 Ill. 164, Ann. Cas. 1913A, 471.

### GENERAL AVERAGE

"General average" or loss is where individual loss or injury is incurred for the common good of those having a community of interest and benefit, and is apportioned to the interests benefited. *Perry v. Ohio Ins. Co.*, 5 Ohio, 305, 307.

"General average as per foreign custom" would be a declaration not wholly lived up

to, if foreign custom made the assured pay on one basis, but the memorandum clause allowed him to collect on another. *International Nav. Co. v. Sea Ins. Co.*, 129 Fed. 13, 15, 93 C. C. A. 663.

"The term 'general average' implies a case in which, according to natural justice, there should be a contribution, by all concerned, to make good a loss incurred by a part for the common benefit. The simplest instance is that of a jettison, where the goods of one person interested are thrown overboard in order to save the vessel and everything that is at stake in it. In such case, every interest which is thus benefited—the ship, the freight, and the residue of the cargo—must contribute to make good the loss, and this is 'general average.' It may be comprehensively defined to be an expense or sacrifice voluntarily incurred on account of the ship, freight, and cargo, to save them from impending danger, threatening the whole, and which, being incurred by or at the expense of the owner of one of them, entitles him to contribution from all. 'Particular average' is a damage happening to the thing insured, or an expense incurred exclusively on its account, occasioned by the perils insured against, and when such damage or expense is not in the nature of a sacrifice for the common benefit. It is not denied that the injury to the hull and rigging of the boat was occasioned immediately by one of the perils insured against, and therefore comes directly within the general undertaking of the insurers; nor can it be denied, under these definitions, that being a damage to the subject of insurance, incurred not voluntarily for the benefit of all concerned, but fortuitously from one of the perils of the river, it is properly a particular average." *Fireman's Ins. Co. of Louisville v. Fitzhugh*, 4 B. Mon. (43 Ky.) 160, 164 (citing 1 Phillips, Ins., 331, 369, etc.; *Benecke, Marine Ins.*, 165, 166).

Voluntary sacrifices and expenditures in a successful effort to save a negligently stranded vessel and her cargo and freight present a case of general average within the meaning of a clause in the bill of lading under which, if damage results from the negligent navigation of a seaworthy vessel properly manned, equipped, and supplied, the cargo owners are not to be exempt from liability for contribution in general average, but, with the shipowner, are to contribute as if the damage had not resulted from such negligence. *The Jason*, 32 S. Ct. 560, 562, 225 U. S. 32, 56 L. Ed. 969.

Seamen's wages and provisions incurred during an embargo cannot be recovered as a partial loss from the underwriter on freight, as they are "general average," the criterion of which is: Were the expenses necessarily and unavoidably incurred for the general safety of the ship and cargo? *Insurance Co.*

of North America v. Jones (Pa.) 2 Bin. 547, 559.

### GENERAL BENEFICIAL POWER

See Beneficial Power.

### GENERAL BENEFITS

"The term 'general benefits,' when unqualified, should probably be accepted in the same sense as the term 'common benefits'; that is to say, when there is no limitation expressed, it should be deemed applicable to the general public, rather than as embracing, as general, but a limited part of the public." Spokane Traction Co. v. Granath, 85 Pac. 261, 263, 264, 42 Wash. 506 (quoting and adopting Kirkendall v. City of Omaha, 57 N. W. 752, 39 Neb. 1).

### GENERAL BILL OF EXCEPTIONS

Where a motion for a new trial was overruled, and the record showed that appellants were given 90 days in which to present their general bill of exceptions, it was held that the expression "general bill of exceptions" might be transposed so as to read "bill of general exceptions," and that the expression as used in this connection meant that appellants were granted 90 days within which to prepare a bill or bills of exceptions, in writing, exhibiting all exceptions taken by them to rulings of the court made during the trial of the cause, and which rulings had been embraced in the motion and assigned as reasons for a new trial. Wagner v. Weyhe, 73 N. E. 89, 90, 164 Ind. 177.

### GENERAL BUSINESS

The word "general," in the statute forbidding transportation of liquors by persons not regularly conducting a "general express business," imports something more than a casual, infrequent, and incidental carriage of goods other than intoxicating liquors, and means that the major part of the business must be the carriage of a variety of goods commonly the subject of transportation by express companies. Commonwealth v. People's Express Co., 88 N. E. 420, 421, 426, 201 Mass. 564, 131 Am. St. Rep. 416.

Code Civ. Proc. § 1809, providing that an injunction shall not be granted *ex parte* which operates to suspend "the general and ordinary business of a corporation," contemplates only injunctions extending to a total suspension of corporate business, and has no application to an injunction restraining a single act or duty. Town of Ft. Edward v. Hudson Valley Ry. Co., 111 N. Y. Supp. 753, 754, 127 App. Div. 438.

#### Electric

"A 'general electric business' would include the manufacture of, the buying and selling of, every electric contrivance or apparatus known to modern science." Game-well Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 76 S. W. 862, 866, 116 Ky. 759.

### GENERAL CHARACTER

See, also, General Reputation.

#### Of individual

"General character" is the same as "general reputation," and is determined by how one is generally regarded or esteemed in the community in which he lives. Way v. State, 46 South. 273, 278, 155 Ala. 52; Lowman v. State, 50 South. 43, 161 Ala. 47.

"General character," being the reputation one has made in the community in which he resides, is the result of his general walk and conversation, and cannot be shown by any particular act; and hence it may well be that one guilty of a crime may later establish a good character, but the question is one of fact for the jury, and it should not be charged that a man's character may be good, though he may have pleaded guilty to the crime of receiving stolen property. Bell v. State, 56 South. 842, 844, 2 Ala. App. 150.

### GENERAL CHARGE

See Small General Charge.

The term "the general charge," as used in a record of appeal in which an exception is based on the refusal of the court to give "the general charge," has no such meaning that they can permit the appellate court to review the refusal of the trial court. Lunsford v. Bailey & Howard, 38 South. 362, 142 Ala. 319.

### GENERAL CIRCULATION

"General" and "universal" are not synonymous. The word "general" is derived from "genus," and technically relates to a whole genus or kind, or to a whole class or order. But its more usual meaning is "common to many; widely spread; prevalent; extensive, though not universal; as a general opinion; a general custom." The word "general," as used in Seattle City Charter, § 31, requiring the designation of an official daily newspaper of general circulation, is not synonymous with "universal," and the fact that the newspaper gave special prominence to dissemination of legal news did not preclude its being one of general circulation. Puget Sound Pub. Co. v. Times Printing Co., 74 Pac. 802, 805, 33 Wash. 551 (quoting Webster's International Dict.).

To constitute "general circulation" within the statute relating to criminal libel, it is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state; but it must extend beyond the county in which it is published and have a "general circulation." Razee v. State, 103 N. W. 438, 439, 73 Neb. 732 (quoting and adopting Koen v. State, 53 N. W. 595, 35 Neb. 676, 17 L. R. A. 821).

Under Const. art. 19, § 2, requiring the publication of proposed constitutional amendments in not more than one newspaper of general circulation in each county, a proposed

constitutional amendment must be published in one newspaper in each county, which is published and has a general circulation in that county; the words "general circulation" being descriptive of the character of the newspaper and excluding a newspaper of a limited circulation and restricted to some particular trade or calling. In re House Resolution No. 10, 114 Pac. 293, 294, 50 Colo. 71.

The provision in Laws 1909, p. 419, § 6, that the board of directors of education shall, before adopting text-books for use in public schools, advertise for bids in newspapers of general circulation published in the city or district, cannot be construed as allowing the publication of an advertisement in a newspaper having a general circulation in, but not published in, the district, for a newspaper of "general circulation" need only circulate among all classes, and may be published in a place far distant from the district, and the provision requires the advertisement in a newspaper of general circulation published in the city or district; the word "published" clearly meaning the place where a newspaper is first issued or printed, and hence the section is invalid, as impossible to be obeyed. *Polzin v. Rand, McNally & Co.*, 95 N. E. 623, 627, 250 Ill. 561, Ann. Cas. 1912B, 471.

#### GENERAL CREDIT

In the rule of law that it is essential to negotiability that the "general credit" of the maker be pledged to the obligation, the expression "general credit" signifies that general or personal credit must be pledged, as contradistinguished from limiting the liability to a particular or specific fund, which would make the obligation in effect an assignment pro tanto of the fund, and not a negotiable obligation of the maker. *Hibbs v. Brown*, 98 N. Y. Supp. 353, 357, 112 App. Div. 214 (citing Laws 1894, c. 235; Code Civ. Proc. §§ 1919, 1924; *Matter of Jones*, 65 N. E. 570, 172 N. Y. 575, 60 L. R. A. 476; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *People ex rel. Winchester v. Coleman*, 31 N. E. 96, 133 N. Y. 279, 16 L. R. A. 183).

#### GENERAL DAMAGES

"General damages" are such as the law implies and presumes to have occurred from the wrong complained of. *Lee v. Boise Development Co.*, 122 Pac. 851, 852, 21 Idaho, 461. Thus a petition for treble damages to plaintiff because of defendant's alleged unlawful combination or conspiracy to monopolize interstate commerce in violation of the Anti-Trust Act, charges "general damages" by an allegation that by virtue of the alleged unlawful acts plaintiff sustained damages in a specified sum. *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 782 (quoting and adopting definition in *Bates*, Fed. Proc. § 1001).

General damages are those which necessarily result from the wrong complained of,

arising by implication of law. *Henderson v. Coleman*, 115 Pac. 439, 448, 19 Wyo. 183; *Baltimore Mach. Works v. McKelvey*, 75 N. Y. Supp. 1090, 1092, 71 App. Div. 340.

Damages are either general or special; "general" when they are such as the law implies from the wrongful acts alleged, and "special" when, though not implied by law, they are such as really take place. *Hoskins v. Scott*, 96 Pac. 1112, 1114, 52 Or. 271.

The distinction between general and special damages for breach of contract is that the former are such damages as the law implies and presumes from the breach complained of, while the latter are such as have proximately resulted, but do not always immediately result, from the breach and will not therefore be implied by law. *Howard Supply Co. v. Wells*, 176 Fed. 512, 515, 100 C. C. A. 70; *Lillard v. Kentucky Distilleries & Warehouse Co.*, 134 Fed. 168, 171, 177, 67 C. C. A. 74 (citing 13 Cyc. p. 13; *Lawrence v. Porter*, 63 Fed. 62, 64, 11 C. C. A. 27, 26 L. R. A. 167).

"General damages" are such as the law implies or presumes to have occurred from a wrong complained of, while "special damages" are such as really took place and are not implied by law, but are either super-added to general damages from an act injurious in itself, or are such as arise from an act not actionable in itself but injurious only in its consequences. "General damages" need not be pleaded, but "special damages" must be stated in the petition with a reasonable degree of particularity, and it must appear that the damage is the natural though not necessary consequence of the wrong. Hence damages to the market value of a horse by injuries received in transportation are "general," while damages from loss of earnings or use are "special." *Van Buskirk v. Quincy, O. & K. C. R. Co.*, 111 S. W. 832, 833, 131 Mo. App. 357. And so where a person claims damages for a wrongful seizure and detention of his saloon property under a writ of attachment, and it is shown that the property was held about six hours, and it is alleged that damage had been done thereby in the loss of business and profits in the amount of \$5,000, such damages are special. *O'Brien v. Quinn*, 90 Pac. 166, 167, 35 Mont. 441 (citing 13 Cyc. p. 13).

"General damages" in actions for conversion or for the taking and detention of personal property, provable under a general allegation, are those inferred by the law itself because the immediate, direct, and proximate result of the act complained of, as an injury to the property itself, or to its value by detention. *Robert R. Sizer & Co. v. Dopson*, 72 S. E. 464, 466, 89 S. C. 535.

In any case predicated upon a wrong, a person may be entitled to recover general damages which are the necessary and usual results of the acts complained of, and special

damages which are not the usual and ordinary result but as directly traceable to the wrongful acts complained of and result therefrom, but all other damages are too remote. The only difference between general and special damages is that general damages are the necessary and usual result of the acts complained of, while special damages need not be, but must only be the proximate result thereof. *McKinney v. Carson*, 99 Pac. 660, 664, 35 Utah, 180.

"General damages" are such as the law presumes to have accrued from the wrong complained of as a necessary result thereof, and may be recovered under a general allegation of damages; while "special damages" are those which are the natural and proximate result of the wrong, but not the necessary consequence thereof, and must be specially alleged or they are not recoverable. *Louisville & N. R. Co. v. Roney* (Ky.) 108 S. W. 343, 344; *Morris v. Allen*, 121 Pac. 690, 692, 17 Cal. App. 684; *Thompson v. St. Louis & Suburban R. Co.*, 86 S. W. 465, 468, 469, 111 Mo. App. 465 (quoting and adopting definition in *Brown v. Hannibal & St. J. R. Co.*, 12 S. W. 656, 99 Mo. 318); *Cumberland Telephone & Telegraph Co. v. Overfield*, 106 S. W. 242, 244, 127 Ky. 548; *Sloss-Sheffield Steel & Iron Co. v. Dickinson*, 52 South. 594, 595, 167 Ala. 211; *Hoskins v. Scott*, 96 Pac. 1112, 1114, 52 Or. 271; *Epstin v. Berman*, 58 S. E. 1013, 1015, 78 S. C. 327; *Stowe v. La Conner Trading & Transp. Co.*, 80 Pac. 856, 857, 39 Wash. 28; *Norfolk & W. Ry. Co. v. Spears*, 65 S. E. 482, 483, 110 Va. 110; *Irby v. Wilde*, 43 South. 574, 150 Ala. 402.

"Damages which necessarily result from the act complained of are denominated 'general damages,' and may be proved under the ad damnum clause." *Terrace Water Co. v. San Antonio Light & Power Co.*, 82 Pac. 562, 563, 1 Cal. App. 511.

A general allegation in the complaint that damages have been sustained to one by reason of a personal injury authorizes the recovery of "general damages," which are the damages necessarily and directly resulting from the injuries; but "special damages," which are not the necessary result of the injuries, though the natural consequences of the act complained of, must be particularly specified in the complaint to be recoverable. *Cordner v. Hall*, 79 Atl. 55, 56, 84 Conn. 117.

#### Libel or slander

General damages are those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. They arise by inference of law, and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted; and are designed to compensate for that large and substantial class of injuries arising

from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. *Hanson v. Krebbel*, 75 Pac. 1041, 1042, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422.

"General damages" include actual or compensatory damages, and the injuries which the law presumes to have naturally and necessarily resulted from the utterance of words slanderous per se, such as a charge of arson, including injury to the feelings and resulting mental suffering, and may also include punitive damages. *Fields v. Bynum*, 72 S. E. 449, 451, 156 N. C. 413.

#### GENERAL DEMURRER

A "general demurrer" enables a party to assail substantial imperfections in the pleadings of the opposite side without particularizing any of them, as distinguished from a "special demurrer," which goes to the structure merely and not to the substance and obliges the party demurring to lay his finger on the very point. *Douglas, A. & G. R. Co. v. Swindle*, 59 S. E. 600, 603, 2 Ga. App. 550 (quoting and adopting definition in *Martin v. Bartow Iron Works*, 35 Ga. 323, 16 Fed. Cas. 888).

A "general demurrer" goes to the whole case. A demurrer may be general in that it goes to the entire action as alleged, and yet in no wise challenge the legal sufficiency of the facts alleged to establish a cause of action. *Wolfe v. Georgia Ry. & Electric Co.*, 65 S. E. 62, 63, 6 Ga. App. 410.

#### GENERAL DENIAL

A "general denial," like the former plea of "not guilty," is the scientific way of raising the whole issue on a complaint in an action for a tort. It may be superseded, however, by admissions or other allegations connected therewith or by which it is followed. *Schultz v. Greenwood Cemetery*, 93 N. Y. Supp. 180, 181, 46 Misc. Rep. 299.

A "general denial" in replevin puts in issue all of the allegations of the plaintiff's petition or declaration and allows the defendant to give evidence of any special matter amounting to a defense. *First Nat. Bank of Sallisaw v. Barbour*, 95 Pac. 790, 791, 21 Okl. 237 (quoting *Cobbey, Replevin*, § 751).

#### GENERAL DEPOSIT

See, also, Deposit.

"A 'general deposit' in a bank is so much money to the depositor's credit; it is a debt to him by the bank payable on demand to his order, not properly capable of identification and specific appropriation." *Pease & Dwyer Co. v. State Nat. Bank*, 88 S. W. 172, 173, 114 Tenn. 693 (quoting and adopting definition in *Florence Min. Co. v. Brown*, 8 Sup. Ct. 534, 124 U. S. 391, 31 L. Ed. 424).



A general deposit is where the bank is given custody of the money deposited with the intention expressed or implied that the bank is not required to return the identical money, but only its equivalent; the legal title to the money in such cases passing to the bank. Thus where money was deposited in a bank to secure payment of compensation under a well drilling contract, and, while the depositor had no right to check against the deposit, there was no agreement that the money should be kept separate from the other funds of the bank, it was a general and not a special deposit, though the transaction was called a "trust fund account" on the bank's books, and hence, on the insolvency of the bank, the depositor was not entitled to a priority over general creditors. *Butcher v. Butler*, 114 S. W. 564, 566, 134 Mo. App. 61.

A "general deposit" of money in a bank is a loan and transforms the funds from ready money into a chose in action. *Davenport v. State Banking Co.*, 54 S. E. 977, 980, 126 Ga. 136, 8 L. R. A. (N. S.) 944, 115 Am. St. Rep. 68, 7 Ann. Cas. 1000.

#### Special deposit distinguished

Deposits in banks are either general or special. Where a special deposit is made, the bank is merely a trustee, the property right remaining in the depositor. Where a general deposit is made, the property is vested in the bank, and the relation of debtor and creditor is established. *Shoptert v. Indiana Nat. Bank*, 83 N. E. 515, 517, 41 Ind. App. 474.

Deposits in a bank are of two classes, special when the identical or other thing deposited is to be restored or is given for some specified purpose or is received by the bank as a collecting agent, such collection to be remitted, the property in the deposit in such case remaining in the depositor, the bank being the bailee or agent; and general special deposits which comprise all moneys simply deposited in the bank on account of the depositor to be withdrawn from time to time by him, such a deposit transferring the ownership of the money to the bank, and creating the relation of debtor and creditor between the bank and depositor. *City of Miami v. Shutts*, 51 South. 929, 931, 59 Fla. 462.

If the agreement between a bank and its depositor is that the identical coin or currency shall be laid aside and returned, it is a special deposit, but if the money is to be returned, not in the specific coin or currency deposited, but in an equal sum, it is a general deposit. *Warren v. Nix*, 135 S. W. 896, 899, 97 Ark. 374.

Where money or its equivalent is deposited in a bank without any special agreement, the law implies that it is to be mingled with other funds of the bank, and the relation of debtor and creditor is created, and

the deposit is general; the bank becoming the owner of the fund. But, where there is an accompanying agreement that the identical thing deposited shall be returned or paid out for a specific purpose, the transaction constitutes a "special deposit," and the bank is liable only as bailee. *McBride v. American Ry. & Lighting Co.* (Tex.) 127 S. W. 229, 232.

Where money was deposited in a bank to secure payment of compensation under a well drilling contract, and, while the depositor had no right to check against the deposit, there was no agreement that the money should be kept separate from the other funds of the bank, it was a "general" and not a "special" deposit, though the transaction was called a trust fund account. *Butcher v. Butler*, 114 S. W. 564, 566, 134 Mo. App. 61.

#### GENERAL ELECTION

See Next General Election.

The words "general election," when used with reference to city elections, without any qualifying words, must mean the election for municipal officers in general. *State ex rel. Castle v. Schroeder*, 113 N. W. 192, 194, 79 Neb. 759.

The words "general election," as generally used in Constitutions and statutes, have reference to general elections held for the purpose of electing state and county officers. The words "general election," as used in Const. art. 12, § 1, providing that cities and towns heretofore incorporated may become organized under general laws enacted by the Legislature whenever a majority of the electors at a general election shall so determine, mean that the election shall be a general election for the purpose of changing the form of the government, at which the people having the qualifications of electors to vote, shall have a free and open opportunity of expressing themselves upon the questions submitted, and that such qualification shall not be limited to any special qualification, and does not mean that such election shall be at the time of a general election under either the general election laws of the state or the municipality holding such election. *Kessler v. Fritchman*, 119 Pac. 692, 695, 21 Idaho, 30.

An election not held throughout the whole state is not a general state election within Acts 1904, p. 5, No. 3, providing that all general election days shall be legal holidays, and the same is true of parochial elections held in parishes and municipalities. *State v. Duncan*, 43 South. 283, 284, 118 La. 702, 10 L. R. A. (N. S.) 791, 11 Ann. Cas. 557.

In view of Const. art. 7, § 7, and *Mills' Ann. St.* § 1578, referring to annual elections as "general elections," the election of 1903 was a "general election," within Const. art. 14, § 9, providing that, in case of a vacancy in the office of assessor or coroner, the board

of county commissioners shall fill such vacancy by appointment, the appointee to hold office till the next "general election." *Manix v. Selbach*, 74 Pac. 460, 461, 31 Colo. 502.

The term "general election," as used in a statute requiring a petition for local option election to be signed by 25 per cent. of the votes cast at the last preceding "general election," means the last preceding general election at which officers for the state or county embracing the district in question were elected, and not the last congressional election. *Davis v. Henderson*, 104 S. W. 1009, 1011, 127 Ky. 13.

Under Local Option Law (Sess. Laws 1905, p. 44), providing for a local option election on the first Monday of June of any year, to be held at the regular voting places and by the regular judges and clerks of election, and declaring that B. & C. Comp. § 1907, shall be applicable to such elections, a local option election, held during a year in which the general election is held, is a "general election" within section 1907, providing that any person who shall induce another to come into any precinct with intent that he shall vote at any general election, at a place where he is not a resident, shall be punished, and proof that accused induced a voter to remove into a precinct of which he was not a resident, to vote on the liquor question at the general election of the year, and that the voter voted, not only on the liquor question, but for the state, district, county, and precinct officers also, showed a violation of the statute. *State v. Reed*, 97 Pac. 627, 629, 52 Or. 377.

The words "general election," as used in the act of the Legislature of Oklahoma relative to the incorporation and government of cities of the first class, approved February 20, 1908, providing that officers of said cities shall continue in office until the next general election, are intended to refer to the election at which the mayor, city clerk, police judge, city treasurer, city attorney, marshal, and the other general officers of the cities of the first class, shall be elected. *State ex rel. Kline v. Bridges*, 94 Pac. 1065, 1069, 20 Okl. 533.

The expression "general election," as used in Denver City and County Charter, § 22, providing for the reference of ordinances to the electors at a general election, refers to a general city and county election and not to the biennial state and county elections. *Vickery v. Wilson*, 90 Pac. 1034, 1036, 40 Colo. 490.

The words "general election," in Ky. St. 1903, § 1575, making it a misdemeanor to sell liquor "upon the day of any general or primary election," enacted pursuant to Const. § 154, requiring the Legislature to enact laws to prohibit and regulate the sale of liquor on election days, includes the day on which a school election is being held throughout

the state, and it is a misdemeanor to sell liquor on such a day. *Ford v. Moss*, 98 S. W. 1015, 124 Ky. 288.

"General election" is used in the statute requiring the registration of electors, or, in lieu thereof, the furnishing by them of affidavits showing their qualifications as a prerequisite to receiving their votes at a general election, to identify and designate the whole election, held on the Tuesday after the first Monday in November in even numbered years, and applies to all electors desiring to vote on that day either for state officers on any other question submitted at the same time, and, unless such electors have registered or furnished the prescribed affidavits as a substitute, they are not entitled to vote on the question of dividing a county and creating a new county, submitted at a general election in a city under the operation of the law. *Fitzmaurice v. Willis*, 127 N. W. 95, 96, 20 N. D. 372.

Local Option Law (St. 1911, p. 601) § 6, provides that if a petition for an election is certified within six months, and not less than 40 days before the holding of the next general state or general municipal election, the question shall be submitted at said "general election" otherwise at a special election held within a certain time, and Primary Election Law (St. 1911, p. 769), as amended by St. 1911, Ex. Sess. p. 66, designates May 14, 1912, as the day on which the electors qualified to vote thereat shall select delegates to the national convention, and section 1, subd. 1, thereof, defines "primary election" as any and every primary nominating primary election provided for by this act, and subdivision 4 defines "election" as the general, or city, or city and county election as distinguished from a "primary election," and subdivision 5 defines "November election" as the presidential election. To be general, in the sense implied by the Legislature, the election must be one where every qualified voter of the state or district or division of the state where required by law to be held has the right to vote for whomsoever he pleased, and hence the presidential primary election is not a "general election" within the meaning of that term as used in the local option law. *Bigelow v. Board of Sup'rs of Sonoma County*, 124 Pac. 554, 555, 18 Cal. App. 715.

Under Pol. Code, § 2023, providing that no person shall be permitted to vote at any general election unless duly registered, and section 2024 defining a "general election" as one at which a vote is required in every voting precinct, registration is not applicable to a city election as involved in the submission of the question of whether intoxicating liquor shall be sold at retail. *Treat v. Morris*, 127 N. W. 554, 556, 25 S. D. 615.

Rem. & Bal. Code, § 6294 (Local Option Law [Laws 1909, c. 81] § 3), provides that any unit hereby created may hold a special

local option election, upon filing with the clerk of any city or town, unit, or the county auditor of any county unit of a petition subscribed by qualified electors of the unit equal to 30 per cent. of the electors voting at the last general election within such unit. The act as originally introduced into the House of Representatives provided that the petition should be signed by a percentage of those voting at the "last general election," but, as introduced into the Senate, the words "at the city election last held therein" were used, and in the Senate substitute bill it was provided that the petition should be drawn with reference to the "last general biennial state election." Held, that the words "last general election" refer to any election at which there had been a general expression of the public will, whether it be a state, county, or city election; a "general election" being one held at stated intervals to fill the terms of public officers regularly expiring under the law at which every qualified elector has the right to participate. *State ex rel. Griffin v. Superior Court for Chehalis County*, 127 Pac. 120, 121, 70 Wash. 545.

A general election in a city for the purpose of electing city officers to carry out the change to the commission form of government was a "general election" within Local Option Law (Laws 1909, c. 81) § 3, permitting any unit of territory thereby created to hold a special election under the statute upon the filing of a petition subscribed by at least 30 per cent. of the electors voting at the last general election. *State ex rel. Forgues v. Superior Court of Lewis County*, 127 Pac. 313, 314, 70 Wash. 670.

#### November election

Local Option Law (Laws 1887, p. 179) § 1, provides for the submission of the question whether intoxicating liquors shall be sold to the qualified voters residing outside of certain cities and towns, provided that no such election shall take place on "any general election day or within sixty days of any general election." Section 2 provides for the submission of the same question in such cities and towns, but not "within 60 days of any municipal or state election." The statutory rule of construction (Rev. St. 1889, § 6570) that the term "general election" refers to the ordinary biennial November election has existed since before the passage of the local option law, and is made controlling, unless plainly repugnant to the intent of the Legislature or of the context. The original law dealing with primaries (Rev. St. 1889, §§ 4795-4798) was merely extended for the protection of political parties who might choose such method of selecting candidates; and the primary feature was made a part of the election system by Laws 1907, p. 263, in which the word "election" is used but once, and in an amendment to a section of the act. The primary authorized thereby is simply a part of the machinery provided for the holding of

general state elections. Held, that such primary is not a "general election," within the meaning of the local option law; and the holding of a local option election within 60 days thereof is not prohibited. *State ex rel. Million v. Graham*, 151 S. W. 729, 731, 246 Mo. 259.

The Constitution recognizes as the "general election" the biennial November election, though one of the election days fixed by the Legislature, and one necessarily general, is recognized by the Const. art. 13, § 6, and the Constitution fixes the election day for certain judges. *Carton v. Secretary of State*, 115 N. W. 429, 438, 151 Mich. 337.

#### GENERAL ELECTION LAWS

See Under the General Election Laws.

#### GENERAL EXECUTION

A "general execution" is one that demands a levy on the debtor's property generally, and it follows a general judgment based upon personal service. *Smith ex rel. McElhany v. Rogers*, 90 S. W. 1150, 1152, 191 Mo. 334.

#### GENERAL FINDING

A "general finding" is a finding on all the issues in favor of the successful party. *Board of Com'rs of Montezuma County v. Frederick*, 115 Pac. 514, 515, 50 Colo. 464.

In a case tried to the court, a general finding includes a finding of all the facts necessary to sustain the claims of the party in whose favor the judgment was rendered. *De Vitt v. City of El Reno*, 114 Pac. 253, 255, 28 Okl. 315.

#### GENERAL FRANCHISE

The charter of a corporation is its "general franchise," which can be repealed at the will of the Legislature pursuant to its reserved power to repeal; while a "special franchise" is the right granted by the public to use property for a public use but with private profit, and such a franchise, when acted on, is vested property and cannot be repealed, unless power to do so is reserved in the grant, though it may be condemned on making compensation. *Lord v. Equitable Life Assur. Society of United States*, 87 N. E. 443, 447, 194 N. Y. 212, 22 L. R. A. (N. S.) 420.

#### GENERAL FUND

The fine and forfeiture fund is a "general fund" of the county within the meaning of section 15 of article 12 of the Constitution, relating to the payment of county officers. *Board of Com'rs of Hillsborough County v. Savage*, 58 South. 835, 837, 63 Fla. 337.

"The phrase 'general fund,' as applied to the fiscal management of a Kansas county, has a definite and well-recognized meaning. It covers the proceeds of a tax levied to provide for the usual current expenses. The building of a courthouse is a special or ex-

traordinary matter, and not one included in the purposes for which the general tax levy is made." *Smith v. Haney*, 85 Pac. 550, 551, 73 Kan. 506.

The provisions in Code, § 894, authorizing any city to levy an "improvement fund tax" to pay for street improvements, and section 830, providing for payment of street improvements out of the "city improvement fund," refer to the same fund, and contracts for paving which provide for payment of difference between amount due for paving and amount raised by special assessments out of the "paving fund" and "general paving fund" refer to the fund specified in the statutes. *Corey v. City of Ft. Dodge*, 111 N. W. 6, 8, 133 Iowa, 666.

There is no statutory authority for the use of the term "general revenue fund" in county taxation. All funds are special in the sense that they may be applied only to such purposes as may be properly embraced therein. *Harrell v. Woodberry*, 56 South. 297, 62 Fla. 205.

#### GENERAL GUARANTY

A guaranty executed and attached to a promissory note at the time it is indorsed and delivered imposes no trust or confidence in the indorsee, and, though it specifically names him, will be considered a "general guaranty" of the note, and not a "special guaranty" personal to the indorsee, and it may be transferred by assignment upon the further indorsement of the note. *Everson v. Gere*, 25 N. E. 492, 493, 122 N. Y. 290; *Id.* 40 Hun (N. Y.) 248 (citing and adopting *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204).

#### GENERAL IMPARLANCE

A "general imparlance" is nothing else than a continuance of the case until a further date. *Otis v. Ellis*, 2 Atl. 851, 78 Me. 75.

#### GENERAL INSANITY

Insanity proved or admitted to have existed at any particular time will be presumed to continue only in cases of "general or habitual insanity," which is insanity of a permanent nature. *Hudson v. Hudson*, 57 S. E. 162, 163, 144 N. C. 449.

If the trial court see fit, it may recognize monomania, or so-called "partial insanity," as distinguished from "general insanity," when instructing the jury in a criminal case involving that form of mental derangement as a defense; but it is not imperative that it should do so, and, if the proper tests of criminal responsibility for the act in question be stated in the instructions, the substantial rights of the defendant are sufficiently protected. *State v. Moore*, 102 Pac. 475, 477, 80 Kan. 232.

#### GENERAL INSTRUCTION

A "general instruction" is one which puts certain facts to the jury, and tells them

that if they find that way plaintiff is entitled to recover. *Flaherty v. St. Louis Transit Co.*, 106 S. W. 15, 20, 207 Mo. 318.

The term "general instructions," in the rule that it is reversible error by instructions to inform the jury of the effect of their answers to the questions of the special verdict on the liability of the parties, means such instructions as are appropriate only to a general verdict, and which also inform the jury of the effect of their answers on the final result. *Banderob v. Wisconsin Cent. Ry. Co.*, 113 N. W. 738, 751, 133 Wis. 249.

#### GENERAL ISSUE

A plea of the "general issue" in detinue is the equivalent of a plea of "non detinet" at common law, and puts in issue the plaintiff's right of recovery. *Ryall v. Pearson Bros.*, 41 South. 673, 148 Ala. 668 (citing *Carlisle v. People's Bank*, 26 South. 115, 122 Ala. 446).

The plea of "general issue" on strict principle operates only as a denial in fact of the express promise or contract where one is alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. But by an early relaxation of the principle the defendant, in actions on express contracts, was admitted under the general issue, to the same latitude of defense which was open to him in actions upon the common count, and was permitted to adduce evidence, showing that on any ground common to both kinds of assumpsit he was under no legal liability to the plaintiff for the cause at the time of pleading. The practice in the English courts by recent rules has been brought back to its original strictness and consistency with principle. In the United States it remains, for the most part, in its former relaxed state; and accordingly, where it has not been otherwise regulated by statute, the defendant, under this issue, may give in evidence any matters, showing that the plaintiff never had any cause of action, such as the nonjoinder of another promisee, the defendant's infancy, lunacy, drunkenness, or other mental incapacity; coverture at the time of contracting; duress; want of consideration; illegality; release or parol discharge or payment before breach; material alteration of the contract; that the plaintiff was an alien enemy at the time of contracting; or that the contract was void by statute, or by the policy of the law; nonperformance of condition precedent by the plaintiff; or, in certain cases, by the act of God; or any like manner of defense. The defenses allowable under the general issue plea at common law, in the absence of statutory changes, are still open to the defendant, except the defense of arbitration and award, and possibly the defense of alien enemy. *Seff v. Brotman*, 70 Atl. 106, 107, 108, 108 Md. 278 (quoting 2 Greenleaf, Evidence; citing *Poe*, Pl. §§ 607-609; *Yingling v. Kohlhaas*, 18 Md. 148; *Herrick v. Swomley*, 56 Md. 439).

**GENERAL JUDGMENT**

A "general judgment" is a judgment in personam. *Smith v. Collopy*, 55 Atl. 805, 806, 69 N. J. Law, 365.

**GENERAL LAW**

See Conflict with General Law.

See, also, Local Law; Special Law.

A general law is one framed in general terms, restricted to no locality, and operating upon all alike. *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 218, 18 Idaho, 695, 32 L. R. A. (N. S.) 534; *Sample v. City of Pittsburg*, 62 Atl. 201, 207, 212 Pa. 533.

The law is a "general" and not a "local law," notwithstanding the fact that local laws on the subject were passed at the same session and approved on the same day. *State ex rel. Collman v. Pitts*, 49 South. 441, 442, 160 Ala. 133, 135 Am. St. Rep. 79.

Where all objects which can constitutionally be included in a class are by legislation recognized by inclusion therein, such legislation will be general in the constitutional sense, and *P. L. 1907, p. 365, art. 25*, supplementary to the school law creating and providing for the Teachers' Retirement Fund, is not a private, local, or special law, violative of Const. art. 4, § 7, par. 11, prohibiting the passage of such laws in certain cases, because for constitutional reasons it did not compel teachers whose contracts antedated the enactment of the supplement to become members of the fund, but only those whose contracts were made after it became effective. *Allen v. Board of Education of City of Passaic*, 79 Atl. 101, 103, 81 N. J. Law, 135.

A law applicable to all the people of the state and operating in all parts of the state would be most "general," but a law may be "general" without affecting all the people of the state. *Koster v. Coyne*, 97 N. Y. Supp. 433, 435, 110 App. Div. 742.

Highway Law, § 59a, added by Laws 1910, c. 701, providing that awards under any statute for damages to real estate by change of grade of any street, etc., shall bear interest, is a "general," and not a local law, as affecting the sufficiency of the title of the act. *People ex rel. Central Trust Co. of New York v. Prendergast*, 95 N. E. 715, 717, 202 N. Y. 188.

Acts 1904, p. 197, c. 93, amending Ky. St. 1903, § 1596a, subsec. 2, making the sheriff ex officio a member of the county board of election commissioners, so as to provide that in counties containing cities of the second class the circuit court clerk, instead of the sheriff, shall be a member of the board, is repugnant to Const. § 59, prohibiting the enactment of a "special law" where a general law can be made applicable, and forbidding the passage of special acts to provide for

conducting elections. *Droege v. McInerney*, 87 S. W. 1085, 1088, 120 Ky. 796.

Act Feb. 25, 1904, 24 St. at Large, p. 485, amending General Dispensary Law March 6, 1896, 22 Stat. at Large, p. 123, § 7, and levying a tax of one-half a mill on counties voting out the dispensary with the exception of two counties which never had dispensaries, is not a violation of Const. art. 3, § 34, as a "special law," where a general law could be applicable, but the law is general with special provisions. *Murph v. Landrum*, 56 S. E. 850, 855, 76 S. C. 21.

A law is "general" when it applies to all of a class, the classification being a proper one, and a constitutional provision requiring all "laws of a general nature" to have a uniform operation has no application to city ordinances adopted in the exercise of police power, giving the city exclusive right to remove garbage. *In re Zhizhuzza*, 81 Pac. 955, 957, 147 Cal. 328.

**As relating to all of a class**

The word "general" comes from "genus," and relates to a whole genus or kind, or to a whole class or order, so that as applied to statutes a "general law" is not necessarily one operative on all persons or things, but rather one which affects all of a class of persons or things. *Smith v. State (Tex.)* 113 S. W. 289, 291; *Commonwealth v. Mathues*, 59 Atl. 961, 976, 210 Pa. 372 (quoting and adopting definitions in And. Dict.; *Bouv. Law Dict.*).

A statute relating to persons and things as a class is a "general law," while one relating to particular persons or things of a class is a "special law." *State v. Miksicek*, 125 S. W. 507, 511, 225 Mo. 561, 135 Am. St. Rep. 597; *Gay v. Thomas*, 46 Pac. 578, 586, 5 Okl. 1; *Ex parte Berger*, 90 S. W. 759, 762, 193 Mo. 16, 3 L. R. A. (N. S.) 530, 112 Am. St. Rep. 472, 5 Ann. Cas. 383 (citing *State ex rel. Lionberger v. Tolle*, 71 Mo. 650); *City of Little Rock v. Town of North Little Rock*, 79 S. W. 785, 787, 72 Ark. 195 (citing *Little Rock & F. S. Ry. Co. v. Hanniford*, 5 S. W. 294, 49 Ark. 291; *Wheeler v. City of Philadelphia*, 77 Pa. 348); *Sanchez v. Fordyce*, 75 Pac. 56, 57, 141 Cal. 427; *Title & Document Restoration Co. v. Kerrigan*, 88 Pac. 356, 365, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; *Boise City Irrigation & Land Co. v. Stewart*, 77 Pac. 25, 28, 10 Idaho, 38 (quoting *Sutherland, Stat. Const.* § 121, and citing *Brooks v. Hyde*, 37 Cal. 366); *Koster v. Coyne*, 97 N. Y. Supp. 433, 435, 110 App. Div. 742 (quoting *In re New York Elevated R. Co.*, 70 N. Y. 327, 350).

An act applying uniformly to the whole or any single class of individuals or objects, where the classification is founded upon some natural intrinsic or constitutional distinction, is a "general law." *Board of Education of City and County of San Fran-*

cisco v. Alliance Assur. Co., 159 Fed. 994, 999; Ex parte King, 106 Pac. 578, 579, 157 Cal. 161.

An act to be "general" in its scope need not include all classes of individuals, but it is enough if it relates to and operates uniformly upon the whole of any single class, though the classification must be a reasonable one. In re Martin, 106 Pac. 235, 237, 157 Cal. 51, 26 L. R. A. (N. S.) 242.

"The term 'general,' when used in antithesis to 'special,' means relating to a class, instead of to persons only of that class." City of Baltimore v. Allegheny County Com'rs, 57 Atl. 632, 636, 99 Md. 1 (quoting Cooley, Const. Lim. 165, note).

A law which excepts a part of a given class is not general and uniform. State ex rel. Rocky Mountain Bell Tel. Co. v. City of Red Lodge, 76 Pac. 758, 760, 30 Mont. 338.

A law general in its nature and uniform in its operation upon all persons coming within its scope is a "general law." Tarrantina v. Louisville & N. R. Co., 98 N. E. 999, 1101, 254 Ill. 624, Ann. Cas. 1913B, 1058.

A law having a uniform operation as to all persons uniformly situated is a "general law," and not a special law. Clendaniel v. Conrad (Del.) 83 Atl. 1036, 1044.

A law is general which operates alike upon all the inhabitants, or all the cities, or all the villages, or other subjects of a class of subjects. A law is general, in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by law. State ex rel. Corrison v. Rogers, 100 N. W. 659, 660, 93 Minn. 55 (quoting State v. Cooley, 58 N. W. 150, 56 Minn. 540); State ex rel. Board of Education of City of Minneapolis v. Brown, 106 N. W. 477, 482, 97 Minn. 402, 5 L. R. A. (N. S.) 327; Bennett v. Nichols, 80 Pac. 392, 396, 9 Ariz. 138; Richardson v. Board of Education, 84 Pac. 538, 540, 72 Kan. 629 (Bouv. Law. Dict.).

A "general law" is one that embraces a class of subjects and does not exclude any subject or place naturally belonging to the classification when considered in its relation to the subject of classification. McGarvey v. Swan, 96 Pac. 697, 701, 17 Wyo. 120.

A statute providing for an attorney's lien on his client's cause of action, providing that attorneys may contract for a percentage of the proceeds of any settlement and that on notice to a defendant of an agreement between the attorney and client, stating the interest the attorney has in the cause of action, if defendant after such notice settles the cause of action without consent of the attorney, defendant shall be liable for the attorney's lien, is a "general law" and not class legislation on the ground that it simply

applies to attorneys at law. O'Connor v. St. Louis Transit Co., 97 S. W. 150, 153, 198 Mo. 622, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

A law which operates only upon a class of individuals is none the less a "general law," if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law. The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be founded on some natural or intrinsic or constitutional distinction (City of Pasadena v. Stimson, 27 Pac. 604, 607, 91 Cal. 238, 251), but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class. The classification must not be arbitrary, for the mere purpose of classification, but must be founded upon some natural or intrinsic or constitutional distinction, which will suggest a reason which might rationally be held to justify the diversity in the legislation. Deyoe v. Superior Court of Mendocino County, 74 Pac. 28, 29, 140 Cal. 476, 98 Am. St. Rep. 73 (citing People v. Central Pac. R. Co., 38 Pac. 905, 105 Cal. 576); Title & Document Restoration Co. v. Kerrigan, 88 Pac. 356, 365, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199 (citing McDonald v. Conniff, 34 Pac. 71, 99 Cal. 386, 391; Deyoe v. Superior Court of Mendocino County, 74 Pac. 28, 140 Cal. 476, 98 Am. St. Rep. 73; People v. Central Pac. R. Co., 38 Pac. 905, 906, 105 Cal. 576, 584; City of Pasadena v. Stimson, 27 Pac. 604, 91 Cal. 251; Rode v. Siebe, 51 Pac. 869, 119 Cal. 518, 39 L. R. A. 342; Darcy v. City of San Jose, 38 Pac. 500, 104 Cal. 642).

"In order to determine whether or not a given law is 'general,' the purpose of the act and the objects on which it is intended to operate must be considered. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class, to be general. But if the characteristics used to distinguish the objects to which the legislation applies from others be not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification is incomplete and faulty, and the legislation not general, but local and special." Parker-Washington Co. v. Kansas City, 85 Pac. 781, 782, 73 Kan. 722.

A "general law" within the meaning of Const. art. 11, § 2, as amended June 4, 1906, providing that corporations may be formed under general laws, but shall not be created by special laws, is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights, and privileges conferred, while a special law is one conferring on certain individuals or citizens of a certain locality rights and powers or liabilities not granted to or imposed on others similarly situated. *Straw v. Harris*, 103 Pac. 777, 780, 54 Or. 424; *Farrell v. Port of Columbia*, 91 Pac. 546, 547, 50 Or. 169.

An act relating to persons or things as a class is a general and not a special law, and hence Act Oct. 14, 1879 (Laws 1878-79, p. 125), relating to the suspension and removal of railroad commissioners, is not a special law. *Gray v. McLendon*, 67 S. E. 859, 868, 134 Ga. 224. And a statute providing for an attorney's lien on his client's cause of action, and for its protection against settlement between the parties is a "general law," though it simply applies to attorneys at law. *O'Connor v. St. Louis Transit Co.*, 97 S. W. 150, 153, 198 Mo. 622, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

A law which defines the procedure for determining conflicting rights of appropriators and owners of water rights, and applying to all alike of this peculiar class of persons and rights, is a "general" and not a special law, in the constitutional sense. *Boise Irrigation & Land Co. v. Stewart*, 77 Pac. 25, 28, 10 Idaho, 38.

Act No. 70 of 1886, § 1, which provides that in suits against railroads for the killing, etc., of stock, it shall suffice in order to recover to prove the killing or injury unless defendant shows that it did not result from carelessness on its part, etc., is a "general law" applying throughout the state and to all railroads, and, since it merely makes a change in the rules of procedure and evidence in a particular class of cases, does not discriminate invidiously between persons, and hence does not contravene Const. art. 48, §§ 15, 18, forbidding the passage of local or special laws regulating the practice of courts or changing the rules of evidence. *Learnned & Koontz v. Texas & P. Ry. Co.*, 54 South. 931, 932, 128 La. 430.

Laws 1907, p. 398, c. 226, which declares its purpose to be to carry into effect the initiative and referendum powers reserved to the people in Const. art. 4, §§ 1, 1a, as to general, local, and special legislation, and to regulate elections thereunder, and to carry into effect the amendment of article 11, § 2, granting cities and towns the right to amend their charters, and which provides (section 2) a form of initiative petition applicable to "any law," and provides that the circuit court of the county in which the municipality con-

cerned is situated shall have jurisdiction over controversies arising under the act, is a general law within Const. art. 4, § 1a, requiring the manner of exercising the initiative and referendum to be prescribed by general laws, except in cases of cities and towns, and is broad enough to include proceedings by initiative to amend the charter of the port of Portland, a municipality not a city or town, but incorporated under a state law. *Farrell v. Port of Portland*, 98 Pac. 145, 147, 52 Or. 582.

#### **As relating to all in like circumstances**

A law is a general law which operates alike on all persons or officers in the state who are similarly situated, though it does not operate equally on every individual or officer in the state. *People v. Nellis*, 94 N. E. 165, 169, 249 Ill. 12.

Laws are general and uniform, not because they operate on all alike, for they do not, but because every one who is brought within the circumstances and conditions propolis Traction & Terminal Co. v. Kinney, 85 Ind. N. E. 954, 956, 171 Ind. 612, 23 L. R. A. (N. S.) 711.

Laws are "general" and uniform, not merely when they operate upon every person in the state, but when every person who is brought within the relations and circumstances provided for is affected thereby. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation. *Eckerson v. City of Des Moines*, 115 N. W. 177, 185, 137 Iowa, 452.

A law operating alike upon all standing in the same relation thereto is general. Thus a territorial act exempting any railroad constructed pursuant thereto from taxation for a term of years is not in conflict with an act of Congress forbidding special laws granting special or exclusive privileges. *Bennett v. Nichols*, 80 Pac. 392, 396, 9 Ariz. 138.

Laws 1905, c. 115, prohibiting saloons within five miles of any United States government sanatorium, and within specified distances of any military reservation, and of enumerated educational institutions, is a "general" statute, and not a special one, within Act Cong. July 30, 1886, c. 818, 24 Stat. 170, prohibiting the special laws, though there was but one United States sanatorium in the territory at the time of the passage of the act. *Rapp v. Venable*, 110 Pac. 834, 836, 15 N. M. 509.

#### **Character of subject-matter**

Whenever the subject-matter of legislation either does or may exist in or affect every part of the state, such legislation is a "law of general nature." *Pump v. Lucas County Com'rs*, 69 N. E. 666, 69 Ohio St. 448.

A "law of a general nature," within Const. art. 2, § 17, providing that all laws of a general nature shall have uniform operation throughout the state, is one whose subject-matter is common to all the people of the state. "Laws of a general nature" are such as relate to a subject of a general nature and subjects of a general nature that exist or may exist throughout the state or which affect the people of the state generally or in which the people generally have an interest. The difference between a "law of a general nature" and a "general law" is that the subject-matter of the former must be one common to the people of the entire state, while all that is required of the latter is uniformity of operation. Whether or not the subject of an act which is either general or special in form is one of general nature is always a question for judicial determination. *Richardson v. Board of Education of Kansas City*, 84 Pac. 538, 540, 72 Kan. 629.

"Without undertaking to discriminate nicely or define with precision, it may be said that the character of a law as 'general' or 'local' depends on the character of its subject-matter. If that be of a general nature, existing throughout the state, in every county, a subject-matter in which all the citizens have a common interest, \* \* \* then the laws which relate to and regulate it are laws of a 'general' nature." Hence a law providing for the pensioning of school teachers in school districts in cities of the third grade of the first class violates the constitutional requirement that all laws of a "general nature" shall have a uniform operation throughout the state; such law at the time of its passage and taking effect being applicable only to one city and containing a provision requiring the board of education to select three members of a pension committee at its first regular meeting within 30 days after the law went into effect, and making no provision in such regard for cities which might thereafter come into the class. *Hibbard v. State*, 64 N. E. 109, 111, 85 Ohio St. 574, 58 L. R. A. 654 (citing *Kelley v. State*, 6 Ohio St. 269, 271).

Public Service Commissions Law (Laws 1907, p. 889, c. 429), creating commissions to regulate certain public service corporations and whose provisions embrace the entire state, is a "general," rather than a local or private act, and hence is not within New York Const. art. 3, § 16, providing that no local or private act shall embrace more than one subject, etc., and the fact that the act requires certain expenses of the commission in one of the two districts of the state to be met by a specified municipality does not make it a local law. *Gubner v. McClellan*, 115 N. Y. Supp. 755, 758, 130 App. Div. 716.

#### As public act or law

In an article in the *Atlantic Monthly* for January, 1906 (volume 97, p. 69), Mr.

Samuel P. Orth states that, "A 'public law' is a measure that affects the welfare of the state as a unit; a 'private law' is one that provides an exception to the public rule. The one is an answer to a public need, and the other an answer to a private prayer. When it acts upon a public bill, a Legislature legislates; when it acts upon a private bill, it adjudicates. It passes from the function of a lawmaker to that of a judge. It is transformed from a tribunal of the people into a justice shop for the seeker after special privilege." *Anderson v. Board of Com'rs of Cloud County*, 95 Pac. 583, 586, 77 Kan. 721.

The charter of a city in Oregon is a "public law" of the state of which all courts take judicial notice. *Naylor v. McCulloch*, 103 Pac. 69, 72, 54 Or. 305.

A public law is one not designated by the statute itself as private as provided by Const. art. 4, § 27, and of which court will take judicial notice. *Farrell v. Port of Columbia*, 91 Pac. 546, 547, 50 Or. 169.

The common-law definition of a crime, as given by Blackstone, is, "An act committed or omitted in violation of a public law"; and the term "criminal prosecutions," as employed in Const. 1819, art. 1, § 10, giving the accused the right to be heard in all "criminal prosecutions," relates exclusively to prosecutions for violations of the "public laws of the state," and a city ordinance is not a public law of the state, but a local law of the particular corporation, made for its internal practice and good government. *Costello v. Feagin*, 50 South. 134, 135, 162 Ala. 191.

"'Public' and 'general,' as applied to statutes, are sometimes synonymous, depending upon the context; but they are not so in all cases. Every general law is necessarily a public one, but every public law is not a general one. Thus an act incorporating a city is a public law, but it is not a general law, because it is applicable to a particular locality." *Farrell v. Port of Columbia*, 91 Pac. 546, 547, 50 Or. 169.

A "general law" is a law which operates throughout the state alike, upon all the people or all of a class. Every "general law" is necessarily a public law, but every public law is not a "general law." Any law affecting the public within the limits of a county or community would be a public law, though not a "general law." *Wallace v. Board of Revenue*, 37 South. 321, 322, 140 Ala. 491 (citing *Holt v. City of Birmingham*, 19 South. 735, 111 Ala. 373); *State ex rel. Attorney General v. Sayre*, 39 South. 240, 142 Ala. 641, 4 Ann. Cas. 656 (quoting and adopting definition in *Holt v. City of Birmingham*, 19 South. 735, 736, 111 Ala. 372, 373).

#### Territorial comprehensiveness

A law which has a bona fide application to the entire state as to some of its chief



features is a "general" and not a "local" law, as defined by Const. 1901, § 110, though it does not apply in every detail. *State ex rel. Collman v. Pitts*, 49 South. 441, 442, 160 Ala. 133, 135 Am. St. Rep. 79.

A law which is general in its terms and is in good faith so framed that all parts of the state may come within the circle of its operation is a "general law." The Constitution defines the "general law" as one which applies to the whole state, and one of the definitions of the word, "apply" is declare or pronounce as suitable. *State ex rel. Covington v. Thompson*, 38 South. 679, 683, 142 Ala. 98.

A law, to be "general," under article 1, § 4, par. 1, of the Constitution, must operate uniformly, throughout the whole state, upon the subject or class of subjects with which it purposes to deal. *Futrell v. George*, 69 S. E. 182, 183, 135 Ga. 265.

Under Const. art. 3, § 56, prohibiting local or special laws as to certain enumerated matters and in other cases where a general law can be made applicable, a general law need not be one general to the extent that it has a uniform operation throughout the state, but simply that in its nature and character it should apply equally to all persons within the territorial limits describing it, and is one whose operation is equal in its effect on all persons or things on which the law is designed to operate at all. *Smith v. State*, 113 S. W. 289, 290, 54 Tex. Cr. R. 298; *Milam v. Same* (Tex.) 114 S. W. 144.

An act is "general," as contradistinguished from, and inconsistent with, "local," in the sense the latter term is used in Const. Wis. art. 4, § 18, providing that no private or local bill shall embrace more than one subject, and that shall be expressed in the title, only when its operation extends to the whole state or perhaps to the whole of some class of localities therein which the Legislature may constitutionally make upon the principle recognized and approved for the classification of cities for the purpose of general legislation. An act is "general" in the restricted sense in which the term is used in article 7, § 21, providing that no general law shall be in force until published when it is of that character within the broad meaning of the term and also when it is "public," in that its effects extend to the people of a locality such as a county, city, town, or village, or a collection of localities not forming a legislative class formed for some legitimate cause; the term "general" and the term "public" being considered in this respect synonymous. When an act is "general" merely because it is "public," it is at the same time "local" and must be tested as to its validity by section 21, art. 7, and section 18, art. 4, as well, and, if it belong to one of the prohibited classes of special legislation, it must also be tested by the constitutional restriction upon that sub-

ject. *Milwaukee County v. Isenring*, 85 N. W. 131, 135, 109 Wis. 9, 53 L. R. A. 635.

#### Classification of municipal corporations

Acts applicable to single cities or to a special class of cities are not the general laws of the state within the meaning of Charter of Atlantic City (P. L. 1902, p. 284) § 21, relating to granting of licenses. *Leeds v. Atlantic City*, 80 Atl. 23, 24, 81 N. J. Law, 230.

Acts 30th Leg. c. 139, known as the "jury wheel law," and providing a particular jury system for all counties having a city containing a population of 20,000 or more according to the census, is a "general" and not a special law, within Const. art. 3, § 56, prohibiting the passage of any local or special law regulating the summoning or impaneling of juries. *Houston Electric Co. v. Faroux* (Tex.) 125 S. W. 922, 923; *Smith v. State*, 113 S. W. 289, 290, 54 Tex. Cr. R. 298; *Milam v. Same* (Tex.) 114 S. W. 144; *Pate v. State*, 113 S. W. 759, 54 Tex. Cr. R. 462.

P. L. 1907, pp. 79, 89, 114, creating boards of fire and police commissioners, boards of finance, and boards of public works in cities having a population of not less than 100,000 nor more than 200,000, are each a "general law," and not a "special law," regulating municipal affairs. *McCarter v. McKelvey* (N. J.) 73 Atl. 884, 885.

Under the Constitution (article 11, § 5) empowering the Legislature to classify the counties by population for the purpose of regulating the compensation of officers, a statute providing for the compensation of officers within any class provided for is a general law, and it is immaterial whether the provision is in a special statute for each class or in a single act providing for all the classes, and an amendment to a statute which affects an entire class is equally a general law. *Crocket v. Mathews*, 106 Pac. 575, 577, 157 Cal. 153.

Rev. St. 1899, c. 91, dividing all the cities in the state into classes, is a "general law," and therefore Rev. St. 1899, c. 91, art. 3, providing a charter for cities of the second class, is not a special enactment, but is a "general law" applicable to all cities the population of which brings them within the class specified. *State v. Binswanger*, 98 S. W. 103, 104, 122 Mo. App. 78.

The local option law (Laws 1909, p. 9), made applicable to every county in the state alike, its provisions being operative in any county after the electors of such county have complied with its provisions in holding an election to determine whether the sale of intoxicants as a beverage shall be prohibited, and the majority of the electors at such election have voted in favor of prohibiting such sale, is a general law, declarative of the policy of the state in regard to traffic in intoxicants. *Mix v. Board of Com'rs of*

Nez Perce County, 112 Pac. 215, 217, 18 Idaho, 695, 32 L. R. A. (N. S.) 534.

#### Regulation of private corporations

The public utilities act of 1911 (Laws 1911, c. 117), providing for the regulation of public service utilities, creating a Public Service Commission with power to establish rates, etc., enacted pursuant to Const. art. 12, §§ 1, 18, authorizing the formation of corporations under general laws, and empowering the Legislature to adopt laws establishing reasonable maximum rates of charges for carriers, is a general law within article 11, § 10, authorizing the incorporation of cities and the adoption of charters subject to general law, and it supersedes ordinances of cities regulating public service corporations. *State ex rel. Webster v. Superior Court of King County*, 120 Pac. 861, 864, 67 Wash. 37, Ann. Cas. 1913D, 78.

#### Regulation of taxation

Act 1884 (P. L. p. 142) for the taxation of railroad and canal property is a "general law" assessing taxes by a uniform rule on the property of all railroad and canal corporations of the state within Act March 4, 1869 (P. L. p. 226), abolishing transit duties, and providing that all corporations theretofore paying transit duties should thereafter pay the tax therein prescribed until the Legislature should "by general law impose a uniform state tax equally applicable to all railroad and canal corporations of this state," and that the corporations should then pay such tax. *United New Jersey R. & Canal Co. v. Baird*, 69 Atl. 472, 474, 75 N. J. Law, 788.

V. S. 365, provides that manufacturing establishments, quarries, mines, and such machinery, tramways, appliances, and buildings as are necessary for prosecuting the business, machinery put into unoccupied buildings, and all capital and personal property used in such business, if the amount invested exceeds \$1,000, may be exempt from taxation for 10 years from the commencement of business if the town so votes, is a "general" statute, and a general vote of the town extending such exemption to all business locating in the town within the statute is sufficient; it not being necessary to vote an exemption to each particular concern to which the exemption was accorded. *Caverly-Gould Co. v. Village of Springfield*, 76 Atl. 39, 40, 41, 83 Vt. 396.

#### Regulation of saloons

An act prohibiting any licensed dramshop keeper from keeping open his dramshop or selling or giving away or otherwise disposing of intoxicating liquors on Sundays applies to all licensed dramshop keepers, and is a "general law." *State v. Grossman*, 113 S. W. 1074, 1075, 214 Mo. 233.

2 Wds. & P. 2D SER.—46

#### GENERAL LEGACY

See, also, General Legatee.

Legacies are divided into two classes, specific and general, and a general legacy is one that is not to be paid from any particular thing belonging to the estate, the delivery of which will fulfill the intent of the testator, but may be paid from the general funds of the estate. In *re Parsons' Estate*, 129 N. W. 955, 956, 150 Iowa, 230.

A general legacy is a gift of personal property by a last will and testament, not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of the same kind. In *re Fisher*, 87 N. Y. Supp. 567, 568, 93 App. Div. 186 (citing *Crawford v. McCarthy*, 54 N. E. 277, 159 N. Y. 514; In *re Wenner*, 110 N. Y. S. 694, 695, 126 App. Div. 939 (quoting *Crawford v. McCarthy*, 54 N. E. 277, 159 N. Y. 518); *Rogers v. Rogers*, 45 S. E. 176, 177, 67 S. C. 168, 100 Am. St. Rep. 721 (quoting and adopting definitions in *Crawford v. McCarthy*, 54 N. E. 278, 159 N. Y. 514; *Pell v. Ball*, Speers Eq. 48).

"A 'general legacy' is one which is payable out of the general assets of testator's estate, being a gift of money or other thing in quantity and not in any way separate or distinct from other things of the like kind." *White v. White*, 53 S. E. 371, 372, 73 S. C. 261.

A "general legacy" may be satisfied out of the general assets of testator's estate without regard to any particular fund or property, and a general legacy has no reference to the actual state of testator's property, and it is supposed that testator has sufficient property to procure for the legatee the amount given him. *Weed v. Hoge*, 83 Atl. 636, 638, 85 Conn. 490, Ann. Cas. 1913C, 542.

A bequest or devise of the residue of an estate is "general" because such residue is not ascertainable at the time of the will. In *re Painter's Estate*, 89 Pac. 98, 100, 150 Cal. 498, 11 Ann. Cas. 760.

All legacies other than that of the residuum are either general or specific. A "general legacy" is one which does not necessitate delivering any particular thing or paying money out of any particular portion of the estate. A residuary bequest is general, though articles bequeathed are enumerated. In *re Martin*, 54 Atl. 589, 594, 25 R. I. 1.

A "demonstrative legacy" is one of a certain amount or quantity, the particular fund or personal property being pointed out from which it is to be paid or taken; it differing from a "general legacy" in that it does not abate upon insufficiency of assets, and from a "specific legacy" in that there is recourse for its payment from the general

estate in the event of ademption. *Thompson v. Stephens*, 75 S. E. 136, 137, 138 Ga. 205.

#### **Specific legacy distinguished**

A legacy is a "general legacy," and not specific, where so given as not to amount to a bequest of a particular thing or money, distinguished from all others of the same kind. In *re Barton's Estate*, 118 N. Y. Supp. 1087, 1090, 64 Misc. Rep. 242.

A "general legacy" is one payable out of the general assets of testator's estate, while a "specific legacy" is a gift by will of a specific article or particular part of an estate, which is identified and distinguished from all others of the same nature, and is to be satisfied only by the delivery and receipt of the particular thing given. Thus a bequest by testatrix of any and all sums that might thereafter be payable to her or her estate, as the proceeds of any insurance on her husband's life, to her husband's five sisters, or such of them as should be living at the time such insurance money should be actually collected and received by testatrix's executors, etc., was a "specific legacy." *Nusly v. Curtis*, 85 Pac. 846, 847, 36 Colo. 464, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134.

The distinction between a specific and a demonstrative legacy involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all the other provisions of the will. A specific legacy is a bequest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind, while a general legacy is payable out of the general assets of the estate. In *re Stilphen*, 60 Atl. 888, 890, 100 Me. 146, 4 Ann. Cas. 158. See, also, *Rogers v. Rogers*, 45 S. E. 176, 177, 67 S. C. 168, 100 Am. St. Rep. 721, holding a bequest of all claims held by testator against his father and of all interest in his father's estate to be a specific legacy.

Where the thing bequeathed is by the terms of the will individuated so that it is distinguished from all others of the same kind, it is a "specific legacy," and hence a bequest of all "my household goods, cash on hand or in bank, life insurance and all other personal property of every description" was a "specific legacy" so far as the household goods, cash, and insurance were concerned, though a "general legacy" as to any other property passing by the bequest. *Kearns v. Kearns*, 76 Atl. 1042, 77 N. J. Eq. 453, 41 L. R. A. (N. S.) 445.

#### **Stock or bonds**

A legacy of shares of stock given generally, and without any indication that testa-

tor intended to bequeath particular stock held by him at the date of the will or existing as a part of his estate, is a general legacy, and, if the shares bequeathed are not in testator's possession at the time of his death, the gift is considered to be a direction to the executors to purchase the securities for the legatee with his general estate. *Blair v. Scribner*, 57 Atl. 318, 324, 65 N. J. Eq. 498 (citing *Norris v. Thompson's Ex'rs*, 16 N. J. Eq. 218; 2 *Williams Ex'rs [R. & T. Ed.]* \*1026; 3 *Pom. Eq. Juris.* § 1132; 2 *White & T. Lead. Cas. Eq.* [4th Am. Ed.] 610). See, also, In *re Snyder's Estate*, 66 Atl. 157, 158, 217 Pa. 71, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488.

#### **GENERAL LEGATEE**

"A general legatee is one who has a bequest of a specified quantity, payable out of the personal assets generally." In *re Goggin's Estate*, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

#### **GENERAL LEGISLATION**

See General Law.

#### **GENERAL LOCALITY**

The phrase "general locality" and the word "neighborhood" imply a considerable territory, and cannot be used in a legal sense as describing a circle on a street of a diameter of about six feet. *Moriarty v. City of New York*, 116 N. Y. Supp. 323, 324, 132 App. Div. 10.

#### **GENERAL MANAGER**

A "general manager" of a corporation is "the person who really has the most general control over the affairs of a corporation and who has knowledge of all its business and property, and who can act in emergencies on his own responsibility, and who may be considered the principal officer." *Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill Co.*, 93 Pac. 706, 713, 14 N. M. 300 (quoting and adopting the definition in 4 *Words and Phrases*, p. 3073); *Manross v. Uncle Sam Oil Co.*, 123 Pac. 385, 386, 88 Kan. 237 (citing 4 *Words and Phrases*, pp. 3073, 3074). He is its general agent; that is, one authorized to transact any business in which it may be engaged. *Booker-Jones Oil Co. v. National Refining Co. (Tex.)* 132 S. W. 815, 816. And he is impliedly invested with authority to do such acts as are necessary in the ordinary course of the company's business, but, in the absence of authority from the board of directors, he may not make a contract, on behalf of the corporation, with a third person, whereby the latter shall have the entire control over a specified part of the company's business for a fixed compensation and a percentage of profits therein, to continue for a term of years. *Wainwright v. P. H. & F. M. Roots Co.*, 97 N. E. 8, 10, 176 Ind. 682.

In the absence of proof as to the nature of services or powers of a corporation em-

ployé designated "General Manager," the words would simply import that he is a general executive officer for all the ordinary business of the corporation, and no inference can be indulged in that he possessed authority to make a contract for the purchase of an automobile binding on the corporation. *Studebaker Bros. Co. v. R. M. Rose Co.*, 119 N. Y. Supp. 970, 972, 65 Misc. Rep. 322. But by giving to one of its officers the title "general manager" a railroad corporation holds him out to the world as possessing implied power to make in its behalf a contract to repair a sleeping car used on its line. *Raleigh & G. R. Co. v. Pullman Co.*, 50 S. E. 1008, 1010, 122 Ga. 700.

The term "general manager" is not equivalent to "local agent" in Rev. St. 1895, art. 1222, requiring the citation to be served on the president or on the "local agent" representing the company in the county in actions against an incorporated company, and under this article, construed in view of article 1223, permitting process to be served on the president, "general manager," or upon any local agent within the state, in suits against a foreign corporation, service on the manager of a domestic corporation is not sufficient to sustain a default judgment. *Latham Co. v. J. H. Radford Grocery Co.*, 117 S. W. 909, 910, 54 Tex. Civ. App. 510.

#### As laborer

See Laborer.

#### GENERAL NEIGHBORHOOD

See Same General Neighborhood.

#### GENERAL OATH

Where a party to a suit, on the trial thereof, presents himself as a witness in support of the charges against the adverse party on his account book, and voluntarily takes the "general oath" to tell the truth, the whole truth, and nothing but the truth, legally administered, instead of the "suppletory oath," a more restricted oath, to make just and true answers to such questions as shall be asked by the court or by the order thereof, and testifies untruly, wittingly, and willingly to matters material and legitimately derivable from him, he will come within the purview of Rev. St. c. 158, § 1, and may be convicted of perjury. *State v. Keene*, 26 Me. 33, 35.

#### GENERAL OBLIGATION

Eugene City Charter, § 112, as amended, declares that water bonds, in addition to being a "general" obligation of the city, shall be a first and exclusive lien on the water plant, so as to be secured with money derived from the sale of the water bonds, and provides for the payment of the water bonds at maturity and of the interest out of a special fund. Held, that the word "general," employed to qualify the word "obligation," meant a municipal debt for the payment of which provi-

sion must be made by devoting funds raised by taxation, and the entire section, construed together, provided for a special fund for the payment of water bonds and interest, and provided that a shortage in the funds provided for must be paid out of the general fund. *City of Eugene v. Willamette Valley Co.*, 97 Pac. 817, 819, 52 Or. 490.

#### GENERAL OFFICERS

The secretary and treasurer of an association who is the custodian of its records and vouchers, so far as money is concerned, is a "general officer" thereof, within the meaning of Code 1892, § 534, providing that the answer of a corporation shall be sworn to by its president, general manager, superintendent, or other general officer, unless answer under oath is waived. *Masonic Benefit Ass'n v. Simmons*, 38 South. 791, 792, 86 Miss. 470.

#### GENERAL PARTNERSHIP

Code Civ. Proc. § 758, as amended in 1877 provides that in the case of death of one of two or more defendants, if the entire cause of action survives against the others, the action may proceed against the survivors, but that the estate of one jointly liable upon contract with others shall not be discharged by his death; and Partnership Law (Laws 1897, c. 420) § 3, makes a partnership formed otherwise than as prescribed in the chapter for the formation of a limited partnership a general partnership. Section 4 defines a "limited partnership" as one or more persons called "general partners," and also one or more called "special partners." Section 5 makes every general partner the agent for the firm. Section 6 makes every general partner liable for all firm obligations jointly and severally with his general copartner. Section 7 makes a special partner liable only to the amount of the capital invested by him, and article 3 is entitled "Limited Partnership." Section 36 provides that the general partner "in such partnership" shall be jointly and severally liable as general partners are by law, and that special partners shall not be liable beyond the fund contributed by them to the capital. Held, that section 6 of the partnership law is confined to limited partnerships, and does not make the partners of a general firm jointly and severally liable to the firm creditors, and hence the representative of a deceased partner could not be substituted for him in an action for firm debts. *Seligman v. Friedlander*, 92 N. E. 1047, 1049, 199 N. Y. 373.

#### GENERAL POST OFFICE

An order of publication requiring plaintiff to deposit "in the general post office" in the city copies of the summons, etc., is not complied with where the post office box in which a copy of the summons, etc., is mailed is a "mail chute" extending from the upper stories of an office building to a United States

post office box located on the ground floor of the building. *Korn v. Lipman*, 94 N. E. 861, 862, 201 N. Y. 404.

### GENERAL POWER

Whether a power is "general" or limited depends on the terms of the instrument creating the power, and a power general in its terms will not be cut down to a limited one by subsequent provisions, unless by express words, or unless an intent to do so is apparent from the instrument creating the power. A "general power" of appointment may be exercised in favor of whomsoever the donee pleases, even in favor of the donee himself, or for his benefit. A "general power" is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee which a particular power may also do, but because it enables him to give a fee to whom he pleases. The donee has an absolute disposing power over the estate and may bring it into the market whenever his necessities or wishes may so indicate. *Grace v. Perry*, 95 S. W. 875, 879, 197 Mo. 550, 7 Ann. Cas. 948 (citing 1 Sugd. Vendors [3d Am. Ed.] p. 514).

### GENERAL POWER IN TRUST

Where testator gave his wife the income of his estate and provided that on her death or remarriage the property should go to his children and he gave all the property to his wife and his brother, who were appointed executors in trust to pay the legacies with power to sell, and the land devised was unimproved, the power of sale was a "general power in trust," within 1 Rev. St. (1st Ed.) pt. 2, c. 1, tit. 2, art. 3, § 94, defining a "general power in trust," and a sale by the surviving executor evidenced by a deed reciting that it was executed by virtue of the power in the will is valid. *Doscher v. Wyckoff*, 116 N. Y. Supp. 389, 393, 132 App. Div. 139.

Where testatrix devised all her real estate to a trustee, empowering him, with her son's consent, to sell it, but did not dispose of the corpus, the power of sale ended with the son's death, and, no sale having been made during his life, the land thereupon passed to his heirs, so that defendant railroad company acquired easements therein as against these heirs by condemnation proceedings instituted after the death of the son. *Wells v. Brooklyn Union Elevated R. Co.*, 106 N. Y. Supp. 77, 78, 121 App. Div. 491.

### GENERAL PURPOSES

Under constitutional provisions and statutes providing that no tax shall be levied by a city without designating in the levy the purpose for which it is to be applied, that no tax levied for one purpose shall be applied to another, and providing that, in an ordinance fixing the tax rate for any year, the levy shall be subdivided for the following purposes: For schools, for sinking fund, for

police purposes, for sprinkling streets, for general purposes, etc.—and leaving to the discretion of the city the levies to be made each year for the enumerated purposes, an ordinance subdividing a levy among a number of such enumerated purposes, but making no mention of street sprinkling, does not embrace a levy for that purpose under the head of "General Purposes," and no part of the levy can be used for street sprinkling. *City of Louisville v. Button*, 82 S. W. 293, 294, 118 Ky. 732.

### GENERAL RECOGNITION

The word "general" is used in the statute relating to the recognition of a child with the design of emphasizing the thought that the understanding of the father's recognition should be as extensive as the immediate community of his residence and within the common knowledge of the public. *Morgan v. Strand*, 110 N. W. 596, 597, 133 Iowa, 299.

### GENERAL REPUTATION

See, also, General Character.

"General reputation" is what people in a community commonly say about a thing. *Fitzgerald v. State*, 72 S. E. 541, 542, 10 Ga. App. 70.

"General character" is the same as "general reputation," and is determined by how one is generally regarded or esteemed in the community in which he lives. *Way v. State*, 46 South. 273, 278, 155 Ala. 52.

"General reputation" is what a person's neighbors generally say of him; the concurrence of many voices to the same fact. That a woman's reputation for chastity is what the people of her acquaintance generally say of her in this regard. *Moore v. Dozier*, 57 S. E. 110, 113, 128 Ga. 90 (citing *Treschman v. Treschman*, 61 N. E. 961, 28 Ind. App. 219; *Deputy v. Harris* [Del.] 40 Atl. 714, 715, 1 Marv. 104; *State v. Bryan*, 8 Pac. 260, 266, 34 Kan. 72).

"General reputation and repute," as to the marital relation, means the understanding among neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife, and not in meretricious intercourse. *Klipfel's Estate v. Klipfel*, 92 Pac. 26, 28, 41 Colo. 40, 124 Am. St. Rep. 96.

The phrase "general repute in the family," or "general reputation in the family," when applied to cases of pedigree, means declarations of deceased members of the family made ante litem motam, and family history and tradition, handed down by declarations of deceased members of the family, made ante litem motam. The same would be the case when it is necessary to prove marriage, birth, or death for any other purpose. In *re Hurlburt's Estate*, 35 Atl. 77, 78, 68 Vt. 366, 35 L. R. A. 794.

**GENERAL RESTRAINT**

The terms "general restraint of trade" and "partial restraint of trade" have no longer a territorial meaning. In respect of time and territory and in the absence of any affirmative showing that the public welfare is put in jeopardy or that a monopoly is created, or the like, the validity of all contracts in restraint of trade must be made to depend upon the question as presented by each case whether the restraint goes so far as to reasonably insure to the purchaser the full enjoyment of the right purchased by him in good faith and for a good and valuable consideration. *Swigert v. Tilden*, 97 N. W. 82, 86, 121 Iowa, 650, 63 L. R. A. 608, 100 Am. St. Rep. 374.

**GENERAL STATUTE**

See General Law.

**GENERAL STRIKE**

As construed by the courts of England, a strike may be a "general strike" within the clause of a charter party though not all of the men were on the strike; the word "general" not being used in opposition to "partial." A strike was a general strike if it was not a particular strike, and by a particular strike was understood a strike either by an individual workman or by a particular body of workmen working for a particular master; but if there was a strike against all the masters, and if that strike was taken part in by the workmen irrespective of the masters for whom they were working, that amounted to a general strike. *The Toronto*, 168 Fed. 386, 393.

**GENERAL SUPERINTENDENCE**

See Officer Having General Superintendence.

**GENERAL SUPERINTENDENT**

The "general superintendent" of a railroad is necessarily clothed with large specific as well as discretionary powers. He has the general superintendence of the business affairs of the road, and authority to incur liability for medical services to an injured employé. *Hall v. New York, N. H. & H. R. Co.*, 65 Atl. 278, 281, 27 R. I. 525 (citing *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484; *Sevier v. Birmingham, S. & T. R. R. Co.*, 92 Ala. 258, 262, 9 South. 405, 406).

**GENERAL SUPERVISION**

The words "general supervision" imply something more than a mere power to advise and suggest, and confer authority to oversee and review the acts and to correct the errors of those over whom the right of supervision is granted. Under Laws 1905, p. 225, c. 115, § 2, subd. 2, requiring the state board of tax commissioners to exercise "general supervision" over assessors and county boards of equalization, and the assessment of taxable property in order to secure equality in tax-

ation, the commissioners do not act merely in an advisory capacity, but have power to classify intercounty railroads and fix the value thereof for purposes of taxation. *Great Northern Ry. Co. v. Snohomish County*, 93 Pac. 924, 927, 48 Wash. 478.

The grant of appellate jurisdiction given to circuit courts by the constitutional provision declaring that they shall have appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same, and shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to give them a "general control over inferior courts and jurisdictions," does not include authority to review the proceedings of an inferior tribunal on the merits by the writ of certiorari. The use thereof to commence an action relates to judicial authority to supervise inferior courts and jurisdictions. The power of superintending control given to the circuit courts is limited by the means afforded for its exercise; the functions of the original writs referred to in connection with the grant, all of which appertain to matters of jurisdiction. The writ of certiorari was, by the Constitution, made an appurtenance, as before, to jurisdiction of superintending control, with its common-law function in that regard and that only. Such function extends wholly to matters of jurisdiction as regards independent proceedings. *State ex rel. Milwaukee Medical College v. Chittendon*, 107 N. W. 500, 514, 127 Wis. 468.

**GENERAL TAX**

"The general levy of taxes is understood to exact the contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good." *Farnham v. City of Lincoln*, 106 N. W. 666, 668, 75 Neb. 502.

Where a town voted to exempt certain business organizations from taxation for 10 years, such vote precluded a village within the town from levying general taxes on such exempt property, but did not preclude the levy of special assessments thereon for municipal improvements; "general taxes" being based on the fact that the government must have revenue, and on the principle that all citizens and property within its jurisdiction should contribute, without special benefit, while "special assessments" are based on the theory of a special benefit to the property assessed, by means of a local improvement. *Caverly-Gould Co. v. Village of Springfield*, 76 Atl. 39, 42, 83 Vt. 396.

**GENERAL TITLE**

A "general title" to a statute is one which is broad and comprehensive, covering all legislation germane to the general subject stated, as distinguished from a restrictive title, which

is one by which a particular part or branch of a subject is carved out as the subject of legislation. *Memphis St. R. Co. v. Byrne*, 104 S. W. 460, 462, 119 Tenn. 278.

### GENERAL TRUST

A transfer by a person of all his property to a trustee to hold as a trust fund is a "general trust." *Babbitt v. Fidelity Trust Co.*, 66 Atl. 1076, 1080, 72 N. J. Eq. 745.

### GENERAL VERDICT

See Separate General Verdict.

A "general verdict" is that by which the jury pronounce generally upon all or any of the issues either in favor of plaintiff or defendant. *Wiruth v. Lashmett*, 123 N. W. 427, 429, 85 Neb. 286; *Farmers' Savings Bank of Arispe v. Arispe Mercantile Co.* (Iowa) 127 N. W. 1084 (Code, § 3725); *Nerger v. Commercial Mut. F. Assoc.*, 114 N. W. 689, 690, 21 S. D. 537 (Rev. Code Civ. Proc. § 270); *Glade v. Eastern Illinois Min. Co.*, 107 S. W. 1002, 1004, 129 Mo. App. 443 (citing *Shipp v. Snyder*, 25 S. W. 900, 121 Mo. 155; Rev. St. 1889, § 2160); *Russell v. Rhinehart*, 122 N. Y. Supp. 539, 542, 137 App. Div. 843 (Code Civ. Proc. N. Y. § 1186).

A general verdict for plaintiff is a finding in his favor of every fact material to a recovery, and answers to special interrogatories will not overthrow the general verdict, unless they are in irreconcilable conflict with it. *Henderson v. McGruder* (Ind.) 94 N. E. 580, 582; *Indiana Ry. Co. v. Maurer*, 66 N. E. 156, 157, 160 Ind. 25 (citing *Southern Indiana R. Co. v. Peyton*, 61 N. E. 722, 157 Ind. 690, 697).

Separate general findings on separate causes of action are "general verdicts." *Farmers' Savings Bank of Arispe v. Arispe Mercantile Co.* (Iowa) 127 N. W. 1084, 1087.

A "general verdict" in favor of the plaintiff against one of the defendants without mentioning the other is a "general verdict" in favor of the defendant not mentioned, sufficiently definite, in the absence of any objection thereto on the part of the plaintiff, to satisfy the statute requiring the rendition of a general verdict in all cases. *Lawson v. Robinson*, 75 Pac. 1012, 1013, 68 Kan. 737.

#### In criminal proceedings

A "general verdict" is a conviction of everything well charged in the indictment. *Blackshare v. State*, 128 S. W. 549, 551, 94 Ark. 548, 140 Am. St. Rep. 144 (quoting and adopting definition in 1 Bish. New Cr. Proc. § 1006a).

Under Mansf. Dig. § 2283, providing that a "general verdict" is either "guilty" or "not guilty," if guilty the jury affixing the punishment, if the amount thereof is not determined by law, in force in the Indian Territory, by reason of Act Cong. March 1, 1895, one on trial for crime punishable by fine not exceeding a specified sum, and by imprison-

ment for not less nor for more than a specified time, is entitled to have the jury determine the punishment on their finding him guilty. *Taylor v. United States*, 98 S. W. 123, 125, 6 Ind. T. 350.

### GENERAL WARRANT

See Covenant of General Warranty.

### GENERAL WELFARE

A city whose charter contains a "general welfare" clause may legally pass an ordinance prohibiting the possession of intoxicating liquors kept for the purposes of illegal sale. *Sawyer v. City of Blakely*, 58 S. E. 399, 400, 2 Ga. App. 159.

A city ordinance for the separation of the races on street cars is within the "general welfare" clause of the charter enabling the city "to pass all ordinances necessary for the health, convenience, and safety of the citizens." *Patterson v. Taylor*, 40 South. 493, 495, 51 Fla. 275.

Since assessments for benefits from a levee are justified under the police power, rather than the taxing power, in furtherance of the "general welfare," which includes the public health, as well as other things, the inclusion of property of a railroad in a levee district and its assessment for benefits is not violative of the railroad company's charter rights. *Des Moines & Mississippi Levee Dist. No. 1 v. Chicago, B. & Q. R. Co.*, 145 S. W. 35, 38, 240 Mo. 614, 39 L. R. A. (N. S.) 543.

### GENERALLY

The use of the word "generally" imports the existence of exceptions; thus, Civ. Code 1895, § 3656, declaring that an instrument under seal "generally" imports a consideration, indicates an intention to provide for exceptions to the general rule which conclusively presumes a consideration where the instrument is executed under seal. *Sims v. Scheussler*, 64 S. E. 99, 102, 5 Ga. App. 850.

### GENERATOR

A "dynamo" or "generator" is a mechanism which generates electromotive force by moving a closed circuit in a magnetic field. In re *Charlestown Light & Power Co.*, 183 Fed. 160, 165.

### GENS

Among the American Indians, the "gens" is an organized body of consanguineal kindred; an indeterminate number of these gentes making a tribe. *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 636, 20 Okl. 687 (quoting "the American Race" [1901] by Daniel G. Brinton).

### GENS DE TRAVAIL

The term "laborers and servants" as used in Civ. Code 1870, art. 3534 (C. C. 1825,

art. 3499), is a translation of the term "gens de travail et de service," and sick nurses are "gens de travail." Succession of Dolson, 56 South. 514, 129 La. 577 (citing Vaughn v. Terrell, 23 La. Ann. 62).

## GENTLY

A statement of a witness that a conductor laid his hand "gently" upon the shoulder of a passenger for the purpose of ejecting him from the train excludes the idea of rudeness or force. According to Webster's Dictionary, "gently" means softly, mildly; while "rude" means rough, insulting. Holmes v. Carolina Cent. R. Co., 94 N. C. 318, 323.

## GENUINE

Comp. Laws 1907, § 4083, punishing every person who with intent to defraud presents for allowance to any state or county officer, etc., authorized to allow or pay the same if genuine, any fraudulent claim, is violated where the claim presented is one which on its face purports to be a charge against the political division for which the officer acts in allowing or paying it, and the mere fact that the claim is unauthorized by law, and that the officer cannot legally allow or pay it, is not decisive; and so long as the claim, if valid, is one that could or should be allowed or paid, it is within the statute, though the claim itself may be for a matter which the law does not authorize or even forbid, the word "genuine" referring to a real claim as distinguished from a counterfeit. Law v. Smith, 98 Pac. 300, 307, 34 Utah, 394.

## GENUINENESS

"The 'genuineness' of an instrument, which is admitted unless denied under oath, evidently goes to the question of its having been the act of the party just as represented; or, in other words, that the signature is not spurious, and that nothing has been added to it, or taken away from it, which would lay the party changing the instrument, or signing the name of the person, liable to forgery." Puritan Mfg. Co. v. Toti & Gradi, 94 Pac. 1022, 1023, 14 N. M. 425 (quoting and adopting Cox v. Northwestern Stage Co., 1 Idaho, 376, 381).

Under Code Civ. Proc. § 448, providing that when the defense is based on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the "genuineness" and due execution thereof are admitted, unless the plaintiff file, within 10 days after receiving a copy of the answer, an affidavit denying the same. By "genuineness" is meant nothing more than that it is not spurious, counterfeit, or of different import on its face from the one executed, but is the identical instrument executed by the party. Hence under section 462, providing

that the statement of any new matter in the answer in avoidance or defense must be deemed controverted by the opposite party, an instrument set up as a defense can be controverted on the ground that its execution was procured by fraud, where no affidavit denying its genuineness and due execution has been filed. Moore v. Copp, 51 Pac. 630, 631, 119 Cal. 429.

## GEOGRAPHICAL CENTER

It is contended that the words "geographical center" should be restricted so as to mean nothing more than the word "point" when used in considering a geographical problem or proposition—something without length, breadth, or thickness, without magnitude or parts—from which it would follow that no place sufficient for the purposes of a county seat was selected. But it is obvious that such a meaning was not attributed to the words when used with reference to the selection of a place for a county seat, and that any person so voting must have intended and desired to be understood as voting to locate the county seat at a place where the courthouse and other public offices and buildings required by law could be erected; at a place that would include the center of the county and have such area as was necessary for all purposes for which county seats are used and required by law to be established and maintained. State ex rel. Kaufman v. Martin, 106 Pac. 318, 322, 32 Nev. 197 (quoting and adopting Whitaker v. Dillard, 16 S. W. 1086, 81 Tex. 363).

## GEOGRAPHICAL MILE

See English Geographical Miles.

## GERM

Poisonous germ, see Poison.

## GERMANE

Literally "germane" means "alike," "closely allied," and when applied in the sense in which the word is used in an amendment of a city charter creating a municipal court it signifies that the changes in the articles amended by implication are such as are calculated to promote the object and purpose sought to be accomplished by express amendment. City of Chicago v. Reeves, 77 N. E. 237-243, 220 Ill. 274.

Provisions in "an act to create a board of officers" (Laws 1909, p. 466, c. 125, § 1), relating to the qualifications of such officers, are properly included therein as being "germane" to the general subject expressed in the title; that word meaning "pertaining to" or "related to." State ex rel. Thompson v. Majors, 123 N. W. 429, 431, 85 Neb. 375.



## GESTATION

See Period of Gestation; Utero-Gestation.

## GET

### GET AN OFFER

An employment to "get an offer" for land is one to make a sale or exchange in a reasonable time, and not merely to procure a single offer. *Curran v. Hubbard*, 114 Pac. 81, 82, 14 Cal. App. 733.

A memorandum signed by an owner and delivered to a broker, which states description and price of land and asks him to "get an offer," satisfies the requirements of Civ. Code, § 1624, as a written authority to sell or exchange land on commission. *Curran v. Hubbard*, 114 Pac. 81, 82, 14 Cal. App. 733.

## GHEE

The Encyclopedia Britannica (9th Ed.) vol. 4, p. 590, describes "butter" as "the fatty portion of the milk of mammalian animals. The milk of all mammals contains such fatty constituents; and butter from the milk of goats, sheep, and other animals, has been, and may be used; but that yielded by cows' milk is the most savory, and it alone really constitutes the butter of commerce." "Ghee" is defined by the Standard Dictionary as follows: "Butter clarified by boiling or heating and skimming or straining until it becomes a liquid or semi-solid oil, capable of being kept for many years; largely used in India, in cookery and medicines, and in religious rites." "Ghee" is within the provisions for "butter" and substitutes therefor in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 236, 30 Stat. 170. *Sahadi Bros. v. United States*, 152 Fed. 486, 487.

## GIANT POWDER

An information for the malicious placing of an explosive near a dwelling house, describing the explosive as "nitroglycerin," commonly known as "dynamite" or "giant powder," was not objectionable for indefiniteness as to the explosive charged, the substances all being nitroglycerin explosives. *People v. Swalle*, 107 Pac. 134, 136, 12 Cal. App. 192.

## GIFT

See Absolute Gift; Manual Gift; Onerous Donation; Pious Gift; Remunerative Donation; Verbal Gift.

All other gifts, see All Other.

Charitable gift, see Charity.

Gift to a class, see Class.

Keep as gift, see Keep.

See, also, Present.

Webster's Dictionary defines a "gift" as anything given or bestowed; any piece of

property which is voluntarily transferred by one person to another without compensation. A gift is not returnable either in kind or equivalent. *Kirchner v. Lenz*, 87 N. W. 497, 498, 114 Iowa, 527.

"There can be no gift without an intention to give and a delivery, either actual or constructive, of the thing given. There must be both a purpose to give, and the execution of this purpose. The purpose must be expressed either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift." *Collins v. Maude*, 77 Pac. 945, 947, 144 Cal. 289 (citing *Knight v. Tripp*, 54 Pac. 267, 121 Cal. 674).

A gift is perfected when the donor places in the hands of the donee the means of obtaining possession of the contemplated gift, accompanied by acts clearly showing an intention to divest himself of all dominion over the property. *Candee v. Connecticut Sav. Bank*, 71 Atl. 551, 552, 81 Conn. 372, 22 L. R. A. (N. S.) 568.

An obligation to return or repay the thing received is irreconcilably in conflict with the theory of "gift." *Erkson v. Parker*, 84 Pac. 437, 3 Cal. App. 115.

A "gift" is a voluntary transfer of any property or thing by one to another without consideration. To be valid, it must be executed. There must be a delivery by the donor such as will place the property or thing given under the control of the donee, and there must be an intent to vest the title in him. Actual and personal delivery by the donor is not always necessary, for, when another person is the custodian, an order of the donor to deliver to the donee may constitute a gift. It may be oral or in writing. No formal words or expressions are required. It is a question of intent, and the inquiry is as to what was intended by that which was said or done. A promissory note or other evidence of debt may be the subject of a gift, and the delivery of the note or of the evidence of debt is evidence tending to show an intent to give. A debt may be forgiven, and a receipt in full may be evidence of such forgiveness. *McKenzie v. Harrison*, 24 N. E. 458, 460, 120 N. Y. 260, 8 L. R. A. 257, 17 Am. St. Rep. 638 (citing and adopting 2 Schouler, Pers. Prop. §§ 68-90).

"To constitute a valid 'gift' among the living there must be an intention to give and a delivery of the property to the donee or to some one for him." Equity will not enforce a voluntary gift of property in trust so long as it is executory only. *Brannock v. Magoon*, 125 S. W. 535, 536, 141 Mo. App. 316 (quoting and adopting rule in *re Soulard's Estate*, 43 S. W. 617, 141 Mo. 642; citing

*Doering v. Kenamore*, 86 Mo. 588; *Gartside v. Pahlman*, 45 Mo. App. 160; *Thomas v. Thomas*, 18 S. W. 27, 107 Mo. 459).

"Civ. Code 1895, § 3564, defines the essentials of a 'gift': To constitute a valid gift there must be the intention to give by the donor, acceptance by the donee, and a delivery of the article given, or some act accepted by the law in lieu thereof. Section 3567 declares that: Actual manual delivery is not essential to the validity of a gift. Any act which indicates a renunciation of dominion by the donor, and the transfer of dominion to the donee, is a constructive delivery." *Philpot v. Temple Banking Co.*, 60 S. E. 480, 482, 3 Ga. App. 742.

A "gift" cannot be made to take effect in the future. Such a transaction would only amount to a promise to make a gift in the future, and, being without consideration, is void. *Harris Banking Co. v. Miller*, 89 S. W. 629, 635, 190 Mo. 640 (citing *Spencer v. Vance*, 57 Mo. 429; *School Dist. of Kansas City v. Sheidley*, 40 S. W. 656, 138 Mo. 672, 37 L. R. A. 406, 60 Am. St. Rep. 576).

"Where the only words of 'gift' are found in the direction to divide or pay at a future time, the 'gift' is future, not immediate-contingent, and not vested." In re *Southworth's Estate*, 102 N. Y. Supp. 447, 448, 52 Misc. Rep. 86 (quoting and adopting In re *Crane*, 58 N. E. 47, 48, 164 N. Y. 71, 76).

A "gift" of personal property from a husband to his wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it and of vesting title in the wife. Where jewelry was purchased by a husband in part for the wife's use and in part as an investment, there was no gift to the wife. *Farrow v. Farrow*, 65 Atl. 1009, 1010, 72 N. J. Eq. 421, 11 L. R. A. (N. S.) 389, 129 Am. St. Rep. 714, 16 Ann. Cas. 507.

Under Civ. Code, § 324, making stock personalty, and providing for its transfer by indorsement and delivery of the certificates between the parties thereto, and section 1146, defining a "gift" as a transfer of personal property made voluntarily and without consideration, the indorsement of stock certificates reserving dividends during the life of the donor, and the placing of the certificates in an envelope and delivery to the donee with instruction not to open it until the death of the donor, the intention being to make a gift, there is an executed "gift." *Calkins v. Equitable Building & Loan Ass'n*, 59 Pac. 30, 31, 126 Cal. 531.

Where a woman took from the vaults of a trust company her box containing her securities, and called in an officer of the company, stating to him her intent to make a gift of the same to a nephew, who was present with her and executed blank trans-

fers, and the securities were then placed in a box hired by the nephew, while her own box was surrendered, and the nephew, who was about to go to a distant state, appointed his aunt as deputy, there was a valid gift of the securities, and it is immaterial that thereafter the aunt sold some of the securities and collected dividends and interest from the others which she deposited to her own account. *Reese v. Philadelphia Trust, Safe Deposit & Ins. Co.*, 67 Atl. 124, 126, 218 Pa. 150, 120 Am. St. Rep. 880.

#### Acceptance

The owner of a railroad bond some years prior to her death handed it to her companion saying, "This is yours, but if you will cut off the coupons and give them to me during my life." Held that, the bond having been accepted, such facts constitute a valid "gift" of the bond, subject to the qualified reservation of the interest in the donor. *Bone v. Holmes*, 81 N. E. 290, 291, 195 Mass. 495.

It being admitted that a deposited fund is the money of A., the mere issuing by a savings bank, at the direction of A., of a pass-book to "A. or B.," will not constitute a present "gift" of the fund, evidenced by the pass-book, to B. Nor will it constitute a valid gift to take effect upon the death of A. Such a donative purpose in its intent and direction is testamentary in character; and, not being made in the manner prescribed by the statute of wills, is invalid. *Schippers v. Kempkes* (N. J.) 67 Atl. 74, 12 L. R. A. (N. S.) 355.

#### Bargain and sale distinguished

Where a deed from a mother to a daughter recited that it was for the consideration of one dollar and natural love and affection, it was a "gift," and not a bargain and sale, and, where the daughter died intestate, the property will go to the next of kin on her mother's side, to the exclusion of her father's relatives, under Act May 25, 1887 (P. L. 261), prohibiting any person from taking the estate who is not of the blood of the ancestors or other relations by whom it was given or devised to the intestate. In re *Lynch's Estate*, 69 Atl. 290, 292, 220 Pa. 14.

#### Consideration

Where the assignment of household goods and chattels was made upon a consideration of gratitude for services rendered and was not under seal, it should be treated as a gift. *Hobart's Adm'r v. Vail*, 66 Atl. 820, 825, 80 Vt. 152.

Where an instrument recited that it was made in consideration of the sum of \$5, and of the love and affection of the donor, the recital of a nominal consideration did not prevent the transaction from operating as a gift, within Civ. Code, § 1146, defining a gift as a transfer of personal property without consideration. In re *Hall's Estate*, 98 Pac. 269, 271, 154 Cal. 527.

"A 'gift' is something which is freely given and without consideration." A manual gift may be free, onerous, or remunerative, and when the donor makes such a gift *omnium bonorum*, on condition that the donee shall maintain him for the rest of his life, it will be dealt with as an onerous donation and not as a commutative contract. *Ackerman v. Larner*, 40 South. 581, 587, 116 La. 101.

An old man, the father of several children, all of whom had married and left him except the youngest, executed about a month before his death an instrument, whereby he purported to dispose of his estate, both personal and real, subject to the payment of his debts, by creating a life estate in the land in favor of his wife with the remainder in fee to a son. The consideration expressed was "love and affection, and ten dollars." The transaction was a "gift," since the money consideration must be construed as nominal only and the real consideration was love and affection. *Aldridge v. Aldridge*, 101 S. W. 42, 43, 202 Mo. 565.

#### Delivery

In order to constitute a valid "gift," "there must be a delivery, actual or symbolic, of the subject-matter, unless it is already in the possession of the donee, with an intent on the part of the donor to presently divest himself of all title and dominion over the same, and an acceptance by the donee." The intent may be deduced from all the circumstances. *Chamberlain v. Eddy*, 118 N. W. 499, 504, 154 Mich. 593.

A "gift" of personalty can be consummated only by an unconditional delivery of the thing. A "gift" of realty can be consummated only by the execution and delivery of a deed. If either is incumbered, the donor gives only what he had to give. However clear may be the intention of the donor to pay the incumbrances and thus give the entire property, he can accomplish this only by actually paying them, and neither his promise without a valuable consideration, nor his intention, as evidenced by such promise, is of any avail to the donee. *Fischer v. Union Trust Co.*, 101 N. W. 852, 855, 138 Mich. 612, 68 L. R. A. 987, 110 Am. St. Rep. 329.

A "gift" is perfected by delivery and acceptance, and it is immaterial whether delivery precedes or follows or is contemporaneous with the acceptance, and it will be taken that an absolute gift from a father to a child is beneficial to the child and is accepted by him unless the contrary is shown, and this though the child may be ignorant of the transaction. *In re Harris' Estate*, 72 Atl. 912, 916, 82 Vt. 92 (citing *Church's Ex'r v. Church's Estate*, 67 Atl. 549, 80 Vt. 228; *Sparks v. Hurley*, 57 Atl. 364, 208 Pa. 166, 101 Am. St. Rep. 926; *Dunlap v. Dunlap*, 94 Mich. 11, 53 N. W. 788).

To constitute a valid "gift" there must be an actual delivery of the property by

which the gift is perfected. Where plaintiff voluntarily gave all his property to the head of a religious sect absolutely and without reservation, expecting that the same would be used for the advancement of the sect, and that he should be cared for at the home of the community, the gift was not revocable within the rule authorizing revocation of gifts induced by spiritualistic mediums, etc. *Williams v. Johnston*, 104 S. W. 789, 791, 84 Ark. 109 (citing 20 Cyc. p. 1212).

"A 'gift' is declared by Civ. Code, § 1146, to be a 'transfer of personal property,' which, if made in writing, is, by section 1053, called a 'grant' or conveyance or bill of sale, and by section 1083, 'vests in the transferee all the actual title to the thing transferred which the transferor then has unless a different intention is expressed or is necessarily implied.'" Where a father in writing assigned to his daughter his interest in a partnership, the delivery of the written instrument was a sufficient delivery to make a valid gift, since the interest in the partnership was incapable of manual delivery, and the fact that he continued to deal with the partnership property as if he was the owner thereof did not impair the daughter's title, restore the ownership to him, or entitle his administrator to the possession thereof. *Driscoll v. Driscoll*, 77 Pac. 471, 474, 143 Cal. 528.

A "gift" is a contract executed, and, as the act of execution is delivery, it is of the essence of the title. It is the consummation of a contract which without it would be no more than a mere contract to give, and without efficacy for want of consideration. Where there was no delivery by the payee of notes during her lifetime, though she had indorsed them, there was no gift *inter vivos* thereof regardless of her intention to deliver them to a donee at a future time. *Burchett v. Fink*, 123 S. W. 74, 75, 139 Mo. App. 381 (quoting *Lowrey v. Danforth*, 69 S. W. 39, 95 Mo. App. 451; *Doering v. Kenamore*, 86 Mo. 588; *Nasse v. Thoman*, 39 Mo. App. 178; *Gartside v. Pahlman*, 45 Mo. App. 160; *Thomas v. Thomas*, 18 S. W. 27, 107 Mo. 459; *In re Soulard's Estate*, 43 S. W. 619, 141 Mo. 642).

There is no executed "gift" where one leaves notes with others, telling them they are to have them if she dies before needing them, though she dies while the notes are in their hands; an essential of a gift being the actual present transfer of all right and dominion over the thing given, and what was done amounting only to a conditional promise to give. *Jones v. Luing*, 132 N. W. 371, 152 Iowa, 276.

A completed gift is shown where a wife deposits money in a bank in her name "in trust for" her husband, and after his death the passbook is found in his safe deposit vault. *In re Davis' Estate*, 103 N. Y. Supp. 946, 119 App. Div. 35.

A "gift" may be made of a bond and real estate mortgage securing it by delivery thereof without indorsement or written assignment. *Andrews v. Nichols*, 101 N. Y. Supp. 977, 979, 116 App. Div. 645.

Under Civ. Code, §§ 1146, 1147, defining a gift as a voluntary transfer of personal property, and providing that a verbal gift is not valid unless the means of obtaining possession of the thing are given, and there is an actual or symbolic delivery of the thing to the donee if delivery is possible, a gift of money cannot be made by a declaration of intention to pay a note on which the donee is primarily liable and the donor is liable as surety. *Townsend v. Sullivan*, 84 Pac. 435, 437, 3 Cal. App. 115.

In order to constitute a valid "gift," a complete delivery is essential. Where decedent, just prior to her death, drew certain checks on her bank accounts and delivered the same to claimant, to whose order they were drawn, but the checks were neither accepted nor paid by the bank prior to decedent's death, they did not constitute a valid gift of the respective amounts for which they were drawn, for want of a completed delivery. *Pennell v. Ennis*, 103 S. W. 147, 148, 126 Mo. App. 355.

Civ. Code, § 1146, defines a gift as a transfer of personal property, which, when made in writing is by section 1053 designated as a grant, conveyance, or bill of sale, and by section 1083 vests in the transferee all the actual title to the thing transferred which the transferor then had, unless a different intention is expressed or is necessarily implied, and section 1054 declares that the estate transferred is vested in the transferee on the donor's delivery of the grant. Held, that manual delivery of personal property is not essential to the validity of a gift thereof, evidenced by a written instrument duly executed and delivered. *Fisher v. Ludwig*, 91 Pac. 658, 6 Cal. App. 144.

The act of a husband in depositing money in bank in the name of his wife did not constitute a "gift" of the money to his wife, where at the time of the deposit he delivered to the bank a signature card purporting to have been written by his wife, directing the bank to pay funds on the signature of the wife per the husband. *First Nat. Bank of Montgomery v. Taylor*, 37 South. 695, 696, 142 Ala. 456.

#### **Donation distinguished**

A "gift" is an act of generosity or condescension and contributes to the benefit of the receiver. It is private and benefits the individual, as distinguished from a "donation," which is public and serves some general purpose. *State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County*, 78 N. E. 986, 994, 166 Ind. 162 (citing *Crabbe*).

#### **Gratuity distinguished**

Cr. Code 1902, § 263, provides punishment for attempting to corrupt any juror, by giving, offering, or promising any gift or gratuity, with intent to bias the opinion or influence the decision of such juror. Held, that while the term "gift" usually denotes something tangible, "gratuity" is a larger term, and embraces, not only tangible things, but services, or any benefits of pecuniary value bestowed without claim or demand. Hence, where accused requested a juror to do what he could for one about to be tried, and agreed to bring certain customers who had been trading with him down and put them to trading with the juror if the juror cleared the person to be tried, there was such a promising of a gratuity as to bring the case within the statute. *State v. Maddox*, 61 S. E. 964, 965, 80 S. C. 452.

#### **Intent**

To constitute a gift of either realty or personalty, there must be an intention by the donor to divest himself of possession, as well as a donative purpose. *Brown v. Columbus* (N. J.) 75 Atl. 917, 919.

To constitute a valid "gift" there must be a delivery of the subject-matter actually or symbolically, unless it is already in the possession of the donee, with an intent on the donor's part to presently divest himself of all title and dominion over the same, and an acceptance by the donee. The intent, which though necessary to constitute a valid gift and which may be deduced from all the circumstances surrounding the transaction, is not sufficient without a delivery to constitute a "gift." *Chamberlain v. Eddy*, 118 N. W. 499, 504, 154 Mich. 593.

#### **Realty**

Where plaintiffs, for the purpose of perpetuating the family name of Bales, conveyed a lot and church thereon to defendant church corporation upon its parol agreement that it would take the name of "Bales Chapel Baptist Church," the transaction constituted a gift of the property, the purpose of which was continuing, and plaintiffs were entitled to restrain a change of corporate name, and thereby the name of the church, which would defeat the purpose of the gift. *Bales v. Bales Chapel Baptist Church*, 101 S. W. 150, 152, 124 Mo. App. 22.

#### **Sale distinguished**

Gift of liquor as sale, see *Sale*.

A "gift" imports a transfer of personal property gratuitously or upon a merely good consideration, as distinguished from a "sale" *ex vi termini*, which imports a like transaction upon a valuable consideration. *Maxwell v. State*, 37 South. 266, 140 Ala. 131.

#### **Voluntary trust distinguished**

A pecuniary bequest to an unincorporated society, to be used by it in such manner as it may deem most expedient for the de-

velopment and advancement of Spiritualism in a certain town, was an absolute "gift," and not a trust for the benefit of the object specified, of which the society was trustee. *Fralick v. Lyford*, 95 N. Y. Supp. 433, 434, 107 App. Div. 543.

"Gifts" either *inter vivos* or *causa mortis* differ from a declaration of trust, in this, that "gifts" to be effective at all require a delivery of the thing itself and must pass the whole title, so that the donor can have no further dominion or control of it; while a "gift in trust" withholds the legal title from the donee. The legal title may be transmitted to a third person, or it may be retained by the donor; but in either case the equitable title has gone from him, and, unless the declaration of trust contains a power of revocation, it leaves him powerless to extinguish the trust. *Littig v. Vestry of Mt. Calvary Protestant Episcopal Church*, 61 Atl. 635, 636, 101 Md. 494.

A "gift" to be executed requires delivery, while a voluntary trust requires declaration. *Miles v. Miles*, 96 Pac. 481, 484, 78 Kan. 382.

#### GIFT CAUSA MORTIS

A "gift causa mortis" is defined to be a gift made by a person in sickness, who, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep as his own in case of the donor's decease. Three things are necessary to such a gift: (1) It must be made with a view to a donor's death; (2) the donor must die of that ailment or peril; (3) there must be a delivery. To establish such a gift the evidence must be sufficient to show not only that the person in extremis designated with proper distinctness the thing to be given and the person who is to receive it, but it must establish also that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery. In this respect there is no difference between gifts *inter vivos* and *causa mortis*. *Stokes v. Sprague*, 81 N. W. 195, 197, 110 Iowa, 89 (citing and quoting *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313).

"A 'gift causa mortis' is generally defined as follows: 'A gift of personal estate made in prospect of death at no very remote period, and which is dependent upon the condition of death occurring substantially as expected by the donor, and that the same be not revoked before death.'" *Davis v. Kuck*, 101 N. W. 165, 166, 93 Minn. 262 (quoting *Redfield on Wills*, § 42).

A gift causa mortis exists where property is given in the donor's last sickness or in other imminent peril, and takes effect only on his death through the disorder or peril, and is revocable during his life. *Stark v. Kelley*, 113 S. W. 498, 500, 132 Ky. 376.

To establish a gift causa mortis, the donee must show that the gift was made with

a view of the donor's death, that the donor died of his then present ailment or peril, and that there was a delivery. *Davis v. Davis*, 104 N. Y. Supp. 824, 825.

A gift causa mortis is a gift of personal property made in immediate apprehension of death, subject to the conditions, expressed or implied, that if the donor should not die, as expected, or if the donee should die first, or if the donor should revoke the gift before death, the gift should be void. It is a gift in expectation of death, then imminent, on the essential condition that the property shall belong fully to the donee in case the donor dies, as anticipated, leaving the donor surviving him, and in case the gift is not in the meantime revoked, but not otherwise; it being essential to the validity of such gift that the property be delivered to the donee, either actually or constructively. *Barnes v. Barnes*, 56 South. 958, 959, 174 Ala. 196.

Under Rev. Codes, § 4638, defining a gift in view of death as one made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver, a gift causa mortis must be made in contemplation, fear, or peril of death, the donor must die of the illness or peril which he then fears or contemplates, and delivery must be made with the intent that title shall vest only in case of death. *O'Neill v. O'Neill*, 117 Pac. 889, 890, 43 Mont. 505, Ann. Cas. 1912C, 268.

A gift causa mortis is a gift by the donor in contemplation of death to take effect only in the event of his death, and there must be a physical or symbolical delivery of the article given, and the gift is subject to revocation by the act of the donor prior to death, and is revoked by his recovery from sickness or escape from the danger in view of which the gift was made. *Foley v. Harrison*, 136 S. W. 354, 367, 233 Mo. 460.

A "gift causa mortis" is established by a valid delivery, expected and impending death, intention to pass title then and there, and no revocation before death. *Cronin v. Chelsea Sav. Bank*, 87 N. E. 484, 485, 201 Mass. 146.

To constitute a valid "gift causa mortis," there must be a manifest intention to give a subject capable of passing by delivery and an actual delivery at the time, made in contemplation of death. *Hecht v. Shaffer*, 85 Pac. 1056, 1057, 15 Wyo. 34.

Civ. Code 1895, § 3574, declares that a "gift in contemplation of death" must be made by the person during his last illness or in peril of death; must be intended to be absolute only in the event of death; and must be perfected by either actual or symbolical delivery. Such a gift, so evidenced, may be made of any personal property by parol and proved by one or more witnesses. *Philpot v. Temple Banking Co.*, 60 S. E. 480, 483, 3 Ga. App. 742.

"A 'gift causa mortis' must be made on the apprehension of death, which must occur without the revoking of the gift, and it must be made with the understanding that the gift is void in case of the giver's recovery. It is now conceded by all modern authority that every species of personal property capable of delivery, either constructive or actual, may be the subject of a 'gift causa mortis.'" *Phinney v. State ex rel. Stratton*, 78 Pac. 927, 928, 36 Wash. 236, 68 L. R. A. 119 (quoting *Thomas' Adm'r v. Lewis*, 15 S. E. 389, 89 Va. 1, 18 L. R. A. 170, 37 Am. St. Rep. 848).

"A gift in contemplation of death must be made by a person during his last illness or in peril of death, must be intended to be absolute only in the event of death, and must be perfected by either actual or symbolical delivery. Such a gift, so evidenced, may be made of any personal property by parol, and proved by one or more witnesses." *Sorrells v. Collins*, 36 S. E. 74, 75, 110 Ga. 518 (Civ. Code, § 3574).

The essential elements to constitute a "gift causa mortis" are that it must have been made in contemplation of impending death by a clearly expressed intention to give in present, that the subject-matter must have been delivered, and the donor must have died from the ailment or peril without revocation of the gift. Where a depositor in a savings bank sent the bank a writing requesting that another person be allowed to sign the signature book, and that the bank change the account so that the depositor or the other might draw the money, and the request was complied with, unless there had been a gift of money to the other, payment of the deposit to him on presentation of the book by the bank, with knowledge of the depositor's death, was no protection to the bank as against his estate, notwithstanding its rule that payments made to persons producing a passbook should be deemed a valid payment. *O'Brien v. Elmira Sav. Bank*, 91 N. Y. Supp. 364, 365, 99 App. Div. 76.

A gift causa mortis is a gift of personal property made in expectation of death, then imminent, on an essential condition that the property shall belong fully to the donee in case the donor dies as anticipated leaving the donee surviving him, and the gift is not in the meantime revoked. *Vosburg v. Mallory*, 135 N. W. 577, 578, 155 Iowa, 165.

Under Civ. Code, § 1149, which defines a "donatio causa mortis" as "one which is made in contemplation, fear or peril of death, and with intent that it should take effect only in case of the death of the giver," a transfer of a bank deposit by a depositor to himself and his son jointly, with the right and power to each to draw on the account during their lives, and a direction to the bank to pay the residue remaining upon the death of either to the survivor, cannot operate as a gift causa mortis, since it was intended that the trans-

fer should take effect immediately and vest and be enjoyed in present. *Carr v. Carr*, 115 Pac. 261, 264, 15 Cal. App. 480.

The statute taxing transfers of property made "in contemplation of death" includes gifts inter vivos, as well as "gifts causa mortis." In re *Palmer's Estate*, 102 N. Y. Supp. 236, 240, 117 App. Div. 360.

A check on a bank for the entire amount of the drawer's credit therein, delivered to a person as a gift of the money, though unaccepted by the bank, operates as an assignment of the fund, and if so delivered and intended by the donor in anticipation of death from an impending peril from which he subsequently dies, it is valid as a gift causa mortis. *Varley v. Sims*, 111 N. W. 269, 270, 100 Minn. 381, 8 L. R. A. (N. S.) 828, 117 Am. St. Rep. 694, 10 Ann. Cas. 473.

Where one who was ill stated that she was "going to die," and handed another a number of bankbooks, saying "Bury me out of this, and whatever is left is yours," there was a gift causa mortis. *Mahon v. Dime Sav. Bank of Brooklyn*, 87 N. Y. Supp. 258, 259, 92 App. Div. 506.

#### Delivery

Delivery is necessary to a valid gift either "causa mortis" or inter vivos. In re *Miller*, 119 N. Y. Supp. 52, 53, 55, 64 Misc. Rep. 232.

"An essential element, applicable alike to a 'gift inter vivos' or a 'donatio causa mortis,' is the delivery of the thing given, or the subject of the donation, to the donee or to his use." *Wittman v. Pickens*, 81 Pac. 299, 33 Colo. 484.

It is essential to the validity of a "gift causa mortis" that there must be an actual and complete delivery of the property made in execution of the gift, and for the express purpose of consummating it. *Bruce v. Squires*, 74 Pac. 1102, 1103, 68 Kan. 199.

To constitute a valid gift causa mortis there must be an actual delivery of the property during the lifetime of the donor, wholly divesting him of the possession and control, subject to the power of revocation, and the donee must retain possession uninterruptedly until after the death of the donor. *Bledsoe v. Fitts*, 105 S. W. 1142, 1143, 47 Tex. Civ. App. 578.

A "gift causa mortis" is not valid, unless accompanied by actual delivery and a transfer of the dominion and control of the property in the lifetime of the donor. *Day v. Richards*, 83 N. E. 324, 325, 197 Mass. 86.

The holder of a note and mortgage assigned the same in trust, in contemplation of death. He delivered the note and mortgage and assignment either to the assignee, or to a third person, appointed as agent of the assignee. The assignee acknowledged the creation of the trust. The holder, by reason

of the assignment and delivery, lost all dominion over the note and mortgage. Held, to constitute a complete delivery of the note and mortgage to the assignee, so as to consummate a gift causa mortis. To constitute a "gift causa mortis," there must be an intention to give and a delivery, either actual or constructive, of the thing given; and the donor must part with all dominion over the property, but the delivery need not be made to the donee personally, but may be made to another as his agent or trustee even without the knowledge of the donee at the time of the making of the gift. *Hamlin v. Hamlin*, 109 Pac. 362, 365, 59 Wash. 182.

A loan, by a person who did not expect to live long, of a sum of money to a firm, which executed a receipt containing an agreement to turn the money over to a certain person in case of the lender's death, was not a "gift causa mortis" because not delivered to the beneficiary, or any one for him, and not to go to him until the death of the lender. *Ragan v. Hill*, 80 S. W. 150, 72 Ark. 307.

Handing a purse containing a certificate of deposit, to a person, with these words: "Here is my purse. Take it. If anything happens to me, I want you to keep it. In case I get well, I shall want it back"—shortly before the donor's death from the disease, constituted a "gift causa mortis," though the certificate was not indorsed. *Callahan v. Forest*, 118 N. Y. Supp. 541.

#### **As conditional gift**

A "gift causa mortis" is one by a sick person, who, apprehending his dissolution, delivers or causes to be delivered to another the possession of any personal goods to keep as his own in case of the donor's death, and it only takes effect in case the donor dies, being conditional and revocable by the donor at any time. *McCoy's Adm'r v. McCoy*, 104 S. W. 1031, 126 Ky. 783.

A "gift causa mortis" is a gift, absolute in form, made by a donor in anticipation of speedy death, and intended to operate as a transfer only on the happening of his death, and between the time of the making of the gift with the delivery of the property given and the time of the donor's death the gift is conditional. *Scott v. Union & Planters' Bank & Trust Co.*, 130 S. W. 757, 761, 123 Tenn. 258.

#### **Gift inter vivos distinguished**

The principal distinction between a gift inter vivos and one causa mortis is that the former requires an unconditional delivery in donor's lifetime, while the delivery in the latter case is subject to the condition that the donor's survival defeats the gift. *Teague v. Abbott (Ind.)* 100 N. E. 27, 29.

A gift causa mortis is distinguished from a gift inter vivos, in that the former must be made in contemplation of the near approach

of death, with the implied condition that it take effect only on the donor's death, caused by a disorder of which he is then suffering or a peril then impending, whereas by a gift inter vivos, completed by delivery, the property vests immediately and irrevocably in the donee. *Vosburg v. Mallory*, 135 N. W. 577, 578, 155 Iowa, 165.

The vital distinction between a gift causa mortis and a gift inter vivos is that the former is subject to the donor's revocation while he lives; but, if there is no unconditional delivery or the control of the property by the donee is postponed to a future date, the transaction is an unexecuted and unenforceable promise to make a gift. *Beebe v. Coffin*, 94 Pac. 766, 768, 153 Cal. 174.

In the case of a "gift causa mortis," as well as in that of a gift inter vivos, a delivery is necessary to the validity of the gift. *Matthews, J.*, uses this language: "A donatio mortis causa must be completely executed, precisely as required in the class of gifts inter vivos subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation by the donor or by the donor's surviving the apprehended peril of outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts causa mortis and inter vivos. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition good only if made and proved as a will." *Duryea v. Harvey*, 67 N. E. 351, 352, 183 Mass. 429 (citing *Basket v. Hassell*, 2 Sup. Ct. 415, 107 U. S. 602, 27 L. Ed. 500).

A "gift inter vivos" must take effect immediately, while a "gift causa mortis" must be made in contemplation of death. A deed carrying property to be held in trust for a third person until the death of the grantor, and not made in contemplation of death, is neither a gift inter vivos nor causa mortis. *Rogers v. Richards*, 74 Pac. 255, 256, 67 Kan. 706.

A gift of personal property made with intent that it shall take effect immediately and irrevocably and fully executed by complete and unconditional delivery is good and valid as a gift inter vivos, although at the time the donor is in extremis and dies soon after. Moreover, a gift made in anticipation of death, but not conditioned upon that event, is a gift inter vivos, and not a "gift causa mortis." A donor to a trustee, charging him with the payment to him of the interest thereon for life, declared that on his death the trustee should deliver the bonds to persons named. Held to constitute an irrevocable disposition of the bonds, by which the title passed out of the donor, and the gift

was not invalid, as against his wife, as a disposition testamentary in character. *Robertson v. Robertson*, 40 South. 104, 105, 147 Ala. 311, 3 L. R. A. (N. S.) 774, 10 Ann. Cas. 1051.

#### **Expectation of death**

The delivery of a savings bank deposit book by decedent to his wife was inoperative as a "gift causa mortis," where it was not made in contemplation of a conceived approach of death. *Nogga v. Savings Bank of Ansonia*, 65 Atl. 129, 79 Conn. 425.

To constitute a gift causa mortis of personal property, the donor must be apprehensive of the near approach of death, and it must appear that he did not recover from the illness with which he was then afflicted, or escape from the peril then impending. *Hillman v. Young*, 127 Pac. 793, 796, 64 Or. 73.

#### **Legacy distinguished.**

"Donatio mortis causa" is defined as that which is made to meet the case of death, as where anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but, if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. It was much doubted by the early jurists whether such disposition of property should be considered as a gift, or as a legacy, and in some respects it is similar to a legacy. A legacy is always given in view of the possible death of the donor, and so must a gift causa mortis be given; but, in the case of a legacy, the donor need not be sick and in present peril of death, while in the case of a gift causa mortis it must be given in anticipation of a speedy death from a present sickness or impending peril. *Noble v. Garden*, 79 Pac. 883, 884, 146 Cal. 225, 2 Ann. Cas. 1001.

A writing is not necessary to allow a "gift causa mortis," but in contradistinction to a legacy a change of possession before the donor's death is essential. *Fite v. Perry*, 96 Pac. 102, 103, 8 Cal. App. 85.

#### **GIFT, DEVISE, OR DESCENT**

Under *Burns' Ann. St. 1908, § 2996*, providing that kindred of the half blood shall inherit equally with those of the whole blood, but if the estate came to intestate by gift, devise, or descent, those only who are of the blood of the ancestor shall inherit, the term "gift, devise or descent" includes all property real or personal that came to intestate without a consideration being paid therefor. In *re Hullett's Estate*, 89 N. E. 509, 510, 46 Ind. App. 412.

#### **GIFT ENTERPRISE**

The law lexicographers define a "gift enterprise" as a scheme for the division and

distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme. *Black's Law Dict.*; *Bouv. Law Dict.*; *Anderson's Law Dict.* So in *Lohman v. State*, 81 Ind. 17, it was said, in approving the above definition, that the words "gift enterprise," as thus understood, had attained such notoriety that the courts would take judicial notice of what is meant when they appear in legislative enactments. Manufacturers and dealers in trading stamps sold to merchants, to be given to cash customers, and absolutely redeemable in goods offered by the trading-stamp concern, without restrictions except as to the number redeemable at any one time, are not engaged in a gift enterprise within the meaning of a provision of a city charter authorizing the city to levy a license tax on each gift enterprise. *City of Winston v. Beeson*, 47 S. E. 457, 459, 135 N. C. 271, 65 L. R. A. 167.

To constitute a gift enterprise, the element of chance must enter into the scheme. A trading-stamp business, consisting of the selling of checks or stamps to merchants, who give the same to their customers on purchases of goods, the number of stamps given being determined by the amount of the purchase, the stamps on presentation at the trading-stamp store entitling the holders to select any article from an assortment of articles, each article being plainly marked with its value in stamps, such value not being greater than the market value of the articles, is not a "gift enterprise" within the meaning of a statute denouncing gift enterprises, etc. *State v. Shugart*, 35 South. 28, 29, 138 Ala. 86, 100 Am. St. Rep. 17.

"Gift enterprise," as generally defined and understood, constitutes a scheme for the division and distribution of certain articles of property to be determined by chance among those who have taken shares in the scheme. Three things must concur in order to constitute it: First, there must be the purchase of a right; second, the right must be a contingent one to receive something greater than that which is purchased; and, third, the contingent right must depend upon lot or chance. *Const. art. 18, § 2*, and *Mills' Ann. Stat. § 2927*, prohibiting lotteries or "gift enterprises," does not authorize an ordinance prohibiting gift enterprises, defined to include the giving of trading stamps, since the term "gift enterprise," as used in the Constitution and statute, applies only to transactions in which the element of chance is involved. *City and County of Denver v. Frueauff*, 88 Pac. 389, 394, 39 Colo. 20, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521 (quoting and adopting definition in *Winston v. Beeson*, 47 S. E. 457, 135 N. C. 271, 65 L. R. A. 167; *Lohman v. State*, 81 Ind. 17; citing *Black's Law Dict. p. 539*; *Bouv. Law Dict. p. 884*; *Anderson's Law Dict. p. 488*).

The definition of a "gift enterprise" as the business of selling merchandise, coupled



with a promise to give any other article in consideration of the purchase, which is made by Laws D. C. 1871-72, pt. 2, pp. 96, 97, licensing various trades and businesses, was not imported into Rev. St. D. C. § 1177, making it a crime in any manner to engage in any gift enterprise business in the district, by the provisions of section 1176, disapproving and appealing the earlier legislation for the licensing of gift enterprises and declaring it thereafter to be unlawful for any person or persons to engage in said business in any manner, as defined in the repealed act or otherwise. *Matter of Gregory*, 31 Sup. Ct. 143, 144, 219 U. S. 210, 55 L. Ed. 184.

A "gift enterprise," which is made punishable by Pen. Code 1895, § 406, is a sporting artifice by which, for example, a merchant or tradesman sells his wares for their market value, but, by way of inducement, gives to each purchaser a ticket which entitles him to a chance to win certain prizes to be determined after the manner of a lottery. The element of chance is an essential of a "gift enterprise." *Russell v. Equitable Loan & Security Co.*, 58 S. E. 881, 884, 129 Ga. 154, 12 Ann. Cas. 129.

In a statute authorizing cities to tax, license, and suppress certain occupations named, among them "gift enterprises," such term means schemes for the distribution of property into which some element of chance enters, and the statute does not confer power on a city to impose a license tax upon the occupation of selling trading stamps to merchants, which are given by them to cash customers as a premium, and redeemed by the seller in merchandise at their face value in whatever sums presented by such customers. *Humes v. Little Rock*, 138 Fed. 929, 931.

Where each purchaser of goods receives from the seller, in furtherance of an advertising scheme, a certificate entitling him to a gift of a hat pin, which, so far as appears, is the same in each case, the contract is not void, as part of a "gift enterprise," under Laws 1895, p. 289, c. 152; each scheme prohibited thereby involving the element of chance as the determining factor on which property or money may be procured. *United Jewelers' Mfg. Co. v. Keckley*, 90 Pac. 781, 77 Kan. 797.

#### **GIFT FOR RELIGIOUS USE**

See Religious Uses.

#### **GIFT INTER VIVOS**

See, also, Gift.

The essential elements of a "gift inter vivos" are (1) intent to vest the title of the thing given in the donee; (2) delivery; (3) acceptance by the donee. *Glick v. Stumpf*, 103 N. Y. Supp. 1109, 1112, 53 Misc. Rep. 83 (citing *Gannon v. McGuire*, 55 N. E. 7, 160 N. Y. 476, 73 Am. St. Rep. 694; *Beaver v.*

*Beaver*, 22 N. E. 940, 117 N. Y. 421, 6 L. R. A. 403, 15 Am. St. Rep. 531).

"Gifts inter vivos" have no reference to the future, and go into immediate and absolute effect. To constitute such a gift, the donor must be divested of and the donee invested with the right of property in the subject of the gift. It must be absolute, irrevocable, without any reference to its taking place at some future period. The donor must deliver the property and part with all present and future dominion over it. *Holman v. Deseret Sav. Bank (Utah)* 124 Pac. 765, 766 (quoting 4 Words and Phrases, pp. 3091, 3092).

Under Rev. Codes, § 4635, defining a gift as a transfer of personal property, made voluntarily and without consideration, to constitute a "gift inter vivos," the donor must voluntarily deliver the subject of the gift to the donee with the present intention to vest the legal title in the donee, who must accept the same; the essential elements being the delivery, the accompanying intent, and acceptance by the donee, the gift being without condition and at once irrevocable. *O'Neil v. O'Neil*, 117 Pac. 889, 890, 43 Mont. 505, Ann. Cas. 1912C, 268.

It is essential to a "gift inter vivos" that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, and that there be such a change of possession as to put it out of the power of the giver to repossess himself of the thing given. *Shafer v. Manning*, 132 Ill. App. 570, 573.

A "donation inter vivos" is an act by which the donor divests himself at present irrevocably of the thing given. *Hearsey v. Craig*, 53 South. 17, 19, 126 La. 824 (quoting and adopting the definition in Civ. Code, art. 1468).

To constitute a valid "gift inter vivos," there must be a voluntary, gratuitous, and absolute transfer of the property from the donor to the donee, effective immediately, and fully executed by delivery to and an acceptance by the donee. *Shepard v. Shepard*, 129 N. W. 201, 208, 164 Mich. 183; *Garrison v. Union Trust Co.*, 129 N. W. 691, 692, 164 Mich. 345, 32 L. R. A. (N. S.) 219; *Calvin v. Free*, 71 Pac. 823, 825, 66 Kan. 466.

In a "gift inter vivos" the donor must not only part with possession of the property, but with dominion over it; it being unconditional and irrevocable. *McCoy's Adm'r v. McCoy*, 104 S. W. 1031, 126 Ky. 783.

"A 'gift inter vivos' must be without any conditions attached to it." *Phinney v. State ex rel. Stratton*, 78 Pac. 927, 928, 36 Wash. 236, 68 L. R. A. 119 (quoting *Thomas' Adm'r*

v. Lewis, 15 S. E. 389, 89 Va. 1, 18 L. R. A. 170, 37 Am. St. Rep. 848).

The unconditional delivery of personal property by the owner to another, with intent that such other shall immediately and permanently become the owner thereof, on acceptance constitutes a "gift inter vivos." Hall v. Hall, 93 Pac. 177, 178, 76 Kan. 806.

In order to legalize a "gift inter vivos" there must be, not only a donative intention, but also, in conjunction with it, a complete stripping of the donor of all dominion or control over the thing given. Nicklas v. Parker, 61 Atl. 267, 268, 69 N. J. Eq. 743 (citing Stevenson v. Earl, 55 Atl. 1091, 1093, 65 N. J. Eq. 721, 725, 103 Am. St. Rep. 790, Ann. Cas. 49).

To constitute a "gift inter vivos," there must exist an intent to make the gift then and there, and such delivery as divests the donor of all dominion, and invests the donee therewith. In re Ashman's Estate, 72 Atl. 899, 901, 223 Pa. 543.

To constitute a valid "gift inter vivos," there must be on the part of the donor an intent to give, delivery of the thing given to or for the donee pursuant to such intent, and an acceptance by the donee. Schneider v. Schneider, 107 N. Y. Supp. 792, 795, 122 App. Div. 774.

To constitute a valid "gift inter vivos," there must be an absolute transfer of the property taking effect immediately and fully executed by a delivery of the property by the donor, and an acceptance by the donee. Combest v. Wall (Tex.) 102 S. W. 147, 150.

To make a "gift inter vivos," the donor must at the time of the alleged gift have been of sound mind so that he knew and understood the effect of his act and intended that effect, and he must have actually delivered the subject-matter to the donee, and by such act he must have intended to pass title thereto to the donee to take effect immediately, and the donee must have actually accepted it as a gift. Lowe v. Hart, 125 S. W. 1030, 1032, 93 Ark. 548.

To constitute a "gift inter vivos," the gift must be by a donor competent to contract and exercise free will, the gift must be complete, the property must be delivered by the donor and accepted by the donee, and the gift must go into immediate and absolute effect. In re Van Derzee, 121 N. Y. Supp. 662, 665, 66 Misc. Rep. 399.

To constitute a valid "gift inter vivos," there must be an intention to make the gift then and there, and such an actual and constructive delivery at the same time to the donee as divests the donor of all dominion of the subject and invests the donee therewith. Where a woman took from the vaults of a trust company her box containing her securities, called in an officer of the company, stated to him her intent to make a gift of the same to a nephew, who was present with her,

and executed blank transfers, and the securities were then placed in the box hired by the nephew, who being about to go to a distant state, appointed his aunt as a deputy, there was a valid gift. Reese v. Philadelphia Trust, Safe Deposit & Ins. Co., 67 Atl. 124, 126, 218 Pa. 150, 120 Am. St. Rep. 880.

To constitute a valid "gift inter vivos," there must be an absolute transfer of the property from the donor to the donee taking effect immediately and fully executed by a delivery by the donor and acceptance by the donee. A gift of the donor's check, payable immediately, and delivered subject to the terms of a written memorandum stipulating that the check shall not be payable until after the donor's death, is not a valid gift inter vivos. Foxworthy v. Adams, 124 S. W. 381, 383, 136 Ky. 403, 27 L. R. A. (N. S.) 308, Ann. Cas. 1912A, 327.

The statute taxing transfers of property made "in contemplation of death" includes "gifts inter vivos" as well as "gifts causa mortis." In re Palmer's Estate, 102 N. Y. Supp. 236, 240, 117 App. Div. 360.

To establish a "gift inter vivos" of a deposit in a savings bank, it must appear, not only that the depositor intended a gift, but also that he executed his intention and completed the gift by acts sufficient to pass title. Candee v. Connecticut Sav. Bank, 71 Atl. 551, 81 Conn. 372, 22 L. R. A. (N. S.) 568.

To constitute a "gift inter vivos" of a bank deposit, it is not enough that the donor should make the deposit formally in trust for the donee; but the gift does not become a completed transaction until it has been communicated to the donee, or some one acting in trust for him and for his benefit and accepted by him. Supple v. Suffolk Sav. Bank for Seamen, 84 N. E. 432, 433, 198 Mass. 393, 126 Am. St. Rep. 451.

An owner of stock filled out a transfer of it to B. and delivered the certificate to her. The certificate remained in B.'s exclusive possession for a year, when it was put into the owner's deposit box, with a paper pinned to it, in her handwriting, that the certificate was the property of B. and was placed there for safe-keeping. The owner prior to the transfer evinced an intention to retain the stock in her own control and allow title to pass only after her death, and the dividends to be paid to her for life. The stock was never transferred on the books of the corporation during the owner's life. Held, that such facts were sufficient to show a valid "gift inter vivos" of the stock. Bone v. Holmes, 81 N. E. 290, 291, 195 Mass. 495.

#### **Gift causa mortis distinguished**

See Gift Causa Mortis.

#### **Delivery**

To constitute a "gift inter vivos," there must be a delivery, either actual or sym-

bolical. *Taylor v. Purdy*, 151 S. W. 45, 47, 151 Ky. 82.

Delivery is essential to a valid gift either *causa mortis* or *inter vivos*. In *re Miller*, 119 N. Y. Supp. 52, 53, 55, 64 Misc. Rep. 232.

"An essential element, applicable alike to a 'gift *inter vivos*' or a '*donatio causa mortis*,' is the delivery of the thing given, or the subject of the donation, to the donee or to his use." *Wittman v. Pickens*, 81 Pac. 299, 33 Colo. 484.

The delivery of an inventory of decedent's assets, with an instrument attached thereto assigning them to his son, is a sufficient delivery to complete a "gift *inter vivos*." In *re Palmer's Estate*, 102 N. Y. Supp. 236, 239, 117 App. Div. 360.

In order to establish a "gift *inter vivos*" of personal property, the delivery must appear to have been absolute; that is to say, the donor must appear not only to have parted with the possession of the property, but he must likewise appear to have relinquished to the donee all dominion and control over it. *Millard v. Millard*, 77 N. E. 595, 221 Ill. 86.

To constitute a valid "gift *inter vivos*" of personal property, the gift must be voluntary, gratuitous, and absolute, and take effect at once, and ordinarily must be accompanied by a delivery of the thing to the donee, or to some one for his use and benefit. The delivery of a gift, however, is not always required. Hence, where a deed recited that part of the consideration was a note, with interest payable annually for the use of a certain person during her life, there was a valid gift of the interest, though the note was not delivered to the donee. *Malone's Committee v. Lebus*, 77 S. W. 180, 181, 116 Ky. 975.

It is essential to the validity of a "gift *inter vivos*" that there must be an actual and complete delivery of the property made in execution of the gift, and for the express purpose of consummating it. *Bruce v. Squires*, 74 Pac. 1102, 1103, 68 Kan. 199.

Where a husband signed and had witnessed and delivered to his wife assignments of certain shares and certificates representing the same, and the wife placed them in the safety deposit box from which the husband had taken them, and the key to which he then gave her, and she afterwards paid rental on the box and the husband survived for three years thereafter, it constituted a valid gift to the wife not in contemplation of death, so as not to be subject to the transfer tax. In *re Graves' Estate*, 103 N. Y. Supp. 571, 573, 52 Misc. Rep. 433.

To constitute a valid "gift *inter vivos*," there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately, and fully executed by a delivery of the property

by the donor and acceptance thereof by the donee, and, where future control over the property remains in the donor until his death there is no valid gift *inter vivos*. *Dick v. Harris' Ex'r*, 141 S. W. 56, 58, 145 Ky. 739.

To constitute a valid "gift *inter vivos*," there must be both an intention to give and a complete and unconditional delivery to the donee, or to some one for him, of the property. *Lohnes v. Baker*, 137 S. W. 282, 285, 156 Mo. App. 397.

To complete a "gift *inter vivos*," there must be an absolute delivery by the donor, with intention to part with his interest in and dominion over the property. Bonds and other negotiable instruments cannot be transferred by delivery as a gift without a written assignment. The essential in case of such gifts requires such delivery as the subject-matter of the gift reasonably admits of. Many of the strict requirements for transfer by gift indicated by the old cases have been removed or relaxed. *Opitz v. Karel*, 95 N. W. 948, 949, 118 Wis. 527, 62 L. R. A. 982, 99 Am. St. Rep. 1004.

"Gifts *inter vivos*" of personal property, to be effective, must be accompanied by the delivery of the possession, the donor parting with all present and future dominion over it: the donor must be divested of, and donee invested with, the right of property in the subject of the gift; it must be absolute, irrevocable, without any reference to its taking effect at some future time; and without such proof, clear and explicit, the gift fails. No mere promise or declaration of intention to give will suffice, however clearly the same may be established. Nothing short of a complete and unconditional delivery is sufficient to constitute a valid gift, and until delivery the gift is inchoate and revocable. *Bowen v. Kutzner*, 107 Fed. 281, 296, 93 C. C. A. 33.

In order to constitute a valid "gift *inter vivos*" of personal property, there must be shown an intention to give; that is, an expressed purpose to divest the donor of title in and ownership of the thing given, carried into effect and evidenced by a delivery of possession to the donee and acceptance by him. It inheres in the conception of the possession essential to a completed gift that the donee should have some control, and such control only, of the subject-matter of the gift as is consistent with the ownership purported to be transferred to him. Where delivery of the property has once been made, and possession transferred, the gift is irrevocable, and is not affected by the fact that the donor immediately thereafter comes into physical possession and control of the property, without any retransfer of the ownership. Hence, if a donor, with the clearly expressed intention of making a gift, make an actual delivery into the hands of the donee, the fact that the donor has lawful access to the depository of the thing given

does not invalidate the gift, if the donee has also the same access to said depository, and has such control over the thing given that he may remove it at any time he chooses to do so. *Beaumont v. Beaumont*, 152 Fed. 55, 59, 81 C. C. A. 251 (citing *Corle v. Monkhouse*, 25 Atl. 157, 50 N. J. Eq. 537, 546; *Matthews v. Hoagland*, 21 Atl. 1054, 48 N. J. Eq. 455, 485; *Industrial Trust Co. v. Scanlan*, 58 Atl. 786, 26 R. I. 228; *Dennin v. Hilton* [N. J.] 50 Atl. 600).

#### Immediate effect

"To constitute a valid 'gift inter vivos,' there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately and fully executed by delivery of the property by the donor and an acceptance thereof by the donee. Such gifts can have no reference to the future, but go into immediate and absolute effect." *Combest v. Wall* (Tex.) 102 S. W. 147, 150.

To constitute a "gift inter vivos," the property must be delivered absolutely, and the gift must go into immediate effect, and, where future control over the property remains in the donor until his death, there is no valid gift inter vivos. *Stark v. Kelley*, 113 S. W. 498, 500, 132 Ky. 376 (citing 4 Words and Phrases, p. 3092).

#### Intent

The test in determining whether there was a "gift inter vivos" is to ascertain the donor's intention as to the transfer of the property, there being no gift unless he intended to part with dominion and control over it. *Shepard v. Shepard*, 129 N. W. 201, 208, 164 Mich. 183.

To constitute a valid "gift inter vivos," there must be an intention to give and a delivery to the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Neither will a delivery be sufficient, unless made with an intention to give. The transaction must show a completely executed transfer to the donee of the present right of property and the possession. The donee must become the owner of the property given. *Harris Banking Co. v. Miller*, 89 S. W. 629, 635, 190 Mo. 640, 1 L. R. A. (N. S.) 790 (citing *In re Souland's Estate*, 43 S. W. 617, 141 Mo., loc. cit. 657; *Dunn v. German-American Bank*, 18 S. W. 1139, 109 Mo. 97; *McCord's Adm'r v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *Tomlinson v. Ellison*, 16 S. W. 201, 104 Mo. 105).

To constitute a valid "gift inter vivos," the intention to make it must be satisfactorily established, and this intention must have been executed by actual, constructive, or symbolic delivery of the thing proposed to be given, without power of revocation.

In other words, there is no gift until the intention of giving is fully consummated by the donor transferring all right to and dominion over the thing given to the donee. This rule applies to choses in action duly assigned and gifts of funds on deposit in banks, whether represented by passbooks or certificates of deposit. *Tucker v. Tucker*, 116 N. W. 119, 120, 138 Iowa, 344 (citing *In re Brown's Estate*, 85 N. W. 617, 113 Iowa, 351; *Furenes v. Elde*, 80 N. W. 539, 113 Iowa, 351, 77 Am. St. Rep. 545).

The delivery of a savings bank deposit book by decedent to his wife was in operation as a "gift inter vivos," when not intended as such. *Nogga v. Savings Bank of Ansonia*, 65 Atl. 129, 79 Conn. 425.

To constitute a "gift inter vivos" or causa mortis, there must be a transfer of possession under circumstances indicating an intention thereby to at once transfer title as well as possession irrevocably. Inclosing the article in a sealed envelope, and handing the package to another with instructions to keep, but not to open it until after the death of the depositor, does not indicate such intention. *Northwestern Mut. Life Ins. Co. v. Collamore*, 62 Atl. 652, 655, 100 Me. 578.

#### GIFT IN TRUST

A gift by deed, devise, or bequest to an existing corporation, or to one to be thereafter organized within the time limited by law, with directions or conditions as to the use or management of the subject-matter of the gift which are reasonably consistent with the corporate purposes of the donee, is not a "gift in trust," but an absolute one to the corporation, within the meaning of the statute of uses and trusts. "A 'gift in trust' is one where the subject of the gift is transferred to the donee, not for the purpose of vesting both the legal title and beneficial ownership of the subject in the donee, but that it may be held and applied to certain uses for a third party—the beneficiary." *Watkins v. Bigelow*, 100 N. W. 1104, 1109, 1110, 93 Minn. 210, 232.

#### GIFT OF PUBLIC MONEY

Since a statute of limitations affects the remedy only, and does not go to the substance of the right, *St. 1901*, p. 646, c. 214, authorizing suits against the state on claims for coyote bounty already barred by the two-year limit imposed by *St. 1893*, p. 57, c. 45, was not in violation of *Const. art. 4, § 31*, prohibiting the Legislature from making any "gift of public money" or anything of value, as in such case the waiver of defense of limitation is not a gift. *Bickerdike v. State*, 73 Pac. 271, 275, 144 Cal. 681.

An appropriation of money by the Legislature for the relief of one who has no legal claim therefor must be regarded as a "gift," within the meaning of that term as used in *Const. art. 4, § 31*, providing that

"the Legislature shall have no power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation." Act March 23, 1901, providing that all jurors in criminal cases in any superior court in the state since the act of March 28, 1895, who have not been paid the fees specified in said act, shall be paid out of the general county fund the sum of \$2 per day for each day's attendance as such juror, violates this constitutional provision, as prior to its enactment there was no law making the city and county of San Francisco liable for the payment of jurors' fees in criminal cases. *Powell v. Phelan*, 71 Pac. 335, 337, 138 Cal. 271 (citing *Conlin v. Board of Sup'rs of San Francisco*, 33 Pac. 753, 99 Cal. 18, 21 L. R. A. 474, 37 Am. St. Rep. 17; *Id.*, 46 Pac. 279, 114 Cal. 404, 33 L. R. A. 752).

### GIFT TO A CLASS

A "gift to a class" is defined as a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at future time, and who are to take in equal or in some other definite proportions; the share of each being dependent for its amount on the ultimate number of persons. In *re King's Estate*, 93 N. E. 484, 485, 200 N. Y. 189, 34 L. R. A. (N. S.) 945, 21 Ann. Cas. 412; In *re Barrett's Estate*, 116 N. Y. Supp. 756, 758, 132 App. Div. 134; *Id.*, 116 N. Y. Supp. 756, 63 Misc. Rep. 484; In *re Henderson's Estate*, 119 Pac. 496, 499, 161 Cal. 353 (quoting and adopting definition in 1 Jarm. Wills [6th Ed.] 232); *Clark v. Morehous*, 70 Atl. 307, 308, 74 N. J. Eq. 658 (citing Jarm. Wills, 534; In *re Russell*, 61 N. E. 166, 168 N. Y. 169).

Gifts for charitable purposes, though gifts for the benefit of individuals, are not gifts to individuals, within an instruction in a will directing payment of inheritance taxes on legacies to individuals. Such gifts are not gifts to the individuals, but to the class. *Kingsbury v. Bazeley*, 70 Atl. 916, 917, 75 N. H. 13, 139 Am. St. Rep. 664, 20 Ann. Cas. 1355.

### GIFT TO CHURCH

A gift of all the property of an estate not otherwise disposed of to a church, in trust for the repair of the church and church buildings, and for promoting and extending the religion of Christian Science, is a gift for religious purposes, and not a "gift to a church," or "gift for the use of a church," within Pub. St. 1901, c. 152, § 10, providing that the income of any grant or donation made to or for the use of a church shall not exceed \$5,000 a year, nor R. L. Mass. c. 37, § 9, which limits the income of gifts for the use of any one church to \$2,000 a year. *Glover v. Baker*, 83 Atl. 916, 924, 76 N. H. 593.

A devise of property to a church in trust is a "gift to the church," within the meaning of Rev. Laws, c. 37, § 9, providing that the income of gifts to or for the use of any one church shall not exceed \$2,000 a year. *Chase v. Dickey*, 99 N. E. 410, 413, 212 Mass. 555.

### GIFT TO INDIVIDUAL

See Individual.

### GILL NET

A "gill net" is much like a seine, except in its method of use. Its meshes are made of a proper size to permit the head of the fish to pass through beyond the gills, which prevents the fish from withdrawing it, and it is thereby trapped and captured. While fishermen might be expected to distinguish between seines and gill nets, and pound or pond nets, calling each by its distinguishing name, if all might not be called by the generic name of seines, certainly the gill net is a species of trap net. *Hilborn v. Smith*, 111 N. W. 1082, 1083, 148 Mich. 474.

### GILSONITE

Asphaltum is a solid valuable mineral deposit, commonly called "gilsonite," which is found in a vein or lode in rock in place. *Webb v. American Asphaltum Mining Co.*, 157 Fed. 203, 205.

### GIN

See Cotton Gin.

"Gin" is distilled alcoholic spirits, made from rye and barley, flavored with juniper berries or turpentine. It is notoriously strong alcoholic spirits. When diluted and sweetened, with the slight flavor of buchu leaves added, it would be and doubtless is an attractive drink as a beverage. *Dr. C. Bouvier Specialty Co. v. James*, 118 S. W. 381, 133 Ky. 580.

### GIN AND WATER

In considering an indictment charging the mixing of cantharides with "gin and water," which was objected to on the ground of ambiguity, the court said: "The court, jury, and accused must have known that 'gin and water' is a drink. That is the usual acceptance and meaning of those words, and in that sense they must be taken." *Madden v. State*, 1 Kan. 340, 350.

### GIN HOUSE

As house, see House.

### GIN MEN

"Gin men" are men employed in coal mines who have no specific work to do, but are hired to do general work, or any kind of work they are ordered to do. The word is

probably a contraction of the word "general." *Smith's Adm'r v. North Jellico Coal Co.*, 114 S. W. 785, 786, 131 Ky. 196, 28 L. R. A. (N. S.) 1266.

## GINGER

### GINGER ROOT UNGROUND

A by-product in the process of extracting the essence of ginger root, which results from cracking the crude root in a machine and running it through a still, and consists of the residue of the process pressed into cakes, is not within the provision in paragraph 667, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201, for "ginger root unground." Cracking the root, so that it is reduced to small particles and pulverized, is a process of grinding. *Lewis German & Co. v. United States*, 128 Fed. 467.

The article known as spent ginger, which is a by-product from the treatment of ginger root in the manufacture of ginger extract, etc., and consists of a dried cake of ginger particles, is held to be "ginger root, unground," as enumerated in paragraph 667, Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 667, 30 Stat. 201. *Lewis German & Co. v. United States*, 137 Fed. 817, 818, 70 O. C. A. 315.

## GINSENG

Growing ginseng as growing crop, see Growing Crops.

## GIRL

Under Code 1896, § 4889, declaring that, if "any man and woman" (within the prohibited degrees) have sexual intercourse together, etc., they must, on conviction, be punished, an indictment charging that defendant, a man, being father of C. D., "a girl," and within the prohibited degree of consanguinity, etc., did have sexual intercourse with the said C. D., etc., was not fatally defective for failure to charge that C. D. was a "woman," viz., a female having passed the age of puberty. *Dixon v. State*, 41 So. 734, 147 Ala. 91, 119 Am. St. Rep. 57, 10 Ann. Cas. 937.

## GIST

The term "gist of the action," as used in *Hurd's Rev. St.* 1905, c. 72, § 2, authorizing the discharge of persons arrested in civil actions, except when malice is of the "gist of the action," means the gist of the action which was in fact brought against the person, and not the gist of an action which might have been, but which in fact was not, carved out of the original transaction or transactions. *Kellar, Ettinger & Fink v. Norton*, 81 N. E. 1037, 1038, 228 Ill. 356.

## GIVE

See Offer to Give.

Giving away liquor as furnishing liquor, see Furnish.

"The strict and primary significance of the word 'give' is to bestow, to confer or grant, usually without any price or reward as a donation or gratuity. \* \* \* While the word does not invariably indicate an intention to make a gift, that is its usual signification. A secondary, but entirely proper, meaning of the word 'give' is to supply; to furnish; to afford." Parol evidence of surrounding circumstances and testator's declarations is admissible in an action by an administrator c. t. a. on notes executed to testator by a legatee to show that the clause giving defendant his legacy, reading, "I will, devise, and bequeath to P. R., the young man I raised, in addition to what I have already given him, the further sum of five hundred dollars," referred to the sums represented by the notes as the amount "already given"; it being necessary to explain the latent ambiguity arising from want of certainty in the reference to the previous gift. *Daugherty v. Rogers*, 20 N. E. 779, 782, 119 Ind. 254, 3 L. R. A. 847 (quoting and adopting *Johnston v. Griest*, 85 Ind. 503, and citing and adopting *Cyclop. Dict.* and *Anderson's Law Dict.*).

Where the evidence showed that a person accused of administering a drug with intent to produce an abortion gave pills to the prosecutrix with directions to take them the next day, an instruction that to "administer" drugs to a person meant to "give" them to such person was erroneous, since while to "give" drugs to a person may in some cases include the idea that the drugs are taken into the stomach, it could not have that meaning in view of the evidence. *State v. Stapp*, 151 S. W. 971, 973, 246 Mo. 338.

### Deliver synonymous

The word "give" may be treated as synonymous with "deliver," which is the meaning of the word "furnish" in a statute making it an offense to "furnish" liquor to minors. *Southern Express Co. v. State*, 58 S. E. 67, 69, 1 Ga. App. 700.

### As expression of gift

In view of the other provisions of the prohibitory law, the section thereof which forbids the "giving" of intoxicating liquor to minors must be construed to have reference only to gifts properly so called, and not to sales, and therefore a conviction upon an information drawn under that section cannot be sustained by proof that the defendant sold intoxicating liquor to a minor. *State v. Fletcher*, 87 Pac. 729, 730, 74 Kan. 620 (citing *Commonwealth v. Davis*, 12 Bush. [75 Ky.] 240; *Young v. State*, 58 Ala. 358; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522).

**Grant synonymous**

The word "grant" is synonymous with the word "give." *Gurnsey v. Northern California Power Co.*, 94 Pac. 858, 862, 7 Cal. App. 534.

Under a warranty deed in the usual form, with a provision that the possession of said above-described premises is to be given to party of second part, her heirs and assigns, on or before the 1st day of March, 1901, the word "given" must be construed as synonymous with the word "granted." *Schwitzgebel v. Beakey*, 105 Pac. 42, 43, 81 Kan. 38.

"Give" and "receive" are synonymous with "grant" and "accept." Where all these words appear in the same phrase, the principle of ejusdem generis forbids their being taken to indicate acts of antagonistic quality. *Standard Oil Co. v. U. S.*, 164 Fed. 376, 390, 90 C. C. A. 364.

Ordinary and accepted meanings of "give" and "receive" are synonymous with "grant" and "accept." *U. S. v. Bunch*, 165 Fed. 736, 739 (citing *Standard Oil Co. v. United States*, 164 Fed. 376, 90 C. C. A. 364).

**As sign**

The word "give," in a statute requiring that one shall "give" bond, does not imply that he shall sign a bond as principal, especially where there is nothing in the stipulations or conditions of the bond which require that it shall be signed by the principal. *Clark v. Bank of Hennessey*, 79 Pac. 217, 222, 14 Okl. 572, 2 Ann. Cas. 219.

**Transfer of title imported**

Property can be as effectually transferred by gift as by sale, and the word "give" is as expressive of a transfer of title as the word "sell." *In re Soulard's Estate*, 43 S. W. 617, 622, 141 Mo. 642.

While the primary meaning of the word "give" is to transfer ownership or possession without compensation, it has a secondary popular meaning of putting into another's possession on any terms, whether for a consideration or as a gift. *Spencer v. Potter's Estate*, 80 Atl. 821, 825, 85 Vt. 1.

**GIVE AND BEQUEATH**

The word "bequeath" is naturally applicable to the transmission by will of personal property; but, when it is associated with the word "give," it may transmit not only personal, but real, property. *Campbell v. Cole*, 64 Atl. 461, 462, 71 N. J. Eq. 327.

**As devise**

The words "give and bequeath," in a will disposing of personalty and realty, are the equivalent of "devise." *Hoefliger v. Hoefliger*, 107 N. W. 312, 313, 132 Iowa, 575.

Realty may pass under a residuary clause of a will using the words "give and bequeath," although the word "devise" is not

used therein. *Rickman v. Meier*, 72 N. E. 1121, 1126, 213 Ill. 507.

**GIVE AWAY OR OTHERWISE DISPOSE OF**

See *Sell, Give Away, or Otherwise Dispose of*.

**GIVE COLOR**

"As a term of pleading, the phrase 'give color' signifies an apparent or prima facie right, and the meaning of the rule that every pleading in confession and avoidance must give color is that it must admit an apparent right in the opposite party, and rely on some new matter by which the apparent right is defeated." *Shipp v. Patton*, 93 S. W. 1033, 1034, 123 Ky. 65 (quoting and adopting *Steph. Pl.* p. 206).

**GIVE, DEVISE, AND BEQUEATH**

The words in a will, "I give, devise, and bequeath to my daughter, A.," certain real property described, are sufficient to pass the fee to the devisee named. *Aneshaensel v. Twyman*, 85 N. E. 788, 789, 42 Ind. App. 354.

Where circumstances indicated that a sale of testator's property would be necessary, and the entire will showed that he probably contemplated that there should be a sale, a provision that he did "give, devise, and bequeath" to his two sons each \$500, and \$500 to three daughters, who should share equally of his estate, both real and personal, with the two sons, the word "devise" was not used in its technical or legal sense, but as synonymous with "give" and "bequeath." *Schwengel v. Anthers*, 101 N. W. 335, 336, 72 Neb. 643, 650.

**GIVE IN HIS VOTE**

In a statute providing the punishment for any person who shall fraudulently vote, the word "vote" imports a ballot marked according to law; and it follows that it is sufficient in a complaint for a violation of the statute to charge that accused did "give in his vote," inasmuch as it follows from this that the ballot was marked for some or all of the officers then to be voted for, and the complaint is sustained by the proof of such voting for any one of them, without an averment of the particular office or officers for whom or for which he voted. *State v. Custer*, 66 Atl. 306, 308, 28 R. I. 222.

**GIVE NOTICE**

The quoted words in section 1433, *Balinger's Ann. Codes & St.*, that the clerk shall inform "the judge of the superior court who may 'give notice,'" will be construed to mean that the judge may "cause" notice to be given, such as required by section 1434. *Thomas v. Van Zandt*, 106 Pac. 141, 144, 56 Wash. 595.

**GIVE NOTICE OF APPLICATION FOR APPEAL**

Under statutes providing that a party desiring to appeal may serve on the prevailing party written notice "that he appeals from such judgment or order," and providing that no appeal shall be dismissed for any informality or defect in the notice of appeal, the phrases "intention to appeal," "will appeal," or "give notice of their application to appeal," are equivalent to the more direct phraseology of the statute, and will effect an appeal; and a notice reading, "Will please take notice that the defendant, L. J., has appealed," etc., is sufficient to effect an appeal. *James v. James*, 77 Pac. 1082, 35 Wash. 655 (citing *Ranahan v. Gibbons*, 62 Pac. 773, 23 Wash. 255; *In re Murphy's Estate*, 66 Pac. 424, 26 Wash. 222; *Brown v. Calloway*, 75 Pac. 630, 34 Wash. 175).

**GIVEN**

See *Duly Given or Made*.

Where the judge, after having read a requested instruction to the jury which had been marked "given," stated that he wished to modify it, and immediately concluded not to give the same, and orally so stated to the jury, whereupon he marked it "refused," the instruction being plainly erroneous, and defendant's right to review the same having been preserved by the court's marking the same "refused," defendant was not prejudiced by the court's oral statement that he wished to modify the instruction which was objectionable, under *Prac. Act*, § 53, providing that the court shall not modify instructions given otherwise than in writing. *Chicago & E. I. R. Co. v. Zapp*, 70 N. E. 623, 624, 209 Ill. 339.

A railroad company subject to the interstate commerce laws, which paid rebates to a shipper in 1904, is subject to prosecution therefor under the *Elkins act* (*Act Feb. 19, 1903*, c. 708, § 1, 32 Stat. 847), although the agreement therefor was made before the passage of such act. Such agreement was unlawful and unenforceable under the original interstate commerce law, and the rebates cannot be said to have been "given," within the meaning of the *Elkins act*, until their actual payment, and, as so construed, the act as applied to such a case is not an *ex post facto* law. *United States v. Great Northern R. Co.*, 157 Fed. 288, 289.

**As delivered**

In a suit to set aside an alleged fraudulent conveyance from a husband to his wife, which he claimed was made in payment of a debt due for money borrowed by him, the fact that in a will executed by him he directed the payment of such money, and referred to it as having been given to him by his wife, did not prove that there was no debt; it not being clear that he used the word "given" in any different sense than

"delivered," or as indicating that it was received as a gift. *Dresser v. Zabriskie* (N. J.) 39 Atl. 1066, 1067.

**Surrendered or granted synonymous**

Under a warranty deed in the usual form, with a provision that the possession of said above-described premises to be given to party of the second part, her heirs and assigns, on or before the 1st day of March, 1901, the word "given" must be construed as synonymous with the word "surrendered" or "granted." *Schwitzgebel v. Beakey*, 105 Pac. 42, 43, 81 Kan. 38.

**GIVEN BY THE CONDUCTOR**

Where it was plaintiff engineer's duty under the rules not to start his train until the proper signal was given by the conductor, if he did so he could not recover for resulting injuries; but if, when the conductor could not be seen, it was customary for the conductor to signal the brakeman and for him to pass it to the engineer, and plaintiff received a signal to go ahead from the brakeman in the usual way, and acted upon it in good faith, believing it had come from the conductor, the signal was "given by the conductor" within the meaning of the rule, and plaintiff could recover. *Cincinnati, N. O. & T. P. R. Co. v. Silvers* (Ky.) 126 S. W. 120, 123.

**GIVEN FOR A PATENT RIGHT**

Notes given in payment for the stock of a corporation to which the payee had assigned patent rights were not given for a patent right within *Act April 12, 1872* (P. L. 60), requiring that such a note have the words "given for a patent right" written across its face. *Showell v. Barr*, 76 Atl. 718, 228 Pa. 42.

**GIVING AWAY**

"Giving away," within *Wilson's Rev. & Ann. St. 1903*, § 3407, punishing any person who shall sell at retail or give away upon any pretext intoxicating liquors without having obtained a license, must be a "giving away" on a pretext, and a simple act of giving away intoxicating liquors, unaccompanied by an intention to evade the law, is not necessarily a crime, and an information for giving away on any pretext intoxicating liquors must state the name of the person to whom the gift was made and the pretext under which the gift was made, so that accused may know the offense he is required to defend against. *Weston v. Territory*, 98 Pac. 360, 361, 1 Okl. Cr. R. 407 (quoting and adopting the definition in *State v. Ball*, 43 N. W. 399, 27 Neb. 604).

"Giving away" intoxicating liquors is within the inhibition of *Acts 1902*, p. 92, § 90, forbidding furnishing liquor, but not expressly forbidding giving, though the law repealed thereby did expressly forbid the giving away of intoxicating liquors. *State v. Tague*, 56 Atl. 535, 76 Vt. 118.



**GIVING IN PAYMENT**

"Giving in payment," within Civ. Code, art. 2655, providing that the giving in payment is an act by which a debtor gives a thing to a creditor, who is willing to receive it in payment of the sum which is due, means, when applied to a contract of sale, that the price or value of the thing given is fixed and agreed on; but there is no such rule with regard to donations, though in case of a gratuitous donation the value of the thing may be inquired into, for the purpose of ascertaining whether or not it exceeds the disposable portion, and in cases of conveyances purporting to be remunerative or onerous donations, such values may be inquired into, to determine whether they are what they purport to be, or whether they are real or gratuitous donations and subject to the rules applicable thereto. *Hearsey v. Craig*, 53 South. 17, 20, 126 La. 824.

**GLASS**

See Buttons of Glass; Cylinder Glass; Prismatic Glass; Wire-Glass.

Articles of glass ornamented, decorated, etc., see Articles within Tariff Act.

Manufactures of, see Manufactures—Manufactured Articles.

Congress in its tariff legislation having distinguished between glass and the form of glass known as paste, articles in chief value of paste, cut, are not within the provision of Schedule B, par. 100, in Tariff Act, for goods in chief value of cut "glass," but are dutiable as manufactures of "paste," under paragraph 112. *United States v. New York Merchandise Co.*, 167 Fed. 684, 685.

In the paragraph of the Tariff Act providing for "vessels or articles of 'glass,' \* \* \* all the foregoing filled and unfilled, and whether their contents be dutiable or free," the reference to the filling of such articles does not, in view of the history of the legislation, imply that only articles capable of being used as containers are covered by the paragraph; and microscope slides cannot for that reason be excluded. The words "filled or unfilled" may be interpreted distributively, and would thus apply only to "all the foregoing" which were capable of being filled. *O. G. Hempstead & Son v. United States*, 158 Fed. 584, 587, 86 C. C. A. 42.

"Glass bottles \* \* \* filled or unfilled," as used in the paragraph of the Tariff Act imposing a duty thereon as "glass or glassware," does not include a cork, wiring, or other fitting to preserve the contents. *James A. Hayes & Co. v. United States*, 150 Fed. 63, 67, 80 C. C. A. 17.

In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 565, 30 Stat. 198, for "glass plates or discs, rough cut or unwrought," with the proviso that "discs exceeding eight inches in diameter may

be polished sufficiently to enable the character of the glass to be determined," held, that the proviso does not require the exclusion from said paragraph of polished square plates less than eight inches across, where the polishing is done simply to determine the character of the articles, is of no other use, and is taken off in their manufacture. *Hensel, Bruckmann & Lorbacher v. United States*, 139 Fed. 95, 96.

Glassware ornamented with metal filigree work held dutiable as "articles of glass, \* \* \* ornamented, decorated," etc., under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 50 Stat. 157, regardless of whether glass or metal is the component of chief value. *Gallenkamp v. Rachman*, 147 Fed. 769, 770.

**GLASS EYES**

Dutiable as articles of glass ornamented, etc., see Articles within Tariff Act.

**GLASSWARE**

The term "glassware," in the provision for "blown glassware" in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, is not a term of general commercial designation. *United States v. Durand*, 137 Fed. 382, 69 C. C. A. 566.

**GLAZED BRICK**

Brick-glazed, see Brick.

**GLEBE**

"No parish church, as such, could have a legal existence until consecration; and consecration was expressly inhibited unless upon a suitable endowment of land. The canon law, following the civil law, required such endowment to be made or at least ascertained, before the building of the church was begun. \* \* \* This endowment was in ancient times commonly made by an allotment of manse and 'glebe,' by the lord of the manor, who thereupon became the patron of the church. Other persons also at the time of consecration often contributed small portions of ground, which is the reason, we are told, why, in England, in many parishes, the glebe is not only distant from the manor, but lies in remote, divided parcels. \* \* \* Whenever \* \* \* within the province, previous to the Revolution, an Episcopal church was duly erected by the crown, in any town, the parson thereof regularly inducted had a right to the glebe in perpetual succession. Where no such church was duly erected by the crown, the glebe remained as an *hereditas jacens*, and the state, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it, or might erect an Episcopal church therein, and collate, either directly, or through the vote of the town, indirectly, its parson, who would thereby become seised

of the glebe *jure ecclesiæ* and be a corporation capable of transmitting the inheritance." Story, J., in *Pawlet v. Clark*, 9 Cranch, 292, 330, 334, 3 L. Ed. 735. "Upon the sale of the glebe, the proceeds become parochial property, and must be applied for the common benefit, the maintenance of the minister, the repairs of the churches, and other parochial expenses, by the vestry, in good faith. But the mode, and extent, and circumstances, under which the fund is to be applied, are necessarily left to the discretion of the vestries from time to time chosen." Story, J., in *Mason v. Muncaster*, 9 Wheat. 445, 453, 6 L. Ed. 131.

## GLUCOSE

The term "glucose" is obnoxious to many, if not a majority, of the public, and is misunderstood by them. They do not know that in this country glucose is now made entirely from corn, and that the terms "glucose" and "corn syrup" are commercially synonymous. This fact is known to the manufacturers, and perhaps to the dealers. A prejudice exists against the term "glucose," because that material can be manufactured from many substances, including sawdust. In Europe it is made mainly of potatoes. By many it is associated with a glue factory. In this country "corn syrup" and "glucose" are not only commercially synonymous terms, but it is stated by counsel for respondent that they are permitted to be so used in all the other states. We have not verified this statement, but, as it is not challenged, we assume it to be correct. *People v. Harris*, 97 N. W. 402, 403, 135 Mich. 136.

Judicial notice should be taken that "glucose" is an element entering into many different articles of food and is not used by itself as such. "To the ancients 'honey' was known by the name of 'glucose,' and it is still somewhat difficult to draw the line of demarcation. Furthermore, it is a matter of common knowledge that honey deposited by the honey bee is on occasion almost entirely pure 'glucose,' dependent upon the food which the bee may eat." *People v. Berghoff*, 95 N. Y. Supp. 257, 258, 259, 47 Misc. Rep. 1.

## GLUE

So-called "bone size," used for filling and softening corduroys, is not "glue," within Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152. *G. W. Sheldon & Co. v. United States*, 127 Fed. 494.

A bequest of "glue" by a manufacturer thereof includes gelatine, where both products were made from the same stock and by the same process in the "glue factory" of testator. *Brown v. Clothey*, 79 N. E. 269, 270, 193 Mass. 211.

## GLYCEROPHOSPHATE

As medicinal preparation, see *Medicinal Preparation*.

## GO

A decree distributed the residuary estate of a testator to a trustee named in the will, "in trust to manage, control, and care for said property and the accumulations thereof" until the youngest surviving child of the testator reached majority, "and then to go" one-third to the widow and the remainder in equal shares to the surviving children of the testator. It also provided that in the meantime the income should annually be distributed to the widow and children in the same proportions. Held, that the words "to go" were clear words of direct grant or devise, and that under the same the widow took a vested estate in remainder, which on her death intestate before the termination of the trust descended to her heirs, notwithstanding the provisions of Civ. Code, § 863, that "every express trust in real property \* \* \* vests the whole estate in the trustees subject only to the execution of the trust," and that "the beneficiaries take no estate or interest in the property, but may enforce the performance of the trust"; the estate which a trustee takes by virtue of such section not being necessarily a fee, but only such estate as is required for the execution of his trust. *Keating v. Smith*, 97 Pac. 300, 303, 154 Cal. 186.

## GO OUT OF OFFICE

See *Out of Office*.

## GO TO

As revert, see *Revert*.

Where a testator in his will directs that certain property after the death or remarriage of his widow "shall go to and belong to" other relatives, the words "go to and belong to" are not equivalent to "pay and divide." On the marriage or death of the widow the property "goes to"—that is, moves, passes, proceeds, and belongs to; that is, comes under the physical power of, and is at the disposal of—those persons to whom the legal title was transferred at his death. Thus the language used correctly describes the progress of the tangible property from the possession of the testator to that of the beneficiary, and has nothing of the meaning of "paying and dividing." *In re Hitchins' Estate*, 89 N. Y. Supp. 472, 476, 43 Misc. Rep. 485.

Testator bequeathed to his wife and to his son and daughter each an undivided one-third of all of his property, declaring that all revenues arising from the property bequeathed to the children should "go to" the wife until the children became of age or should reach majority, according to the laws of Montana, after which the children should have their portions absolutely, the wife be-

ing directed to take and receive all the revenues of the property of both the children and use the same for their support and education. Held, that the words "go to," as so used, were not to be construed as equivalent to "give," "devise," or "bequeath," and hence did not vest in the wife any right to the surplus of the income of the children's portion not expended for their support and education. *Speckart v. Schmidt*, 190 Fed. 499, 505, 111 C. O. A. 331.

### GOES TO HIS CREDIBILITY

An instruction that certain evidence of a witness "goes to his credibility" is equivalent to telling the jury that it affects his credibility, and imports that the evidence referred to weakens the credibility of the witness. *Stull v. State*, 84 S. W. 1059, 1060, 47 Tex. Cr. R. 547 (citing *Howard v. State*, 8 S. W. 929, 25 Tex. App. 686; *Poyner v. State*, 51 S. W. 376, 40 Tex. Cr. R. 640; *Crockett v. State*, 49 S. W. 392, 40 Tex. Cr. R. 178).

### GOING AT LARGE

See At Large.

### GOING BUSINESS OR CONCERN

"Going business" is a term applied to a corporation which is "still prosecuting its business with the prospect and expectation of continuing to do so, even though its assets are insufficient to pay its debts." It means "that it continues to transact its ordinary business." *Contra Costa Water Co. v. City of Oakland*, 113 Pac. 668, 682, 159 Cal. 323 (quoting *Corey v. Wadsworth*, 11 South. 350, 353, 99 Ala. 68, 23 L. R. A. 618, 42 Am. St. Rep. 29; *White, Potter & Paige Mfg. Co. v. Henry B. Pettes Importing Co.*, 30 Fed. 864, 865; 4 Words and Phrases, p. 3103).

Although, after its organization, a manufacturing corporation became a legal entity, yet it was not a "going concern" where it did not manufacture the articles which it was organized to make, and had no capital to begin business; and hence persons purchasing unissued stock at less than par, with knowledge of the facts, are liable to subsequent creditors for corporate debts. *Utica Fire Alarm Telegraph Co. v. Waggoner Watchman Clock Co.*, 132 N. W. 502, 504, 166 Mich. 618 (citing 4 Words and Phrases, p. 3103).

A manufacturing plant is not a "going concern," so as to require supplies for operation, within Code Va. Supp. 1898, § 2485, giving a lien to persons furnishing such supplies, until the plant is complete by the combination of the site, structure, machinery, and motive power. *American Woodworking Machinery Co. v. Agelasto*, 136 Fed. 399, 401, 69 C. C. A. 243.

### GOING VALUE

"Going value" of a water company furnishing water to a city without contract as

to price, within the rule that the company is entitled to recover as a fair compensation for the service a just proportion of the operating expenses, taxes, and costs of administration paid by the company and of a just and reasonable return on the cost of reproducing its plant and its going value, is the excess of the cost of reproduction based on the fact that the system of the company is in operation, not only with capacity to supply the city, but actually supplying the city; not only with a capacity to earn, but actually earning. *O. H. Venner Co. v. Urbana Waterworks*, 174 Fed. 348, 352 (C. C.) (quoting and adopting the definition in *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 665, 27 L. R. A. 827).

### GOD'S ACRE

"The place where the dead are deposited all civilized nations and many barbarous ones regard in some measure, at least, as consecrated ground. In the old Saxon tongue the burial ground of the dead was 'God's acre.' One who buys the privilege of burying his dead kinsmen or friends in the cemetery acquires no general right of property; he acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as connected with the right of sepulture. Beyond this his title does not extend. He does not acquire, in strict sense, an ownership of the ground. All that he does acquire is the right to use the ground as a burial place." *Anderson v. Acheson*, 110 N. W. 335, 337, 132 Iowa, 744, 9 L. R. A. (N. S.) 217 (quoting from the opinion in *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903).

The burial place of the dead has among all nations and in all times been deemed sacred, and our Anglo Saxon forefathers called it "God's acre." *Hertle v. Riddell*, 106 S. W. 282, 286, 127 Ky. 623, 15 L. R. A. (N. S.) 796, 128 Am. St. Rep. 364.

### GOLD CERTIFICATE

A "gold certificate" issued under the act of Congress is properly called, in an indictment for stealing, "a United States Treasury note." Its designation as a certificate would merely have pointed out with more particularity what sort of a note it was, but such detail was not requisite. *Randall v. State*, 22 Atl. 45, 46, 53 N. J. Law, 485.

### GONE FROM THE BAR

The phrase "gone from the bar," as used in Practice Act, § 160 (P. L. 1903, p. 580), providing that plaintiff shall have no right to submit to a nonsuit after the jury have "gone from the bar" to consider their verdict, means when the jury have actually entered upon the consideration of their verdict, whether such action takes place within the

precincts of the courtroom or in some other place provided for their use. *Dobkin v. Dittmers*, 69 Atl. 1013, 76 N. J. Law, 235.

## GOOD

See Perfectly Good; Public Good; Stand Good.

### Acceptance imported

The certification of a check by a bank that it is "good" is equivalent to acceptance. *First Nat. Bank of Detroit v. Currie*, 110 N. W. 499, 501, 147 Mich. 72, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537, 11 Ann. Cas. 241 (quoting and adopting definition in *Merchants' Bank v. State Bank*, 10 Wall. [77 U. S.] 604, 19 L. Ed. 1008).

### As sound

In an action for the breach of a contract for the delivery of "good merchantable corn," an instruction using the phrase "sound merchantable corn" is not erroneous, for the words "sound" and "good" mean substantially the same. *Stahr v. Hickman Grain Co.*, 116 S. W. 784, 786, 132 Ky. 496.

Where, in an action for injuries on a defective sidewalk, defendant asked instructions which required it to maintain a sound and sufficient walk, it was not prejudiced by another instruction requiring the maintenance of sidewalks in "good" and reasonably safe condition. *City of Aledo v. Honeyman*, 70 N. E. 338, 339, 208 Ill. 415.

### As suitable

An instruction, in the language of Kirby's Dig. § 6644, defining a railroad company's duty to maintain stock guards is not objectionable because it uses the words "good" and "sufficient," while the statute uses the words "suitable" and "safe"; the words being substantially the same. *Kansas City Southern Ry. Co. v. Greer*, 119 S. W. 1121, 1123, 90 Ark. 531.

### As untarnished, honorable

Defendant in complaining of plaintiff, a general freight agent, wrote to the general manager of the railroad that plaintiff told him one thing and wired the agent another, and concluded with a separate paragraph, saying that the plaintiff was not a reliable man in any respect, and that his word was not good with people who knew him. Held that, in view of the arrangement of the letter which showed that the last paragraph related to plaintiff's personal character, the communication was libelous per se, as tending to injure him in his business; the letter charging him with not being "reliable" in any respect, which means untrustworthy, and that his word was not "good," the word "good" as applied to one's word meaning untarnished, honorable; and so action might be maintained without allegation of special damage. *Allen v. Earnest* (Tex.) 145 S. W. 1101, 1104.

## GOOD AND EFFECTUAL DEED

The words "good and effectual," as applied to a tax deed, must be understood to mean that the deed shall pass the title to the vendee, if the sale was made in obedience to the directions of the law, and was authorized by it; not that the vendee shall be released from the onus of proving every prerequisite to the regularity of the sale. *Lyon v. Hunt*, 11 Ala. 295, 315, 316, 46 Am. Dec. 216.

## GOOD AND LAWFUL REASONS

An order by a trial judge appointing another judge to try a cause, which recites that the presiding judge refuses to try such cause for "good and lawful reasons," will be construed to mean some one of the causes specified in Act March 1, 1885, which provides that in certain specified cases it shall be lawful for the presiding judge, in his discretion, to decline to preside during the trial of a cause. *Leonard v. Blair*, 59 Ind. 510, 514.

## GOOD AND MARKETABLE TITLE

In a contract for the sale of land made between the agent of the owner and the purchaser, the words requiring a "good and marketable title" refer to the record title, or the chain of title as shown by the public records, and not to the agent's authority from the owner to make the contract. *Roberts v. Tuttle*, 105 Pac. 916, 922, 36 Utah, 614.

## GOOD AND PERFECT TITLE

Where a contract calls for a "good and perfect title," it requires the conveyance of a fee. *Henderson v. Beatty*, 99 N. W. 716, 718, 124 Iowa, 163.

## GOOD AND SUFFICIENT

See Sufficient.

## GOOD AND SUFFICIENT CAUSE

See Sufficient Cause.

## GOOD AND SUFFICIENT DEED

### Good title

A "good and sufficient deed" is a marketable deed, one that will pass a good title to the land; and a stipulation for such deed is not satisfied by conveyance of whatever title the vendor may have. *Hall v. McKee*, 145 S. W. 1129, 1130, 147 Ky. 841.

## GOOD AND SUFFICIENT QUITCLAIM DEED

An executory contract for the sale of land, stipulating that the vendor shall, upon payment of the purchase price, convey and assure the land to the vendee by a "good and sufficient quitclaim deed," does not require the vendor to do more than to quitclaim his interest in the land by a properly executed deed. *McNellis v. Hilkowski*, 107 N. W. 965, 966, 98 Minn. 127.

**GOOD AND SUFFICIENT SUPPORT**

The reservation of "good and sufficient support" has been construed to mean such a support as is proper for a mother and the head of a family with the fortune and rank of her husband and his children. *Offutt v. Offutt*, 67 Atl. 138, 141, 106 Md. 236 (quoting and adopting definition given in *Jacobus' Ex'r v. Jacobus*, 20 N. J. Eq. 49, 54).

**GOOD AND SUFFICIENT TITLE**

Under a contract for the sale of land, whereby the vendor agrees to give a "good and sufficient title," where the record title proves bad, a title by limitation, to be sufficient, must be such as can be proved good as matter of law, and not as depending on a question of fact. *Greer v. International Stockyards Co.*, 96 S. W. 79, 82, 43 Tex. Civ. App. 370.

A condition in a bond for title, that upon performance by the obligee the obligor is "to issue a 'good and sufficient title,'" contemplates that the obligor will convey good title by a deed containing a general warranty. *Toomey v. Read & Gresham*, 67 S. E. 100, 101, 133 Ga. 855 (citing 4 Words and Phrases, pp. 3109, 3110).

**GOOD AND WORKMANLIKE JOB**

A "good and workmanlike job" is one that is done as a skilled workman should do it. *Ideal Heating Co. v. Kramer*, 102 N. W. 840, 841, 127 Iowa, 137 (citing *Fitzgerald v. La Porte*, 40 S. W. 261, 64 Ark. 34; *Smith v. Clark*, 58 Mo. 145).

**GOOD AND WORKMANLIKE MANNER**

To drill an oil well in a "good and workmanlike manner" within the terms of a contract does not include placing it in complete condition for permanent preservation by placing therein a packer and tubing and removing salt water therefrom. *Collier v. Munger*, 89 Pac. 1011, 1012, 75 Kan. 550.

A contract to construct buildings in a "good, workmanlike manner" meant that it was to be constructed with fair average skill, considered in relation to the character of the work, and not with the highest skill known to the carpenter trade; "workmanlike" meaning worthy of a skillful workman, well-executed, skillful, and "skillful" being defined as having ability in a specified direction, experienced, practiced. *Holland v. Rhoades*, 106 Pac. 779, 780, 56 Or. 206.

Plaintiff, after installing a steam heating plant in defendant's block (a larger boiler than necessary being used on the understanding that later defendant might heat his house therefrom), contracted to install radiation for steam heating in the house; no detailed plans or specifications being given, but the radiators and piping to be put in, the connection thereof with the boiler, and the quality of the materials to be used

being specified, and it being provided that all work should be done "in a 'good and workmanlike manner.'" Held, that plaintiff undertook not simply to do a good job of pipe fitting, but to have the apparatus, when put in, operate with reasonable success for heating the house, and if, to accomplish this, it was necessary to lower the boiler, it was his duty to lower it without extra charge. *Ideal Heating Co. v. Kramer*, 102 N. W. 840, 841, 127 Iowa, 137.

**GOOD BEHAVIOR**

See *During Good Behavior*.

"Good behavior" is conduct authorized by law. *United States v. Hraskey*, 88 N. E. 1031, 1033, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279.

The expression "good behavior," used in a municipal charter provision that the police force should be retained during good behavior, if taken alone, would give them life tenure except in case of removal for cause. *Smith v. Bryan*, 40 S. E. 652, 653, 100 Va. 199.

**GOOD CARE**

An agreement by an agister to take "good care" of a herd of cattle intrusted to his charge is equivalent to a contract to take such care of them as an ordinarily skillful and prudent man would take of his own animals under like circumstances. *Darr v. Donovan*, 102 N. W. 1012, 73 Neb. 424.

**GOOD CAUSE**

See *Without Good Cause*.

**For abandonment or desertion**

In a prosecution for abandonment of defendant's wife, the giving of an instruction that it is primarily the duty of the husband to provide reasonable support for his wife, and that any willful failure without good cause so to do constitutes a breach of his duty, and if he also has abandoned his wife without good cause then he has committed a desertion, and the expression "without good cause" does not mean that the husband can abandon his wife or neglect or refuse to provide for her support for some trivial reason, but before the law justifies him in so doing he must have some substantial reason which would cause or justify an ordinary person to neglect one of his most important duties, and the refusal of an instruction that if the jury believed that the husband had reason to suppose that the wife was unfaithful to him, or that she neglected to prepare his meals or tend to the household duties when she was in good health and able to do so, and caused her husband to go to his work every day without any breakfast, or spoke disrespectfully of the mother of the husband without just cause for so doing, each of said acts, if found to exist by the jury and taken seriously by the husband,

would be a "good cause" for his conduct, was not error. *Graham v. State*, 134 N. W. 249, 250, 90 Neb. 658.

The expression "good cause," as used in Code Supp. 1907, § 4775a, punishing desertion of wife and children, means sufficient cause, and in case of the wife this may be such as would justify separation. *State v. Dvoracek*, 118 N. W. 399, 401, 140 Iowa, 266.

A husband who has a conviction as to the unfaithfulness of his wife, without being able to prove a reasonable basis therefor, and who abandons her and then establishes her unfaithfulness, has "good cause" for deserting her, within Code Supp. 1907, §§ 4775a-4775f, defining desertion without good cause. *State v. Stout*, 117 N. W. 958, 960, 139 Iowa, 557.

#### **For abating tax**

Under the statute authorizing the selectmen for "good cause" shown to abate any tax assessed by them or their predecessors, the petition should allege the good cause relied on. The excess in the tax—that is, the subjection of the petitioner to more than his fair share of the public expense—is the effect of or injury occasioned by the good cause, and not the cause itself. Where a party seeks abatement because he is entitled to exemption under a vote of the town exempting it, the vote of the town is the good cause required. Where he seeks an abatement because of a departure from the statutory requirements relative to valuation, such departure is the good cause required to be shown. *Winnipiseogee Lake Cotton & Woollen Mfg. Co. v. City of Laconia*, 65 Atl. 378, 381, 74 N. H. 82.

#### **For change of venue**

Where the white people of a county are so greatly aroused against an accused, a colored man, and the relations between the races are such that it became necessary for the Governor to order the military to the place to preserve the public peace and accused was taken by a detail of soldiers to another city to await trial, and the judge of the court where accused was to be tried ordered that a posse comitatus proceed with the sheriff to bring him for trial, and the posse was still retained to protect him at the time of the application for a change, there was a "good cause," within the meaning of Code 1887, § 4036 (Code 1904, p. 2126), as amended, and a change should be granted. *Uzzle v. Commonwealth*, 60 S. E. 52, 55, 107 Va. 919; *Burton and Conquest v. Same*, 60 S. E. 55, 107 Va. 931.

#### **For delay in issuing execution**

Comp. Laws 1897, §§ 10,412, 10,413, authorize a body execution if issued within three months after the return day of the property execution unless good cause is shown for a delay in the issuance thereof. A body execution was not issued until nearly four

months after the return day of the property execution, but during such period negotiations were pending for a settlement conducted by the attorneys of the parties, and the attorneys for the execution defendant gave assurances of a settlement. Held, that good cause for the delay in the issuance of the body execution was shown within the discretion of the court; the phrase "good cause" conferring on the court the right to exercise discretion in determining whether conditions exist excusing a delay. *Lapham v. Oakland Circuit Judge*, 136 N. W. 594, 595, 170 Mich. 564.

#### **For not dismissing prosecution**

That the complaint filed with the committing magistrate had been lost, and the information of the loss not communicated to the prosecuting attorney until about two weeks before the beginning of the term of court, with press of business on the part of the prosecuting attorney, is not a "good cause to the contrary," within the meaning of Rev. St. 1887, § 8212, providing that the court must order the prosecution dismissed where an indictment or information is not found or filed at the next term of court at which he is held to answer unless good cause to the contrary is shown. *In re Jay*, 79 Pac. 202, 10 Idaho, 540.

Where defendants, indicted for perjury involving negative proof as to whether the capital stock of a surety company had been paid in in full, did not plead for nearly two years after the indictment was found because of their prosecution of a demurrer thereto, and, in response to a motion to dismiss for delay, not made until after notice that the indictment would be moved for trial, the district attorney stated that he was ready to proceed as soon as court should take up bail cases, of which the case in question was one, it was not error to refuse the motion, under Code Cr. Proc. § 668, authorizing the court to grant such motion unless "good cause to the contrary" is shown. *People v. Martin*, 91 N. Y. Supp. 486, 488, 99 App. Div. 372.

#### **For dissolving corporation or association**

In Code, § 1640, providing that courts of equity shall have full power on "good cause" shown to dissolve any corporation and appoint a receiver to wind up its business, the "good cause" must necessarily be a legal cause, a cause for which the sovereign authority might by law resume the franchises granted, and it cannot be presumed that the Legislature intended to authorize a forfeiture for causes for which the state might not procure judgment of forfeiture at law. *Platner v. Kirby*, 115 N. W. 1032, 1034, 138 Iowa, 259.

A "good cause shown," in Laws 1894, p. 413, c. 235, § 5, providing that a joint-stock association shall not be dissolved, except,

among other things, for good cause shown, refers to a condition of affairs where the business of the association could no longer be carried on, either because of the inherent failure of the enterprise, or because of considerable loss of the assets, and consequent danger of continuing the business, or because of the existence of other reasons which threaten to eventually wipe out the assets or divert the business from the original purposes for which it was formed. *Colton v. Raymond*, 85 N. Y. Supp. 210, 213, 214, 41 Misc. Rep. 580.

#### For extending time

The term "for good cause shown," in Pub. St. 1901, c. 186, § 13, and chapter 195, § 14, providing that a husband may waive the provisions of his wife's will in his favor by writing filed within one year after her decease, and not afterwards, unless the judge of probate on petition and for good cause shown shall extend the time, should be construed to mean whenever it would be reasonable and just to do so, or whenever justice required it. *Jaques v. Chandler*, 62 Atl. 713, 714, 73 N. H. 376.

"Good cause," for which Laws 1893, c. 127, § 24, empowers a trial judge to extend the time for taking proceedings, etc., is any cause moving the court to its conclusion, not arbitrary or contrary to all the evidence. *Sylvester v. Olson*, 115 Pac. 175, 176, 63 Wash. 285.

#### For failing to file transcript

Sureties on a bail bond perfected their appeal from a judgment of forfeiture, but did not file the transcript within 90 days thereafter. They lived 50 miles by rail from the county seat, and they sent to the clerk the appeal bond, and asked him to make up the transcript. The attorneys of the sureties were notified by the clerk that they must return to him all the papers in the case before he could make up a transcript. The attorneys forwarded the papers a week later, but they did nothing else until after the expiration of the time for filing the transcript, at which time they notified the clerk that they must insist upon getting the transcript. The transcript was short, and could easily have been prepared at any time. No effort to file it was made until the judgment was affirmed on certificate. Held not to show a "good cause" for failing to file transcript in time within Rev. St. 1895, arts. 1016, 1017, authorizing the affirmance of a judgment, unless good cause is shown why the transcript was not filed in time. *Savage v. State* (Tex.) 148 S. W. 584, 585.

Rev. St. 1895, art. 1015, provides that appellant or plaintiff in error shall file the transcript with the clerk of the Court of Civil Appeals within 90 days from perfecting of the appeal or service of the writ of error, provided that for good cause shown the court may permit the transcript to be thereafter

filed on such terms as it may prescribe. Held mandatory, and that an agreement by appellees' attorney that the transcript might be filed more than 90 days after the taking of the appeal constituted "good cause shown," and that the court was therefore required to grant appellants leave to file the transcript under such agreement after the 90 days had expired, where it did not interfere with the orderly conduct of business of the court. *Smalley v. Paine*, 116 S. W. 38, 40, 102 Tex. 304.

#### For terminating contract

A contract of employment as soliciting agent for an insurance company for seven years stipulated for the payment of a commission on renewal premiums in the event the company discontinued the contract after one year, provided that the agent should forfeit his rights under the contract on his being guilty of specified acts, and declared that the contract might be terminated by the company "at any time for good cause in accordance therewith." Held, that the company could without cause discharge the agent at any time after one year, in which case he was entitled to the commission on renewal premiums, and the company could also discharge him for any of the acts operating to forfeit his rights; "good cause" applying to the matters specified in the contract. *Armstrong v. National Life Ins. Co.* (Tex.) 112 S. W. 327, 330.

#### GOOD CHARACTER

See Good Moral Character.

Good general reputation for honesty, chastity, veracity, and like qualities is synonymous with "good character" as to these qualities, within the meaning of Pen. Code, § 268. The good character of a man is the estimation in which he is held in the community in which he resides. As stated in *Anderson's Law Dictionary*, the term "character" means: "The qualities impressed by nature or habit on a person, which distinguish him from other persons. These constitute his real character, while the qualities he is supposed to possess constitute his estimated character or 'reputation.'" *Ex parte Vandiveer*, 88 Pac. 993, 994, 4 Cal. App. 650.

#### GOOD CONDITION

Statements contained in receipts and bills of lading to the effect that the goods mentioned therein were received in "good order" or "good condition" are in the nature of mere admissions, mere written declarations, not conclusive or nonexplainable as against the party making them, much less as against one who did not. *Bath v. Houston & T. C. Ry. Co.*, 78 S. W. 993, 995, 34 Tex. Civ. App. 234.

A servant has a right to assume, in the absence of knowledge to the contrary, that appliances furnished him are substantially in a reasonably safe condition to work with.

In an instruction to that effect, the use of the expression "good condition," instead of "reasonably safe condition," conveyed substantially the same meaning to the mind of the jury. *Missouri, K. & T. R. Co. of Texas v. Smith* (Tex.) 82 S. W. 787, 788.

In an action against a carrier for damages to a shipment of mules, the words "in good condition," used in an instruction that the measure of damages was the difference between the vendible value of the mules at their destination in good condition and the reasonable vendible value of them in the condition they were when delivered, must be considered with reference to the circumstances surrounding the transaction, and it cannot be presumed that the jury understood that they were not to take into consideration the natural condition in which the mules might be expected to be if carried promptly and properly cared for. *Southern Ry. Co. in Kentucky v. Thomas* (Ky.) 90 S. W. 1043, 1044.

### GOOD CONSCIENCE

See Equity and Good Conscience.

### GOOD CONSIDERATION

Other good and valuable consideration, see Other.

Since a "good consideration" is that of blood or natural affection, an order for payment of money made for such a consideration prevails, unless it interferes with the rights of creditors or purchasers. *Candee v. Connecticut Sav. Bank*, 71 Atl. 551, 553, 81 Conn. 372, 22 L. R. A. (N. S.) 568.

A "good consideration" is love and affection or the like, and has no pecuniary measure or value. Where a decree is entered refusing to rescind a deed as procured by undue influence, the findings of fact to the effect that the deed was executed voluntarily and for a "good consideration," and was delivered, and that there was no fraud, when based on sufficient evidence, will not be disturbed. *Dickey v. Norris*, 65 Atl. 541, 216 Pa. 184.

In this state, love and affection, growing out of the relationship of parent and child, is a "good consideration," and sufficient to uphold, not only an executed, but an executory, contract between them. *Doty v. Dickey* (Ky.) 96 S. W. 544, 546 (citing *Ford v. Ellingwood*, 3 Metc. [60 Ky.] 359; *Berry v. Graddy*, 1 Metc. [58 Ky.] 553; *Buford's Heirs v. McKee*, 1 Dana [31 Ky.] 107; *McIntire v. Hughes*, 4 Bibb [7 Ky.] 187; *Jennings v. Anderson*, 4 T. B. Mon. [20 Ky.] 445).

The term "good consideration," to express a consideration sufficient to support a deed, does not apply to simple contracts, to support which mere relationship or natural love and affection is not a sufficient consideration. *Sullivan v. Sullivan*, 92 S. W. 966, 967, 122 Ky. 707, 7 L. R. A. (N. S.) 156,

13 Ann. Cas. 163 (quoting and adopting definition in *Chit. Cont.* p. 27).

A "good consideration" is such as is founded on natural duty and affection, or on a strong moral obligation, as distinguished from a "valuable consideration," which is founded on money or something convertible into money, or having a value in money, except marriage, which is regarded as a valuable consideration. An allegation in a plea that a note was without valuable consideration, either moral or legal, does not involve the idea that it was founded on a good consideration. *Dicks v. Andrews*, 59 S. E. 782, 783, 129 Ga. 756 (Civ. Code 1895, § 3658).

The affection and sense of duty which should naturally exist on the part of a child towards an aged and dependent parent is a "good consideration" to support a contract making provision for her support. *Worth v. Daniel*, 57 S. E. 898, 900, 1 Ga. App. 15.

A duebill, issued to the holder of an order for the payment of money for his services by the drawee of the order in part payment thereof, is supported by "sufficient consideration," under Civ. Code, §§ 2160, 2161, relating to "good consideration," since, the transaction amounting to an assignment of the order, the payee of the order lost his right to a statutory lien for his services, and the drawee (the maker of the duebill) gained the benefit of its waiver. *Parnell v. Davenport*, 93 Pac. 939, 940, 36 Mont. 571.

The construction of the term "good consideration," as used in the statute of frauds, which excepts from its operation conveyances made bona fide, without fraud or covin, on good consideration, is equivalent, the synonym, of "valuable consideration," and cannot be taken in its ordinary legal signification, as importing a consideration of love and affection, of generosity or benevolence, or of moral obligations, which, as between the parties would support a conveyance. *Early v. Owens*, 68 Ala. 171, 174 (citing *Killough v. Steele*, 1 Stew. & Port. [Ala.] 262).

The term "good consideration," as used in the statute against frauds and fraudulent conveyances, excepting any estates or interests which shall be upon good consideration lawfully conveyed to any person, means the same as "valuable consideration." *Killough v. Steele* (Ala.) 1 Stew. & P. 262, 267, 278, 279 (citing *Hodgeson v. Butts*, 3 Cranch, 155, 2 L. Ed. 391); *Baker v. Washington* (Ala.) 5 Stew. & P. 142, 149 (citing *Killough v. Steele*, 1 Stew. & P. [Ala.] 262).

The term "good consideration," as used in the third section of the statute of frauds, declaring that the act shall not extend to any estate or interest in any lands, goods, or chattels, or any rents, commons, etc., which shall be on good consideration, bona fide lawfully conveyed, etc., means valuable consideration. *Bank of State v. Croft*, 6 Ala. 622, 624.



"The consideration [of a deed] may be either a good or valuable one. A 'good consideration' is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded in motives of justice." *Groves v. Groves*, 62 N. E. 1044, 1045, 65 Ohio St. 442 (citing 2 Bl. Comm. 296).

#### **Valuable consideration distinguished**

See Valuable Consideration.

#### **GOOD DEED**

See Good and Sufficient Deed; Good Warranty Deed.

A vendor's obligation to furnish a "good deed" does not require one which can be shown to convey a title good by an abstract thereof, but one conveying a good title, including title acquired by adverse possession. *Clark v. Asbury (Tex.)* 134 S. W. 286, 288 (citing 4 Words and Phrases, p. 3108).

#### **GOOD FAITH**

See Possessor in Good Faith.

"Good faith" means free from design to defraud. *Tapia v. Williams*, 54 South. 613, 617, 172 Ala. 18.

"'Good faith' is the opposite of bad faith, and bad faith and fraud are synonymous." *State ex rel. Millice v. Petersen*, 75 N. E. 602, 605, 36 Ind. App. 269 (quoting and adopting definition in *Stark v. Starr*, 1 Sawy. 15, 22 Fed. Cas. 1084).

"Good faith" is defined to be honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. *Cochran v. Fox Chase Bank*, 58 Atl. 117, 118, 209 Pa. 34, 103 Am. St. Rep. 976.

One having knowledge of facts exciting such suspicions as to notes that he fears to make investigation, lest it may disclose a defense, is not a purchaser in good faith. *Iowa Nat. Bank v. Carter*, 123 N. W. 237, 240, 144 Iowa, 715.

The terms "good faith" and "notice" are intimately related in jurisprudence, but are not of uniform meaning; the former retaining in some measure the popular sense of honest belief, but its technical significance depends largely on the doctrine of notice as developed in equity. Considered respecting and as influenced by notice, "good faith" has several legal meanings, according to the subject-matter of the litigation in which it is used. *Richmond v. Ashcraft*, 117 S. W. 689, 692, 137 Mo. App. 191.

"Good faith" is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an

absence of all belief of facts which would render the transaction unconscientious. A want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is in judgment of law a want of good faith. *Jennings v. Lentz*, 93 Pac. 327, 329, 50 Or. 483, 29 L. R. A. (N. S.) 584 (quoting 4 Words and Phrases, p. 3117).

"A stipulation in a contract that a party for whom work is to be done, or to whom an article is to be furnished, may reject the work or article unless it is satisfactory to him, gives that party the right to reject it as unsatisfactory in any respect if he acts in good faith, but does not give him the right to reject it arbitrarily; and the words 'good faith' and 'arbitrarily' we take to mean that the rejecting party must find some substantial fault in the work or the article itself which renders it unsatisfactory, and not merely a reason for changing his mind regarding the project he had in view, and for which he ordered the work or the article. That such a term in a contract requires good faith and a just motive, in the party to be pleased, in declining the stipulated service, is the law." *Cann v. Rector, Wardens, etc., of Church of Redeemer*, 85 S. W. 994, 1002, 111 Mo. App. 164.

A concession that brokers received plaintiff's stock in "good faith," as collateral for personal obligations of her son, under a power of attorney to the son, means that a business man might innocently take the terms of the power as to give him leave to deal with the stocks at his will, and is an admission of absolute honesty. *Platt v. Francis*, 152 S. W. 332, 337, 247 Mo. 296.

Though "true" and "made in good faith," are synonymous terms, an instruction that the jury are not required to receive blindly the testimony of the accused as true, but are to consider whether it was true and made in good faith, or "only for the purpose of avoiding conviction," is prejudicial. *Donner v. State*, 100 N. W. 305, 307, 72 Neb. 263, 117 Am. St. Rep. 789.

#### **Assignment of commercial paper**

One having knowledge of facts exciting such suspicions as to notes that he fears to make investigation, lest it may disclose a defense, is not a "purchaser in good faith." *Iowa Nat. Bank v. Carter*, 123 N. W. 237, 238, 240, 144 Iowa, 715 (quoting and adopting definition in *Walters v. Rock*, 115 N. W. 513, 18 N. D. 45).

The term "good faith," applied to a holder of a negotiable instrument, means not only honesty of intention, but the absence of suspicious circumstances, or, if such circumstances exist, then of such inquiry as will satisfy a prudent man of the validity of the transaction. *Pennington County Bank v. First State Bank of Moorhead*, 125 N. W.

119, 121, 110 Minn. 263, 26 L. R. A. (N. S.) 849, 136 Am. St. Rep. 496.

A purchaser of a note, fraudulent in its inception, must, to constitute himself a "purchaser in good faith," made inquiries of the payee as to the making and delivery of the note, and he cannot rely alone on the fact that he had no information of any defense to the note, but he must show that he used the means that an ordinarily prudent person would have used to ascertain how the note was obtained. *Mee v. Carlson*, 117 N. W. 1033, 1036, 22 S. D. 365, 29 L. R. A. (N. S.) 351.

"There was a shadow on the checks, and the defendant could not, in 'good faith,' accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicions which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint." Hence one accepting a check to a corporation in payment of individual liabilities of its officers cannot do so in good faith, so as to become a bona fide holder. *Ward v. City Trust Co. of New York*, 84 N. E. 585, 589, 192 N. Y. 61 (quoting and adopting the definition in *Rochester & C. Turnpike Road Co. v. Pavlour*, 58 N. E. 114, 164 N. Y. 281, 286, 52 L. R. A. 790).

"'Bona fides' or 'good faith' is a term used as a mere distinction from 'mala fides' or 'bad faith.' If paper be purchased without anything which the law can construe into notice, it is spoken of as being purchased in good faith. Where, on the contrary, the purchaser has what the law construes to be notice of defects or equities, then he is a purchaser in bad faith, and can secure to himself none of the advantages given to the bona fide purchaser; but bad faith means nothing more than participation in the fraud, and resolves itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith." The great weight of authority in this country, as well as reason, supports the doctrine that the bona fide character of a holder can be destroyed only by proof of participation in or actual knowledge of the fraudulent or illegal character of the instrument. *Forbes v. First Nat. Bank of Enid*, 95 Pac. 785, 788, 21 Okl. 206 (quoting and adopting definition in *Norton, Bills and Notes*, p. 306, and *Tiedeman, Bills and Notes*, p. 256).

2 Wds. & P. 2d Ser.—48

### Color of title

Section 788, Rem. & Bal. Code, provides that seven years' actual possession of land under claim and color of title made in good faith with payment of all taxes assessed on the land shall vest title according to the purport of the paper title. Plaintiffs, at the time of taking of a quitclaim deed, knew that defendant's grantor was the owner under a previous unrecorded deed, and that their own grantor had no title or right to convey the land. Held, that plaintiffs' possession was not in "good faith" within the meaning of the statute, and hence did not ripen into title by seven years' possession with payment of taxes. *Petticrew v. Green-shields*, 112 Pac. 749, 751, 61 Wash. 614.

"Good faith" in the acquirement of title, within Limitation Law (Hurd's Rev. St. 1909, c. 83) § 6, authorizing the acquisition of title by possession under color of title, does not require ignorance of adverse claims or defects in the title, and there is good faith where there is no fraud, and the color of title is not acquired in bad faith. *Peters v. Dicus*, 98 N. E. 560, 562, 254 Ill. 379.

Where a party to a suit in partition obtained a decree vesting title in him, and he was not guilty of fraud or bad faith in procuring it, and believed it gave him title, and he knew that a third person had an interest in the premises, and his sole heir and widow were parties to the suit, he acquired color of title in "good faith," within Limitation Law (Hurd's Rev. St. 1909, c. 83) § 6, authorizing the acquisition of title by possession under color of title, though the third person's administrator and a part of the tenants in common, not made parties, were not bound by the decree. *Peters v. Dicus*, 98 N. E. 560, 562, 254 Ill. 379.

### Improvements

"The principle is well settled that, to entitle an occupant to recover the value of his improvements against the real owner of the land, in purchasing he must have used that degree of care that an ordinarily prudent man would have used, and must have had reasonable grounds for believing he acquired the true title; for if, by the use of due care, the facts as to the ownership of the land could have been learned, good faith is wanting, and, if the mistake was caused by the claimant's negligence, he did not act in 'good faith,'" and where one claiming for improvements could have discovered that the record title to the land was in another by examining the records of deeds, he cannot recover on the ground of "improvements made in good faith." *Runge v. Gilbough (Tex.)* 87 S. W. 832, 837.

"'Good faith,' in the law relating to reimbursement for improvements put upon land not belonging to the person in possession, is used in its popular sense as the actual, exist-

ing state of mind, whether so from ignorance, skepticism, sophistry, delusion, fanaticism, or imbecility, and without regard to what it should be from given standards of law or reason." *State v. West Branch Lumber Co.*, 63 S. E. 372, 380, 64 W. Va. 673 (quoting and adopting definition in *Searl v. School District No. 2*, 10 Sup. Ct. 374, 133 U. S. 553, 33 L. Ed. 740).

Under the betterment act, Kirby's Dig. §§ 2754-2757, providing that any person, believing himself to be the owner at law or equity under color of title, shall be entitled to compensation for improvements placed on the land, one, to recover for improvements placed on the land of another, must occupy the land in good faith under color of title and in ignorance of his title, being questioned by another claiming a better title, and though he knows the facts which prove the invalidity of his title, yet if, through mistake of law, he believes his title is good, he is a possessor in "good faith" within the act. *McDonald v. Rankin*, 122 S. W. 88, 92, 92 Ark. 173.

In order that one may recover compensation for improvements made on another's land, it is necessary that he should have made such improvements in "good faith" while in bona fide adverse possession under color of title, and by "good faith" in this connection is meant an honest belief on the part of the occupant that he has secured a good title to the property and is the rightful owner, and for this belief there must be some reasonable grounds, such as would lead a man of ordinary prudence to entertain it. Where the person making such improvements knew the property did not belong to her, and had no reasonable grounds for supposing or believing that it did, she was not entitled to compensation. *Bryan v. Councilman*, 67 Atl. 279, 282, 106 Md. 380, 14 Ann. Cas. 1175.

The terms "good faith" and "notice" are intimately related, but not of uniform meaning; the former retaining in some measures the popular sense of honest belief, but its technical meaning depends largely on the doctrine of notice as developed in equity. Considered respecting and as influenced by notice, the term "good faith" has several legal meanings, according to the subject-matter of the litigation in which it is used. Constructive notice of adverse title afforded by records will not impeach the good faith of an occupant in making improvements; actual notice being essential. A statute permitting one claiming land in another's possession to bar the occupant from compensation for betterments by notifying him in writing of the claim and its nature does not make an exception in favor of an occupant who believes the hostile title to be bad and makes improvements regardless of such notice. *Richmond v. Ashcraft*, 117 S. W. 689, 692, 137 Mo. App. 191.

### Incumbrancers

The phrase "incumbrancers in good faith and for a valuable consideration," as used in Civ. Code, § 164, providing that when property is conveyed to a married woman, it is presumed to vest in her as her separate estate, which presumption is conclusive in favor of a purchaser or incumbrancer in good faith, and for a valuable consideration, means persons who have taken or purchased a lien or the means of obtaining one, and who have parted with something of value in consideration thereof, and the payment of money or the parting with something of value is essential. *Fulkerson v. Stiles*, 105 Pac. 966, 967, 156 Cal. 703, 26 L. R. A. (N. S.) 181.

### Issue of stock dividend

While a stock dividend issued in good faith may not generally be successfully questioned afterwards, "good faith" requires the exercise by the corporate officers of good sense and reasonable business prudence. *Whitlock v. Alexander*, 76 S. E. 538, 541, 160 N. C. 465.

### Mortgage

A "subsequent chattel mortgagee in good faith" is one who receives his mortgage without knowledge of the existence of a prior mortgage. *Vanaman v. Fliehr*, 71 Atl. 692, 693, 75 N. J. Eq. 88.

The language "mortgagees in good faith," as used in P. L. 1902, p. 487, § 4, providing that a chattel mortgage not accompanied by immediate delivery, followed by actual and continued change of possession, shall be absolutely void against mortgagees in good faith, unless the mortgage, having annexed thereto a prescribed affidavit or affirmation, be recorded as directed, etc., includes a mortgagee whose mortgage secures a pre-existing indebtedness. *Vanaman v. Fliehr*, 71 Atl. 692, 693, 75 N. J. Eq. 88.

Under B. & C. Comp. § 5633, making every mortgage of personal property, alone or with real property, if not accompanied by immediate delivery, and continued change of possession, or not recorded, either as a personalty mortgage, or as a realty mortgage and indexed as a personalty mortgage, void as against subsequent purchasers in good faith, though a mixed mortgage was not indexed as a personalty mortgage, a purchaser having actual notice of the mortgage was not a "purchaser in good faith" within the statute. *Ayre v. Hixson*, 98 Pac. 515, 518, 53 Or. 19, 133 Am. St. Rep. 819.

A corporation, acquiring an interest in real and personal property under a judgment of foreclosure which provides that the interest be sold subject to the lien of a certain mortgage, is not a "purchaser in good faith" as against such mortgage, within Lien Law (Consol. Laws 1909, c. 33) § 230, providing that every chattel mortgage, not accompanied by immediate delivery and followed

by change of possession, is void as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a copy thereof, is filed. *Clement v. Congress Hall*, 182 N. Y. Supp. 16, 19, 72 Misc. Rep. 519.

Comp. St. 1910, § 3733, provides that a chattel mortgage filed as provided by law shall cease to be invalid as against the creditors of the mortgagor and subsequent purchasers or mortgagees in good faith after 60 days from the end of the term for which it was given, unless before such time notice of foreclosure shall be given as required by law or a renewal affidavit filed. Held, that a corporation, not only having actual notice of the mortgage, but having assumed the mortgage debt, is not a "purchaser in good faith" within the statute so as to enable it to avoid the mortgage for the absence of a renewal affidavit. *Harle-Haas Drug Co. v. Rogers Drug Co.*, 113 Pac. 791, 800, 19 Wyo. 35.

Under *Sayles' Ann. Civ. St.* 1897, art. 3328, providing that a chattel mortgage shall be void as to subsequent purchasers and lienholders in good faith, unless the mortgage is forthwith filed for record, a lienholder in "good faith" is one who pays a valuable consideration at the time of acquiring the lien without notice of the mortgage, and hence the holder of a deed of trust on land did not, by obtaining a judgment of foreclosure in which the description of the property followed the description as given in the deed of trust, become a lienholder in good faith as against one who furnished rails for the construction of a tramway on the land subsequent to the date of the deed of trust and took a chattel mortgage for the price of such rails which he failed to record. *Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co. (Tex.)* 144 S. W. 343, 346.

Civ. Code, § 2090, provides that a chattel mortgage ceases to be valid as against creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith, after three years from the filing thereof, unless, within 30 days next preceding the expiration of such term a copy of the mortgage and a statement of the amount due, sworn to, are filed anew, with the register of deeds. Section 2448 defines "good faith" as an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, with an absence of all information or belief of facts which would render the transaction unconscientious. Section 2452 provides that every person who has actual notice of circumstances sufficient to put a prudent man on inquiry, and who omits to make such inquiry, is deemed to have constructive notice. A second mortgage given more than three years after the filing of the first mortgage, which was not renewed, described the mortgaged property as that purchased from the

first mortgagee, and stated that it was subject to any incumbrance held by the first mortgagee. Held, that the insertion of the clause in the second mortgage, "subject to any incumbrance held by the first mortgagee," was sufficient to put the second mortgagee upon inquiry whether the first mortgage had been paid and to charge the second mortgagee with constructive notice that it had not, where such was the fact and deny him the character of a subsequent incumbrancer "in good faith" entitled to the benefit of section 2089. *Aultman Engine & Thresher Co. v. Young*, 126 N. W. 245, 247, 25 S. D. 212, Ann. Cas. 1912B, 1101.

#### Pledge

To constitute "good faith" of a pledgee of property, there must be an absence not only of participation in the pledgor's fraud, but of knowledge or notice of the fraud or of facts and circumstances calculated to put an ordinarily prudent business man on inquiry to ascertain the truth. *Austin v. Hayden*, 137 N. W. 317, 323, 171 Mich. 38.

#### Publication of libel

"Good faith" in the publication of an article derogatory to character is not made up by a mere showing of a belief on the part of the publisher in the truth of the publication; but the publication must have been honestly made in the belief of its truth, and upon reasonable grounds for the belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances. *Gray v. Times Newspaper Co.*, 77 N. W. 204, 206, 74 Minn. 452, 73 Am. St. Rep. 363 (adopting definition in *Allen v. Press Co.*, 41 N. W. 936, 40 Minn. 117, 3 L. R. A. 532, 12 Am. St. Rep. 707).

#### Purchase of personality

The words "good faith," as employed in Rev. St. 1899, § 3412, providing that, where personal property is sold to be paid for in installments or delivered to another on condition reserving title, etc., such condition shall be void as to all subsequent purchasers in good faith, unless evidenced by a writing executed and recorded as in cases of mortgages of personal property, were confined to a case of a subsequent purchaser, and did not apply to a subsequent chattel mortgagee of the holder of the property mortgaged under an alleged conditional sale, who was not, therefore, precluded by notice of the claim of the conditional seller. *Gilbert Book Co. v. Sheridan*, 89 S. W. 555, 557, 114 Mo. App. 332.

Defendants in February, 1905, purchased of plaintiffs 200 barrels of certain flour at \$5.35 per barrel, for delivery in fractional lots as requested by defendants within a "reasonable time." Between March 20th and May 16th defendants accepted 55 barrels, and in July requested further delay. In August plaintiffs notified defendants that if

they did not carry out their contract plaintiffs would dispose of the flour on defendants' account, and, receiving no response, plaintiffs tendered the flour to the defendants on September 2, 1903, which defendants refused to receive, whereupon without further notice plaintiffs sold the flour on a produce exchange on September 20th for \$4.20 a barrel, which was the best price obtainable. Held, that plaintiffs acted in "good faith" and with "due diligence" and within a "reasonable time," and that the resale fixed the measure of plaintiffs' damages. *Ford v. Erde*, 99 N. Y. Supp. 487, 488, 50 Misc. Rep. 665.

#### Purchase of realty

"'Good faith' consists in the belief of the purchaser that he is buying from the owner." Where the original vendor of land was in possession and sold the property by title valid in form, this was a sufficient starting point for prescription required by good faith, just title, and ten years' possession. *Bennett v. Calmes*, 40 South. 911, 912, 116 La. 598.

One who purchases his land with knowledge of outstanding incumbrances, or with information sufficient to put him on inquiry in reference thereto, is not a "purchaser in good faith," within Rev. St. § 2241, so as to be protected by a prior record of his deed. *Mueller v. Brigham*, 10 N. W. 366, 367, 53 Wis. 173.

A purchaser is not a "purchaser in good faith" of any part of the bankrupt's estate, if title or security was accepted "in contemplation of or in fraud upon" the bankrupt act, or if for any reason it would not have been valid against the claims of creditors of the bankrupt. *In re Pease*, 129 Fed. 446, 448.

The occupant of lands to which a right to divert water from a stream was appurtenant agreed to sell such water rights to defendant, and the duly authorized officer of the occupant informed defendant that S. was the owner of the land, and that it would be necessary to take a conveyance from him, which defendant did. Although S. was the record owner, the occupant at the time held an unrecorded deed, which was recorded subsequent to defendant's deed, and of which defendant had no knowledge. Held, that defendant was a "purchaser in good faith" within Civ. Code, § 1214, providing that conveyances of real property are void as against subsequent purchasers in good faith whose conveyances are first recorded, since, although defendant knew of the occupant's possession, the officer's statement relieved him from making any further inquiry as to the nature of his rights. *Shurtleff v. Kehr*, 124 Pac. 724, 726, 163 Cal. 24.

One is not a "purchaser in good faith," so as to be protected against an outstanding contract, who has constructive notice of such contract; and this because the law

itself imputes, in the case of constructive notice, knowledge to him. But one may honestly believe that he has good title when in fact he has not, and, while this belief will not avail him as against an outstanding contract or title of which he has constructive notice, he will nevertheless be entitled to be protected in his permanent improvements, for the test of good faith as to them is his honest belief that he has good title. *Hunter v. Coe*, 97 N. W. 869, 872, 12 N. D. 505.

Neither the attorneys of plaintiff in an action, who purchased property sold under a judgment therein, nor plaintiff, to whom such attorneys assigned a part interest in the property, nor assignees of the certificate of purchase prior to the execution of the sheriff's deed, are "purchasers in good faith" within the meaning of Code, § 3797, providing that the title of a purchaser in good faith to any property sold under attachment or judgment shall not be affected by a new trial accorded to a nonresident defendant, who appears within two years after the rendition of judgment against him, except the title to property obtained by plaintiff, and not bought of him in good faith by others; but such persons are purchasers pending litigation, and take subject to any judgment which might subsequently be rendered against plaintiff. *English v. Ols*, 101 N. W. 293, 295, 125 Iowa, 555.

Under a statute providing that, from the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, etc., an attaching creditor, in order to be deemed a "purchaser in good faith" as against the owner of an outstanding equity, must, in an action on a bond for redelivery of the property, allege and prove all the facts necessary to establish that character of his ownership as against the equity; and a reply consisting of a general denial only of the claim of ownership made by defendants in their answer was insufficient to bring plaintiff within the statute. *Flegel v. Koss*, 83 Pac. 847, 848, 47 Or. 366.

Under Wilson's Rev. & Ann. St. 1903, § 9, providing that "good faith" consists in an honest intention to abstain from taking any unconscientious advantage of another, even though the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious, one who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the actual notice he would have received. *Cooper v. Flesner*, 103 Pac. 1016, 1019, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

To constitute a "purchaser in good faith," it is essential that there be a valuable consideration, the absence of notice, and the presence of good faith. If the existence and concurrence of such requisites are shown, it is immaterial, so far as a third person is concerned, whether or not the deed of the purchaser was properly acknowledged. *Derrett v. Britton*, 80 S. W. 562, 564, 35 Tex. Civ. App. 485.

The terms "good faith" and "notice" are intimately related in jurisprudence, but are not of uniform meaning; the former retaining in some measure the popular sense of honest belief, but its technical significance depends largely on the doctrine of notice as developed in the progress of the equity system. Considered with reference to and as influenced by "notice," the term "good faith" bears several legal meanings, according to the subject-matter of the litigation in which it is used. As applied to the purchase of a parcel of land, the title to which passed from the grantor by a prior recorded deed or incumbrance, the constructive notice of the prior conveyance which the record imparts prevents one taking title subsequently from being a purchaser in good faith. *Rev. St. 1899, § 3080* (Ann. St. 1906, p. 1768), permitting one who claims land in another's possession to bar the occupant from compensation for betterments by notifying him in writing of the claim and its nature, does not make an exception in favor of an occupant who believes the hostile title to be bad and makes betterments regardless of such notice, since "notice" and "good faith" cannot coexist, for it is an equity doctrine of universal recognition that he who takes with notice takes subject to the claim, and the notice which will suffice for this purpose does not mean direct and positive information, but anything calculated to put a prudent man on the alert. *Richmond v. Ashcraft*, 117 S. W. 689, 692, 137 Mo. App. 191.

Though pre-existing debts are so far a valuable consideration that persons who release them or part with title to them are deemed to have parted with value, and to have given a valuable consideration so as to be protected as purchasers in good faith, where they did not release or transfer their debts, nor acquire them from third persons, the recovery of judgment thereon would not prejudice them, nor give them the status of "purchasers or incumbrancers in good faith" within the meaning of Civ. Code, § 164, which provides that when property is conveyed to a married woman, it is presumed to vest in her as her separate estate, which presumption is conclusive in favor of a purchaser or incumbrancer in good faith. *Fulkerson v. Stiles*, 105 Pac. 766, 966, 156 Cal. 703, 26 L. R. A. (N. S.) 181.

Certain land in controversy was within the limits of a railroad grant, and, though the

railroad company earned the land, it accepted other land in lieu thereof, and then failed to complete the road for which the grant was made, by reason of which the land in controversy reverted to the United States. The railroad knew that it had no title or equitable claim to the land when it contracted to sell the same to plaintiff's assignor in September, 1888, and, when plaintiff took his assignment, he knew that suit was then pending by the United States to quiet its title, and in October, 1889, he made an agreement with the railroad company, reciting the pendency of such suit, and agreeing that if the government was successful, as it subsequently was, he would receive from the railroad company the amount paid on the original agreement with interest, and release all claims for failure of title. After defendant had taken possession as a homestead entryman in 1890, plaintiff took no steps to regain possession until he sued to recover the land. Held, that plaintiff was not a purchaser in good faith within the adjustment act (Act March 3, 1887, c. 376, § 4, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1596]), providing that, as to all lands erroneously certified or patented and sold by a grantee railroad company to citizens of the United States, such persons purchasing in good faith should be entitled to the land purchased on proof of the purchase at the proper land office, in the manner provided, etc.; the term "good faith" in general being construed to mean without notice as well as for a valuable consideration. *Logan v. Davis*, 124 N. W. 808, 811, 147 Iowa, 441.

*Rev. Code N. D. 1899, § 5114*, defines "good faith" as consisting in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which will render the transaction unconscientious. One purchasing real estate with notice of an outstanding contract of sale takes it subject to such contract, and may be compelled in an action for specific performance to convey the same upon the performance of the conditions of the contract. *Hunter v. Coe*, 97 N. W. 869, 870, 12 N. D. 505.

"By 'good faith,' as judicially interpreted, is meant a purchase made not merely for a consideration, but also without notice to the purchaser of an adverse claim to the property by others; for the taking of an estate after notice of a prior right makes one a mala fide purchaser." Under Civ. Code Prac. § 414, providing that a defendant brought in by constructive service may petition for a new trial at any time within five years, and section 417, providing that the title of purchasers in good faith to any property sold under attachment or judgment, shall not be affected by such new trial, where defendant purchased land from plaintiff, giving notes for the purchase price, in which a lien was retained, and subsequently mortgaged the land, and in a

suit to enforce the vendor's lien constructive service was had on the mortgagee, the land bid in by plaintiff, and sold to defendant's wife, she was not a "good faith" purchaser. *King v. Hunt*, 81 S. W. 254, 255, 118 Ky. 450 (quoting and adopting definition given in *Kellar v. Stanley*, 5 S. W. 480, 86 Ky. 248).

#### **Taking property of another**

The "good faith" which will protect a defendant in an action of trover for the conversion of timber cut and removed by him from plaintiff's land is not incompatible with some degree of negligence. Almost any trespass upon the rights of another which is not willful arises in whole or in part from the defendant's ignorance of something which he might have discovered had he exercised a certain degree of care. Where injury is caused by negligence, as distinguished from willfulness, wantonness, or recklessness, it seems that the defendant is chargeable only with the actual damage in the ordinary sense of that term. *Dartmouth College Trustees v. International Paper Co.*, 132 Fed. 92, 98.

#### **Warehouse certificate**

A distilling company's warehouse certificates, calling for whisky stored in its bonded warehouse, which in practical effect under the internal revenue laws is in the custody of the United States as bailee, represent the property itself, and their transfer to a purchaser or pledgee operates as a delivery of the whisky called for thereby subject to the payment of the tax, and, when made in "good faith" more than four months prior to the company's bankruptcy, such a pledge is good as against its trustee and general creditors, and the whisky does not pass to the trustee. *In re Miller Pure Rye Distilling Co.*, 176 Fed. 606, 607.

#### **GOOD FAITH BELIEVE**

In an instruction on self-defense, the use of the expressions "good faith believe" and "had reasonable grounds to believe" was not error; the court evidently meaning real or actual belief, and not pretended or assumed belief, and it being apparent that the jury could not have understood it otherwise. *Hutsell v. Commonwealth* (Ky.) 75 S. W. 225, 227.

#### **GOOD FENCE**

What is a "good fence" depends on the neighborhood and the materials used. The term is so vague and uncertain that a false statement that "fences are good," made to induce an exchange of lands, is a mere opinion, and not an actionable false representation. *Else v. Freeman*, 83 Pac. 409, 410, 72 Kan. 666.

#### **GOOD GOVERNMENT**

In the ordinance of 1787 giving territorial Legislatures power to make laws for the good government of the territory, etc., the term "good government" embraces within its scope the whole range of legislation neces-

sary to secure the comfort, prosperity, and happiness of a people. Under that power the Legislature may provide for taking private property for public uses. *Swan v. Williams*, 2 Mich. 427, 431.

#### **GOOD HEALTH**

In life insurance cases it has been held that "good health" does not ordinarily mean freedom from infirmity, and that good health or sound health means a state of health free from disease or ailment that affects the general soundness and healthfulness of the system seriously. It is a relative term, and does not mean absolute freedom from physical infirmity, but only such a condition of body and mind as that one may discharge the ordinary duties of life without serious strain upon the vital powers. Hence, in a suit by a female against a railroad company for damages for personal injuries, where it is alleged that plaintiff was, prior to the injuries, in good health, a recovery may be had, notwithstanding it appears from the evidence that at the time of the injuries the plaintiff was laboring under an infirmity of which she was ignorant, and which did not interfere with the discharge by her of the ordinary duties of life. *Atlantic & B. R. Co. v. Douglas*, 46 S. E. 867, 868, 119 Ga. 658.

An applicant for life insurance, who from a time prior to his application until his death, some years after delivery of the policy, suffered from nephritis, or Bright's disease which was the direct though remote cause of his death, was not in "good health" when the policy was delivered, within the meaning of a provision therein that it should not take effect until delivered while the applicant was in good health, nor until the first premium was paid while he was also in good health. *Austin v. Mutual Reserve Fund Life Ass'n*, 132 Fed. 555, 559.

A statement, in an application for additional insurance, that the applicant was in "good health," was not a misrepresentation, though she was at the time pregnant. *American Order of Protection v. Stanley*, 97 N. W. 467, 469, 5 Neb. (Unof.) 132.

In an action on a benefit certificate, where the defense was that the member was not in good health at the time of his reinstatement after suspension for nonpayment of dues, an instruction that the words "good health" mean that the person is in a reasonably good state of health, and free from any disease or illness that tends seriously to weaken or impair the constitution, was a reasonable definition. *Court of Honor v. Dinger*, 77 N. E. 557-559, 221 Ill. 176.

#### **GOOD JOB**

See Good and Workmanlike Job.

#### **GOOD MANNER**

See Good and Workmanlike Manner.

**GOOD MATERIAL**

Other good material, see other.

**GOOD MERCHANTABLE HAY**

In a contract of sale of "good merchantable" hay, the words quoted are descriptive of quality, and mean that the hay is salable on the market at the ordinary market price. *Trego v. Arave*, 118 Pac. 119, 120, 20 Idaho, 38, 35 L. R. A. (N. S.) 1021.

**GOOD MORAL CHARACTER**

"Good moral character," within the provision of the naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 596), requiring a finding that applicant for citizenship has behaved as a man of good moral character, is such character as measures up to the standard of the average citizen of the community in which applicant resides. *In re Hopp*, 179 Fed. 561, 562.

An applicant for liquor license is not a person of "good moral character," as required by the statute, where he has been an habitual violator of law in running a gambling house in connection with his saloon; and his restored good character is not proved by mere cessation therefrom by reason of bench warrants and burning orders. *Whissen v. Furth*, 84 S. W. 500, 501, 73 Ark. 366, 68 L. R. A. 161 (citing *Black*, Intox. Liq. § 162; *Appeal of Leister* [Pa.] 11 Atl. 387; *Hardesty v. Hine*, 34 N. E. 701, 135 Ind. 72; *Stockwell v. Brant*, 97 Ind. 474; *Wleman v. Mabree*, 8 N. W. 71, 45 Mich. 484, 40 Am. Rep. 477; *In re O—*, 42 N. W. 221, 73 Wis. 602; *In re Spenser*, 22 Fed. Cas. 921).

Petitioner's application for citizenship was verified by a saloonkeeper, and declared on oath that petitioner's occupation was that of clerk. An investigation disclosed that he was a bartender for one of the witnesses verifying the application. Petitioner admitted that in 1908, within five years prior to the filing of the petition, he had been convicted in Kansas of violating the liquor law, and was arrested for selling liquor illegally in violation of an injunction; that he was sentenced to 30 days in jail and to pay a fine of \$100, but that he was paroled; and that the parole had terminated. Held, that such conduct showed a willful disregard, not only of the laws of the state, but of the orders of the court, and that he was therefore not entitled to citizenship, under Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596, requiring that the applicant for five years shall have behaved as a man of "good moral character," attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. *In re Trum*, 109 Fed. 361, 362.

**GOOD MORALS**

See Contrary to Good Morals.

**GOOD NAME**

A charge in libel that if the article published was calculated to impeach plaintiff's good name, etc., used the word "good name" as equivalent to reputation, in which sense the words have always been used. *San Antonio Light Pub. Co. v. Lewy*, 113 S. W. 574, 581, 52 Tex. Civ. App. 22.

**GOOD NOTE**

In an action by the holder of a note against a surety thereon, there was evidence that the holder represented to the surety that the debtor had other notes in the bank as security for this debt, and that the maker of one of them was good. Held that, while a representation that a note is good imports both the solvency of the maker and the collectibility of the note by suit, a representation that the persons whose names appear on the note are good does not constitute a warranty that the signatures are genuine; and hence an instruction, charging the jury to find for defendant if the creditor induced the surety to sign upon representations that a certain note put up as collateral was good, was not supported by the evidence. *Milan Bank v. Richmond*, 139 S. W. 352, 354, 235 Mo. 532.

**GOOD OF THE SERVICE**

Where an officer was removed for the "good of the service," such clause specified a valid reason for removal, the natural inference therefrom being that in some respect the officer failed to perform his duties, was incompetent, inefficient or an unsuitable person for the position to which he was appointed. *Ayers v. Hatch*, 56 N. E. 612, 613, 175 Mass. 489.

**GOOD ORDER**

See Apparent Good Order.

Statements contained in receipts and bills of lading, to the effect that the goods mentioned therein were received in "good order" or "good condition," are in the nature of mere admissions, mere written declarations, not conclusive or nonexplainable as against the party making them, much less as against one who did not. *Bath v. Houston & T. C. Ry. Co.*, 78 S. W. 993, 995, 34 Tex. Civ. App. 234.

If one contracts to deliver to the other wool in good order and the latter agrees to accept it, the clause "in good order" is an express warranty. *Polhemus v. Heiman*, 50 Cal. 438, 441.

The terms of every written instrument are to be understood in their ordinary and popular sense, unless from the context it appears that the parties to the instrument attach a different meaning to the terms, or by the usage of trade they have acquired a different meaning, as when a covenant bound the covenantor to put a chartered turnpike road in "good order," it shall not be under-



stood that the covenantor meant that the terms of the charter should be complied with, as there was no reference made to the charter, but in good order according to the popular acceptance of the words. *Davis v. Smith*, 9 Humph. (28 Tenn.) 557, 559.

#### GOOD ORDER AND CONDITION

A franchise by which a railway company obtained a right of way through a city street provided that such railroad would "keep and preserve in 'good order' for the use of the citizens of the town" that particular street. Held, the obligation of the railroad will not be measured by the size and condition of the city at the time the contract was entered into, but by the new and improved methods of paving demanded by its growth and changing conditions, which must have been within the purview of the parties at the time of making the contract, so that the railroad must provide a permanent pavement, where it was necessary to provide the public with the same accommodations as were afforded by similar streets of the city. *City of New Bern v. Atlantic & N. C. Ry. Co.*, 75 S. E. 807, 808, 159 N. C. 542 (citing 4 Words and Phrases, p. 3125).

#### GOOD ORE

See Extra Good Ore.

#### GOOD PLEADING

At common law "good pleading" consists in good matter, pleaded in good form, in apt time, and due order." Co. Litt. 303. Facts should be stated logically, in their natural order, with certainty, that is, clearly and distinctly, to the end that the party who is to answer may readily understand what is meant, in order to prepare his defense. Pleadings are no longer to be put on (in any court of this state) by counsel ore tenus, or vive voce, as at Athens, or as at the very old common law. *Mark v. H. D. Williams Cooperage Co.*, 103 S. W. 20, 24, 204 Mo. 242 (citing 2 Bl. Comm. \*293).

#### GOOD REASON TO BELIEVE

Under Rem. & Bal. Code, § 2640, punishing every officer of any banking corporation who shall accept deposits, when he knows or has good reason to believe that the bank is insolvent, it is sufficient to show that accused had good reason to believe that the bank was insolvent on the date of a deposit, and knowledge of the bank's condition by its officers is presumed; "good reason to believe" implying not only knowledge, but an investigation into such facts as would give knowledge. *State v. Welty*, 118 Pac. 9, 13, 65 Wash. 244.

An affidavit for a warrant of arrest, stating that affiant has "good reason to believe" that an offense has been committed, rather than, as required by Code 1907, § 6703, that he has "probable cause for believing," is void. "Good reason to believe" is not the equivalent of "probable cause for believing," as required

by the statute. *City of Bessemer v. Eldge*, 50 South. 270, 271, 273, 162 Ala. 201.

#### GOOD REPAIR

The phrase "good repair" means a state of restoration to sound or good condition after decay, injury, dilapidation, or partial destruction, and implies the existence of a thing to be repaired. *Missouri, K. & T. R. Co. of Texas v. Bryan* (Tex.) 107 S. W. 572, 578.

Under a covenant in a lease binding the lessee to keep the premises in "good repair" at his own expense during the term, and at the expiration to surrender the premises in as good state and condition as reasonable use and wear will permit, damages by the elements excepted, the lessee is obligated, not only to keep the premises in as good repair as when he entered, but to put, keep, and leave in good repair, having regard to the age and class of buildings; but he is not obligated to keep the buildings up as new buildings, and the expense of the repairs he is obliged to make necessarily depends upon the age and class of the buildings. *Lehmaier v. Jones*, 91 N. Y. Supp. 687, 688, 100 App. Div. 495 (citing *Myers v. Burns*, 35 N. Y. 269; *Ward v. Kelsey*, 38 N. Y. 80, 97 Am. Dec. 773; *Lockrow v. Horgan*, 58 N. Y. 635; *Heintze v. Erbacher*, 1 City Ct. R. 465; 1 Add. Cont. 239; 1 McAdam Landl. & T. [3d Ed.] 429, 430).

The phrase "good repair," in an ordinance granting the right to construct and operate a street railway, which provided that the portion of the street between and adjacent to the tracks should be kept in as "good repair" and condition, considering the nature of the use, as other parts of the street are kept by the city, does not necessarily mean only good condition, but those operating the railway must pave that portion when it becomes necessary to keep it in as good condition as the rest of the street is kept by the city. *Columbus St. R. & Light Co. v. City of Columbus*, 86 N. E. 83, 84, 43 Ind. App. 265.

The words "good repair," in a lease binding the lessee to put the plumbing work and the premises generally in good repair, and providing that he will during the term keep the plumbing work, pipes, glass, fences, and the premises generally in good repair, and at the expiration of the term surrender the estate in as good repair as reasonable wear thereof will permit, damage by the elements excepted, cover only ordinary repairs necessitated by the ravages of the ordinary uses which were in mind, rather than radical changes in the structure of a permanent substantial, and unusual character, and the lessee is not required to rebuild a gable wall of the building which became dilapidated as the result of time and wear. *Street v. Central Brewing Co.*, 91 N. Y. Supp. 547, 549, 101 App. Div. 3.

**GOOD REPUTE**

The phrase "good repute," in the proviso of Act May 19, 1887 (P. L. 128), which reduces the crime of carnal knowledge of a woman child under the age of 16 who is not of good repute from rape to fornication, means the general reputation for chastity of the woman in the community in which she lives. The law presumes that the woman is a person of good repute, and the commonwealth was not required to prove the fact. If she does not sustain that reputation, the defendant must show it. *Commonwealth v. Howe*, 35 Pa. Super. Ct. 554, 568.

**GOOD RIGHT TO CONVEY**

Covenants of seisin and "good right to convey" are synonymous, and, if broken at all, are broken when made, and an actual eviction is unnecessary to consummate the breach. *Faller v. Davis*, 118 Pac. 382, 385, 30 Okl. 56, Ann. Cas. 1913B, 1181.

**GOOD SECURITY**

Code 1904, art. 93, § 171, authorized the orphans' court to order a guardian who has received moneys belonging to his ward to invest the same in mortgages on unincumbered real estate worth double the loan or such public stock, permanent funds, "or other good securities," or order the same invested in land. Section 172 provides that such moneys shall be invested in the name of the ward and transferable only under order of court. Section 166 empowers the court to order the proceeds of sale of leasehold estates of the ward to be invested in "bank stock or any other good security." Section 241 authorizes the court to order a guardian to invest in bank, or other incorporated stock, or any other good security, and that the court shall direct the manner and form in which such money shall be invested. Sections 189 and 192, referring to the transfer of the ward's estate to a substituted guardian, speaks of a delivery as including "bonds, notes and evidences of debt" and other securities. Held, that a loan of the ward's funds to the guardian himself, for which he gave his individual note, was not an investment or "good security" which the court had authority to authorize, as it created an adverse interest in the guardian. *Fidelity & Deposit Co. of Maryland v. Freud*, 80 Atl. 603, 605, 115 Md. 29.

Under a trust of realty to provide for a wife and her children by selling land and investing the proceeds in "good securities," a sale of town lots for the worthless bond of the purchaser, a married woman, secured by two mortgages, without appraisalment or ascertainment of their rental value, and with the belief that the lots were not worth double the incumbrances thereon, was a breach of trust for which the trustee was responsible. *Gilmore v. Tuttle*, 32 N. J. Eq. 611, 626.

**GOOD STANDING**

The term "good standing," as used in reference to members in mutual benefit insurance societies, is very common; but it is not easy to determine its precise meaning in the connection in which it is used. *Littleton v. Wells & McComas Council No. 14*, J. O. U. A. M., 56 Atl. 798, 803, 98 Md. 453.

**GOOD SUPPORT**

See Good and Sufficient Support.

**GOOD TITLE**

See Good and Marketable Title; Good and Sufficient Title.

**As clear title**

A "good title" means an unincumbered title. *McLaughlin v. Wheeler*, 47 N. W. 816, 822, 1 S. D. 497.

"A 'good title' free from incumbrances as shown by a complete abstract of title must be a title disclosed by the records. A title based upon an ex parte affidavit showing the names of the heirs of the deceased owner is not such a title." Under a contract requiring the vendor to convey a good marketable title free from defects, it is insufficient that his right to convey alone without the signature of his wife, who has been adjudged insane in proceedings in which he alleged that the property was community. *Colpe v. Lindblom*, 106 Pac. 634, 637, 57 Wash. 106 (citing and adopting *Crosby v. Wynkoop*, 106 Pac. 175, 56 Wash. 475).

A title, to be good within the implied representation that a vendor has "good title" to the lands, should be free from litigation, palpable defects, and grave doubts. It should consist of both legal and equitable titles and should be fairly deducible of record. *Whittier v. Gormley*, 86 Pac. 728, 727, 3 Cal. App. 489 (citing *Turner v. McDonald*, 18 Pac. 262, 76 Cal. 177, 9 Am. St. Rep. 189).

**As marketable title**

The term "good title" is synonymous with "a good, marketable title," which is one that will protect the purchaser from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him, or his representative, lands on which money has been invested; he being entitled to a title which will enable him, not only to hold the land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no doubt will come up to disturb its marketable value. *Kling v. A. H. Greef Realty Co.*, 148 S. W. 203, 205, 166 Mo. App. 190.

A "good title" is one that can be sold to a reasonably prudent man who might desire the property or a title that can be mortgaged to a person of reasonable prudence. *Justice v. Button*, 131 N. W. 736, 737, 89 Neb. 367, 38 L. R. A. (N. S.) 1.

By the term "good title," as used in a contract of sale, is meant a marketable title;

that is, one which can be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as security for a loan of money. *Fagan v. Hook*, 105 N. W. 155, 157, 134 Iowa, 381.

### GOOD UNTIL USED

A provision in a railroad ticket that it was "good until used" meant that it was good for passage. *Shelton v. Erie R. Co.*, 66 Atl. 403, 408, 73 N. J. Law, 558, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883.

### GOOD WARRANTY DEED

A covenant to "give a good and warranty deed" of land refers to the kind of deed to be executed, and not to the quality of the title to be conveyed. It is not, therefore, broken by the inability to convey a perfect title. *Joslyn v. Taylor*, 33 Vt. 470, 474.

### GOOD WATER-BEARING SAND

The word "good" in a contract by a well digger to make a well "in the first good water-bearing sand" referred to the quantity, and not the quality, of the water, and modified the compound word "water-bearing," and not "water." *Clouston v. Main-gault* (Ark.) 150 S. W. 858, 859.

### GOOD WILL

"Good will" is the probability that the old customers will resort to the old place. *Kennebec Water Dist. v. City of Waterville*, 54 Atl. 6, 19, 97 Me. 185, 60 L. R. A. 856 (citing *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667); dissenting opinion of Judge Chipman in *Contra Costa Water Co. v. City of Oakland*, 113 P. 668, 682, 159 Cal. 323 (quoting 4 Words and Phrases, p. 3128); *Halver-son v. Walker*, 112 Pac. 804, 807, 38 Utah, 264 (citing 4 Words and Phrases, p. 3128).

The "good will" of a business is merely a hope grounded on a probability, the probability that the old customers will resort to the old stand. *Didlake v. Roden Grocery Co.*, 49 South. 384, 386, 160 Ala. 484, 22 L. R. A. (N. S.) 907, 18 Ann. Cas. 430 (citing 4 Words and Phrases, p. 3128).

"Good will" is the probability that old customers will resort to the old place for the purpose of trade, and is recognized as a thing of value which may be sold. *Bloom v. Home Ins. Agency*, 121 S. W. 293, 295, 91 Ark. 367.

"Good will" is "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or from celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient

partialities or prejudices." *Brown v. Benzinger*, 84 Atl. 79, 81, 118 Md. 29 (citing 4 Words and Phrases, p. 3128).

The "good will" of a trade is called the probability that the old customers will resort to the old place. The good will of a trade does not survive, but is partnership property. *Dougherty v. Van Nostrand* (N. Y.) 1 Hoff. Ch. 68, 70.

Good will is an advantage and benefit gained by a business establishment beyond the value of the money and property invested, and is property in a legal sense, and subject to sale in connection with the business precisely as other personalty. *Haugen v. Sundseth*, 118 N. W. 666, 667, 106 Minn. 129, 16 Ann. Cas. 259.

Lord Eldon, in *Cruttwell v. Lye*, 17 Vesey, 335, said: "The 'good will' which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." "'Good will' has been defined as 'all that good disposition which customers entertain towards the house of business, identified by the particular name or firm, and which may induce them to continue giving their custom to it.' \* \* \* That it is property is abundantly settled by authority." See *v. Heppenheimer*, 61 Atl. 843, 846, 69 N. J. Eq. 36 (quoting *Washburn v. National Wall Paper Co.*, 81 Fed. 17, 20, 26 C. C. A. 312, 315).

Good will is the favor which the management of a business has won from the public and the probability that old customers will continue their patronage. *White v. Trowbridge*, 64 Atl. 862, 865, 216 Pa. 11.

The relations of a dealer to customers and to the trade generally is termed the "good will" of the business, and is property which the law protects. *Albro J. Newton Co. v. Erickson*, 126 N. Y. Supp. 949, 951, 70 Misc. Rep. 291.

There cannot be a "good will," strictly so called, of a business which depends for its existence upon the professional qualities of the person who carries it on. *Masters v. Brooks*, 117 N. Y. Supp. 585, 589, 132 App. Div. 874.

"Good will" is "all that good disposition which customers entertain towards a house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it." *Consolidated Gas Co. v. City of New York*, 157 Fed. 849, 872 (quoting and adopting the definition in *Washburn v. National Wall Paper Co.*, 81 Fed. 17, 20, 26 C. C. A. 315).

The good will of a commercial partnership is an asset separate and distinct from its stock of goods or capital, and consists of the advantage which inures to the firm beyond the value of its physical property because of the general public patronage which

it receives from habitual customers. In re Teller, 136 N. Y. Supp. 457, 459, 75 Misc. Rep. 592.

"Good will" means every advantage that has been acquired by an old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the old firm, or with any other matter carrying with it the benefit of the business. Where the firm of which plaintiff and defendant were members when defendant sold his interest to plaintiff, together with the good will on the dissolution thereof, had an understanding that certain patterns should be used exclusively on the goods ordered by the firm from the manufacturer, defendant's attempt to obtain goods of such patterns from the manufacturer was an interference with the "good will" of the business, as was also defendant's solicitation of trade from old customers of the firm. *Goetz v. Rice*, 123 N. Y. Supp. 433, 435 (citing *People ex. rel. Johnson Co. v. Roberts*, 53 N. E. 685, 159 N. Y. 70, 45 L. R. A. 126).

"Good will" varies with the custom of the general trade and the character or methods of the particular business. An early definition by Lord Eldon is "the probability that the old customers will resort to the old place." This involved the ancient idea that good will inhered in the premises where the business was conducted. This is too limited for modern kinds or methods of business. The habit of people to purchase from a certain dealer or manufacturer, which is the foundation for any expectation that purchases will continue, may depend on many things besides place. Confidence in the quality of the goods, in the facilities of the establishment to fill orders promptly, or in the personal integrity or skill of a dealer or manufacturer, familiarity of the public with a designating name for the product, and probably many other circumstances, might be mentioned as illustrative. The good will is a sort of beaten pathway from the seller to the buyer, usually established and made easy of passage by years of effort and expense in advertising, solicitation, and recommendation by traveling agents, exhibition tests, or displays of goods, often by acquaintance with local dealers who enjoy confidence of their own neighbors, and the like. *Rowell v. Rowell*, 90 N. W. 473, 478, 122 Wis. 1.

"A good will is the probability that the old customers will resort to the old place." With reference to a commercial partnership business requiring no special personal skill or professional knowledge, this good will may be described "to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives

from constant or habitual customers on account of its local position, or common celebrity or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Plaintiff and defendant dissolved a partnership existing between them on July 23d, reciting in the contract of dissolution the sale by defendant to plaintiff of his entire interest in the business, together with the good will thereof. On August 1st following, they entered into another agreement, reciting the sale by defendant to plaintiff of abstract books, iron safe, and letterpress for a certain sum, and stipulated as a further consideration that plaintiff should give defendant the free use of the abstract books, and should keep them in defendant's office, and defendant should not compile abstracts or engage in the abstract business. The parties, not being partners at the time of the subsequent agreement, and the sale not being one of good will, the restraint on defendant from engaging in the abstract business was in violation of Rev. Civ. Code, § 1277, making contracts restraining any one from exercising a lawful vocation, otherwise than as provided in sections 1278 and 1279, void. *Prescott v. Bidwell*, 99 N. W. 93, 94, 18 S. D. 64 (quoting *Bish. Cont. p. 520; Story, Partn. § 99*).

The "good will" of a business is a species of personal property, and, although inseparable from business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity. It is defined as "an advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." It is further said that "It is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a market value, whether the business is that of a professional man or of any other person," though it is doubtful that if persons carry on a business, and one of them dies, a share in the good will, where it is of any value at all, forms part of the estate of the deceased partner. "It is a portion of the subject-matter which produces profits." *Morgan v. Perhamus*, 36 Ohio St. 517, 522, 38 Am. Rep. 607 (quoting *Story, Partn. § 99; Lindley, Partn. § 842*).

"Good will" can only exist in connection with an existing and growing business and,

when applied to a corporation, is only an intangible asset dependent on the corporate existence and is appurtenant to the corporation as such, and has no independent existence, and constitutes an element of value in connection with, but not apart from, the corporation and its business. Where stock in a corporation was held in trust, the income to be paid to the beneficiaries of the trust, and the corporation went out of business and its assets were sold, that proportionate part of the price received on such sale, represented by the shares of stock and items of increased amount of material, betterments, and "good will," constituted a part of the corpus of the trust estate and not income. *In re Stevens*, 95 N. Y. Supp. 297, 313, 46 Misc. Rep. 623.

"Good will" is the result of the employment of capital in some established business. It augments its value, and is an incident to the conduct of the enterprise. It exists at the place where the business is carried on, and gives value to the enterprise, because of the benefits that are likely to come to a successor, and which arise from being connected with its reputation." A banking corporation may have a good will constituting a species of property. *Lindemann v. Rusk*, 104 N. W. 119, 126, 125 Wis. 210.

"Good will," however it may be defined generally, does not exist separate and independent of a substantive or principal subject. It always appertains to something else, and is as various as the subjects are to which it appertains. It is the greater probability that patronage will be bestowed upon a subject of purchase, or at a place of business, in respect to which a habit has been formed. In respect to a newspaper, the greater probability that its readers and subscribers will follow their habit, and continue to buy and read the newspaper under the old name, but with a new editor, rather than read or subscribe for a newspaper bearing a different name. In the case under consideration, the greater probability that travelers and transient persons will continue to stop at a hotel to which they have become wonted, and with the ways to and from which and with its accommodations and surroundings they are already familiar. "Good will," then, as used in this case, means the greater probability of patronage of this hotel, and forms an element of value in the hotel and premises covered by these leases. Good will pertaining to the leases of the hotel simply, could not exist, nor be sold, separately from the leases. *Mitchell v. Read* (N. Y.) 19 Hun, 418, 422 (citing *Boon v. Moss*, 70 N. Y. 463).

Where plaintiff had built up a very large foreign trade, and for some time carried on such trade as defendant's agent, and thereafter defendant took a transfer, not only of all the assets of the business and of plaintiff's leasehold estate in the business premis-

es, but also of the good will, of which plaintiff was called in the assignment the beneficial owner, and plaintiff's personal knowledge of the business was great, his experience in it large, and his acquaintance both with the traveling salesmen, through whom sales were generally made, and with probable purchasers extensive, and where plaintiff, according to a part of his evidence, specified his good will as consisting of his file of letters from customers, plaintiff's knowledge, experience, acquaintance, and ability might well be found to constitute what the parties to the agreement called a good will, even though plaintiff, before the transfer of the business, could not have copied for his own future use the accounts, letters, or names of customers with whom he had dealt as defendant's agent, since it might well have been contemplated that plaintiff, because of his personal knowledge, experience, and acquaintance with the trade, could secure merchandise from other sources and become so troublesome a competitor with defendant as to make all the difference between a profit and a loss in the latter's business. *Gordon v. Knott*, 85 N. E. 184, 185, 199 Mass. 173, 19 L. R. A. (N. S.) 762.

In an action on an agreement to sell a milk route, evidence was admissible to show that the term "right and good will of supplying custom" meant in the trade the right of supplying milk to customers pointed out by the seller. *Page v. Cole*, 120 Mass. 37, 39.

#### Insurance agency

"Good will" is an advantage or benefit that has been acquired by, and belongs to, the proprietors of an existing business. It is intangible, and must always attach to and rest upon some principal and tangible thing; and where one had owned an insurance business, but the insurance companies which he formerly represented had all withdrawn their business from him, and he had no lease of the building or office which had been his former place of business, he had no insurance business to which a "good will" could attach. *In re Case*, 106 N. Y. Supp. 1086, 1087, 122 App. Div. 343.

#### As property

See *Personal Property*; *Property*.

#### Use of trade-name

While a firm name may in some cases be deemed a part of the "good will" of the business, it is not of itself necessarily so, and cannot be in cases of enterprises which depend on the personal attributes of the partners engaged therein, such as professional partnerships or banking and brokerage partnerships, in which the name has become a symbol denoting the personal integrity and business qualities of the partners. Where partnership articles merely provide for the relinquishment of all claims to the firm name by the retiring partner, and are silent as to the disposition to be made of the name upon

the expiration of the partnership by limitation, and the name of the firm which is engaged in the banking and brokerage business has for many years been used as a symbol to denote the personal integrity and business qualities of the partners, it cannot be detached from the personnel of the partners and sold as an asset of the "good will" of the business. *Read v. Mackay*, 95 N. Y. Supp. 935, 936, 47 Misc. Rep. 435.

"'Good will' embraces at least two elements—the advantage of continuing an established business in its old place, and of continuing it under the old style or name. While it is not necessarily altogether local, it is usually to a great extent, and must, of necessity, be an incident to a place, an established business, or a name known to the trade." *In re Silkman*, 105 N. Y. Supp. 872, 881, 121 App. Div. 202 (quoting *People ex rel. Johnson Co. v. Roberts*, 53 N. E. 689, 159 N. Y. 79, 45 L. R. A. 126).

The trade-name under which a banking business has been profitably conducted for a number of years is a part of the "good will," and as such is an assignable asset. *Bank of Tomah v. Warren*, 68 N. W. 549, 552, 94 Wis. 151.

#### GOOD WORK

In an action for the value of a machine sold, an instruction, that the questions are whether the machine was of good material and well made and did "good work" with proper management when set up and operated according to the printed directions given with it, is not subject to complaint on the ground that the court was not more specific in its instructions respecting the provisions of the contract that the machine must be used according to the printed directions, since conditions should have been made part of the instructions as explanatory of the meaning of the words in the contract "good work." *Heln v. Mildebrandt*, 115 N. W. 121, 125, 134 Wis. 582.

#### GOOD WORKING ORDER

Under a contract providing that machines should be in "good working order when put up for running," the obvious meaning is that the machine should be so perfect that when put in place to run for the purpose for which it was made it should be in good working order. *Myers v. Steel Mach. Co.*, 57 Atl. 1080, 1084, 67 N. J. Eq. 300.

#### GOODS

See *Confusion of Goods*; *Dress Goods*; *Household Goods*; *Pulled Goods*; *Stock of Goods*; *Stock of Goods, Wares, and Merchandise*.

Any goods or chattels, see *Any*.

Other goods, see *Other*.

See, also, *Effects*.

The word "goods" has a generic meaning, in which it is synonymous with the word

"property"; and it has a specific meaning, as in the phrase "a stock of goods," where it means articles of trade—goods, wares, and merchandise. It is used in its specific sense in section 847 of the Revised Statutes, providing that "every person who shall willfully and maliciously set fire to or burn, or attempt to set fire to or burn, any bridge, shed, railroad, plank road, railroad car, carriage or other vehicle, or any goods, wares, or merchandise, shall, on conviction, be imprisoned." *State v. Fontenot*, 36 South. 630, 631, 112 La. 628.

The meaning of the phrase "goods, wares, and merchandise" depends upon the connection in which it is employed. The selling of material or supplies to retail merchants, manufacturers, and jobbers, or the selling of supplies to public officers, does not constitute the business of the ordinary peddler, and it is only such sales that fall within the exception of section 8 to Laws S. D. 1903, p. 249, c. 190, imposing a license on peddlers dealing in goods, wares, and merchandise, but not applying to traveling salesmen doing business with retail merchants, manufacturers, or jobbers or the state, county, township, and city officials. *In re Watson*, 97 N. W. 463, 466, 17 S. D. 486, 2 Ann. Cas. 321.

Under Pub. St. 1882, c. 11, § 20, providing that all personal estate shall be assessed to the owner in the city of which he is an inhabitant, except that all "goods, wares, merchandise," and other stock in trade in cities other than where the owner resides shall be taxed in those places where the owner hires or occupies manufactories, stores, shops, or wharves, the capital used in conducting the business of a banker and broker was not taxable at the place where such business is located, but at the place of residence of such banker and broker. *Prince v. City of Boston*, 79 N. E. 741, 193 Mass. 545 (citing *Tisdale v. Harris*, 20 Pick. [37 Mass.] 9; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Boston Loan Co. v. City of Boston*, 137 Mass. 332; *Barron v. Boston*, 72 N. E. 951, 187 Mass. 168; *Martin v. City of Portland*, 17 Atl. 72, 81 Me. 293).

Where defendant contracted with plaintiff and another to sell them a stock of drugs, notions, and jewelry, and fixtures, and agreed to surrender "the said stock of goods" to the buyers, the word "goods" as used in the latter instance referred not only to the drugs but to the whole stock, drugs, notions, jewelry, and fixtures. *Hendrickson v. Anderson*, 120 N. W. 765, 766, 23 S. D. 78.

A sale of all property belonging to a livery stable business is not a "sale of goods, wares, and merchandise," within Laws 1901, p. 222, c. 109, providing that sales of merchandise in bulk shall be invalid unless a statement of the seller's liabilities is furnished. *Everett Produce Co. v. Smith Bros.*, 82

Pac. 905, 906, 40 Wash. 566, 2 L. R. A. (N. S.) 331, 111 Am. St. Rep. 979, 5 Ann. Cas. 798 (citing *Plass v. Morgan*, 78 Pac. 784, 36 Wash. 160; *Albrecht v. Cudihee*, 79 Pac. 628, 37 Wash. 206; *Van Patten v. Leonard*, 8 N. W. 334, 55 Iowa, 520; *Kent v. Liverpool & L. Ins. Co.*, 26 Ind. 294, 89 Am. Dec. 463).

#### Animals

Live cattle are embraced within the words "goods, wares, and merchandise," as used in Rev. St. 1899, § 3419, prohibiting verbal contracts for the sale thereof for a price of \$30 or more. *Groomer v. McMillan*, 128 S. W. 285, 287, 143 Mo. App. 612.

#### Choses in action

Rev. St. 1895, art. 2546, provides that no gift of goods or chattels shall be valid, unless by deed or will duly acknowledged or proven up and recorded. A father holding three notes made by his son, dictated a letter to the son stating that he had given the first note to a daughter, the second to another son, and the third to the son addressed, but this writing was not acknowledged or proven up and recorded. Held, that the words "goods and chattels" did not include choses in action, and that the writing, though not acknowledged or proven, was sufficient to constitute a valid gift of the note. *Schauer v. Von Schauer* (Tex.) 138 S. W. 145, 149.

Since, when the subject-matter of a contract is a chattel to be afterwards delivered, the cause of action thereon is goods sold and delivered, and the seller cannot sue for the work and labor, a contract between a tailor and customer for the making of a coat and vest of peculiar design and pattern at an agreed price is for "goods, wares, and merchandise," within the statute of frauds (Rev. St. 1899, § 3419). *Schmidt v. Rozier*, 98 S. W. 791, 121 Mo. App. 306.

"How extensive the meaning of the word 'goods' or 'goods and chattels' is to be understood in any instance must depend on the subject-matter and the context. 'Goods' may include everything but what descends to the heir. \* \* \* Choses in action may pass by that name." Under the General statutes of Massachusetts (Gen. St. c. 113, § 2), replevin lies in that state and therefore by the federal practice act of 1870 (17 Stat. 196), in the Circuit Court for the District of Massachusetts, for writings or documents of value unlawfully detained. *Gibbs v. Usher*, 10 Fed. Cas. 303, 304, Holmes 351.

#### Land or real estate

Where testator gave his wife all of "this world's goods" of which he might be possessed, it included real estate. *Torrey v. Torrey*, 59 Atl. 450, 451, 70 N. J. Law, 672.

#### Leasehold

A sheriff's levy upon personalty particularly described and all other "goods and chattels" belonging to defendant did not cover a leasehold interest not part of the per-

sonalty particularly described; the officer who executed the writ not knowing of the property until he was asked to and did levy upon it under another writ after power to levy under the first writ had expired. *Olden v. Sassman*, 66 Atl. 603, 604, 72 N. J. Eq. 637.

#### Lemons

"Goods, wares, and merchandise," as used in a statute punishing one who shall expose for sale any goods, wares, or merchandise on Sunday, does not embrace lemons. *State v. Campbell*, 105 S. W. 637, 639, 206 Mo. 579.

#### Lumber

Act Aug. 17, 1903 (Acts 1903, p. 92), regulating the sale of "goods, wares, and merchandise" in bulk, requiring notice to creditors, does not apply to a sale of substantially all lumber manufactured by one who operates a sawmill. *Cooney, Eckstein & Co. v. Sweat*, 66 S. E. 257, 133 Ga. 511, 25 L. R. A. (N. S.) 758.

#### Money

The words "goods and chattels," in Code 1899, c. 71, § 1, include money and every other kind of personal property which may be the subject of a gift inter vivos or causa mortis. *Claytor v. Pierson*, 46 S. E. 935, 937, 55 W. Va. 167 (citing *Dickeschied v. Exchange Bank*, 28 W. Va. 340).

Under Cr. Code 1902, § 56, providing that an indictment shall be sufficient which charges the crime so plainly that the nature of the offense charged may be easily understood, an indictment charging breach of trust in fraudulently converting money alleged to have been held in trust by accused, describing the money as "the proper goods and chattels" of the owner, was sufficient, though, strictly speaking, money is not goods and chattels, where, if the words "of the proper goods and chattels" were stricken out, the remaining portion of the indictment would charge that accused had committed a fraudulent breach of trust by converting \$63.35 belonging to a certain named person; it sufficiently alleging ownership. *State v. Pentacost*, 69 S. E. 880, 881, 87 S. C. 405.

#### Note

"The words of the statute (of frauds) 'goods' and 'merchandise' are sufficiently comprehensive enough to include promissory notes of hand. The word 'goods' is a word of large signification, and so is the word 'merchandise.'" *New England & Savannah S. S. Co. v. Commonwealth*, 81 N. E. 286, 289, 195 Mass. 385, 11 Ann. Cas. 678 (quoting and adopting the definition in *Baldwin v. Williams*, 3 Metc. [44 Mass.] 365, 367).

Whether notes and mortgages are "goods," within Tax Law, § 92, authorizing the sale of goods and chattels for taxes, or not, they are unquestionably "chattels." *Blain v. Irby*, 25 Kan. 499, 500 (Webster's Dict.; Bouv. Law Dict.; and Abbott's Law Dict.).

**Shares of stock**

Shares of corporate stock which have been issued are "goods" within the statute of frauds. *Comp. Laws*, § 9516. *Sprague v. Hoste*, 118 N. W. 497, 499, 155 Mich. 30, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558.

Corporate stock is "goods, wares, and merchandise" within *Civ. Code* 1895, § 2693, par. 7, requiring contracts for the sale of "goods, wares, and merchandise" to the amount of \$50 or more to be in writing. *Hightower v. Ansley*, 54 S. E. 939, 940, 126 Ga. 8, 7 Ann. Cas. 927.

**Stock of goods**

See *Stock*.

**Wearing apparel and personal ornaments**

The words "goods and chattels" are ordinarily broad enough to cover all personal property, but gifts of necessary wearing apparel and personal ornaments by a husband to his wife are not within *Code* 1906, § 2522, providing that a transfer of "goods and chattels" between husband and wife is invalid as against third persons, unless in writing and acknowledged and filed for record as a mortgage; the object of the statute being to prevent the perpetration of frauds by pretended transfers between husband and wife, without affecting the duty of a husband to support his wife in a way suitable to her station and his condition in life. *Kennington v. Hemingway*, 57 South. 809, 810, 101 Miss. 259, 39 L. R. A. (N. S.) 541.

**GOODS AND CHATTELS**

See *Goods*.

**GOODS AND EFFECTS**

See *Effects*.

**GOODS AND MERCHANDISE**

See *Goods*.

**GOODS IN STORE**

The term "goods in store," in a chattel mortgage, does not include an iron safe kept for use, and not for sale; it has reference only to merchandise and commodities kept on hand for purposes of sale. *Curtis v. Phillips*, 5 Mich. 112, 113.

**GOODS, WARES, AND MERCHANDISE**

See *Goods*.

**GOPHER HOLING**

The term "gopher holing," as used in mining, consists in drilling horizontal holes into the bank, charging them with dynamite or powder, attaching a fuse, and exploding the charge. *Spino v. Butler Bros.*, 129 N. W. 590, 113 Minn. 326.

**GOVERN**

See *Be Governed*.

"One of the definitions of the word 'govern' given by Webster's International Dict.

is to 'regulate by authority'; another, 'to direct or control.'" To be "governed," therefore, is to be regulated by authority or to be directed or controlled, and the one regulated, directed, or controlled by the authority of another is subject to that other. An act passed at the June session, 1836, of the General Assembly, amending an act incorporating the New York, Providence & Boston Railroad Company, provided in section 2 that said corporation should be liable for damages from the burning of property by fire communicated by the engines. An act passed at the October session, 1846, further amending the original act of incorporation, authorized the railroad company to construct an extension of its existing railroad, and provided in section 9 that such railroad, when constructed, should be managed, governed, and protected in all respects by the provisions of the charter and amendments theretofore granted to the corporation. Held, that section 2 of the act of 1836 applied to the extension authorized by the act of 1846, and made the railroad company liable for a fire caused by an engine operating on the extension. *Gorham Mfg. Co. v. New York, N. H. & H. R. Co.*, 60 Atl. 638, 639, 27 R. I. 35.

The words "govern" and "regulate," as used in *Const. art. 284*, giving the Railroad Commission power to govern and regulate railroad tariff and service, should be given a broad meaning so as to invest the commission with sufficient authority to prevent the railroad from taking down and doing away with any part of its road, and hence the commission had power to order that a spur or switch be not removed, subject to review by the court. *Railroad Commission of Louisiana v. Kansas City Southern R. Co.*, 35 South. 487, 489, 111 La. 133.

**GOVERNED BY ILLINOIS CLASSIFICATION**

The phrase "governed by Illinois classification," in a published rate filed with the Interstate Commerce Commission, does not mean a classification subsequently adopted by the Illinois Railway Commission unless the words "as from time to time that classification may be changed" are added to the words "governed by Illinois classification," and that cannot be done unless such words are to be judicially imported into the published rate as filed, and since such a construction, if adopted, would authorize the state commission at any time, through changes of state classifications, to alter from time to time, and without the consent of the interstate carriers, interstate rates for interstate commerce, unless such interstate carrier instantly reconfirms its tariff sheets to the changed classifications of the commission. The question of such construction is one on which judges might reasonably disagree. *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, 383, 90 C. C. A. 864.



**GOVERNING AUTHORITY**

Other governing authority, see Other.

**GOVERNING BODY**

The term "governing body," as used with reference to a city, means common council or other body performing legislative functions. *Borough of Rutherford v. Hudson River Traction Co.*, 63 Atl. 84, 88, 73 N. J. Law, 227.

The term "governing body," as used in Const. art. 11, § 1, relative to the fixing of water rates, is to be understood in the same sense as the term "corporate authority" referred to in article 9, § 12, relative to the assessment and collection of local taxes, and means no more than that the official body thereby referred to is to have the power of performing the duty specified. *In re Pfahler*, 88 Pac. 270, 278, 150 Cal. 71, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911.

**GOVERNMENT**

See Branch of State Government; City Government; Full State Government; Good Government; Municipal Government; Permanent Form of Government; Representative Government; Republican Government; State Government.

"Government" is the exercise of authority in the administration of the affairs of a state, community, or society. *Platt v. City and County of San Francisco*, 110 Pac. 304, 309, 158 Cal. 74.

A "government" does not exist in a personal sense, or as an entity in any primary sense, for the purpose of acquiring, protecting, and enjoying property. It exists primarily for the protection of the people in their individual rights, and holds property not primarily for the enjoyment of property accumulations, but as an incident to the purpose for which it exists—that of serving the people and protecting them in their rights. *Curley v. United States*, 130 Fed. 1, 8, 64 C. C. A. 369.

**GOVERNMENT BOND**

A "government bond" is a contract which imports a loan of money by an individual to the government at a stipulated rate of interest payable at a designated time and place. The income and dividends of such a bond are generally supposed to be this interest. *New York Life Ins. & Trust Co. v. Baker*, 59 N. E. 257, 259, 165 N. Y. 484, 53 L. R. A. 544.

**GOVERNMENTAL ACT**

A governmental use may include any act which the state may lawfully perform or authorize. There are, however, governmental acts to which certain immunities attach. In this sense a "governmental act" is one done in pursuance of some duty imposed by the state on a person, individual or corporate,

which duty is one pertaining to the administration of government and is imposed as an absolute obligation on a person who receives no profit or advantage peculiar to himself for its execution. *Markwardt v. City of Guthrie*, 90 Pac. 26, 30, 18 Okl. 32, 9 L. R. A. (N. S.) 1150, 11 Ann. Cas. 581 (quoting *Platt v. City of Waterbury*, 45 Atl. 154, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335).

**GOVERNMENTAL DUTY**

The duty imposed on the board of freeholders by Pub. Laws 1898, p. 877, § 30, providing that they "shall take care that detained witnesses shall be comfortably lodged," etc., is a "governmental duty" of a purely public character for the neglect of which no private action lies in favor of one specially damaged in the absence of statute confirming such right of action. *Watkins v. Board of Chosen Freeholders of Atlantic County*, 62 Atl. 1134, 1135, 73 N. J. Law, 213.

**GOVERNMENTAL FUNCTION**

One of the "governmental functions of a municipality" is the supplying of a sufficient amount of water for its public uses, such as the watering of its streets and parks, the extinguishing of fires, and providing its citizens with a sufficient supply of water as pure as it can reasonably be made. *Kirch v. City of Louisville*, 101 S. W. 373, 375, 125 Ky. 391.

**GOVERNMENTAL POWER**

Municipal corporations have two classes of powers—the one, governmental, in the exercise of which their officers may not bind the municipality beyond their terms of office; the other, business powers, in the exercise of which they are governed by the same rules as individuals or private corporations. *Tuttle Bros. & Bruce v. City of Cedar Rapids, Iowa*, 176 Fed. 86, 99 C. C. A. 606.

A city exercises its business and not its governmental power in making a contract to accept the dedication of and grade streets and alleys within its limits. *Tuttle Bros. & Bruce v. City of Cedar Rapids, Iowa*, 176 Fed. 86, 88, 99 C. C. A. 606.

Municipal corporations have two classes of powers, the one "governmental," in the exercise of which their officers may not bind the municipalities beyond their terms of office, the other business or proprietary, in the exercise of which they are governed by the same rules as individuals or private corporations. The court said: "In the exercise of powers which are strictly governmental or legislative, the officers of a city are trustees for the public, and they may make no grant or contract which will bind the municipality beyond the terms of their offices, because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are control-

led by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances." A city exercises its business or proprietary power in purchasing water-works or contracting for their construction or operation. The power of a city to regulate or fix the rates which a water, gas, or railway company may collect of private consumers partakes of the nature of a governmental power and also of the nature of a business power. *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 5, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614 (citing *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271, 292, 22 C. C. A. 171, 182, 34 L. R. A. 518).

Municipal corporations have two aspects. In one their functions are chiefly ministerial, and relate to corporate interests only. These include the making of public improvements, the repair of such improvements, and the holding of property for corporate purposes. The officers of the municipality in exercising this class of powers are to be regarded as agents of the lesser public and the maxim of respondeat superior applies. In the other aspect, the municipality is regarded as holding a quasi delegated sovereignty for the preservation of the public peace and safety and the prevention of crime. This includes the maintenance of a police force, the appointment of officers charged with the public health, the establishment of regulations for the suppression of vice, and other matters of public concern in which all people have a common interest. As to this class of powers the municipal officers are regarded as agents of the greater public and the maxim respondeat superior does not apply. *Barree v. City of Cape Girardeau*, 95 S. W. 330, 332, 197 Mo. 382, 6 L. R. A. (N. S.) 1090, 114 Am. St. Rep. 763 (citing *Dodahoe v. Kansas City*, 38 S. W. 571, 136 Mo. 657; *Bullmaster v. City of St. Joseph*, 70 Mo. App. 60; *Maxmillian v. Mayor, etc., of City of New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Conrad v. Village of Ithaca*, 16 N. Y. 158; *Jones v. City of New Haven*, 34 Conn. 1).

## GRABBOT COTTON

Acts 1896, p. 172, c. 156, § 16, imposes a tax on all "lint cotton" annually grown in a levee district, etc., and Acts 1904, p. 126, c. 90, § 5, makes it unlawful for any person to remove from the district any "cotton" grown therein without first paying the levee tax thereon, and declares that the levee board may recover from the person wrongfully removing such cotton a certain penalty tax on each bale or hundredweight of "seed cotton" so removed. Held, that the words "lint cotton" in the first act and "cotton" and "seed cotton" in the second act were limited to "lint

cotton" ginned by ordinary gins, and did not include "lint" or "Grabbot" cotton, obtained by reginning cotton seed and hard locks of cotton and cotton mixed with hulls, bolls, and other substances which could not be removed by ordinary ginning. *Mississippi Levee Com'rs v. Refuge Cotton Oil Co.*, 44 South. 828, 829, 91 Miss. 480.

## GRABIRON

A "handhold" or "grabiron" is a rod of iron placed diagonally on the top of a railway freight car about 12 or 15 inches from the edge, and fastened on with lag screws extending into the roof boards on the top of the car, to assist a brakeman in getting on and off the car. *Missouri, K. & T. Ry. Co. of Texas v. Box (Tex.)* 93 S. W. 134, 136.

In railroad parlance, a "grabiron" is an iron handhold near the top of the tender of a switch engine above the footboard, which enables employes to get on the engine while it is moving slowly and to stand securely on the footboard while the engine is moving. *Pollard's Adm'x v. Kentucky & I. Bridge & R. Co. (Ky.)* 97 S. W. 735.

An iron rod extending horizontally across the door near the center in the cab of a construction train is known as the "grabiron." *Atlanta & B. Air Line R. Co. v. McManus*, 58 S. E. 258, 259, 1 Ga. App. 302.

## GRACE

See *Days of Grace*; *Of Grace*; *Without Grace*.

## GRADE

See *Five Per Cent. Grade*.

Any change in grade, see *Any*.

Change of grade, see *Change*.

Establish grade, see *Establish*.

### In army and navy

Under Act April 22, 1898, c. 187, § 6, providing that, where a state militia regiment enlisted during the Spanish War in a body as a regiment, the regimental officers shall have the same grade as when in the state service, the term "grade" means a step or degree in their office or rank, and has reference to the divisions of the one or the other or both, according to the connection in which the word is employed. *Hawkins v. United States*, 40 Ct. Cl. 110, 114.

### In school

The law recognizes but three school "grades," namely, primary, grammar, and high school, and certificates authorizing teachers to instruct in these grades qualify the teacher for services only in the grade or grades covered by the certificate; hence it is in the statutory sense that the court must regard the term "grade" when seeking a limitation upon the powers of the board of

education to transfer and assign teachers. *Loehr v. Board of Education of City and County of San Francisco*, 108 Pac. 325, 326, 12 Cal. App. 671.

#### Of railroad

Raising a railroad track two or three feet was "grading" and not surfacing, within the meaning of a contract, and whether grading was done before or after the track was made was immaterial. *Snell v. Cottingham*, 72 Ill. 161, 168.

A contractor agreed to furnish the work, tools, etc., to do "all the grading required for filling." Held, that the word "grading" is not synonymous with "filling." Manifestly the word was not employed in the technical sense of bringing the surface to a line or grade, but in the broader sense of including the excavating and filling contemplated by the agreement of the parties. *Parrott v. Chicago Great Western Ry. Co.*, 103 N. W. 352, 353, 127 Iowa, 419.

#### Of sidewalk

Buffalo City Charter, § 288, as amended, provides for the laying and relaying of sidewalks at the expense of abutting owners. Laws 1891, p. 221, c. 105, § 303, divides streets into carriage ways and sidewalks, and Buffalo City Ordinance, c. 4, pars. 8, 9, declares that the owner or occupant may be required to grade and level the sidewalk in front of his premises between the street and curbs, and, on his failure to grade and level the sidewalk for ten days after notice, the same may be done at his expense. Held, that the words "laying or relaying" of a sidewalk, within section 288, have the same meaning as "grading or regrading" in section 8, in each case referring to original work on the sidewalk or street, and not to repair after the sidewalk is once laid or relaid. *Konowalski v. City of Buffalo*, 115 N. Y. Supp. 467, 469, 131 App. Div. 465.

#### Of street or highway

Change of grade, see *Change*.

A complaint, in an action to reform a contract, alleging that the term "graded street" as used in the contract meant a street graded, graveled, guttered, curbed, sidewalked, and otherwise improved and placed in a finished and completed condition for travel and use thereof by the public and acceptable to the city, held to state the true import of the contract. *Chapin v. Ross*, 84 Pac. 53, 54, 2 Cal. App. 433.

The "grading" of a street is its physical opening. The ordinance to open is usually the first step, after which a jury is appointed and damages assessed and paid, and thereafter, when the city is in funds, the physical grading is done. The physical opening or grading is the depositing of dirt on the strip taken as the street, or the cutting out of dirt from that strip according as the grading

consists of a fill or a cut. In re *Sedgley Ave.*, 66 Atl. 546, 547, 217 Pa. 313.

#### Same—Change of level

The term "grade" in Gen. St. 1902, § 2051, making the municipality liable for special damages resulting from a change in a street grade, is used not to signify a level precisely established by mathematical points and lines, but the surface of the highway as it in fact exists; and any elevation or depression of this surface by municipal authorities resulting from an attempt to establish a grade is a change of grade which, if damages result, will support an action. *Pickles v. City of Ansonia*, 56 Atl. 552, 553, 76 Conn. 278.

Since the ordinary meaning of the term "grade" is the amount of difference between grade line and a level or horizontal line, and to grade a street is to bring the surface to the grade line, a village charter authorizing it to grade its streets did not include permission to erect a wall in the street to alter its grade, without ordinance or resolution, nor authorize the closing or withdrawal of any part of the street from public use. *Hyland v. President and Trustees of Village of Ossining*, 107 N. Y. Supp. 225-230, 57 Misc. Rep. 212.

#### GRADE CROSSING

When a railroad highway and a carriage highway intersect at a common grade, the "grade crossing" thus formed is established by the state through its agents, and a grade crossing is in the nature of a nuisance and cannot lawfully exist unless pursuant to state authority. *Cowles v. New York, N. H. & H. R. Co.*, 66 Atl. 1020, 1022, 80 Conn. 48, 12 L. R. A. (N. S.) 1067, 10 Ann. Cas. 481.

#### GRADED SALARIES

The term "graded," as used in Const. art. 128, providing that justices of the peace and constables shall receive no fees in criminal matters, including peace bond cases, but in lieu thereof such salaries as may be fixed by the police jury and paid by the parish, which salaries shall be graded, means to allow a larger salary to one justice than to another according as he was liable to be called on to do more work than another, and such section not being self-executing, in that it prescribed no mode of grading, the making of a contract between the police jury and a particular justice of the peace fixing the amount of his salary was a proper method of grading. *Klees v. Police Jury of Parish of St. Bernard*, 59 South. 247, 248, 131 La. 263.

#### GRADING OUTFIT

The property attached in an action and the ownership of which was contested consisted of mules, horses, wagons, scrapers, and other implements usually termed "grading outfits." *Hicks Co. v. Thomas*, 38 South. 148, 149, 114 La. 219.

## GRADUATE

By "graduating the license" is meant to regulate its amount according to the amount of the gross sales of the licensee, or on some other basis of proportion. Thus, under the general license law, the wholesale merchant pays \$3,500 if his gross sales amount to seven millions or more, and \$50 if they amount to a quarter of a million or less; and the retail merchant's license varies in the same way, from \$3,500 to \$5, according to the amount of his sales. *State v. Rittenberg*, 36 South. 330, 331, 112 La. 224.

## GRADUATED TAX

"If different rates are levied on inheritances or bequests according to the degree of relationship of the heir or successor, the tax is sometimes called a 'graduated' or 'progressive' tax. 'Graduated or progressive taxation' is intimately associated with that of classification, and perhaps amounts substantially to the same thing. The progressive rule is applied to the income tax, which in principle is identical with the inheritance tax; the only difference being that the income tax is one upon property, while the inheritance tax is upon the right of succession." *State ex rel. Foot v. Bazille*, 106 N. W. 93, 96, 97, 97 Minn. 11, 6 L. R. A. (N. S.) 732, 7 Ann. Cas. 1056.

## GRAFT

"Graft," as defined by the Century Dictionary, is a dishonest gain, acquired by private or secret practice, or corrupt agreement or connivance, especially in a position of trust, as by offering or accepting bribes; and the trial court correctly instructed that "graft" is a dishonest transaction in relation to public or official acts, an advantage which one person, by reason of his peculiar position or superior influence of trust, acquires from another. *Quinn v. Review Pub. Co.*, 104 Pac. 181, 183, 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077.

The term "graft" is but another name for dishonesty, corruption, or fraud. *Merrimon v. Southern Pav. & Const. Co.*, 55 S. E. 366, 371, 142 N. C. 539, 8 L. R. A. (N. S.) 574.

The word "graft" in its generally accepted meaning, as applied to individuals, public officials, corporations, etc., imputes to the person, officer, or corporation charged with grafting dishonesty; dishonest gain by reason of public office, or public or private position; irregular or unlawful means of support; the use of office or position for personal gain; without rendering fair or compensatory service; to steal; to swindle. *State v. Sheridan*, 93 Pac. 656, 658, 14 Idaho, 222, 15 L. R. A. (N. S.) 497.

Where an alleged libelous article attacking correspondence schools of education was

headed with the word "graft" and attacked the contracts and mode of doing business by such schools as unjust, harsh, etc., whether the term "graft" was used in its most reflective sense as involving wrongdoing and illegality, or in its nonobjectionable sense as a "soft snap," was for the jury. *International Text-Book Co. v. Leader Printing Co.*, 189 Fed. 86, 89.

A newspaper article, charging that justice has been outdone, that it is a matter of self-exposure, self-ignorance, bad recollection, no bookkeeping, or downright graft on the part of the county officials, that, when things go wrong, the county judge has a very bad memory, and his graft continues to extract money from the taxpayers' pockets, touches the county judge in his office, and charges him with graft, and is libelous per se; the word "graft" meaning the fraudulent obtaining of public money unlawfully by the corruption of public officers. *Dixon v. Chappell*, 118 S. W. 929, 930, 133 Ky. 663.

"The word 'grafting' is commonly used to designate an advantage which one person, by reason of his peculiar position of superiority, influence, or trust, exacts from another. *Craig v. Warren*, 109 N. W. 231, 99 Minn. 246.

## GRAFTER

A "grafter" is defined as one who grafts; a swindler or dishonest person; one who takes or makes graft or dishonest private gain, especially in positions of trust and in ways peculiarly corrupt. *State v. Sheridan*, 93 Pac. 656, 658, 14 Idaho, 222, 15 L. R. A. (N. S.) 497 (citing Standard and Century Dictionaries).

## GRAIN

As materials, see Materials.

Crops as including growing grain, see Crop.

Dealing in grain, see Deal—Dealing.

## Bran

A fire policy on stock of "grain" in a building occupied as grain warehouse covers the part of the stock therein consisting of "bran," a product from grinding wheat. *German Fire Ins. Co. of Peoria v. Walker* (Tex.) 146 S. W. 606, 607.

## GRAIN BROKER

Revenue Act, § 66 (Laws 1903, p. 407, c. 73) defining "grain broker" as a person, company, or corporation engaged in buying and selling grain for profit, was not to enable the Legislature to levy an occupation tax on grain dealers, and so avoid the provision of Const. art. 9, § 1, authorizing a tax on peddlers, auctioneers, and brokers. *Central Granaries Co. v. Lancaster County*, 113 N. W. 199, 200, 77 Neb. 319.

**GRAIN ELEVATOR**

As workshop, see Workshop.

A "grain elevator" is "a building equipped with improved apparatus for receiving grain in bulk off the cars of the railroad and placing it in such position as to be conveniently delivered to him who is to receive it from the railway company, whether in wagons to haul it to his mill or into boats to continue its transport to the consumer. It is merely a perfected freighthouse specially provided for grain in bulk." Where a railroad company, as a means of effectively performing its duty as a common carrier, and without any purpose of conducting a storage business, erects an elevator which it rented to certain grain buyers, who elevated and stored grain transported over the company's road at cost, and after the first year paid no rent therefor, such elevator was "necessarily" used in the operation of the railroad within a statute exempting property "necessarily" used in the operation of a railroad from taxation. *Chicago, St. P., M. & O. R. Co. v. Douglas County*, 99 N. W. 1030, 1032, 122 Wis. 273.

**GRAIN STACK**

See Stack.

**GRAMMAR**

"Grammar" is the science which treats of the principles of languages, the study of the forms of speech, and their relations to each other. *State v. Traylor*, 56 South. 521, 524, 100 Miss. 544.

**GRAMMAR SCHOOL**

See Primary and Grammar Schools.

**GRANDCHILD**

The right of action against a person who causes damage to another "in case of death shall survive in favor of the minor children" of the deceased. Act No. 71, p. 94, of 1884. Minor grandchildren, under the statute, cannot recover damages for personal injuries to their grandfather, resulting in his death. Children are descendants in the first degree. "Grandchildren" are descendants in the second degree. "Children," under the codal definition, may include "grandchildren." But "minor" children do not include grandchildren who are minors, or those who are of age, or any other descendants more remote. *Walker v. Vicksburg, S. & P. R. Co.*, 34 South. 749, 750, 110 La. 718.

Where testator made devise to the grandchildren of his sons, testator being at the time 80 years of age and having no great-grandchildren, but having grandchildren, of whom he was extremely fond, the word "grandchildren" should be construed to mean testator's grandchildren. In *re Stocum's Will*, 94 N. Y. Supp. 588, 591, 592.

The status of parent and child is a correlative one, so that, where there is a legal child, there must have been a legal father, and hence the children of such legal child, whether natural or adopted, are the grandchildren of such legal father. *Batchelder v. Walworth*, 82 Atl. 7, 10, 85 Vt. 322, 37 L. R. A. (N. S.) 849.

**As child**

See Child—Children.

**Child of stepchild**

Testator married a widow with three children, all of whom lived with testator for several years as members of his family, and referred to and called him "grandfather," and each of whom, at the time of testator's death, their mother having predeceased him, was married and had children. Testator's only surviving heir at law was a brother of the half blood, and his will, after providing for certain legacies and expenses, gave all the remainder of his estate to "my grandchildren." Held, that the testator, by the words "my grandchildren," meant the grandchildren of his wife. *Coon v. McNelly*, 98 N. E. 218, 219, 254 Ill. 39.

**As descendant**

See Descendant.

**Great-grandchild**

Where testatrix created a trust for the use of her sons for life, then to her grandchildren, to be theirs when they reached 21, declaring her intent to be that part of the estate should be protected for her own children while they lived, and then for her own flesh after they were gone, the word "grandchildren" should be limited to the children of testatrix's children, and did not include great-grandchildren. *Thomas v. Thomas*, 53 South. 630, 633, 97 Miss. 697.

Where testator made devise to the grandchildren of his sons, testator being at the time 80 years of age and having no great-grandchildren, but having grandchildren, of whom he was extremely fond, the word "grandchildren" should be construed to mean testator's grandchildren. In *re Stocum's Will*, 94 N. Y. Supp. 588, 590.

**As heir**

See Heirs.

**As illegitimate child**

See Illegitimate Child.

**As issue**

See Issue (Descendants).

**As name of class**

Where there are in a will no words importing a gift to a class as "grandchildren," except in the direction to make division among them at the period subsequent to the testator's death, the members of that class are to be ascertained as of the time fixed for the division. *Stoors v. Burgess*, 62 Atl. 730, 733, 101 Me. 26.

**Posthumous child**

Testator by the third clause of the codicil of his will created two life estates, one for the use of his daughter and the other for the use of his grandchildren, declaring that, if any of the grandchildren shall die leaving descendants living, such descendants shall take per stirpes the same interest they would have taken if the property were then to descend, and the rest should be managed and controlled by the trustee for the use of testator's surviving grandchildren without the right to convey, anticipate, or incur the same, etc. Held, that the word "grandchildren" as there used should be construed to include not only those born and living or having died leaving issue at testator's death, but also any who might be born to testator's daughter during her lifetime. *United States Fidelity & Guaranty Co. v. Douglas' Trustee*, 120 S. W. 328, 329, 134 Ky. 374, 20 Ann. Cas. 993.

**GRAND INQUEST**

The term "grand inquest" has no other meaning than "grand jury"; the term "inquest" being used to indicate a body of men appointed by law to inquire concerning certain matters submitted to them. *Geiger v. United States*, 162 Fed. 844, 845, 89 C. C. A. 516.

**GRAND JUROR**

As holding office of honor or profit, see Office of Honor or Profit.  
As juror, see Juror.  
As officer, see Officer.

**GRAND JURY**

See Witnesses Before Grand Jury.  
De facto grand jury, see De Facto Jury.  
Grand jury inquiry as proceeding, see Proceeding.  
Inquisition before grand jury as criminal case or cause, see Criminal Case or Cause.

A "grand jury" is one of the instruments through which the court acts in the enforcement of the laws. It is called by the court, and is always subject to be excused from further attendance on duty. *Zinn v. District Court for Barnes County*, 114 N. W. 475, 476, 17 N. D. 128.

The "grand jury" is a de jure body created by the Constitution (Const. art. 1, § 8). *Kitts v. Superior Court of Nevada County*, 90 Pac. 977, 980, 5 Cal. App. 462.

The order for a "grand jury" organized at an adjourned term, which is but a prolongation of the regular term, and not a special term, showing by its terms that it was made under Code 1896, § 5001, which has application solely to special terms, and not under section 5000, which confers the only au-

thority for organizing a second grand jury at the same term of court, an indictment found by such grand jury is invalid and should be quashed. A "grand jury" constituted in any other manner than that prescribed by statute is illegal. A "grand jury" is not a mere assemblage of 15 or 18 persons in the jury box, congregated by an order of the court, or by their own volition, or at the summons or on the behest of an unauthorized person, but it is a constituent element of a circuit or city court, having criminal jurisdiction, sitting at a regular term, and drawn, selected, and summoned in a mode clearly prescribed, under the superintendence and in the exercise of the sound judgment of sworn officers of law. *Fryer v. State*, 41 South. 172, 173, 146 Ala. 4 (citing *O'Byrnes' Case*, 51 Ala. 25).

**Examination of witnesses**

"The 'grand jury' is simply a tribunal organized to make inquiry, and may call any person before it as a witness." *State v. Shepherd*, 106 N. W. 190, 191, 129 Iowa, 705.

**As component part of court**

See Court (Of Justice).

**As grand inquest**

See Grand Inquest.

**Number of jurors**

Accusation against a municipal officer authorized by statute may be presented by 12 members of the grand jury; the statute being silent as to the number that may present the accusation. *Coffey v. Superior Court of Sacramento County*, 83 Pac. 580, 582, 2 Cal. App. 453.

Code 1897, § 5240, provides that from the number of grand jurors drawn the clerk shall draw seven names, and the persons so drawn shall constitute the grand jury for that term, and, if any person so drawn be excused or fail to attend on the second day of the court, the clerk shall draw other names until seven are selected. Held, that the fact that the court excused two of the persons summoned for grand jury duty before the seven had been drawn to form the jury was no objection to the grand jury as subsequently organized. *State v. Johnson*, 111 N. W. 827, 829, 136 Iowa, 601.

**GRAND LARCENY**

By Pen. Code, § 444, "grand larceny" is committed in either of the following cases: (1) When the property taken is of the value exceeding \$50. (2) When the property is taken from the person of another. (3) When the property taken is a horse, mare, gelding, cow, calf, mule, goat, sheep or hog, or any neat or horn cattle. (4) When property taken is a bicycle. *Ruffehr v. Territory*, 89 Pac. 415, 11 Ariz. 165.

"Grand larceny," as defined by Pen. Code, § 444, as amended by Laws 1905, p. 15,

is larceny committed in either of the following cases: (1) When the property taken is of the value exceeding \$50. (2) When the property taken is from the person of another. (3) When the property taken is a horse, mare, gelding, cow, steer, bull, calf, jack, jenny, goat, sheep or hog or any neat or horn cattle. (4) When the property taken is a bicycle. *Territory v. Ruval*, 84 Pac. 1096, 1097, 9 Ariz. 415.

Under Kirby's Dig. §§ 1821-1824, defining larceny as the felonious carrying away of the personal property, bonds, bills, banknotes, etc., of another, the stealing of a bank check of the value of \$15 is grand larceny. *Crossland v. State*, 92 S. W. 776, 77 Ark. 544.

Under Rev. Pen. Code, §§ 605, 607, 608, as amended by Laws 1903, p. 175, c. 151, "larceny" is the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof. "Larceny" is divided into two degrees, the first of which is termed "grand larceny," the second, "petit larceny." Grand larceny is larceny committed in either of the following cases: (1) When the property taken is of value exceeding \$20. (2) When such property, although not of value exceeding \$20, is taken from the person of another. (3) When such property, although not of value exceeding \$20, is a bull, steer, cow, helper, or calf, or is a stallion, mare, gelding, horse or colt. Larceny in other cases is petit larceny. Under Rev. Pen. Code, §§ 605, 607, 608, as amended by Laws 1903, p. 175, c. 151, making it grand larceny to take property exceeding \$20 in value, or when the property, though not of value exceeding \$20, is a stallion, mare, gelding, horse, or colt, there is no variance between an information alleging larceny of a horse and proof of the larceny of a gelding, especially in view of Rev. Code Cr. Proc. § 569, providing that neither a departure from the form or mode prescribed as to any pleading nor error therein renders it invalid, unless it has prejudiced defendant, and section 229, providing that an indictment is sufficient if the act charged is clearly set out in ordinary and concise language, so as to enable a person of common understanding to know what is intended. *State v. Matejousky*, 115 N. W. 96, 98, 22 S. D. 30.

Cr. Code 1896, § 5049, provides that if any person steals personal property of the value of \$5 or more from or in any dwelling house he is guilty of "grand larceny." Held, that in order to constitute theft of that grade the property stolen must be of the value of \$5 or more, and if less than that value the offense is "petit larceny," defined by Cr. Code 1896, § 5050. *Thomas v. State*, 46 South. 565, 566, 155 Ala. 92.

An instruction defining "grand larceny" in the language of Pen. Code, § 487, as "when the property taken is of a value exceeding \$50; when the property taken is from the

person of another; when the property taken is a bicycle, horse, mare, gelding, cow, steer, bull, calf, mule, jack or jenny"—is correct, in a prosecution for grand larceny, consisting in the alleged stealing of calves. *People v. Ruiz*, 77 Pac. 907, 908, 144 Cal. 251.

Where the value of property alleged to have been stolen was not material, proof of its value is not necessary, as courts and jurors will presume from the nature and character of the property proved to have been stolen that it had some value. Hence in a prosecution for grand larceny, under Rev. Pen. Code, § 608, subd. 2, as amended by Laws 1903, p. 175, c. 151, making a larceny from the person grand larceny, the presumption that the property stolen was of some value is sufficient to sustain a conviction. *State v. Faulk*, 116 N. W. 72, 73, 22 S. D. 183.

Where an automobile worth over \$500 was taken from a street by the proprietor of a garage without authority of the owner, and withheld from the owner to enforce payment of a claim due from him, if any crime was committed, either in taking the car from the street or receiving or holding it, it was grand larceny, which is a felony under Pen. Code, § 530, subd. 3, making it "grand larceny" in the first degree to steal or unlawfully obtain in any manner whatever property worth more than \$500, and section 533, making grand larceny in the first degree punishable by not exceeding 10 years' imprisonment. *Greene v. Fankhauser*, 121 N. Y. Supp. 1004, 1007, 137 App. Div. 124.

Act No. 124 of 1874, § 8, divides larceny into grand and petit larceny, and makes the larceny of property or money worth \$100 or more grand larceny, punishable with imprisonment for not more than ten years, and the larceny of property under the value of \$100 petit larceny, punishable with imprisonment for not more than two years. Act No. 64 of 1910 makes the stealing of cattle a specific offense, punishable with imprisonment for not less than one year. Held that, the two statutes being repugnant and the whole subject of cattle stealing being covered by the later one, the earlier one was repealed thereby by necessary implication in so far as cattle theft is concerned. *State v. Hickman*, 53 South. 680, 127 La. 442.

An instruction that "every person who with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, takes from the possession of the true owner any mare, gelding or colt is guilty of 'grand larceny,'" contains a correct definition of the crime of "grand larceny." *State v. Allen*, 87 Pac. 177, 180, 34 Mont. 403.

Pen. Code, § 487, defines "grand larceny" to include the taking of property of another exceeding \$50 in value, and section 532 de-

clares that every person who knowingly, and by false or fraudulent pretense, defrauds another of money, etc., is punishable in the same manner and to the same extent as for larceny of the money or property so obtained. Held that, where defendant was accused of obtaining by false pretenses a loan of \$1,000, the state was not bound to show that defendant received the full amount alleged, but proof that she received an amount in excess of \$50 was sufficient to sustain a conviction. *People v. Osborn*, 106 Pac. 891, 892, 12 Cal. App. 148.

An information before a Court of Special Sessions for theft of a cow not showing that the value thereof did not exceed \$25 was insufficient basis for a warrant for petit larceny within the jurisdiction of the court, given under Cr. Code, § 56, subd. 1, to hear trials for petit larceny, but not of larceny in any other degree, inasmuch as under Penal Law (Consol. Laws, c. 40) § 1296, if property of more than the value of \$25 is stolen, the crime is grand larceny in the second degree, triable only after indictment. *People v. Jones*, 126 N. Y. Supp. 1085, 1087, 142 App. Div. 180.

Grand larceny, the felonious stealing of property of another, being committed when the property exceeds \$50 in value, and is taken from the person of another, or is one of a number of things, among which is a "steer," it is not necessary in case of a steer that it be taken from the person of another or the possession of the owner; so that the allegation of the indictment that it was taken from the possession of the owner is surplusage. *People v. Hutchings*, 97 Pac. 325, 326, 8 Cal. App. 550.

To warrant a conviction under Laws 1903, p. 372, c. 218, § 1, making the theft in the nighttime of any harness, grand larceny, it is not necessary that the property stolen comprise all the parts of a complete harness. *State v. Wortman*, 98 Pac. 217, 78 Kan. 847.

As expressly defined by Laws 1903, p. 372, c. 218, § 1, "grand larceny" consists of the "taking or carrying away any money, goods, right in action or other personal property or valuable thing whatsoever of the value of twenty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, neat cattle, sheep, goat, hog, or in the nighttime any domestic fowls, harness or saddles belonging to another." *Ex parte Howard*, 83 Pac. 1032, 1034, 72 Kan. 273.

In a prosecution for "grand larceny," an instruction, defining the offense as the wrongful and fraudulent taking the property of another and converting the same to his own use, was erroneous for omitting the element of felonious intent to convert the property taken to the use of the offender without the consent of the owner. *State v. Weatherman*, 100 S. W. 482, 483, 202 Mo. 6.

Pen. Code, § 484, defines larceny as a felonious stealing, etc., of the personal property of another. Section 487 declares that "grand larceny" is committed: "(1) When the property taken is of value exceeding \$50; (2) when the property is taken from the person of another; \* \* \* (3) when the property taken is 'one of certain enumerated animals or articles.'" *People v. Roberts*, 82 Pac. 624, 625, 1 Cal. App. 447.

An information, alleging that accused did take, steal, drive, lead, and entice away one steer branded as indicated, the property of a person named, of the value of \$25, with a felonious intent on the part of the accused to deprive the true owner of his property and to steal the same, charges "grand larceny," as defined by Rev. Codes, § 8645, declaring that grand larceny is committed by any person taking and driving away domestic animals. *State v. Biggs*, 123 Pac. 410, 411, 45 Mont. 400.

"Grand larceny," under the act of 1874, is the larceny of any property of the value of \$100, and is made punishable with imprisonment in any parish prison or at hard labor in the penitentiary at the discretion of the court for not more than 10 years. *State v. Wall*, 52 South. 556, 559, 126 La. 400.

"Grand larceny" is defined by Snyder's St. § 2594, as larceny committed when the property is of value exceeding \$20 and when such property, though not of value exceeding \$20, is taken from the person of another. The larceny of an animal punishable by section 2606 is a separate and distinct offense. *Crowell v. State*, 117 Pac. 883, 884, 6 Okl. Cr. 148.

Since, under Pen. Code, § 484, defining "grand larceny" as the taking of personal property from the person of another, asportation is not an essential element of the offense, an information charging that defendant feloniously took from the person of prosecutor certain gold coins, etc., was not objectionable for failure to charge an asportation thereof. *People v. Lonnen*, 73 Pac. 586, 587, 139 Cal. 634.

Kirby's Dig. § 1603, defines burglary as the unlawful entering of a house or other building in the nighttime with the intent to commit a felony. Section 2227 provides that an indictment must be direct and certain as regards the party charged, the offense charged, the county in which the offense was committed, and the particular circumstances of the offense charged, where they are necessary to constitute a complete offense. Sections 1821-1826 provide that larceny is the felonious stealing of the personal property of another, and shall embrace every theft which unlawfully deprives another of his property, and provides that the taking and removing of any personal property with intent to steal the same shall be deemed "larceny," and that where the value of the prop-



erty stolen exceeds the sum of \$10 punishment shall be by imprisonment in the penitentiary, and when it does not exceed the sum of \$10 by imprisonment in the county prison. Held, that an indictment which charges accused, upon a date specified, in a certain county within the state, and during the nighttime of said day, in a certain house owned by a person specified, with breaking and entering with felonious intent to steal, take, and carry away the goods, wares, and merchandise, of the value of \$11.06, of the personal property of the said owner, contrary to the statutes in such cases made and provided and against the peace and dignity of the state, is sufficient. *McCarthy v. State*, 119 S. W. 647, 648, 90 Ark. 384.

## GRAND MAL

It appears that a person who has suffered from epilepsy in the major form, or "grand mal," as it is technically termed, in which the expression is usually through convulsions, may later pass into the stage of minor epilepsy, or "petit mal," which is the more dangerous form, because of liability to sudden attacks of maniacal paroxysms or of epileptic furor. The victim of such attacks is unconscious of his conduct, and usually, but not universally, will not remember what has occurred. *People v. Egnor*, 67 N. E. 906, 907, 175 N. Y. 419.

## GRANDNEPHEW

As nephew, see Nephew.

## GRANITE

As mineral, see Mineral.

Tariff Act July 24, 1897, c. 11, § 1, Schedule B, pars. 117, 118, 30 Stat. 159, relating to granite, etc., "and other building or monumental stone," "hewn, dressed or polished," and "unmanufactured or undressed," was intended to cover the general subject of building and monumental stone; and granite monuments imported in sections dressed, ornamented, and polished abroad and ready to be set up and leaded or cemented together are dutiable under said paragraph 118 as "granite \* \* \* dressed." *Alexander Murphy & Co. v. United States*, 162 Fed. 871, 872, 89 C. C. A. 561.

## GRANITE LINOLEUM

"Granite linoleum" is that "in which the paste contains masses or spots of different colors, which colors remain separate in the completed fabric. The assemblage and relationship of these variously colored spots and masses is, however, casual. *United States v. Scott & West*, 164 Fed. 285, 287.

## GRANITE QUARRY

See Undeveloped Granite Quarry.

## GRANT

### Admit synonymous

In a rule of court declaring that a rehearing shall not be "granted" after the lapse of the term at which the final decree is entered, and providing that, in nonappealable cases, a petition for a rehearing may be "admitted" before the end of the next term after final decree, the word "admitted" is synonymous with the word "granted," and the effect of the rule is to deprive the court of the power to grant a rehearing in any case after the lapse of the term next succeeding the entry of a final decree. *Glenn v. Dimmock*, 43 Fed. 550, 551.

### Give synonymous

The ordinary and accepted meaning of "give" is synonymous with "grant." *United States v. Bunch*, 165 Fed. 736, 739 (citing *Standard Oil Co. v. United States*, 164 Fed. 376, 90 C. C. A. 364).

### Of injunction

An order for an injunction pendente lite recited that the court, being fully advised, ordered that the injunction as prayed be granted, and that the same be continued until the hearing of the cause, and it was further ordered that on giving a bond "an injunction forthwith issue." Held, that the point that under the terms of the order it became necessary after the bond was filed and approved to issue a formal injunction order, and that inasmuch as this was not done there was in fact no injunction, and therefore no liability on the bond, was not well taken, the words "granting the injunction" being manifestly intended to operate as the injunction order itself on the filing and approval of the necessary bond. *Collins v. Huffman*, 93 Pac. 220, 225, 48 Wash. 184.

### GRANT (In Conveyancing)

See Crown Grant; Express Grant; Imperfect Grant; Inclusive Grant; Perfect Grant; Public Grant.

All other grants, see All Other.

Implied grant of easement, see Implied Easement.

"To 'grant' \* \* \* requires the conscious and understanding act of the intellect and will. If one does not know what he is about, his alleged grant is no grant." *Standard Oil Co. v. United States*, 164 Fed. 376, 390, 90 C. C. A. 364.

A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. Trustees of the Freeholders & Commonalty of Town of Brookhaven v. Smith, 90 N. Y. Supp. 646, 649, 93 App. Div. 212.

A "grant" is a generic term applicable to all transfers of real property (3 Washb. Real Prop. 181, 353) and may be applied to

a party wall contract. *Loyal Mystic Legion v. Jones*, 102 N. W. 621, 624, 73 Neb. 342.

Rev. Codes 1905, § 4965, provides that a transfer vests in the transferee all the actual title to the things transferred which the transferor then has, unless a different intention is expressed or is necessarily implied. A transfer, as applied to real estate, is termed a "grant." *North Dakota Horse & Cattle Co. v. Serungard*, 117 N. W. 453, 458, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not a "grant" within Rev. St. U. S. § 4898. *National Cash Register Co. v. New Columbus Watch Co.*, 129 Fed. 114, 116, 68 C. C. A. 616.

A "grant" of public lands is a solemn deed of the state under its great seal. *Bowser v. Wescott*, 58 S. E. 748, 749, 145 N. C. 56.

A "grant" confirming state title to land has a technical meaning under Virginia and West Virginia law. A public "grant" means an instrument by which the state, as sovereign, passes to an individual title to land before vested in the state. A patent is only another name for a land "grant." The instrument is indifferently called a patent or "grant" in the Virginias. *State v. Harman*, 50 S. E. 828, 833, 57 W. Va. 447.

The expression "grants," when employed in treaties, comprehends not only those which are made in form, but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or protocol, or presumed from possession. The terms "grants" and "legitimate titles" employed in the protocol of the treaty of Guadalupe Hidalgo, providing that grants of land by the Mexican government should preserve their legal value, and that the grantee might cause their legitimate titles to be acknowledged before the American tribunals, was not limited to absolutely perfect grants, but embraced all character of titles, legal or equitable. *Haynes v. State (Tex.)* 85 S. W. 1029, 1040 (quoting and adopting definition in *Strother v. Lucas*, 12 Pet. [37 U. S.] 435, 9 L. Ed. 1113; *State v. Russell*, 85 S. W. 288, 38 Tex. Civ. App. 13).

#### **Agree and agreement under seal synonymous**

"It is settled that the word 'agree' may be read 'grant,' and an 'agreement under seal' construed to be a 'grant.'" *Bailey v. Agawam Nat. Bank*, 76 N. E. 449, 451, 190 Mass. 20, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep. 296 (citing *Hogan v. Barry*, 10 N. E. 253, 143 Mass. 538; *Ladd v. City of Boston*, 24 N. E. 858, 151 Mass. 585, 21 Am. St. Rep. 481).

#### **Assign synonymous**

Rev. St. 1899, § 2933, provides that dower in a leasehold estate for a term of 20 years or more shall be granted and assigned as in real estate, and for a less term than 20 years shall be granted and assigned as in personal property. Held, that the words "granted" and "assigned," as so used, were synonymous, and mean only that the widow shall have the same dower in a leasehold estate of 20 years or more that she is entitled to in real estate, and that if the lease is for less than 20 years she has dower in it as she has in other personal property; the term of such leasehold being determined by the term named in the lease, and not by the portion of the term remaining at the husband's death. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 499, 225 Mo. 414, 20 Ann. Cas. 1072.

#### **Claim distinguished**

A "claim" is, not only legally speaking, but in ordinary parlance, clearly distinguishable from a "grant" or a "title." A "claim" is defined in the Century Dictionary (verbo "claim") as "the thing claimed or demanded; specifically, a piece of public land which a squatter or settler marks out for himself with the intention of purchasing it when the government offers it for sale; as, 'He staked out a claim.'" "A 'grant,' on the contrary, has a distinctly broader meaning. It implies an acquired right, and is described by Mr. Bouvier as applicable to the conveyance of incorporeal rights. But in the larger sense the term comprehends anything that is granted or passed from one to another, and is applied to every species of property. It therefore necessarily implies a 'title' or vested right in the grantee from the grantor, or has a much more pregnant signification than a claim." *Corkran Oil & Development Co. v. Arnaudet*, 35 South. 747, 754, 111 La. 563.

#### **Convey synonymous**

The word "convey" or "transfer" as operative words in a deed is of equivalent signification and effect as "grant." *State v. Kelliher*, 88 Pac. 867, 868, 49 Or. 77 (quoting and adopting definition in *Lambert v. Smith*, 9 Or. 193; citing *Field v. Columbet*, 9 Fed. Cas. 12, 4 Sawy. 527).

In modern law, the terms "grant" and "convey," when used in instruments intended to alienate or transfer real estate, have substantially the same meaning. A deed, reciting that the grantor has "granted," bargained, and sold, is a substantial compliance with the statute providing that bargain and sale deeds for conveyance of land, reciting that the grantor does bargain, sell, and "convey," shall be adjudged an express covenant that the grantor had the fee. *Blood v. Slebert*, 80 Pac. 799, 801, 38 Wash. 643.

The word "grant," as used in Code 1899, c. 52, § 1, providing that every corpora-

tion, as such, shall contract and be contracted with by simple contract or specialty; purchase, hold, use, and grant estate real and personal, is the equivalent of "convey" and similar terms, and thus gives the corporation power to sell and convey equally broad with its power to purchase and hold. *Germer v. Triple-State Natural Gas & Oil Co.*, 54 S. E. 509, 513, 60 W. Va. 143.

A deed reciting that the grantor does "give, grant, remise, release and forever quitclaim" all the right and title the grantor has or ought to have in and to the property described, is not a quitclaim deed, but under *Shannon's Code*, § 3672, providing that every grant shall pass all the estate of the grantor, it conveys the grantor's whole estate, and must be taken in connection with the chain of title on which it is based, whereby it must appear what estate was owned by the grantor, the word "grant" being equivalent to the word "convey." *Hitt v. Caney Fork Gulf Coal Co.*, 139 S. W. 693, 696, 124 Tenn. 334.

While it may be that the word "conveyed" usually implies the passing of the legal title, it is not inaptly nor incorrectly used to describe a transfer of title, legal or equitable, and, whether used with a narrow and technical meaning or in a broad and general sense, is to be determined by the context and the circumstances under which the entire instrument or document in which it was found is framed. When a railroad company received full payment for lands granted to it by Act Minn. May 22, 1857, and executed an instrument by which all its equitable and substantial interests in them was transferred, the lands were "conveyed" within the meaning of the provision that the lands so granted should be exempt from taxation until "sold and conveyed." *Winona & St. P. Land Co. v. State of Minnesota*, 16 Sup. Ct. 83-85, 159 U. S. 531, 40 L. Ed. 247.

#### **Covenant of warranty against incumbrances imported**

By statute the words "grant or convey" in a deed carry with them an implied warranty that the estate conveyed is at the time of the execution of the deed free from incumbrances, unless restrained by express terms contained therein. *Rotan v. Hays*, 77 S. W. 654, 655, 33 Tex. Civ. App. 471.

Mortgaged property was conveyed by deed of gift, which was silent as to the mortgage, and the conveying words were, "give, grant, alien, and confirm." Held, that there was no covenant by implication against incumbrances, notwithstanding Civ. Code, § 1113, subd. 2, declaring that from the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed a covenant is implied that at the time of the execution of the conveyance the estate was free from incumbrances. In

*re Well's Estate*, 94 Pac. 856, 857, 7 Cal. App. 515.

By the express provisions of Rev. St. 1901, par. 728, a conveyance of a fee simple in which the use of the word "grant" or "convey" is made impliedly covenants that the estate is free from incumbrance. *Sherman v. Goodwin*, 89 Pac. 517, 519, 11 Ariz. 141.

From the use of the words "grant" and "convey" in a deed the law implies a covenant that at the time of such conveyance the land is free from incumbrances, and taxes are included in the term "incumbrances" as here used. *Bullitt v. Coryell*, 85 S. W. 482, 483, 38 Tex. Civ. App. 42.

Where defendant C. and wife conveyed certain land in controversy in fee, with covenants of warranty, and thereafter purchased the land on foreclosure of a trust deed which they had previously given to secure a loan on the land, the title so acquired by them inured to the benefit of their grantee by estoppel, under Rev. St. 1895, art. 633, providing that the use of the words "grant" or "convey" in any conveyance by which an estate of inheritance or fee simple is passed implies a covenant that the estate is at the time of the execution of the conveyance free from incumbrances. *Lowry v. Carter*, 102 S. W. 930, 931, 46 Tex. Civ. App. 488.

The word "grant," when used in a conveyance, under the provisions of section 3120, Rev. Codes, implies the following covenants, and none other, on the part of the grantor, for himself and heirs, to the grantee, his heirs and assigns, unless restrained by express terms contained in such conveyance, to wit: (1) That previous to the time of execution of such conveyance the grantor has not conveyed the same estate or any right, title, or interest therein to any person other than the grantee; (2) that such estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor, or any person claiming under him. *Polak v. Mattson*, 128 Pac. 89, 91, 22 Idaho, 727.

#### **Give synonymous**

The word "grant" is synonymous with the word "give." *Gurnsey v. Northern California Power Co.*, 94 Pac. 858, 862, 7 Cal. App. 534.

Under a warranty deed in the usual form with a provision that "the possession of said above-described premises to be given to party of second part, her heirs and assigns, on or before the 1st day of March, 1901," the word "given" must be construed as synonymous with the word "surrendered" or "granted." *Beakey v. Schwitzgebel*, 105 Pac. 42, 43, 81 Kan. 38.

"Give" and "receive" are synonymous with "grant" and "accept." Where all these words appear in the same phrase, the prin-

ciple of ejusdem generis forbids their being taken to indicate acts of antagonistic quality. *Standard Oil Co. v. United States*, 164 Fed. 376, 390, 90 C. C. A. 364.

Ordinary and accepted meanings of "give" and "receive" are synonymous with "grant." *United States v. Bunch*, 165 Fed. 736, 739 (citing *Standard Oil Co. v. United States*, 164 Fed. 376, 90 C. C. A. 364).

#### Lease

Const. art. 15, § 3, provides that all tidelands within two miles of any incorporated city or town, and fronting on the waters of any harbor, estuary, bay, or inlet used for navigation, shall be withheld from "grant or sale" to private corporations, partnerships, or corporations. Held that, while the word "grant" has sometimes been used to include a lease for a term of years, the constitutional provision should be construed in its ordinary sense to refer to a conveyance of the title to property; and hence such provision did not prevent a lease of tidelands belonging to the state to private persons or corporations for a term of years. *San Pedro, L. A. & S. L. R. Co. v. Hamilton*, 119 Pac. 1073, 1075, 161 Cal. 610, 37 L. R. A. (N. S.) 686; *Same v. Nelson*, 119 Pac. 1077, 161 Cal. 720.

#### License distinguished

Whether an instrument is a "license" or a "grant" depends upon the construction of the instrument as a question of law. If it merely confers a privilege to do an act or series of acts under the owner which, without permission, would be unlawful, it is a "license"; but if it grants exclusive possession of premises against the world, including the owner, it is not a license, but creates an irrevocable estate or interest in the land. *City of Berwyn v. Berglund*, 99 N. E. 705, 707, 255 Ill. 498.

#### Mortgage

The word "grant" is sometimes construed to include mortgage. *Hanrion v. Hanrion*, 84 Pac. 381, 382, 73 Kan. 25, 117 Am. St. Rep. 453.

St. 1898, § 2077, provides that, on a grant for a valuable consideration to one person, the consideration being paid by another, no trust shall result in favor of the person making the payment, but the title shall vest in the alienee. Held, that the statute applies only to real property, the "grant" contemplated being an absolute one, and hence does not apply to a mortgage to secure a note. In *re Tobin's Estate*, 121 N. W. 144, 139 Wis. 494.

#### As patent

See Patent.

#### Tax deed

A tax deed is not a grant under the section classifying the persons entitled to transfer of the state title to forfeited lands, under Const. § 3, art. 13, but is a good claim and

color of title under the first and third classifications of such section. *State v. Harman*, 50 S. E. 828, 833, 57 W. Va. 447.

#### Transfer of incorporeal hereditament

An instrument reciting that, in consideration of \$1.00 and a stated royalty, per ton, the owner of land granted to another all the bituminous rock, petroleum, asphaltum, and other minerals he might choose to take, while using the word "grant," is not a grant of land nor a lease, but a conveyance or a right in the nature of an incorporeal hereditament, which could be lost by abandonment. *Payne v. Neuval*, 99 Pac. 476, 478, 155 Cal. 46.

#### GRANT AND DEMISE

The words "grant and demise" in a lease for years created an implied warranty of title and a covenant for quiet enjoyment. *Stott v. Rutherford*, 92 U. S. 107, 109, 23 L. Ed. 486; *Headley v. Hoopengartner*, 55 S. E. 744, 747, 60 W. Va. 626.

The words "grant and demise" in a lease by an officer or agent of the law do not raise against such character of trustee a covenant by implication, though they do with individuals. *Shannon v. Mastin*, 114 S. W. 1127, 1128, 135 Mo. App. 50 (citing *Webster v. Conley*, 46 Ill. 13, 92 Am. Dec. 234).

#### GRANT, BARGAIN, AND SELL

The use of the words "grant, bargain, and sell" in a deed containing a covenant of warranty of title does not, in the state of Mississippi, amount to a covenant of seisin. *Duncan v. Lane*, 8 Smedes & M. (16 Miss.) 744, 753.

Under the direct provisions of Kirby's Dig. § 731, the words "grant, bargain, and sell" in a deed amount to a covenant that the grantor is seised of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor. *Seldon v. Dudley E. Jones Co.*, 85 S. W. 778, 74 Ark. 348.

The words "grant, bargain and sell," in a deed purporting to convey the fee, have, under Rev. St. 1899, § 907, the effect of a covenant that the grantor is seised of an indefeasible estate in fee, but unless the deed purports to convey the fee the words mean only a transfer of the estate. *Waldermeyer v. Loebig*, 121 S. W. 75, 76, 222 Mo. 540.

The words "grant, bargain and sell" in a deed have under the statute the force of covenants that the grantor is seised of an indefeasible estate in fee in the land conveyed, that the same is free from incumbrance done or suffered by the grantor, his heirs and assigns, and all claiming under him, and for further assurance to be made by the grantor, his heirs and assigns. *Stoepler v. Silberberg*, 119 S. W. 418, 420, 220 Mo. 258.

Under Rev. St. 1909, § 2793, providing that the words "grant, bargain and sell" in conveyances shall be construed as covenants that the grantor was seized with an inde-

feasible estate in fee, free from incumbrances, and for further assurances, such words create covenants of warranty which run with the land. *Staed v. Rossier*, 137 S. W. 901, 903, 157 Mo. App. 300.

The statutory covenants raised by the words "grant, bargain, and sell," when used in a conveyance of land, are not restricted in their scope by an express covenant of special warranty making no reference to the former covenants and not coupled with them in such a way as to modify their ordinary effect. *Miller v. Bayless*, 92 S. W. 482, 483, 194 Mo. 630 (quoting same case, 74 S. W. 648, 101 Mo. App. 487).

In the absence of any statutory provision, many of the courts of last resort have held that the words, "grant, bargain, and sell," when used in a conveyance in fee, do not imply any covenants. A deed, reciting that the grantor has granted, bargained, and sold, was a substantial compliance with *Balinger's Ann. Codes & St. § 4520*, providing that bargain and sale deeds for conveyance of land, reciting that the grantor does bargain, sell, and convey, shall be adjudged an express covenant that the grantor had the fee. *Blood v. Sielert*, 80 Pac. 799, 800, 38 Wash. 643.

Where the words "grant, bargain, and sell," contained in a deed, are not limited by express words, they import a covenant by the grantor with the grantee, his heirs and assigns, that the land is free from incumbrances made or suffered by him, as expressly provided by *Kirby's Dig. § 731*. *Crawford v. McDonald*, 106 S. W. 206, 208, 84 Ark. 415.

The terms of a conveyance "grant, bargain, sell, and convey" are of sufficient recognized legal effect to carry all legal or equitable interests the grantor has in the land, together with all that is appurtenant or incident to it or beneficial to its enjoyment, and the effect of their use in a conveyance is to divest the grantor of any interest whatever possessed in and to water rights or riparian rights appurtenant thereto. *Rianda v. Watsonville Water & Light Co.*, 93 Pac. 79, 80, 152 Cal. 523.

The statutory warranty attached to the words "grants, bargains, and sells," imports a covenant only against incumbrances done or suffered by the grantor, and not against incumbrances generally. *Hood & Wheeler v. Clark*, 37 South. 550, 141 Ala. 397.

A mortgage containing no express covenant or warranty, but using the statutory words "grant, bargain, and sell," implies the statutory warranty that the grantee was seized of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor. *New England Mortgage Security Co. v. Fry*, 42 South. 57, 59, 143 Ala. 637, 111 Am. St. Rep. 62.

## GRANTED AND LEASED

The words "granted and leased," used in a contract by which the grantor "granted and leased" to the grantees, their heirs and assigns, certain land for the purpose of a gas well, so long as it was used for the same, etc., amounted merely to a covenant for quiet enjoyment on the conditions stipulated in the contract. *Shenk v. Stahl*, 74 N. E. 538, 540, 35 Ind. App. 493.

## GRANTED LANDS

Under Act March 16, 1897, § 11, providing that no more than 160 acres of any school or granted lands shall be offered for sale in any one tract, and section 4, defining the term "granted lands," which is not to include tidelands, it was held that, though unnecessary to sell tidelands in tracts of not more than 160 acres, tidelands having improvements thereon should be divided, in case of sale, with reference to such improvements, so that the purchaser can buy not only the land covered by the improvements, but unoccupied and unimproved adjoining land necessary for the convenient use and enjoyment thereof. *Sullivan v. Callvert*, 68 Pac. 363, 366, 27 Wash. 600.

## GRANTEE

A "grantee" being a person to whom a grant is made (*Black, Law Dict.*), the word "grantee" as used in a party wall contract means the person or persons to whom the real estate might be conveyed by deed. *Loyal Mystic Legion v. Jones*, 102 N. W. 621, 624, 73 Neb. 342.

Rev. St. 1898, § 1198b enacted in 1898, provides that no action shall be brought by the owner for lands conveyed for the nonpayment of taxes by deed void on its face after the expiration of five years from the date of the recording thereof, etc. A tax deed, void on its face, was executed June 10, 1896, and recorded on the following day. At the same time, the grantee therein executed a warranty deed conveying the premises to a third person who recorded her deed in November following. The third person immediately took possession of the premises and remained in the actual possession for nearly 10 years. Held, that the owner's rights were barred, and the third person's title established, in view of section 4971, subd. 4, declaring that the word "grantee" may include every person to whom any interest passes by deed. *Brunette v. Norber*, 110 N. W. 785, 786, 130 Wis. 632.

Where a conveyance by A. and wife to B. and C., her husband, recited that it was to them and the heirs of their body, for the express purpose of a home for them for life, and for the welfare and comfort of their children, provided that, if B. and C. separated, the interest of C. in the land should cease, and provided that the grantees, with the written consent of the grantors, or the sur-

vivor of them, might sell the land and reinvest the proceeds in other lands, to be owned and held by them and their heirs in the manner provided in the deed, and provided that, if the grantees died, the land should revert to the grantors or the survivor, the grantor's widow may convey the property without requiring B. and C. and children to join in the deed, C. having separated from B., the grantees being B. and C. Louisville & A. R. Co. v. Horn (Ky.) 82 S. W. 567, 568.

#### **As assigns**

See Assigns.

#### **As representative**

See Legal Representative; Representatives.

#### **As trustee of express trust**

See Trustee of Express Trust.

### **GRANTOR'S LIEN**

A "grantor's lien" is a right given to the grantor of land, who has conveyed title and reserved no lien, taken no security for the price other than the personal obligation of the grantee to subject the lien in equity to the payment of the price, when the rights of others are not injured, and it is equitable so to do. McKinnon v. Johnson, 45 South. 451, 452, 54 Fla. 538.

### **GRAPEFRUIT**

Since shaddocks are not "grapefruit" for commercial purposes, a delivery of shaddocks is not a compliance with an order for "grapefruit" notwithstanding the scientific relation between the two classes of fruit. Abel v. Murphy, 91 N. Y. Supp. 26, 45 Misc. Rep. 628.

### **GRAPE PLANTS**

As fructus industriales, see Fructus Industriales.

### **GRASS**

As emblements, see Emblements.

Crops as including growing grass, see Crop.

"Grass" piquets, consisting of stacks of oats or of wheat, cut in the milk, and grasses died to imitate their natural color, mixed with palm leaves and other artificial leaves, bound at the end of the stems with wire, to be used for millinery purposes, are not taxable for duty as manufactures of "grass," but are properly assessed as "artificial or ornamental grains, leaves and flowers, and stems or parts thereof not specially provided for." Herman & Guinzeberg v. United States, 121 Fed. 201, 202.

### **GRASS SEED**

Canary seed, which is botanically a grass seed, but is used principally as a bird seed, and which is not known commercially as

grass seed, is not within the meaning of the words "grass seeds," as used in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 656, 30 Stat. 201, relating to grass seeds not specially provided for. Nordlinger v. United States, 127 Fed. 683, 684, 62 C. C. A. 409.

### **GRATUITOUS**

#### **GRATUITOUS BAILMENT**

Where a carrier has become liable as warehouseman, such liability continues until it notifies the consignee that it will not insist on storage charges, from which time as a "gratuitous bailee" it is held only to slight care. Brunson & Boatwright v. Atlantic Coast Line R. Co., 56 S. E. 538, 540, 76 S. C. 9, 9 L. R. A. (N. S.) 577.

### **GRATUITY**

Damages to abutting property owners, caused by a change of grade of a bridge approach, authorized by statute to be paid by a city, do not constitute a gratuity, within the constitutional prohibition against giving "gratuities" from public funds. People ex rel. Hallock v. Hennessy, 131 N. Y. Supp. 827, 329, 146 App. Div. 440.

#### **Gift distinguished**

Cr. Code 1902, § 263, provides punishment for attempting to corrupt any juror, by giving, offering, or promising any gift or gratuity, with intent to bias the opinion or influence the decision of such juror. Held, that while the term "gift" usually denotes something tangible, "gratuity" is a larger term, and embraces, not only tangible things, but services, or any benefits of pecuniary value bestowed without claim or demand. Hence, where accused requested a juror to do what he could for one about to be tried, and agreed to bring certain customers who had been trading with him down and put them to trading with the juror if the juror cleared the person to be tried, there was such a promising of a gratuity as to bring the case within the statute. State v. Maddox, 61 S. E. 964, 965, 80 S. C. 452.

### **GRAVEL**

As materials, see Materials.

#### **GRAVEL PIT CASE**

A case in which an employé received an injury while engaged in excavating under an embankment for the purpose of tearing it down is a "gravel pit case." Ft. Smith & W. R. Co. v. Ketis, 110 Pac. 661, 664, 28 Okl. 696.

### **GRAVEL ROAD**

As hard road, see Hard Road.

As highway, see Highway.

## GRAVEYARD

A cemetery is none the less a "graveyard" because further interments become impossible. It only loses its character as a resting place of the dead when those already interred are exhumed and removed. The mere passage of a city ordinance prohibiting further interments in a graveyard did not constitute an abandonment thereof, especially where the bodies were not removed for 21 years. *Kansas City v. Scarritt*, 69 S. W. 283, 286, 169 Mo. 471.

## GRAZE

Where sheep are being driven from one range to another, the occasional eating of grass as they go, or while stopped for a needed rest, is not "grazing" them, within Rev. St. 1887, § 1210, making it unlawful to herd sheep or permit them to graze within two miles of the dwelling house of the owner or owners of possessory claims. *Phipps v. Grover*, 75 Pac. 64, 65, 9 Idaho, 415.

## GRAZING LAND

As land, see Land.

## GREASE

See Enfleurage Grease; Wool Grease.

"Grease" and oil are not identical in substance, in function, or in language. *Sturtz v. Delaware, L. & N. Ry. Co.*, 74 Atl. 30, 31, 225 Pa. 249.

## GREASY

A slippery condition of railroad rails is known as "greasy." *Mayer v. Detroit, Y., A. A. & J. Ry.*, 116 N. W. 429, 430, 152 Mich. 276.

## GREAT

### GREAT BODILY HARM

"Great bodily harm," within the rule governing the right of self-defense, means more than mere injury by the fist such as is likely to occur in ordinary assault and battery. *State v. Doherty*, 98 Pac. 152, 154, 52 Or. 591 (citing 4 Words and Phrases, p. 3162).

The instruction that the "great bodily harm" sufficient to justify killing does not mean mere bruises inflicted by hands and feet correctly announces the law, though the one inflicting them be larger and stronger than the other. *Waldrop v. State*, 54 South. 66, 70, 98 Miss. 567.

The rule that "great bodily harm," in contemplation of law, does not mean such harm as may be inflicted by mere blows with the hands or feet, is subject to the modification that where deceased was a much larger and stronger man than defendant, so that defendant was liable to receive great bodily

injuries at his hands, defendant was justified in using a deadly weapon to protect himself, though deceased was wholly unarmed. *Hill v. State*, 49 South. 145, 146, 94 Miss. 391; *Id.*, 52 South. 630, 631, 97 Miss. 304.

A charge that accused might defend himself against unlawful attack, reasonably threatening injury to his person, by the use of all necessary and reasonable force, but no more than circumstances reasonably indicated to be necessary, that homicide is justified by law when committed in defense of one's person against unlawful and violent attack, made so as to produce a reasonable expectation of death or some serious bodily injury, that a reasonable apprehension of death or great bodily harm would excuse accused in using all necessary force to protect his life or person, and that it was not necessary that there should be actual danger, provided he acted upon a reasonable apprehension or appearance of danger, as it appeared to him from his standpoint at the time, was not misleading in the use of the term "great bodily harm" as well as the statutory phrase "serious bodily injury," the terms as used being identical in meaning. *Ward v. State*, 126 S. W. 1145, 1146, 59 Tex. Cr. R. 62.

### GREAT BODILY INJURY

See Assault with Intent to Commit Great Bodily Injury.

The term "great bodily injury," as used in Cr. Code, § 17b (Cobbe's Ann. St. 1903, § 2069), implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury. *Lambert v. State*, 114 N. W. 775, 776, 80 Neb. 562.

Where there were no eyewitnesses to a homicide, nothing in the dying declaration of decedent tending to show that accused acted in self-defense, and the evidence for accused showed that as he was ascending the steps of a passenger coach with a bucket of ice water decedent, the colored porter, confronted him, and asked him what he was doing, whereupon accused told him that he had permission from the conductor to get the water, and that it was none of the porter's business, that the porter struck him on the side of the face, throwing him off the steps of the car and upsetting the bucket, and that accused, being terribly scared and fearing that the porter would follow up his attack, immediately shot him, and there was no evidence that decedent was armed with a deadly weapon, that accused was being attacked at the time of the shooting, or that he had any reason to apprehend that he was in danger even of great bodily harm—the question of self-defense was not in the case, since, to establish a case of justifiable homicide, it must appear that something more than an ordinary assault was made upon ac-

cused, but the danger must be one of great bodily injury that would maim, be permanent in character, or might produce death; the phrase "great bodily injury" being more than apprehension, however imminent, of a mere battery not amounting to a felony. *Territory v. Ayers*, 113 Pac. 604, 606, 15 N. M. 581.

#### GREAT CARE

See, also, High Care.

"Great care," such as is required of a carrier of passengers; such as the operator of a passenger elevator in an office building, is the care usually bestowed upon the matter in hand by the most competent, conscientious, prudent, and careful class of persons engaged in the business to which such matters belong, no matter how few such persons may be, if they are numerous enough to have a recognized existence as a class. *Goldsmith v. Holland Bldg. Co.*, 81 S. W. 1112, 1115, 182 Mo. 597 (quoting and adopting definition in *Shearman & R. Neg.* [5th Ed.] § 47, par. 3).

The distinction in degrees of care, such as slight, ordinary, or "great," is unscientific and impracticable, as the law furnishes no definition of these terms which can be applied in practice. *Pomroy v. Bangor & A. R. Co.*, 67 Atl. 561, 562, 102 Me. 497.

#### GREAT DANGER

The danger to which plaintiff was exposed in being upon the trestle of a bridge with a rapidly approaching train was that of a collision with such train, the result of which most probably and naturally would have been the destruction of his life, or the infliction of serious bodily injury on him, and may be called "great danger." *Texas Midland R. R. v. Byrd*, 90 S. W. 185, 188, 41 Tex. Civ. App. 164.

#### GREAT-GRANDCHILD

As grandchild, see Grandchild.

#### GREAT INCONVENIENCE

The mere question between the right to challenge three jurors and the right to challenge two juries and a half is not within the meaning of the expression "great inconvenience," as used in the statement that, where a proposed construction of a statute would occasion great inconvenience, that construction is to be avoided if another and more reasonable interpretation is present in the statute. *Betts v. United States*, 132 Fed. 228, 236, 65 C. C. A. 452.

#### GREAT MANY PERSONS

In an action for personal injury, received at a railroad crossing, the averment by plaintiff that the highway which crossed the railroad track and on which he was traveling at the time of the accident was the main highway between two specified places,

and a "great many persons" were constantly travelling on said highway and crossing the tracks of the railroad company, uses a term so indefinite as to the number intended that it has no significance in pleading. *Lake Shore & M. S. R. Co. v. Barnes*, 76 N. E. 629, 631, 106 Ind. 7, 3 L. R. A. (N. S.) 778.

#### GREAT PONDS

Any pond containing more than 10 acres is a "great pond" within the Colonial Ordinance of 1641-47, forbidding appropriation of great ponds to any particular person or persons. *Conant v. Jordan*, 77 Atl. 938, 939, 107 Me. 227, 31 L. R. A. (N. S.) 434.

Lakes and ponds of more than 10 acres in extent are known as "great ponds," and are under the ownership and control of the state, which at its discretion can authorize the diversion of their waters for public purposes, without providing compensation to riparian owners on the ponds or their outlets. *American Woolen Co. v. Kennebec Water Dist.*, 66 Atl. 316, 317, 102 Me. 153.

China Lake, in Maine, is a "great pond," being of more than ten acres in extent, and hence with its waters is public property owned and controlled by the state for the benefit of the public. *American Woolen Co. v. Kennebec Water Dist.*, 66 Atl. 316, 317, 102 Me. 153.

#### GREATER PORTION

The term "greater portion," used in Bankr. Act 1898, § 2, subd. 1, conferring jurisdiction over the estates of bankrupts who have had their principal place of business within the territorial jurisdiction of the court for six months preceding or the "greater portion" thereof, means the major part or more than half of the period named. *In re Plotke*, 104 Fed. 964, 966, 44 C. C. A. 282.

#### GREATER RATE

The term "greater rate," as used in Laws 1870, p. 14, appropriating funds to a corporation for the improvement of a river, and providing that it should construct a canal and locks, and after completion pass all steam boats at a charge not greater than 50 cents a ton, is equivalent to authorizing the corporation to charge that much. *State v. Portland General Electric Co.*, 98 Pac. 160, 162, 52 Or. 502.

Rev. Codes 1899, § 4066, provides that the taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 4064, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the "greater rate" of interest has been paid, the person to whom it has been paid or his legal representatives may recover back in an action



for that purpose twice the amount of interest thus paid from the person taking or receiving the same. Held, that the "greater rate" includes a recovery for the whole sum paid, whether legal or illegal, and is the same as the entire interest contracted to be paid. *Waldner v. Bowdon State Bank*, 102 N. W. 169, 171, 13 N. D. 604, 3 Ann. Cas. 847.

#### GREATEST NUMBER OF VOTES

The words "greatest number of votes" at a primary in the election law declaring that the person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party, necessarily include the votes for persons whose names are not printed on any ballot but are written in on the primary ballot of his party, as well as those that are written in and also printed on the ballot of some other party. *State ex rel. Pray v. Yankee*, 109 N. W. 550, 552, 129 Wis. 602.

#### GREATLY

The use of the word "greatly," in instructions, by calling attention to the injury by the repeated expressions "greatly injured," "greatly wounded," and "suffered greatly," is error, either to mislead the jury to understand there could be no recovery unless the injury was great, or to give them the impression that the trial judge considered the injury great. *Louisville & N. R. Co. v. Lynch*, 126 S. W. 362, 365, 137 Ky. 696.

#### GREEK FIRE

"Greek fire" is a term that was applied to explosives for centuries before the invention of gunpowder or blasting powder, and, in the absence of proof to the contrary, will be presumed to be an explosive of lower degree than gun or blasting powder. *St. Paul Fire & Marine Ins. Co. v. Penman*, 151 Fed. 961, 963, 81 C. C. A. 151.

#### GREEN GOODS

"Green goods" is a term applied to counterfeit money. *People v. Marvin*, 29 N. Y. Supp. 381, 382, 79 Hun. 310. See, also, *People v. Reilly*, 4 N. Y. Supp. 81, 84, 51 Hun. 624.

#### GREEN OR RIPE FRUIT

The term "green or ripe fruits," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 262, 30 Stat. 171, indicates fruit in its condition as it is plucked from the tree. *A. L. Causse Mfg. Co. v. United States*, 143 Fed. 690, 691.

The first part of paragraph 262, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171, imposing a duty per bushel on cherries and other fruits, "green or ripe," applies to those fruits, ripe or unripe, when imported in their natural condition. *Causse Mfg.*

*Co. v. United States*, 151 Fed. 4, 5, 80 C. C. A. 461.

#### GREEN TURTLE

As animal, see *Animal*.

#### GREEN WALL

A term used in building, to represent a wall in which the cement mortar had not fully set so as to make the wall solid. *Scharff v. Southern Illinois Const. Co.*, 92 S. W. 126, 127, 115 Mo. App. 157.

#### GREENBACKS

The term "greenback" is a popular name applied to all United States Treasury notes. *McDonald v. State*, 58 S. E. 1067, 1068, 2 Ga. App. 633.

United States Treasury notes are commonly called "greenbacks." *State v. Neilon*, 73 Pac. 321, 324, 43 Or. 168.

The courts judicially know that the term "greenback" is the popular name used to designate a certain species of the currency of the United States. *Jones v. State*, 72 S. E. 518, 10 Ga. App. 59.

#### GREENSTICK BREAK OR FRACTURE

Where a rib breaks on one side, the opposite bending but holding fast and refusing to sever, it is called a "greenstick fracture." *Gorman v. St. Louis Transit Co.*, 70 S. W. 731, 734, 96 Mo. App. 602.

"Greenstick break," as used in reference to a fracture of the jaw, means a crack without any separation of the bone. *Commercial Telephone Co. v. Davis (Tex.)* 96 S. W. 939, 940.

#### GRENADINE SYRUP

Claimant shipped in interstate commerce a compound labeled "Grenadine Syrup," composed of sugar, citric and tartaric acid, and the juices of certain fruits. Held that, since the word "grenadine" in its common acceptance does not mean a syrup made from pomegranates, but the term "grenadine syrup" is used in commerce to designate, not a syrup so made, but a syrup possessing a certain characteristic flavor and color, a purchaser of syrup so labeled was not entitled to expect to receive a syrup actually made from pomegranates, and that the syrup labeled was therefore not subject to forfeiture because of adulteration or misbranding. *United States v. Thirty Cases Purporting to be Grenadine Syrup*, 199 Fed. 932, 933.

#### GREYHOUND MOTION

"Greyhound motion" means the oscillation of a street car due simply to the speed and constant going, and not to any sudden

or abnormal motion. *Moskowitz v. Brooklyn Heights R. Co.*, 85 N. Y. Supp. 960, 963, 89 App. Div. 425.

## GRIEVANCE

Other grievances, see Other.

## GRIEVOUS

The word "grievous," as used in Civ. Code, § 134, defining extreme cruelty as inflicting "grievous" bodily injury, means painful. *Ryan v. Ryan*, 84 Pac. 494, 33 Mont. 406.

## GRIFF

The word "griff" in the state of Louisiana has a definite meaning, indicating the issue of a negro and a mulatto. A person too black to be a mulatto and too pale in color to be a negro is a "griff." *State v. Treadaway*, 52 South. 500, 508, 126 La. 300, 139 Am. St. Rep. 514, 20 Ann. Cas. 1297.

## GRINDING

The Standard Dictionary defines "grinding" as a reduction to fine particles or powder by crushing or friction. *United States v. Graser-Rothe*, 164 Fed. 205, 206.

## GRIP

A device attached to cable cars to grasp the cable is called a "grip." *Redman v. Metropolitan St. Ry. Co.*, 84 S. W. 26, 27, 185 Mo. 1, 105 Am. St. Rep. 558.

## GROCEER

### GROCERIES

As supplies, see Supply (Noun).

## GROGSHOP

As defined in a legislative act as any place where intoxicating, vinous, or malt liquors are sold at retail, by "grog or tipping shop" was meant a place where intoxicating liquors are kept, and would not include a place where only a nonintoxicating malt liquor was sold. *State v. Marou*, 55 South. 472, 473, 128 La. 829.

## GROOVE

A "groove" is defined as "a furrow, channel, or long hollow." *Gordon, Strobel & Laureau v. Carnegie Steel Co.*, 126 Fed. 538, 540.

## GROSS

See Easement in Gross; Power in Gross; Sale in Gross.

Right of way in gross distinguished from easement, see Easement.

2 Wds. & P. 2D SER.—50

## GROSS AMOUNT

The words "gross amount of premiums" received, as used in the statute, providing for the levy and collection of an occupation tax on corporations, etc., and requiring every fire insurance company to annually report "the gross amount of premiums received" in the state on property located there and from persons residing there, during the preceding year, and imposing an annual tax on the gross premium receipts, and declaring that the gross premium receipts are the premium receipts reported to the commissioner on the sworn statement, etc., include sums which a fire insurance company paid for reinsurance without proof that the companies in which it reinsured had the right to claim a portion of the premium at the time the insurance was effected, and include the sums returned to policy holders on the cancellation of policies, as provided therein; the word "gross" meaning whole, entire, total, without deduction. *Fire Ass'n of Philadelphia v. Love*, 108 S. W. 158, 159, 101 Tex. 376.

The term "gross amount of premiums," when used as the basis for payment of of an insurance license, means of the premiums actually received and earned. *Mutual Benefit Life Ins. Co. v. Commonwealth*, 107 S. W. 802, 804, 128 Ky. 174 (quoting and adopting the definition in *State v. Hibernia Ins. Co.*, 38 La. 464).

## GROSS DAMAGES

In a complaint for the flowage of plaintiff's land by defendant's milldam under the mill acts "gross damages" are simply the equivalent of "annual damages," which are to be ascertained by the same mode and upon the same facts. *Ingram v. Maine Water Co.*, 57 Atl. 893, 894, 98 Me. 566.

When the jury determined the damages for land taken for a municipal improvement, and then that resulting to property not taken, it did all that it could do, though the court pursuant to the statute submitted as a third item "the 'gross damages' to any land or property not taken (other than damages to a remainder by reason of its severance from the part taken)," as that means the same as damages accruing to the part remaining, and the parenthetical clause must, if it means anything mean that the damages to the remainder shall be assessed separate from the sum allowed for land actually taken. *City of Tacoma v. Bonnell*, 109 Pac. 60, 61, 58 Wash. 593.

## GROSS EARNINGS

See Gross Earnings Tax.

See, also, Railroad Business.

The income derived by a railroad company from money deposited in banks, interest on securities, rentals upon the right of way, garnishee fees, commissions from in-

insurance companies, rental from telephone companies, billboard privileges, sale of hay, stumpage, etc., is not "gross earnings" within Sp. Laws 1873, p. 302, c. 111, imposing a 3 per cent. tax on gross earnings in lieu of all other taxation. Amounts which might have been received had a railroad company charged itself at the usual rates for shipping its own supplies and material over its own lines are not "gross earnings" within such law. Amounts received from other railroad companies for the repair of cars, based upon actual cost, according to a reciprocal arrangement between them, are not "gross earnings" within such law. Amounts received for the sale of old material, supplies, and equipment, or of the surplus of supplies and material not necessary for a railroad company's own use, are not "gross earnings" within such law. Amounts received from other railroad companies for the use of work trains employed in construction work are "gross earnings" within such law. Amounts received by a railroad company for its cars employed in transportation in excess of the amounts paid by it for the use of cars of other companies are "gross earnings" within such law. Amounts received from lumber companies and other parties in moving, transferring, and switching cars at loading points are "gross earnings" within such law. The "gross earnings" is not limited to earnings derived from the operation of trains, but includes all earnings received by the railroad company while performing work incidental to or connected with the business of transportation, and which may reasonably be considered within the scope of its corporate power. *State v. Minnesota & I. Ry. Co.*, 118 N. W. 679, 106 Minn. 176, 16 Ann. Cas. 426.

Gross receipts from labor and work train service, and materials furnished in maintaining, laying, surfacing, extending, and taking up spur tracks for private parties, is no part of the "gross earnings" forming the basis of the 3 per cent. tax, under Gen. St. 1894, § 1667. *State v. Minnesota & I. Ry. Co.*, 118 N. W. 1007, 106 Minn. 176, 16 Ann. Cas. 426.

Under St. 1897, p. 504, c. 500, § 10, amending St. 1894, p. 768, c. 548, § 21, which required a street railroad company to pay a franchise tax computed on the "gross earnings," so as to provide that it shall pay for the privileges granted, and for use and occupation of the streets by its lines, a sum in each year depending on the dividend for that year, to be seven-eighths of 1 per cent. of the gross earnings of all its lines of railroads, in case the dividend does not exceed 6 per cent., with a certain amount to be added in case the dividend is larger, it is the earnings from the railway in the transportation of passengers, as distinguished from all other income incidental to the business, on which the tax is

computed. *Boston Elevated Ry. Co. v. Commonwealth*, 84 N. E. 845, 846, 199 Mass. 96.

A proportionate part of the property of telephone companies within the state resulting from its use in interstate commerce constitutes a part of its "gross earnings," on which it must pay the 3 per cent. tax provided by Gen. Laws 1897, p. 581, c. 314. Money collected by a telephone company from its patrons for other telephone companies with which it has traffic arrangements is not a part of its "gross earnings." Money received from messengers employed specially to call nonsubscribers to the telephone stations, and money collected from the company's patrons as messenger charges paid to persons in whose buildings the company's booths are located, are a part of the "gross earnings." *State v. Northwestern Telephone Exch. Co.*, 120 N. W. 534, 537, 107 Minn. 390.

Amounts which the regular rates would have produced, had the telephone service which was in fact rendered without charge been charged for at the regular rates, is not a part of the "gross earnings." *State v. Northwestern Telephone Exch. Co.*, 120 N. W. 534, 539, 107 Minn. 390.

The term "gross earnings" from its transportation or transmission business," as used in a statute imposing the franchise tax on the gross earnings of certain corporations, must have been intended by the Legislature to embrace all of the corporation's receipts derived from the use of its capital in the transportation business or elsewhere, even though it had been invested for business purposes in stocks or bonds of other corporations. *State v. Central Trust Co.*, 67 Atl. 267, 271, 106 Md. 268 (People ex rel. New York Cent. & H. R. R. Co. v. Roberts, 52 N. Y. Supp. 859, 32 App. Div. 113; *Id.*, 51 N. E. 1093, 157 N. Y. 677).

Under Tax Law (Laws 1896, c. 908) § 186, imposing an annual tax on lighting and other companies of five-tenths of 1 per cent. of their gross earnings, and defining the term "gross earnings" as all receipts from the employment of capital, without any deduction, the definition having been added by amendment by Laws 1907, c. 734, § 3, the cost of raw materials used by a lighting company converted into gas and electric current is not to be deducted from the receipts of the company in determining its gross earnings. *People ex rel. Westchester Lighting Co. v. Gaus*, 92 N. E. 230, 231, 190 N. Y. 147.

#### Gross receipt synonymous

Laws 1884, c. 252, § 8, provides that every railroad corporation organized, constructed, or extended thereunder shall pay a 3 per cent. gross earnings tax for the year ending the next preceding 30th day of September, and, after the expiration of five years, shall pay a 5 per cent. tax. Held, that the term "gross earnings" as so used was synonymous with "gross receipts" to be derived from

fares; and hence the statute should be construed as applicable only to the company operating a railroad so organized, and not to its lessor. *City of New York v. Thirty-Fourth St. Crosstown Ry. Co.*, 122 N. Y. Supp. 344, 346, 137 App. Div. 644.

### GROSS EARNINGS TAX

See, also, Tax—Taxation.

The "gross earnings tax" provided for by Gen. Laws 1897, p. 581, c. 314, is a tax on the property of the corporation, and not on the corporation, or upon the right to engage in business. *State v. Northwestern Telephone Exch. Co.*, 120 N. W. 534, 537, 107 Minn. 390.

The "gross earnings tax" imposed on a street railway by Acts 1882, p. 357, c. 229, includes as an element a tax on the easement of the company in the streets under a grant for that purpose, and the tax is on the corporation itself measured by the amount of its business, intended as a substitute for a direct tax on its intangible property, and no further assessment on its easement can be made without express legislative authority. *United Rys. & Electric Co. of Baltimore v. City of Baltimore*, 73 Atl. 633, 634, 635, 111 Md. 264.

### GROSS INCOME

Where the charter of a railroad company required a payment of a percentage of earnings of its charter lines to the state, and in various sections of the charter referred to them as "gross proceeds," "gross receipts," or "gross income," all three terms were of equivocal import, but should be construed to mean the total receipts received by the railroad company from its charter lines, before anything was deducted for expenses of management. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 847, 246 Ill. 188.

Where a testator gave his wife and unmarried daughters the use of his residence, together with the total income of his estate after deducting taxes, the total income in view of the deduction of taxes meant the "gross income," which is the entire amount that the use of the principal yields, as contradistinguished from "net income," which means what is left of gross income after all expenses on behalf of up-keep are deducted. *Schmidt v. Schmidt*, 84 Atl. 629, 631, 80 N. J. Eq. 364.

### GROSS INDIGNITY

The words "gross indignity" are more generally employed in proceedings for divorce than in criminal cases, and when so employed the indignity which will furnish good ground for divorce may be inflicted by acts or conduct rendering the condition of the injured party intolerable, and personal violence and conduct creating fear of bodily harm, it seems, is not a necessary element of the offense. A proposed instruction to the jury telling them that where one kills another

though intentional but in passion, in the heat of blood, upon sudden provocation, by gross indignity of by threat of personal violence, was rightly rejected by the use of the disjunctive "or," the instruction would have justified the murder if only the deceased threatened the defendant with personal violence. *State v. Crawford*, 66 S. E. 110, 115, 66 W. Va. 114 (citing 14 Cyc. pp. 625, 626).

### GROSS INJUSTICE

A proceeding which deprives a person of his property by means of a void tax is "gross injustice" within the meaning of Comp. St. 1907, § 5235, providing that a confirmation of a tax sale shall be denied where the taxes and assessments or a part thereof were based on proceedings wherein there had been gross injustice. *State v. Several Parcels of Land*, 116 N. W. 682, 683, 81 Neb. 770.

Comp. St. 1901, c. 12a, § 161, providing that the action of the board of equalization of the city of Omaha may be attacked for fraud, gross injustice, or mistake, in the use of the term "gross injustice," means an act so excessive in its nature as to deprive a citizen of his property or a part thereof without due process of law. *Wead v. City of Omaha*, 102 N. W. 675, 676, 73 Neb. 321.

### GROSS MISTAKE

The words "palpably wrong" and "gross mistake of fact" are very comprehensive and elastic, and it is not necessarily true that the action of the Postmaster General may be reviewed when it is palpably wrong or when, through gross mistake of facts, he fell into a misapprehension of the facts. *People's United States Bank v. Gilson*, 161 Fed. 286, 294, 88 C. C. A. 332.

### GROSS NEGLIGENCE

"Gross negligence" may be defined as "the want of slight care and diligence." *Lothian v. Western Union Telegraph Co.*, 126 N. W. 621, 622, 25 S. D. 319; *Western Union Telegraph Co. v. Reeves*, 126 Pac. 216, 218, 34 Okl. 468.

"Gross negligence" is the absence of slight care. *Louisville & N. R. Co. v. Smith*, 122 S. W. 806, 809, 135 Ky. 462; *Louisville St. Ry. Co. v. Brownfield (Ky.)* 96 S. W. 912, 914; *Louisville, H. & St. L. Ry. Co. v. Kessee (Ky.)* 103 S. W. 261, 264; *Louisville & N. R. Co. v. Roth*, 114 S. W. 264, 268, 130 Ky. 759.

"Gross negligence" denotes a degree of carelessness greater than the degree implied by ordinary negligence and is sometimes used to denote willful negligence or fraud, or the want of even a slight care and diligence, or of such diligence that even careless men are accustomed to exercise. *Strong v. Western Union Tel. Co.*, 109 Pac. 910, 916, 18 Idaho, 389, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

While "gross negligence" has often been defined as the absence of slight care, an in-

struction that "gross negligence is that kind of negligence which evinces a reckless disregard or reckless indifference to the safety of another or others" accurately defined the act of street car men in knowingly operating on a steep incline a car with a useless brake and relying entirely on the reverse electric current to control the car. The railroad company complained that the court defined "gross negligence" as "failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to those which may be under investigation." But a comparison of the two definitions shows that the difference was in favor of the company. *Lexington R. Co. v. Johnson*, 122 S. W. 830, 831, 139 Ky. 323.

Civ. Code, § 2175, prohibiting a carrier from limiting its liability for injuries resulting from gross negligence, was a part of Civ. Code 1872, which by sections 16 and 17 declared that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance, and "gross negligence" was defined as that which consists in the want of slight care and diligence. These sections were repealed in 1874. Held, that such repeal cannot affect the construction of the words "gross negligence" as used in section 2175, as the intention of the Legislature at the time of the adoption of the latter section must control, and there is no warrant for holding that such words were intended to mean other than as the term is defined in the repealed sections. *Walther v. Southern Pac. Co.*, 116 Pac. 51, 54, 159 Cal. 769, 37 L. R. A. (N. S.) 235.

In a suit in which an issue of gross negligence was involved, the trial court, in defining the term, instructed the jury that "gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life, under circumstances of equal or similar danger to the plaintiff on the occasion under consideration." The appellate court, in passing on this instruction, and the contention of the appellant that "gross negligence" should be defined as the want of slight care, said that it might be doubted if there was an appreciable practical difference between the two definitions, and that whatever the hazard of the particular employment might be, whether upon a railroad or elsewhere, the degree of care is required to correspond with the danger of the situation, and a definition given by the trial court, or its equivalent, should

be applied in all cases where gross negligence was an element of the suit. *Chesapeake & O. Ry. Co. v. Board* (Ky.) 77 S. W. 189.

The words "gross negligence," as used in an instruction in an action for wrongful death of an employé, means the failure to use such care as careless and inattentive persons usually exercise under similar circumstances as those under investigation. *Illinois Cent. R. Co. v. Cane's Adm'r* (Ky.) 90 S. W. 1061, 1064.

"Gross negligence" is a failure to use that degree of care that careless and inattentive persons would usually exercise under the circumstances as then and there existed. *Moss v. Home Ins. Co. of New York* (Ky.) 99 S. W. 308, 309.

Since officers charged with keeping the streets in repair are liable for injury caused by their indifference in failing to repair, they may by enactment be rendered accountable when such neglect is gross, which is the want of that diligence which even careless men are accustomed to exercise. *Batdorff v. Oregon City*, 100 Pac. 937, 940, 53 Or. 402, 18 Ann. Cas. 287 (citing 4 Words and Phrases, p. 3168).

The words "slight," "ordinary," and "gross," as applied to negligence, are not used in the decisions with the same meaning, or any definite and well-understood meaning. The words "gross negligence" are often used as the antithesis of "slight care," but in many relations the law only requires the exercise of slight care, and the failure to exercise it cannot be different in degree from the failure to exercise a very high degree of care where it is demanded by the law. The absurdity for such a standard for determining supposed degrees of negligence is manifest. It has been noted that "slight negligence" is not regarded as inconsistent with due care, and, if due care is exercised, there is no actionable negligence, and therefore, in a legal sense, no negligence at all. *Chicago, R. I. & P. R. Co. v. Hamler*, 74 N. E. 705, 709, 215 Ill. 525, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 3 Ann. Cas. 42 (citing *Bloor v. Town of Delafield*, 84 N. W. 115, 69 Wis. 273; *Decker v. McSorley*, 93 N. W. 808, 116 Wis. 643; *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 123 Wis. 297, 69 L. R. A. 601).

The better doctrine is that care or the want of it is not to be measured arbitrarily according to fixed definitions as "slight care," "ordinary care," or "extraordinary care," or "slight negligence" or "gross negligence," although all these phrases are used somewhat loosely by courts and law writers; but it is to be measured by reasonableness, under all the circumstances of the particular inquiry. The only true measure is "reasonable care." And that expression has been declared by the courts in England and elsewhere to be synonymous with "ordinary

care." "Reasonable care" is a relative term, and what is reasonable care in a given case depends upon many considerations. What would be reasonable care under some conditions would clearly be negligence in others. Reasonable care and vigilance vary according to the exigencies which require vigilance and attention. They relate to the work to be done, to the instrumentalities to be used, to the dangers that may result from their use, to the varying duties owed by those who supply or use them. And in all cases reasonable care means such care as reasonable and prudent men use under like circumstances. *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278 (citing *Fletcher v. Boston & M. R. R.*, 1 Allen [83 Mass.] 9, 79 Am. Dec. 695; *Bigelow v. Reed*, 51 Me. 325; *Palmer v. Lumber Ass'n*, 90 Me. 93, 38 Atl. 108; *Sawyer v. J. M. Arnold Shoe Co.*, 38 Atl. 333, 90 Me. 369; *Cayzer v. Taylor*, 10 Gray [76 Mass.] 274, 69 Am. Dec. 817; *Cunningham v. Hall*, 4 Allen [86 Mass.] 268; *Holly v. Boston Gaslight Co.*, 8 Gray [74 Mass.] 123, 69 Am. Dec. 233).

"Gross neglect" is a want of that care which every man of common sense, how inattentive soever he may be takes of his own property." *Southern R. Co. v. Davis*, 65 S. E. 131, 132, 132 Ga. 812 (quoting the definition in *Civ. Code* 1895, § 2900); *Insurance Co. of North America v. Leader*, 48 S. E. 972, 977, 121 Ga. 260.

By *Civ. Code* 1895, § 2900, "gross neglect" is defined as "the want of that care which every man of common sense, how inattentive soever he may be, takes of his own property"; the amount of diligence required is such as an ordinarily prudent person would use in his own affairs. *Brown Store Co. v. Chattahoochee Lumber Co.*, 49 S. E. 839, 840, 121 Ga. 809 (citing *Macon & Western R. Co. v. McConnell*, 31 Ga. 133, 76 Am. Dec. 685; *Macon & Western R. Co. v. Davis*, 13 Ga. 68; *Southern Mut. Ins. Co. v. Hudson*, 38 S. E. 964, 113 Ga. 434).

Carelessness manifestly materially greater than want of common prudence is necessary to constitute "gross negligence." *Devine v. New York, N. H. & H. R. Co.*, 91 N. E. 522, 523, 205 Mass. 416.

"Gross neglect" means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised. *City of Franklin v. Caldwell*, 96 S. W. 605, 606, 123 Ky. 528 (quoting and adopting the definition in *Savings Bank v. Caperton*, 8 S. W. 885, 87 Ky. 306, 12 Am. St. Rep. 488).

The "gross negligence," which excuses contributory negligence, means more than a mere epithet characterizing the degree of negligence of which the defendant may be guilty, and the theory on which a recovery is permitted by one guilty of contributory negligence on the ground of defendant's gross

negligence is that where plaintiff's negligence has been discovered by the defendant, or should by the exercise of ordinary care have been discovered, in time to have avoided the injury, and the subsequent negligence of the defendant results in an injury to the plaintiff, his previous negligence is not a bar to a recovery. *Strong v. Grand Trunk Western Ry. Co.*, 120 N. W. 683, 687, 156 Mich. 66.

Before "gross negligence" can be made out which warrants recovery notwithstanding the precedent contributory negligence of the plaintiff, the negligence of the latter must have been discovered, or the defendant must have neglected the most ordinary precaution in failing to discover it. *Buxton v. Ainsworth*, 101 N. W. 817, 818, 138 Mich. 532, 5 Ann. Cas. 146.

A motorman who allows his car to run down a sharp grade past a number of persons engaged in picking up packages on the edge of the track, at the place of a recent accident, with no control of the car and without sounding an alarm, is guilty of "gross negligence" justifying a verdict for injuries to one of the persons so engaged, though the latter may be guilty of contributory negligence. *Rhymes v. Jackson Electric Ry., Light & Power Co.*, 37 South. 708, 85 Miss. 140.

"Gross negligence" is sometimes defined as the entire absence of care." In an action against a railroad for injuries at a crossing, an instruction that "gross negligence" is sometimes defined as an entire absence of care does not put on defendant a greater burden of proof than the law requires. *Thomasson v. Southern R.*, 51 S. E. 443, 447, 72 S. C. 1.

Gross negligence is not characterized by inadvertence in the lexical sense, but rather by absence of it. There are three degrees of negligence: First, slight negligence involving an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use; second, ordinary negligence, involving failure to exercise in any given situation such care as the great mass of mankind ordinarily exercise under the same or similar circumstances; and, third, gross negligence involving a failure to exercise any care to avoid inflicting injury to the person or property of others, recklessly or wantonly acting or failing to act to avoid such injury, evincing such utter disregard of consequences as to suggest a willingness, substantially equivalent to intent, to injure and denominated such, constructively, and classibly with actual intent as regards duty to compensate for the injury. *Astin v. Chicago, M. & St. P. R. Co.*, 128 N. W. 265, 268, 143 Wis. 477, 31 L. R. A. (N. S.) 158.

The error in a charge, in an action for injuries in a collision at a crossing, which defines "gross negligence," within *Civ. Code* 1902, § 2139, relieving a railroad company

from liability if the person injured was guilty of gross negligence, as the want of any degree of care for his own safety is not prejudicial, since the difference between want of slight care and the want of any care is too shadowy to affect the verdict of a jury of ordinary intelligence. *Lee v. North Western R. Co.*, 71 S. E. 840, 89 S. C. 274.

Failure on the part of a locomotive engineer to see when he ought to have seen, and when the consequences of such failure might result in the death of a human being, may be found to be "gross negligence," within St. 1906, c. 463, pt. 1, § 63, rendering a carrier liable for the death of a passenger resulting from the gross negligence of its employes. *Renaud v. New York, N. H. & H. R. Co.*, 97 N. E. 98, 102, 210 Mass. 553, 38 L. R. A. (N. S.) 689.

Negligence of a carrier of passengers in leaving their personal safety to careless agents is "gross negligence." *Jordan v. Seattle, R. & S. R. Co.*, 92 Pac. 284, 286, 47 Wash. 503.

"The personal safety of railroad passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" *Chicago, R. I. & P. Ry. Co. v. Stibbs*, 87 Pac. 293, 294, 17 Okl. 97 (quoting and adopting definition in *Philadelphia & R. R. Co. v. Derby*, 14 How. [55 U. S.] 468-485, 14 L. Ed. 502).

When carriers, such as the operator of a passenger elevator in an office building, undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, and, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such case may well deserve the epithet of "gross." *Goldsmith v. Holland Bldg. Co.*, 81 S. W. 1112, 1115, 182 Mo. 597 (quoting and adopting definition in *Philadelphia & R. R. Co. v. Derby*, 14 How. [55 U. S.] 486, 14 L. Ed. 502).

The use of the word "gross" in an instruction as to negligence is not prejudicial, where the pleadings show that plaintiff was put to work under a high bank and then the bank was pruned off on him. *Logsdon v. Western Brick Co. (Ky.)* 74 S. W. 706, 708.

The personal injury on which the action is based having occurred in Tennessee, the definition of gross negligence, authorizing punitive damages, approved by its Supreme Court, "such entire want of care as would raise a presumption of a conscious indifference to consequences," and not that approved by the Supreme Court of Kentucky, "the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in

avoiding injury to his own person or life, under circumstances of equal or similar danger to those which may be under investigation," should be given. *Louisville & N. R. Co. v. Lynch*, 126 S. W. 362, 365, 137 Ky. 696.

#### Lesser degree included

"'Gross neglect' is the highest degree of neglect now recognized by our statute, and, under a petition charging gross neglect, the plaintiff may recover for any lesser degree of negligence." *Pendley v. Illinois Cent. R. Co. (Ky.)* 92 S. W. 1, 2.

"Gross negligence" does not include ordinary negligence, and proof of the former does not prove the latter. *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 674, 123 Wis. 297, 69 L. R. A. 601.

#### Ordinary negligence distinguished

See Ordinary Negligence.

#### As want of due or ordinary care

A characterization of defendant's negligence as "gross," in a declaration, does not change the legal effect of the allegation from what it would have been had the term "negligence" alone been used. *Kelly v. Malott*, 135 Fed. 74, 76, 67 C. C. A. 548.

"'Gross negligence' is a materially greater degree of negligence than mere lack of ordinary care." *Manning v. Conway*, 78 N. E. 401, 402, 192 Mass. 122.

A substantially and appreciably greater degree of negligence than failure to exercise ordinary care must be shown to prove the heedless and palpable disregard of the safety of others, characterizing that excess of ordinary negligence termed "gross" in Rev. Laws, c. 111, § 267, relating to liability for wrongful death caused by the gross negligence of a railroad company's agents or servants. *Devine v. New York, N. H. & H. R. Co.*, 91 N. E. 522, 523, 205 Mass. 416.

The term "gross," in a petition for negligence charging gross negligence in respect to an act complained of when there is no allegation of wanton and reckless conduct, is nothing but an epithet meaning no more than the failure to exercise ordinary diligence in the circumstances of the particular case. *Clark v. Colorado & N. W. R. Co.*, 165 Fed. 408, 411, 91 C. C. A. 358, 19 L. R. A. (N. S.) 988.

There is no such legal degree of negligence as "gross negligence." The word "gross" in this connection is a mere epithet used to characterize one of the two legal classes of negligence mentioned. *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 130, 51 C. C. A. 564, 57 L. R. A. 700.

"The term 'gross negligence' undoubtedly describes colloquially a greater degree of carelessness than the term 'ordinary negligence'; but the legal significance of the term is difficult to ascertain. In one view gross negligence is deemed equivalent in law to

fraud or to intentional wrong; in another it is deemed exactly synonymous with ordinary negligence; while in a third it is deemed to be applicable to those degrees of carelessness, whatever they may be, existent between ordinary negligence and willful negligence or fraud. \* \* \* The doctrine that in a legal contemplation there is no distinction between gross negligence and ordinary negligence has certainly not been adopted uniformly by the courts which have considered negligence on the part of the telegraph company. In certain cases gross negligence is evidently deemed the equivalent in legal contemplation of ordinary negligence. In many cases, however, gross negligence is used to denote a degree of carelessness greater than the degree implied by ordinary negligence and one of which the law takes distinct legal cognizance. It is thus used in those cases in which telegraph companies are permitted to limit their liability for losses occurring through their ordinary negligence, but at the same time are not permitted to limit their liability for losses occurring through their gross negligence. Unfortunately, in only one of these cases is an attempt made to define gross negligence or a test offered to distinguish it from either ordinary negligence or fraud. In the rest of these cases, therefore, it is impossible to determine whether gross negligence is deemed to be synonymous with willful negligence or fraud or to be applicable only to those degrees of carelessness, whatever they may be, existent between willful and ordinary negligence. \* \* \* Gross negligence is the want of even a slight care and diligence. Gross negligence is the want of that diligence that even careless men are accustomed to exercise, and gross negligence is the want of that care which every man of common sense, however inattentive he may be, takes of his own property, and is nothing more than negligence with the addition of a vituperative epithet." *Strong v. Western Union Tel. Co.*, 109 Pac. 910, 916, 18 Idaho, 389, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55 (quoting and adopting definition in 4 Words and Phrases, p. 3168; *Gray, Communication by Telegraph*, § 37).

Negligence, to be "gross," must include an element of carelessness so great that the court or jury can say that there was not only an absence of the due care that should have been exercised, but also a great degree of negligence materially greater than that which would constitute ordinary negligence. *Martin v. Boston & N. St. R. Co.*, 91 N. E. 159, 205 Mass. 16.

The term "gross negligence," under the statute relating to the negligence of employes, means negligence materially greater than the lack of ordinary care; but a finding of gross negligence should be sustained, where the injury likely to result from failure to do that which should be done will be

fatal or very serious, so that a finding of gross negligence by a railroad company's servants is justified where an express train is run past a station without slowing up while a local train is stopping to discharge passengers. *Renaud v. New York, N. H. & H. R. Co.*, 92 N. E. 710, 711, 206 Mass. 557.

#### As want of necessary care

"Gross negligence" is the same thing as ordinary negligence with the addition of a vituperative epithet, and is a relative term which doubtless is to be understood as meaning a greater want of care than is implied by the term "ordinary negligence," but after all merely means the absence of care, that was necessary under the circumstances. *St. Louis, I. M. & S. R. Co. v. Stamps*, 104 S. W. 1114, 1119, 84 Ark. 241 (citing *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374).

" 'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is applied by the term ordinary negligence, but after all it means the absence of the care that was necessary under the circumstances." *Southern Ry. Co. v. Davis*, 65 S. E. 131, 132, 132 Ga. 812 (quoting and adopting the definition in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374); *Raymond v. Portland R. Co.*, 62 Atl. 602, 605, 100 Me. 529, 3 L. R. A. (N. S.) 94 (quoting and adopting the definition in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. Ed. 374).

"Gross negligence" is a relative term. It is doubtless to be understood as meaning greater want of care than is implied by the term "ordinary negligence," but it means the absence of care that is necessary under all the circumstances. The burden of proving "gross negligence" of a carrier of goods is sustained by proving that the goods were properly packed and delivered to the carrier and that they arrived in a damaged condition. *Rieser v. Metropolitan Exp. Co.*, 91 N. Y. Supp. 170, 171, 45 Misc. Rep. 632 (citing in support of definition *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374).

"Gross negligence" by a bailee is nothing more than a failure to bestow the care which the situation demands. The omission of the reasonable care required is the negligence which creates the liability, and its existence is for the jury or for the court where a jury is waived. *Booth v. Litchfield*, 114 N. Y. Supp. 1009, 1012, 62 Misc. Rep. 279 (quoting and adopting the definition in *Preston v. Prather*, 11 Sup. Ct. 162, 137 U. S. 604, 34 L. Ed. 788).

"Gross negligence" is a relative term, and means a greater want of care than is implied by the term ordinary negligence. It, however, means only the absence of the care that was necessary under the circumstances. The absence of such care, however,



will not authorize the awarding of punitive damages, which may be based only on some willful misconduct, or that entire want of care which would raise the presumption of conscious indifference to consequences. *Western Union Telegraph Co. v. Cashman*, 132 Fed. 806, 807, 65 C. C. A. 607 (quoting and adopting the definition in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 493, 23 L. Ed. 374).

"Gross negligence" as applied to a gratuitous bailee is nothing more than a failure to bestow the care which the property in its situation demands. *Sherwood v. Home Sav. Bank*, 109 N. W. 9, 12, 131 Iowa, 528 (quoting and adopting definition in *Preston v. Prather*, 11 Sup. Ct. 162, 137 U. S. 604, 34 L. Ed. 788).

"The term 'gross negligence,' in a case where the degree of care due is the highest degree of care, means that there has been a gross failure to exercise that degree of care." *Dolphin v. Worcester Consol. St. Ry. Co.*, 75 N. E. 635, 636, 189 Mass. 270.

#### As wanton or willful negligence

The term "gross negligence" signifies willfulness and involves intent, actual or constructive, which is a characteristic of criminal liability. *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 674, 123 Wis. 297, 69 L. R. A. 601.

Where plaintiff, who was struck by a train, was guilty of contributory negligence, he cannot recover unless the railroad company was guilty of gross negligence, which is the intentional failure to perform a manifest duty. *Putt v. Grand Rapids & I. Ry. Co.*, 137 N. W. 132, 136, 171 Mich. 216.

"Gross negligence" is the synonym for willful and wanton injury. *McNeill v. Durham & C. R. Co.*, 47 S. E. 765, 780, 135 N. C. 682, 67 L. R. A. 227.

Although what is really reckless and wanton misconduct is sometimes spoken of as "gross negligence," the expression is everywhere recognized as inaccurate and unfortunate, because it seems to imply a difference only of degree, whereas the whole doctrine that contributory negligence is no defense where the injury is the result of recklessness and wantonness is based upon the theory of a difference in kind. For the same reason the phrase "reckless and wanton negligence" has a misleading tendency. One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. *Atchison, T. & S. F. Ry. Co. v. Baker*, 98 Pac. 804, 806, 79 Kan. 183, 21 L. R. A. (N. S.) 427.

The term "gross negligence," authorizing a recovery for a negligent injury, notwithstanding the contributory negligence of

the person injured, means an intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another; and it implies a thoughtless disregard of consequences, without the exercise of any effort to avoid them. *Knickerbocker v. Detroit, G. H. & M. R. Co.*, 133 N. W. 504, 507, 167 Mich. 596.

It is perhaps impossible to define "gross negligence" as that term is used in the various cases bearing on the interpretation of contracts exempting carriers from liability from negligence. It must mean something more than ordinary mistake of judgment, and must refer either to a willful or to a reckless disregard either of right of property or of life. *Wilson v. Delaware, L. & W. R. Co.*, 104 N. Y. Supp. 293, 294, 119 App. Div. 675).

In order to constitute gross negligence, there must be charged and shown either a willful intent to injure, or that reckless and wanton disregard of another's rights and safety, and that willingness to inflict injury, which the law deems equivalent to an intent to injure; and where plaintiff, in an action for wrongful death, alleges that it was caused by defendant's wanton and willful misconduct, he cannot recover on proof of mere negligence. *Wilson v. Chippewa Valley Electric R. Co.*, 98 N. W. 536, 538, 120 Wis. 636, 66 L. R. A. 912.

To constitute "gross negligence," there must be either willful intent to injure, or that reckless and wanton disregard of the rights and safety of another or of his property, and that willingness to inflict injury, which the law deems equivalent to an intent to injure; want of inadvertence being essential. *Willard v. Chicago & N. W. Ry. Co.*, 136 N. W. 646, 648, 150 Wis. 234.

"Gross neglect," as used in written charges for the removal of a commissioner of parks and boulevards, is not confined to intentional official wrongdoing, since such acts would hardly be described by the word "neglect." *Bolger v. Common Council of City of Detroit*, 117 N. W. 171, 175, 153 Mich. 540.

Rev. Laws, c. 111, § 267, provides that if a corporation operating a railroad or a street railroad by the gross negligence of its agents or servants while engaged in its business causes the death of a passenger, it shall be punished by a fine, etc., to be recovered for the use, etc. Held, that while the "gross negligence" mentioned in the statute does not include wanton or willful misconduct which would warrant criminal prosecution or a suit for damages by a trespasser or one guilty of negligence on his own part, yet it is something more than mere ordinary negligence. *Lancaster v. Boston Elevated Ry. Co.*, 83 N. E. 1, 2, 197 Mass. 32.

"Gross negligence" is defined as that entire want of care which would raise a presumption of conscious indifference to consequences and as an entire want of care on the part of the employees, or such a slight degree of care as to raise the presumption of entire disregard and indifference to the safety and welfare of others. *Gulf, etc., R. Co. v. Letsch (Tex.)* 55 S. W. 584, 587.

"Gross negligence" is that entire want of care which would raise a presumption of a conscious indifference to consequences; and the conduct of the servants and agents of a defendant cannot be considered gross negligence unless evinced by an entire failure on their part to exercise care, or by the exercise of so slight a degree of care on their part as to justify the belief that they were indifferent to the interest and welfare of others. *Crawleigh v. Galveston, H. & S. Ry. Co.*, 67 S. W. 140, 141, 28 Tex. Civ. App. 260.

"'Gross negligence' means an intentional failure to perform a manifest duty in reckless disregard of the consequences, as affecting the life or property of another, and also implies a thoughtless disregard of consequences without the exercise of any effort to avoid them." *Airkainen v. Houghton County St. R. Co.*, 101 N. W. 264, 266, 138 Mich. 194.

An allegation in the complaint against a carrier that the action of the defendant in ejecting plaintiff "was not only a gross violation of the obligation which it had assumed to carry the plaintiff, but was a willful, wanton, and malicious violation of the plaintiff's rights as a passenger," did not limit plaintiff to recovery of punitive, but permitted recovery of actual, damages; the words "gross negligence" do not ordinarily import recklessness or wantonness, but only when the context shows they were so intended. *Wesley v. Southern Ry. Co.*, 71 S. E. 855, 857, 89 S. C. 314.

In an action against a street railroad for damages because of failure to stop a car and admit plaintiff as a passenger, "gross negligence" was defined as that entire want of care which would raise in the jurors' minds the belief that the act or omission on the part of the motorman in failing to stop was the result of conscious indifference on his part to the right of plaintiff. *Northern Texas Traction Co. v. Peterman (Tex.)* 80 S. W. 535, 536.

"Gross negligence," within Rev. Laws, c. 111, § 267, making a corporation operating a railroad or street railway liable for loss of life by gross negligence of its servants while engaged in its business, is not the same as a wanton act, which dispenses with proof by plaintiff of freedom from contributory negligence, but, where the degree of care due is the highest degree of care, means a gross failure to exercise that degree of care; and, where the duty owed is ordinary care, gross

negligence is a materially greater degree of negligence than lack of ordinary care, and is also a failure to exercise a slight degree of care. *Dimauro v. Linwood St. Ry. Co.*, 85 N. E. 894, 895, 200 Mass. 147.

A charge on a trial of an automobile driver for negligent homicide that "gross negligence" imports a thoughtless disregard of consequences, and that if the circumstances establish a degree of carelessness amounting to a culpable disregard of the safety of others, "criminal negligence" is established, and one who without intention to take life causes the death of another by his own unlawful act is criminally responsible, and it is unlawful for any person to operate an automobile recklessly, or at a rate of speed greater than is reasonable, having regard to the width, traffic, and use of the highway, etc., requires the jury, in order to convict, to find that accused with reckless disregard for the safety of others negligently drove his automobile in a public street and thereby caused the death of decedent, and is sufficiently favorable to accused. *State v. Goetz*, 76 Atl. 1000, 1002, 83 Conn. 437, 30 L. R. A. (N. S.) 458.

Rev. Laws, c. 111, § 267, provides that, if the life of a passenger is lost by reason of the unfitness or gross negligence of the carrier's servants, his personal representatives may recover damages according to the degree of culpability. Held that, while "gross negligence" as used in such section requires something more than mere want of common prudence, the difference is one of degree, and the term is satisfied by proof of a reckless or willful disregard of consequences on the part of the carrier's servants. *Spooner v. Old Colony St. Ry. Co.*, 76 N. E. 660, 661, 180 Mass. 132.

Where plaintiff sought to recover for injuries sustained by being struck by an automobile on the ground that defendant was guilty of "gross negligence" and wantonly and recklessly injured plaintiff, an instruction that "gross negligence" is great negligence, and that plaintiff, in order to recover on that ground, must have satisfied the jury that the way the machine was operated by defendant was reckless and "careless to the degree of recklessness," and that it was run with a reckless disregard of plaintiff's rights in the street, and that if the machine was run on the occasion of the accident in a grossly negligent manner—that is, careless to such a degree that the jury could say it was reckless—then plaintiff was entitled to recover, without showing that he was in the exercise of due care, was objectionable for failure to explain that willful negligence differed in kind, as well as degree, from ordinary negligence. *Banks v. Braman*, 74 N. E. 594, 595, 188 Mass. 367.

The pushing of cars over a crossing at a time when there were school children at the

crossing, without ringing a bell or blowing a whistle, or without any person on the cars to control or give warning, the watchman on duty giving no warning, was "gross negligence," which is a reckless or wanton disregard of the rights or safety of others, or the doing of an act intentionally or maliciously, and punitive damages were properly allowed. *Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14, 19, 150 Ky. 831.

Plaintiff while walking by the side of a railroad track in a street where there was plenty of room to have avoided a moving engine was struck by the tender of an engine approaching her from the rear. The engine was moving very slowly, and stopped within 10 feet after plaintiff was discovered to be in a place of danger. The engineer saw plaintiff as he approached, and was watching her until the time of the accident with nothing to obstruct his view. One of his hands was on the air brake lever, the other was ringing the bell continuously, and he testified that the air pump was making a noise that could be heard 35 or 40 rods, but that plaintiff proceeded along the path for 100 feet without looking to the rear, and that just before the injury she suddenly stepped between the rails, when the engine was not more than 10 feet from her. Held, that the engineer was not guilty of gross negligence, such term being defined to mean an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, a thoughtless disregard of consequences without the exercise of any effort to avoid them. *Berry v. Harbor Springs Ry. Co.*, 138 N. W. 1038, 1040, 173 Mich. 181.

In an action against a street railroad company for damage caused by a collision between a steam road roller and an inter-urban car at a public highway, the court instructed that plaintiff could not recover unless the injury occurred by reason of the gross negligence of defendant and by that was not meant that the motorman actually intended to do the particular wrong complained of, that by gross negligence is meant intentionally failing to perform a manifest duty in reckless disregard of the consequences as affecting the life and property of another, and also implies a thoughtless disregard of the consequences without the exercise of any effort to avoid them, and unless the motorman, after he saw plaintiff's steam roller upon the track, and had no reason to believe it would vacate the track, did nothing to prevent the collision, but ran on in reckless disregard of the consequences, the jury could not find for plaintiff. Held, that the instruction was not erroneous. *Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co.*, 138 N. W. 320, 324, 173 Mich. 1.

#### GROSS PREMIUM PLAN

The "gross premium plan" employed by a building association in taking the premium

and determining the amount is where an amount or certain percentage determined on is deducted from the par value of the stock at the time of the loan, and the difference or balance is handed over to the borrower. The amount so deducted is often determined by receiving bids from various members who are desirous of anticipating the value of their stock by borrowing from the association some of its funds on hand. *Fidelity Sav. Ass'n v. Bank of Commerce*, 75 Pac. 448, 456, 12 Wyo. 315.

#### GROSS PREMIUMS

In Tax Law, § 187, Laws 1896, p. 859, c. 908, as amended by Laws 1897, p. 630, c. 494, as amended by Laws 1901, p. 297, c. 118, imposing a franchise tax on the gross amount of premiums received during the preceding calendar year by domestic insurance companies, the term "gross premiums" includes, in addition to all other premiums, such premiums as are collected from policies subsequently canceled and from reinsurance. *People ex rel. Provident Sav. Life Assur. Soc. v. Miller*, 85 N. Y. Supp. 468, 471, 88 App. Div. 218.

Gross premiums received by domestic insurance companies for business done in the state for the purpose of taxation, under Laws 1896, p. 859, c. 908, § 187, as amended by Laws 1901, p. 297, c. 118, § 1, imposing an annual state tax for the privilege of carrying on the business, and providing that the term "gross premiums" shall include such premiums as are collected from policies subsequently canceled and from reinsurance, do not include premiums unearned and paid in advance, but refunded on a cancellation of a policy. *People ex rel. Continental Ins. Co. v. Miller*, 70 N. E. 10, 11, 177 N. Y. 515.

The words "gross amount of premiums" received, as used in the statute providing for the levy and collection of an occupation tax on corporations, etc., and requiring every fire insurance company to annually report the "gross amount of premiums received" in the state on property located there and from persons residing there, during the preceding year, and imposing an annual tax on the gross premium receipts, and declaring that the gross premium receipts are the premium receipts reported to the commissioner, on the sworn statement, etc., include sums which a fire insurance company paid for reinsurance without proof that the companies in which it reinsured had the right to claim a portion of the premium at the time the insurance was effected, and include the sums returned to policy holders on the cancellation of policies, as provided therein; the word "gross," as defined in Webster's Dictionary, meaning whole, entire, total, without deduction. *Fire Ass'n of Philadelphia v. Love*, 108 S. W. 158, 159, 101 Tex. 376.

"Gross premiums" include the net premium and the loading, usually imposed on a

policy, to pay expenses of the company and yield a profit to the insurer. *Rose v. Franklin Life Ins. Co.*, 132 S. W. 613, 616, 153 Mo. App. 90.

### GROSS PROCEEDS

Where the charter of a railroad company required a payment of a percentage of earnings of its charter lines to the state, and in various sections of the charter referred to them as "gross proceeds," "gross receipts," or "gross income," all three terms were of equivocal import, but should be construed to mean the total receipts received by the railroad company from its charter lines, before anything was deducted for expenses of management. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 847, 246 Ill. 188.

### GROSS PROFITS

The "gross profits which must be deducted from the sales valuation of manufactured goods taken from a factory since the last inventory and previous to a fire, in order to determine how much must be added to the last inventory to show the value of the materials, etc., on hand at the time of the fire, means the difference between the sales valuation and certain costs and expenses of production; the actual net profits being such profits as finally remain after deducting all costs and incidental charges and expenses of every kind and description. *Wells Whip Co. v. Tanners' Mut. Fire Ins. Co.*, 58 Atl. 894, 896, 209 Pa. 488.

#### Net profits distinguished

"Net profits," participation in which constitutes a person a partner, contemplates a sharing of the loss as well as the profits, while "gross profits" mean the aggregate sales made after deducting cost, import duties, and carriage, and participation therein would not raise a presumption of partnership. *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462, 469, 470, 66 C. C. A. 336.

### GROSS RECEIPTS

Unearned premiums returned to the insured on the cancellation of the policy of insurance do not constitute any part of the "gross receipts" of the company, by which the policy was issued, and need not be included in its return of gross receipts, under the provisions of Sess. Laws 1903, c. 73, § 58. *State ex rel. Palmer v. Fleming*, 97 N. W. 1063, 1069, 70 Neb. 523, 529.

Under Acts 30th Leg. 1st Ex. Sess. c. 18, § 11, requiring every one engaged in the wholesale liquor business to make a quarterly report showing the gross amount collected and uncollected from all sales made during the quarter next preceding, and to pay an occupation tax for the quarter beginning on the date of the report equal to one-half of 1 per cent. of "said gross receipts," the term "gross receipts," though ordinarily meaning the gross amount of cash received, here in-

cludes the gross amount collected and uncollected of all the sales, on which amount the percentage must be computed to determine the tax. *Eppstein v. State (Tex.)* 138 S. W. 1124, 1125.

Where the grantees of a telephone franchise agreed to pay the city 2 per cent. per annum of the "gross receipts" collected from the use of the telephone system, such earnings consisted not only of the rentals paid for the use of telephone instruments in the city, but also included a percentage received by the grantees of the proceeds of toll line business that required the service of the exchange in its transaction. All such income actually received by the grantees under contracts with the owners of independent connecting lines on account of the service of the exchange in the transmission or delivery of long distance business certainly belonged to the gross receipts of that exchange, and with respect to the tolls received by the grantees for long distance service over lines and exchanges operated entirely by them, the reasonable value of the services rendered by the exchange to that class of business should be regarded as part of the gross receipts of that exchange. *City of Lancaster v. Briggs & Melvin*, 96 S. W. 314, 315, 118 Mo. App. 570.

The term "gross receipts" in Laws 1884, c. 252, § 8, providing that every railroad corporation, organized, constructed, or extended thereunder shall pay a 3 per cent. of its "gross receipts" for the year, and after the expiration of five years shall make a like annual payment of 5 per cent. of the "gross receipts," means receipts from the operation of the railroad; that is, fares. *City of New York v. Thirty-Fourth St. Crosstown Ry. Co.*, 122 N. Y. Supp. 344, 346, 137 App. Div. 644.

The "gross receipts" of a railroad for purpose of taxation are not necessarily those in fact received, but such receipts as would be received under a reasonably economical and prudent management. *State v. Nevada Cent. R. Co.*, 81 Pac. 99, 102, 28 Nev. 186, 113 Am. St. Rep. 834 (quoting and adopting definition in *State v. Virginia & T. R. Co.*, 49 Pac. 945, 50 Pac. 607, 24 Nev. 80).

The "gross receipts" of the corporations named in Code Pub. Gen. Laws 1904, art. 81, § 164, upon which the corporations named are to be taxed, means all the receipts arising from or growing out of the employment of the corporation's capital in its designated business or otherwise. *State v. Central Trust Co.*, 67 Atl. 267, 271, 106 Md. 268 (citing *People ex rel. New York Cent. & H. R. R. Co. v. Roberts*, 52 N. Y. Supp. 859, 32 App. Div. 113; *Id.*, 51 N. E. 1003, 157 N. Y. 677; *Commonwealth v. Brush Electric Light Co.*, 53 Atl. 1096, 204 Pa. 249).

A statute imposing a tax on railroads of a certain per cent. of the "gross receipts from all sources" means that which arises from the transportation of passengers,

freight, and baggage, and includes the gross receipts arising from interstate commerce as well as from local traffic. *Galveston, H. & S. A. Ry. Co. v. Davidson* (Tex.) 93 S. W. 436, 455.

Where the charter of a railroad company required a payment of a percentage of earnings of its charter lines to the state, and in various sections referred to them as "gross proceeds," "gross receipts," or "gross income," all three terms were of equivocal import, but should be construed to mean the total receipts received by the company from its charter lines, before anything was deducted for expenses of management. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 847, 246 Ill. 188.

Illinois Central Railroad Charter (Priv. Laws 1851, p. 72) § 22, provides that it shall pay the state an amount equal to at least 7 per cent. of the gross receipts of the corporation in lieu of other taxes. Held, that the word "gross" meant the entire amount, the total sum, without any deduction of any kind, and therefore included receipts derived from the charter lines for transporting interstate commerce. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 825, 246 Ill. 188.

Where a railroad company, subject to a payment to the state of 7 per cent. on the gross receipts of its charter lines, maintained and operated hotels, eating houses, and dining cars for the benefit of its passengers, the receipts derived from such activities were a part of the "gross receipts" on which the state's percentage was to be determined. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 825, 246 Ill. 188.

Under Rev. Laws, c. 14, § 44, cl. 2, providing that the percentages of gross receipts of street railway companies, to be ascertained for the purpose of taxing, shall be based on the annual "gross receipts for each mile" of track, the computation is to be made by dividing the annual gross receipts by the entire number of tracks operated. *Greenfield & T. F. St. Ry. Co. v. Town of Greenfield*, 73 N. E. 477, 478, 187 Mass. 352.

#### Gross earnings synonymous

See Gross Earnings.

#### GROSS SALES

See Sale in Gross.

#### GROSS TON

In common parlance, the word "gross," when applied to a ton, describes a long ton or a ton of 2,240 pounds. Where a charter party described the capacity of the ship as about 3,400 "gross tons" and fixed the freight rate at \$8.00 per ton of 2,240 pounds, the representation as to the capacity of the ship should be construed as meaning 3,400 long tons. *Wood v. Sewall's Adm'rs*, 128 Fed. 141; *Sewall v. Wood*, 135 Fed. 12, 18, 67 C. C. A. 580.

The word "gross," as used in a contract by which a party agreed to mine certain bituminous rock and liquid asphaltum, in consideration of receiving therefor "the sum of fifty cents per ton," means a long ton, or a ton consisting of 2,240 pounds. *Hale Bros. v. Milliken*, 90 Pac. 365, 370, 5 Cal. App. 344 (quoting from opinion in *Higgins v. California Petroleum Co.*, 52 Pac. 1080, 120 Cal. 629).

#### GROSS VIOLATION OF PROFESSIONAL DUTIES

The words "gross violation of professional duties" in Rev. St. 1899, § 8528, as amended, authorizing the revocation of the license of a dentist for "fraud, deceit, or misrepresentation in the practice of dentistry, or for gross violation of professional duties," are used to cover offenses similar to and belonging to the same general class as those denounced by the words "fraud, deceit, or misrepresentation," so that the statute is not invalid for uncertainty on the ground that the words "gross violation of professional duties" have no well-defined meaning. *State ex rel. Williams v. Purl*, 128 S. W. 196, 197, 198, 228 Mo. 1.

#### GROSSLY CARELESS

An instruction that, if the jury found there was no willful act nor wanton act nor grossly careless act, they could then only find actual damages, but if the jury found the injury was wantonly done in a grossly careless and reckless way, then plaintiff could recover punitive damages, was not error, on the theory that the words "grossly careless" imported negligence only; such words, construed with the context, being used to import recklessness. *Howard v. Atlantic Coast Line R. Co.*, 65 S. E. 245, 250, 83 S. C. 240.

#### GROSSLY IMPROBABLE STATEMENTS

The term "grossly improbable statements," as used in St. 1901, p. 56, c. 51, authorizing the revocation of the certificate of a physician by the board of medical examiners for unprofessional conduct, consisting of medical advertising in which "grossly improbable statements" are made, is too indefinite and uncertain to be capable of enforcement, where the statute fails to define the term in any way, but leaves it to the opinion of the then board of medical examiners in each particular case. *Hewitt v. Board of Medical Examiners of the State*, 84 Pac. 39-41, 148 Cal. 590, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

#### GROSSLY MISLEADING

A statement by the Board of United States General Appraisers that they departed from the ruling made in *Boker v. United States*, 124 Fed. 59, 59 C. C. A. 425, because it believed that the testimony there present-

ed to the court was "grossly misleading," meant that the protestant in the case cited, who occupied the same position in the subsequent case, had varied his evidence in such wise that it was impossible to tell whether he falsified in 124 Federal or in this litigation. *Hermann Boker & Co. v. United States*, 154 Fed. 174, 175.

## GROUND

See Break Ground; Depot Grounds; Fair Grounds; On the Ground; Public Grounds; Reasonable Ground; Soft Ground; Station Grounds; Unground.

The word "ground" is defined as meaning land; estate; possession; and in the plural, garden; land; field belonging to a homestead; land appropriated to some special use; and the limited meaning of the word "grounds," as connoting appurtenancy to a homestead or other building, is not ordinarily to be adopted unless it appears from the context that the word is employed in connection with some particular building or group of buildings, or that there is an intent to distinguish between the "grounds" and the other lands of the same owner. *Trustees of Princeton University v. Wilson*, 78 Atl. 393, 397, 78 N. J. Eq. 1.

### As property

See Property.

### Electric current

By "ground," as used in describing difficulties attending the telephone service, is meant the interruption of the current by the crossing of wires or the breaking and falling of a telephone wire to the earth, or against some surface that acts as a conductor of electricity, and interrupts its continued flow along its proper wire. *Dow v. Sunset Telephone & Telegraph Co.*, 106 Pac. 587, 588, 157 Cal. 182.

Electric wires are on a "ground circuit" when the current is carried to the end of the line upon a wire and there connected with the earth, through which it returns to the place of generation. If the wire at any intermediate point is brought into connection with the ground by any good conductor of electricity, the current will use the shorter line of travel thus established. When the wires are on a metallic circuit, the electric fluid travels its entire course on wires without coming into contact with the earth. A grounding of the circuit at any point will change the course of the current from the wire to the earth; the latter medium offering less resistance, and an electric current traveling the line of least resistance. *Smith v. Missouri & Kansas Tel. Co.*, 87 S. W. 71, 72, 113 Mo. App. 429.

As protection against electricity, a wire is said to be "grounded" if it is in contact with moist earth. *New Omaha Thomson-*

*Houston Electric Light Co. v. Johnson*, 93 N. W. 778, 780, 67 Neb. 393.

## GROUND FLOOR

Where a subcontractor agreed to furnish and set terra cotta arch blocks on all floors of a building except the "ground floor," and the building had a cellar, a basement, and seven stories above, the basement floor being on the level of the street, the basement should be regarded as the ground floor, and the contractor was not bound to set the blocks on that floor, and on being compelled to do so was entitled to charge therefor as extras. *Isaacs v. Dawson*, 75 N. Y. Supp. 337, 338, 70 App. Div. 232.

The expression, "come in on the ground floor," indicates a proposal to enter a business transaction on the same terms as the proposer is or is to be admitted. *Mackenzie v. Seeberger*, 76 Fed. 108, 114, 22 C. C. A. 83.

## GROUND LOADER

Plaintiff when he sustained the injuries sued for, was employed in defendant's logging camp as a "ground loader"; his duty being to pull cars in place to be loaded with logs. *Williams v. Levert Lumber & Shingle Co.*, 38 South. 567, 568, 114 La. 805.

## GROUND OF DEFENSE

A demurrer that an answer does not state facts sufficient to constitute a "ground of defense" is sufficient, though the language of the statute is "cause of defense." *Durbin v. Northwestern Scraper Co.*, 73 N. E. 297, 301, 36 Ind. App. 123.

## GROUND OUTSIDE OF OR ADJOINING

Tenement House Act, Laws 1901, p. 910. c. 334, § 91, subd. 2, requires the ceilings of rooms in the basement of a tenement house occupied for living purposes to be at least 4½ feet "above the surface of the street or ground outside of or adjoining the same." Held, that the section does not authorize the occupancy for living purposes of cellar rooms whose ceilings are only two feet above the street surface, though they are over seven feet above the surface of an adjoining sunken court; the clause "ground outside of or adjoining the same" being intended to cover the case of a tenement house not abutting upon a street, or standing upon a lot of such conformation that as to some rooms a height of four feet and six inches above the curb level would not equal four feet and six inches above the ground outside of and adjoining the same. *People ex rel. Cohen v. Butler*, 109 N. Y. Supp. 900, 904, 125 App. Div. 384.

## GROUND RENT

See Irredeemable Ground Rent.

A "ground rent" is a rent service and not a rent charge and, being so, is undoubtedly apportionable and may be partially released without extinguishing the whole. *City of Baltimore v. Latrobe*, 61 Atl. 203,

208, 101 Md. 621, 4 Ann. Cas. 1005 (citing *Cuthbert v. Kuhn* [Pa.] 3 Whart. 357, 31 Am. Dec. 513).

A ground rent, being an estate of inheritance in the rent of lands, is a freehold estate, and is a right to and interest in the lands, within the meaning of section 4158, Rev. St. 1892, relating to descent and distribution. *McCammon v. Cooper*, 69 N. E. 658, 659, 69 Ohio St. 366.

A "ground rent" is nothing more than a lien, or even a charge; it is an estate and is bound by the lien of a judgment or mortgage equally with the land. *Rushton v. Lippincott*, 12 Atl. 761, 764, 119 Pa. 12.

Where a contract for the sale of real estate reserved certain "ground rents," such term did not in itself mean a rent reserved under a lease for 99 years renewable forever. *Ward v. Newbold*, 81 Atl. 793, 794, 115 Md. 689, Ann. Cas. 1913A, 919.

#### GROUND TO BELIEVE

In a declaration of law in an action by a trustee in bankruptcy to recover an alleged preference, the phrase "ground to believe" is equivalent to the phrase "cause to believe," used in Bankr. Act July 1, 1898, c. 541, § 60, subd. b, 30 Stat. 562, providing that if a bankrupt shall have given a preference, and the person receiving it shall have had reasonable "cause to believe" that it was intended thereby to give preference, it shall be voidable by the trustee. *Edwards v. Carondelet Milling Co.*, 83 S. W. 764, 766, 108 Mo. App. 275 (citing *Benedict v. Deshel*, 177 N. Y. 1, 68 N. E. 999, 11 Am. Bankr. Rep. 20).

#### GROUNDMAN

A "groundman," as applied to an employé of a telephone company, is of lower rank than a lineman, and his duties ordinarily are to assist the lineman, and to generally, as his name indicates, stay on the ground; but a lineman on a pole in the performance of his duty at the time he receives an electric shock, occasioned by the breaking of a wire, is entitled to recover as against the objection that he is a mere volunteer. *Cumberland Telephone, etc., Co. v. Adams* (Ky.) 91 S. W. 739, 741.

#### GROUNDS

See Sufficient Grounds.

The "grounds" on which an appeal from a justice of the peace is based, required to be stated in the appellant's statement on appeal by Rev. Justices' Code, § 100, are the grounds mentioned in Rev. Code Civ. Proc. § 303. *Halvorsen v. Myren*, 121 N. W. 782, 783, 23 S. D. 263.

Rev. St. 1899, § 7029, enacts that the notice to be served upon the contestee in an election contest shall specify the "grounds" upon which contestant intends to rely. Section 7033 provides that every court author-

ized to determine election contests shall do so in a summary manner without formal pleadings. A notice stated that contestor made contest on the ground that there were many illegal and fraudulent votes cast for contestee, the names of the voters and precincts wherein they voted being unknown, and that there were many legal votes cast for contestor and not counted for him, the name and precincts being unknown. Held, that the notice was insufficient for indefiniteness. The word "grounds," as used in the statute, can only mean substantive averments, informal perhaps, but in plain terms setting forth a cause of action upon which issue may be joined and which may, at least, tend to notify contestee of the charges he must face. *Hale v. Stimson*, 95 S. W. 885, 888, 198 Mo. 134.

A testatrix in one item of her will devised to trustees "my house and grounds," with all the buildings standing within such grounds, to be used for public purposes, and in a subsequent item gave the remainder of her estate to the trustees of a university, to be devoted to the construction "upon the grounds of the said university" of a building to be used for certain purposes. Held, that the term "university" was not used to designate any building or group of buildings, but the corporation, the preposition "of" denoting proprietorship and not location, and the word "grounds" evidently used in the latter item to express the rhetorical antithesis between "my house and grounds," used in the previous item, upon which a public hall and garden were to be established; and the establishment of the building upon the grounds "of the said university" will not be deemed to bear a limited or special meaning confining it to such lands as lie immediately adjacent to and are used in connection with the existing buildings of the university, but to embrace any land owned by the university so located as to make the building to be erected available for the purposes intended; and a tract not contiguous to the original and central campus upon which the existing university buildings are situated, but separated therefrom in part by a railroad, in part by a public street, and in part by land of other owners, the only communications between the tract and the central campus being by means of streets or lanes, would be "grounds of the said university," within the meaning of the will, where owned by the university. Trustees of Princeton University v. Wilson, 78 Atl. 393, 395, 78 N. J. Eq. 1.

#### GROUSE

Laws 1900, c. 20, § 140, defines "grouse" as used in the game law as including "ruffed grouse, partridge, and every member of the grouse family." *People ex rel. Silz v. Hesterberg*, 96 N. Y. Supp. 286, 290, 109 App. Div. 295.

## GROUT

"Grout" is a thin watery concrete in which the proportion or bulk of water is large. *Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co.*, 189 Fed. 608, 610.

The term "grout," as defined in Mahan's Civil Engineering, is applied to any mortar in a thin or fluid state; and the terms "concrete" and "beton" to mortars incorporated with gravel and small fragments of stone or brick. The difference between grout and concrete is stated, by the text-books to consist in the fact that grout is fluid enough, or prepared in such plastic condition as to flow readily, and thus may be employed in filling in cracks and apertures, where a more solid or resistant material, like concrete, could not be made to enter all parts of the opening, and where even tamping would not accomplish the desired object, if the space would allow that method of distributing the substance itself. *Donaldson v. Roksament Stone Co.*, 170 Fed. 192, 193.

## GROVE

The Century Dictionary defines a "grove" as a group of trees of indefinite extent but not large enough to constitute a forest; especially such a group considered as furnishing shade for avenues and walks. It is common knowledge that a grove is the nucleus of a park or pleasure ground for the people, so that a plan showing an open square marked, "A Grove," colored in green, with paths through it, and an announcement that the grove had been set apart as a public park, was sufficient to establish a dedication as a park; the fact that the word "grove" was used instead of "park" being immaterial. *Morrow v. Highland Grove Traction Co.*, 69 Atl. 41, 42, 219 Pa. 619, 123 Am. St. Rep. 677.

## GROW

### GROW DUE

P. L. 1892, p. 369, authorizes mechanics and materialmen performing work on public buildings to file a notice and claim of lien for the amount due, and section 5, p. 371, declares that such lien extends to any funds which may be due or grow due to the contractor under the contract when the lien claim is filed. Held, that the phrase "be due or to grow due under the contract" clearly refers to the portion of the contract price which remains unpaid when the lien claim is filed. *Somers Brick Co. v. Souder*, 61 Atl. 840, 842, 70 N. J. Eq. 388.

### GROWING CROPS

Growing ginseng, a plant, the roots of which are the marketable and valuable part, and which require 7 to 15 years to mature, is for purpose of taxation part of the real

estate, and not personalty, or within St. 1898, § 1038, subd. 11, exempting from taxation a number of articles of personal property and "growing crops"; this evidently referring to annual crops, which are commonly treated like personalty. *Kuehn v. City of Antigo*, 120 N. W. 823, 824, 139 Wis. 132, 131 Am. St. Rep. 1043.

### As appurtenance

See Appurtenance—Appurtenant.

### GROWING GINSENG

As growing crop, see Growing Crops.

### GROWING GRAIN

As land, see Land.

### GROWING OUT OF MARRIAGE RELATION

See Property Growing Out of Marriage Relation.

### GROWING TIMBER

See Real Property.

## GROWLER

The term "growler" is slang United States for a vessel, as a pitcher, jug, pail, or can, brought by a customer for beer. *Cullinan v. Horan*, 102 N. Y. Supp. 132, 135, 116 App. Div. 711 (quoting Cent. Dict.).

## GROWTH

Where one conveyed to another "all the timber and growth of timber" on certain land, with the privilege of at all times entering on the land and removing the timber, the instrument included timber to be subsequently grown; "timber" being defined as wood or forest land, and the term "growth" being defined as that which has grown or is growing, anything produced, a product, the words in such circumstance not being synonymous. *Baker v. Kenney*, 124 N. W. 901, 904, 145 Iowa, 638, 139 Am. St. Rep. 456.

The word "growth," as used in reference to the wood growing on a lot, though plainly generic in meaning, and including all the wood upon the lot, when used in a contract by the owner of land will not be construed by arbitrary definitions of the word, and the question will be as to what was intended by the party using it. Plaintiff offered to purchase defendant's standing "timber" for \$700, to which defendant replied that she would not take less than \$900 for the timber, after which plaintiff again wrote: "I agree to take it at your price and inclose check for \$100. \* \* \* I to buy all the growth." Held, that this letter was not an acceptance of defendant's offer to sell the "timber" for \$900, in the absence of proof that the words "growth" and "timber" were used synonymously by both parties. *Lord v. Meader*, 60 Atl. 434, 435, 73 N. H. 185.



## GRUBSTAKE

"'Grubstake' contracts have sometimes been called prospecting partnerships, and are said to partake of the character of qualified partnerships. Yet, unless the agreement goes beyond the mere furnishing of supplies in consideration of a participation in the discoveries, the word 'partnership' is improperly used and is misleading. It is simply a common venture, wherein one, called the 'outfitter,' supplies the 'grub,' and the other, called the 'prospector,' performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement. The prospector has the right to insist on the outfitter performing his part of the agreement as a condition precedent to participation in such discoveries. Should he fail to do so, the prospector may discover and locate for his own advantage, free from any obligation to the outfitter. \* \* \* Is it essential to a right in property under a grubstake contract that such property be acquired by means of the grubstake furnished, and pursuant to such contract? \* \* \* The 'grubstake' contract, properly speaking, applies to the search for and location of mines on the public domain. \* \* \* We frequently encounter cases where the object of the venture is not only to search for and discover mines, but also to work and develop them, and conduct a general mining business. This is something more than a 'grubstake' contract. Such an agreement constitutes a partnership." *Costello v. Scott*, 93 Pac. 1, 7, 30 Nev. 43 (quoting and adopting definition in 2 Lindl. Mines [2d Ed.] § 858, p. 1565 et seq.).

A "grubstake" contract is an agreement between two or more persons to thereafter locate mines upon the public domain by their joint aid, effort, labor, or expense, whereby each is to acquire, by virtue of the act of location, such an interest in the mine as is agreed on in the contract. The title accrues to each as an original locator, though the location be made in the name of one or more of the parties only. Each party to the grubstake contract not named in the location notice becomes, nevertheless, an equitable owner and tenant in common with those named. Such a contract, when clearly established, will be enforced in equity. *Marks v. Gates*, 2 Alaska, 519, 523.

A "grubstake" contract is an agreement between two or more persons to locate mines upon the public domain by their joint aid, effort, labor, or expense, whereby each is to acquire, by virtue of the act of location, such an interest in the mine as is agreed on in the contract. The title accrues to each as an original locator, though the location be made in the name of one or more of the parties only. Such a contract, whether oral or written, when clearly established, will be enforced

ed in equity. *Elliott v. Elliott*, 3 Alaska, 352, 365.

## GUARANA

As medicinal preparation, see Medicinal Preparation.

## GUARANTEE

### GUARANTEED

See Previous Indorsements Guaranteed; Quality Guaranteed; Title Guaranteed.

### GUARANTOR

One who writes his name on the back of a nonnegotiable note to give credit thereto is a "guarantor," and is *prima facie* bound to pay the note on the principal's default, without demand or notice. *Tilden v. Goldy Mach. Co.*, 98 Pac. 39, 9 Cal. App. 9 (quoting and adopting definition in *First Nat. Bank of San Diego v. Babcock*, 29 Pac. 415, 94 Cal. 96, 28 Am. St. Rep. 94).

The transferral of a nonnegotiable written contract does not, by signing his name on the back of it, make himself liable as maker, guarantor, or indorser, within Rem. & Bal. Code, § 6250, providing that the discounting of commercial paper, where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan for the purpose of the chapter relating to usury. *Thomson v. Koch*, 113 Pac. 1110, 1111, 62 Wash. 438.

Where one appointed agent signs a contract containing stipulations as to his duties and compensation, and afterwards, in a different contract, signed by two other persons, to which the agent is not a signatory party, it is agreed that the signers thereof will, upon the agent's failure to pay and notice thereof, pay his indebtedness arising under the agency, the liability of the signers of the latter contract is that of "guarantors." *Musgrove v. D. E. Luther Pub. Co.*, 63 S. E. 52, 54, 5 Ga. App. 279.

### As creditor

See Creditor.

## GUARANTY

See Conditional Guaranty; Continuing Guaranty; Continuous Guaranty; General Guaranty; Special Guaranty; Unlimited Guaranty.

"A 'guaranty' is a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party." *Miller v. Lewiston Nat. Bank*, 108 Pac. 901, 909, 18 Idaho, 124.

The word "guaranty" has an established meaning, and ordinarily implies an undertaking by one person that another will perform some engagement. *Bailey v. Miller*, 91

N. E. 24, 45 Ind. App. 475 (citing 4 Words and Phrases, p. 3179).

Webster defines "guaranty" as: "In law and common usage: An undertaking to answer for the payment of some debt, or the performance of some contract or duty, of another, in case of the failure of such other to pay or perform; a guaranty; a warranty; a security. In law and common usage: To undertake or engage that another person shall perform (what he has stipulated); to undertake to be answerable for (the debt or default of another); to engage to answer for the performance of (some promise or duty by another) in case of a failure by the latter to perform; to undertake to secure (something) to another, as in the case of a contingency." Storey's defines it as: "A guaranty is an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty, by another person, who himself remains liable to pay or perform the same." The court, with these and other definitions in mind, holds that an agreement between defendants and others by their agents as parties of the first part and plaintiff as party of the second part, reciting that plaintiff had made advances, and agreed to make further advances, to enable defendants to bid for certain property which was to be sold at judicial sale, and provided that a stated part of such advances should be secured by a mortgage on the property "to be acquired," and that when necessary powers of attorney were received the agreement should be supplemented by a formal mortgage; that the remainder of the sums advanced "shall be secured by the joint and several personal guaranty of said parties of the first part," and be paid in installments as therein specified, was not a guaranty. Guaranty Trust Co. of New York v. Koehler, 187 Fed. 192, 200.

A "guaranty" is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another who is in the first instance liable to such payment or performance. Clymer v. Terry, 109 S. W. 1129, 1131, 50 Tex. Civ. App. 300; Cowan v. Roberts, 46 S. E. 979, 980, 134 N. C. 415, 65 L. R. A. 729, 101 Am. St. Rep. 845; Ruberg v. Brown, 51 S. E. 96, 98, 71 S. C. 287 (quoting and adopting definition in Carroll Savings Bank v. Strother, 22 S. C. 555); Ricker Nat. Bank v. Stone, 97 Pac. 577, 579, 21 Okl. 833 (quoting and adopting definition in Black, Law Dict. p. 550).

A "guaranty" is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another who is himself in the first instance liable to such payment or performance, and the debt or duty may be either

present or prospective. J. L. Mott Iron Works v. Clark, 69 S. E. 227, 228, 87 S. C. 199.

"The definition of a 'guaranty' by text-writers is an undertaking by one person that another shall perform his contract or fulfill his obligation or that, if he does not, the guarantor will do it for him. A guarantor of a bill or note is said to be one who engages that the note shall be paid but is not an indorser or surety." A guarantor of a note at its maturity, by writing his name across the back thereof, is not entitled to notice of nonpayment and failure of the payee to give notice of nonpayment until the maker, who was solvent at the maturity of the note, became insolvent, did not discharge the guarantor, though he was obliged to pay the debt and was unable to enforce payment thereon against his principal. Pfaelzer v. Kau, 69 N. E. 914, 916, 207 Ill. 116 (quoting and adopting definition in 2 Pars. Bills & N. 117).

"Guaranty is an undertaking by one person that another shall perform his contract or fulfill his obligation, and that in case he does not do so the guarantor will do it for him. A guarantor of a bill or note is one who engaged that the note shall be paid." Northern State Bank of Grand Forks v. Bellamy, 125 N. W. 888, 890, 19 N. D. 509, 31 L. R. A. (N. S.) 149.

The word "guaranty" may be used to create an obligation to indemnify one against loss, and no recovery may be had on a contract to indemnify until actual damage is sustained. Norris v. Reynolds, 116 N. Y. Supp. 106, 108, 131 App. Div. 818.

A "guaranty" is a contract—an "aggregatio mentium." A letter stating, in answer to an inquiry as to the general standing of a certain person, that the writer regarded him as reliable and trustworthy, with whom the samples and sales of the addressee of the letter would be entirely safe, especially as all goods that might be shipped would come direct to the warehouses of the writer, and payment for such goods would be made by the writer to the addressee, did not constitute a "guaranty" by the writer of payment for goods which the addressee might ship to the person as to whose standing inquiry was made. W. T. Hughes & Co. v. Peper Tobacco Warehouse Co., 51 S. E. 793, 139 N. C. 158.

A "guarantor" does not contract that his principal will pay, but simply that he is able to do so. Before an action can be maintained against a guarantor, therefore, it must be shown that the principal is unable to perform. Musgrove v. D. E. Luther Pub. Co., 63 S. E. 52, 54, 5 Ga. App. 279 (quoting and adopting the definition in Manry v. Wixelbaum Co., 33 S. E. 701, 108 Ga. 14, 17).

An agreement whereby S. turned over to defendant all of his book accounts, bills receivable, etc., and all the balance of the money, and defendant received them and stipulated as a consideration therefor that he would pay all the indebtedness of S., contracted on account of mercantile business conducted by him, was an agreement by defendant for the payment of his own debts, and not in the nature of a "guaranty." *Grimsrud Shoe Co. v. Jackson*, 115 N. W. 656, 659, 22 S. D. 114.

A state bank was chargeable with notice that the credit and resources of a national bank were being used unlawfully where the national bank's president had written the state bank obligating his bank unconditionally to pay all checks of the corporation not over \$5,000, and the national bank afterwards wired that it would "protect" the corporation's checks for \$5,000 weekly in excess of "present guaranty," and would pay checks in excess of "guaranty" during the current week, as "guaranty" does not signify an obligation of the bank to pay checks which it was its duty to pay. *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642, 645, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526.

Where a witness, during his testimony in a personal injury action as to the safety of staging erected outside of a building, stated that the staging supported by iron hooks of the size named would hold a certain weight, and that he would "guarantee" it to hold that much, the use of the word "guarantee" was inapt and was used only as a strong expression of opinion. *Lewis v. John Crane & Sons*, 62 Atl. 60-63, 78 Vt. 216.

An "agreement to keep in repair" for a period of twelve months, contained in a contract for street paving, is a mere "guaranty" of good work, and not a contract for repairs within the meaning of a charter requiring repairs of streets and highways to be paid out of the general revenue of the city. *Allen v. Labsap*, 87 S. W. 926, 929, 188 Mo. 692, 3 Ann. Cas. 306.

#### Acceptance and notice thereof

A written and signed offer of guaranty made by one party to another is not a completed agreement until it is delivered to and accepted and acted upon by the party for whose indemnity it is given. *Irving Nat. Bank v. Ellis*, 64 Atl. 1071, 74 N. J. Law, 42.

The true test in determining whether a "guaranty" is in fact an offer of guaranty or an absolute guaranty is whether there is mutual assent. A guaranty signed by the guarantor without any previous request of the other party and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, is, in legal effect, an offer or proposal on the part of the guarantor which

requires an acceptance to complete the contract. Mr. Justice Gray summarizes the rule as follows: "A contract of guaranty, like every other contract, can only be made by mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party or if the latter's agreement to accept is contemporaneous with the guaranty or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him, or for his use, completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." *Standard Sewing Mach. Co. v. Church*, 92 N. W. 805, 806, 11 N. D. 420 (quoting and adopting *Davis Sewing Mach. Co. v. Richards*, 6 Sup. Ct. 173, 115 U. S. 524, 29 L. Ed. 480).

#### As absolute agreement

To "guarantee the payment" of a sum of money, in an appropriate context, imports a direct undertaking to pay the sum in a given event and not a mere promise to become answerable for the default of another. *Perkins-Goodwin Co. v. Hart*, 83 Atl. 877, 878, 83 N. J. Law, 471.

On the insolvency of a trustee, his bondsmen entered into an agreement whereby the trustee made certain notes to cover the amount of his indebtedness to the trust fund and assigned a certain policy of insurance to secure the same; the said bondsmen agreeing to "guarantee to pay as the same becomes due all assessments and premiums" necessary to keep the insurance in full force so long as any of the notes remain unpaid. Held that, while the term "guarantee" was used in the agreement, the promise on the part of the defendants to pay the premiums was an original promise, and not a guaranty. *Merritt v. Haas*, 129 N. W. 379, 380, 113 Minn. 219.

#### As agree or promise

A building contract provided that the work and materials, except the mason work, should be sublet, and provided the time for making payments for the work sublet and the mason work. Plaintiff guaranteed the proper performance of such subcontracts and to save the owner harmless against all claims for damages arising in the construction of the building, and against all mechanics' liens. Plaintiff agreed and guaranteed that the building should be completed by March 1st, and, if not, to relinquish \$10,000 of the \$20,000 compensation payable. Plaintiff expressly guaranteed that the total cost of the

building should not exceed a certain sum and that all saving of expense under that amount should inure to the owner, and all cost above it should be paid by plaintiff. The contract further provided that, in consideration of the performance of the foregoing agreements and conditions, in addition to the payments under the subcontracts and the cost of mason work mentioned, the owner agreed to pay plaintiff the sum of \$20,000, which should be in full for the performance of the contract and the completion of the building at whatever time completed, including all office expenses, etc., \$5,000 payable when the roof was tight, \$5,000 when the work was practically finished, and the remaining \$10,000 when completely finished according to the architect's certificate, and further provided that the owner should pay the actual cost of the mason work and architect's services, and required plaintiff to keep a set of books showing expenditures, etc. The owner claimed that the contract contained two independent agreements, the first of which was to furnish the labor and materials for the building in consideration of the cost thereof, and the second was the promises termed "guarantees," the consideration of which was \$20,000 if the building was completed within the time specified, and \$10,000 if not, and that as the building was not completed within the specified time, plaintiff could only recover the latter sum. Held, that the word "guarantee" was not used technically, but as a synonym of "agree" or "promise," and the contract constituted but one agreement, the consideration of which was the amount of the subcontracts, cost of mason work, and a lump sum of \$20,000. *Richard Deeves & Son v. Manhattan Life Ins. Co.*, 88 N. E. 395, 398, 195 N. Y. 324.

Where a building contract specified the exact construction desired, and stipulated that the floor was "to be 'guaranteed and kept in repair' for two years," the stipulation did not import an agreement to keep the floor water-tight, but meant only a guaranty that the work and materials which the defendant was to supply should remain in good order and condition for the specified time, and the defendant could not be held to guarantee that the prescribed mode of construction would produce a water-tight floor. *Erickson v. George B. H. Macomber Co.*, 97 N. E. 615, 616, 211 Mass. 311.

#### As collateral agreement

"Of course, there is no dispute as to the primary meaning of 'guaranty.' It is a collateral undertaking to pay a debt or perform some other duty in case of the failure of another person who is, in the first instance, liable to such payment or performance. \* \* \* But while this is the primary meaning, it is clear that the word may be used in such a connection with other words as to constitute an original contract or undertaking.

\* \* \* Where defendant executed a note to plaintiff at the foot of which, on the same paper and on the same side on which it was written, two of his codefendants before delivery signed an indorsement as follows: "Waiving demand and notice, we hereby guarantee the payment of this note, any future payment on account of either principal or interest, not releasing us as guarantors," and plaintiff in advancing the money relied on the security given to the note by their signatures, all the defendants were joint and several makers primarily liable, and not "guarantors." *Atwood v. Lester*, 40 Atl. 867, 870, 20 R. I. 660 (citing and adopting *Sturges v. Bank of Circleville*, 11 Ohio St. 168, 78 Am. Dec. 296; *Gallagher v. Nichols*, 60 N. Y. 444; *Dole v. Young*, 24 Pick. [41 Mass.] 252; and *Story*, Prom. Notes, § 461).

A contract of "guaranty" of payment of a promissory note is a contract separate and apart from the note itself. *Lemmer v. Guthrie Bros.*, 95 N. W. 1046, 1049, 69 Neb. 490, 62 L. R. A. 954, 111 Am. St. Rep. 561.

"Guaranty" is an undertaking to answer for another's liability and collateral thereto. It is a secondary, and not a primary, obligation." Where plaintiffs leased to defendant floor space in a store, the lease providing that the receipts by defendant should be turned over to plaintiff, that defendant guaranteed that the gross receipts from his business should amount to certain sums, and agreed to pay plaintiff a certain per cent. on the difference between the actual receipts and a certain sum, should the receipts be less than that sum, the word "guaranteed" was not used in a technical sense, but to express defendant's confident estimate as to the amount of the gross receipts. *Shartenberg & Robinson v. Ellbey*, 62 Atl. 979, 981, 27 R. I. 414.

#### As a concurrent agreement

The employment of the word "guaranty" implies, when it does not appear to the contrary, that the entire matter was one concurrent act, and the contract of guaranty was part of the original agreement, supported by the same consideration. *Great Western Printing Co. v. Belcher*, 104 S. W. 894, 895, 127 Mo. App. 133.

#### Consideration

A "guaranty" is an obligation to pay the debt of another on consideration of a benefit flowing to the guarantor. A contractor was under contract with the city of Albany to bore for it an artesian well. In order to obtain materials necessary to the completion of his contract, he requested the municipal authorities to pay to a dealer in such materials a portion of the amount that would be due him on the completion of his contract, up to a certain amount. This sum was in payment for materials already bought, but not paid for, as well as for materials subsequently to be purchased. The city agreed to do this,

and so notified the dealer, who furnished the materials on the faith of this agreement. There was no obligation on the part of the city to pay any money unless the contract was fulfilled, and it was distinctly understood that the money to be paid was only a part of that which would be due to the contractor. Held, that the agreement of the city was not a contract of 'guaranty' or suretyship, and was not in contravention of article 7, § 6, par. 1, of the Constitution of Georgia (Civ. Code 1895, § 5891), and that a demurrer to a petition containing such allegations was properly overruled. *City of Albany v. Cameron & Barkley Co.*, 49 S. E. 798, 799, 121 Ga. 749 (citing 6 Enc. Dig. 811; Civ. Code 1895, § 2966; *Manry v. Waxelbaum*, 33 S. E. 701, 108 Ga. 14).

#### **Indorsement distinguished**

The material difference between "guaranty" and "indorsement" of a note as referable to the original payee is as to the extent of liability when measured by the diligence due from the creditor, in order to charge the guarantor or indorser; both being agreements to pay the note. *Walcott v. Carpenter* (Tex.) 132 S. W. 981, 982.

Where the president of a bank declined to discount certain corporate notes unless the payment was guaranteed by the personal indorsement of two of the officers of the corporation, the word indorsement was not used in its technical sense, but only to mean that the bank demanded "guaranty" of such officers. *Keyser v. Warfield*, 63 Atl. 217, 218, 103 Md. 161.

A writing on the back of a note by its payee guaranteeing its payment at maturity, and waiving notice of nonpayment and demand, is an indorsement. *Mullen v. Jones*, 112 N. W. 1048, 102 Minn. 72.

Where, in an action on a note and on a written guaranty, executed by defendant, the note and a guaranty thereof by N. to plaintiff were filed with the declaration, defendant was thereby advised as to the cause of action; and hence the fact that the declaration alleged that N. "indorsed" the note sued on to the bank, and that the proof showed that he "guaranteed" payment of the note, was not a material variance. *Booth v. Irving Nat. Exch. Bank*, 82 Atl. 652, 655, 116 Md. 668.

#### **As stand good**

See Stand Good.

#### **Suretyship distinguished**

Guarantor distinguished, see Guaranty.

While a contract of guaranty differs from that of a surety, in that a guaranty is a secondary, while a contract of "suretyship" is a primary, obligation, the contract of guaranty is, nevertheless, an obligation of a surety, it being regarded as a mercantile instrument, to be construed according to what is fairly to be presumed to have been the understanding of the parties, without strict techni-

cal accuracy, but in furtherance of its spirit to promote its use and convenience in commercial intercourse. *Booth v. Irving Nat. Exch. Bank*, 82 Atl. 652, 654, 116 Md. 668.

A surety and guarantor each promises to answer for the debt or default of another, the surety assuming liability as a regular party to the primary undertaking, while the guarantor does not, but his liability depends upon an independent, collateral agreement to pay the obligation if the primary payor fails to do so. *Bedford v. Kelley*, 139 N. W. 250, 252, 173 Mich. 492.

An instrument, designated a "guaranty," executed at the time of the execution of a contract for the consideration supporting the contract and for the purpose of the contract, which provides that a party to the contract signing the instrument and the sureties thereto guarantee performance of the contract, etc., creates a contract of suretyship and not of guaranty. A surety is bound with his principal by the same instrument executed at the same time and on the same consideration, while a guarantor incurs his obligation by a contract of his own in which the principal does not join. *News-Times Pub. Co. v. Doolittle*, 118 Pac. 974, 977, 51 Colo. 386.

A "contract of suretyship" is a contract by which the surety becomes bound as the principal or original debtor is bound. It is a primary obligation, and the surety is bound with his principal as an original promisor. The "contract of a guarantor" is his separate contract in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done. The guarantor is bound only to answer for the consequences of the principal's default. A "surety" is an insurer of the debt. A "guarantor" is an insurer of the solvency of the debtor. *Northwestern State Bank of Grand Forks v. Bellamy*, 125 N. W. 888, 890, 19 N. D. 509, 31 L. R. A. (N. S.) 149 (quoting *Ogden*, Neg. Inst. § 220).

A "surety" is usually bound with his principal by the same instrument, executed at the same time and on the same consideration, and he is an original debtor, and his liability is immediate and direct, while a "guarantor" is one who undertakes by a separate undertaking to pay a debt if the debtor cannot, and the contract of guaranty is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. *W. T. Rawleigh Medical Co. v. Tarpley*, 59 South. 512, 513, 5 Ala. App. 412.

"A surety undertakes to pay the debt of another. A guarantor undertakes to pay if the principal debtor does not or cannot. A surety joins in the contract of the principal and becomes an original party with the principal. The guarantor does not join in the contract of his principal, but engages in an independent undertaking. A surety promises

to do the same thing the principal undertakes. The guarantor promises that the principal will perform his agreement, and, if he does not, then he will do it for him." Defendant signed a note promising to pay to the order of plaintiff a certain sum; the note stating that it was given as collateral security for a debt represented by the open account of one of the parties and by any notes given therefor. A contract was executed at the same time, reciting that, whereas, plaintiff on the security of the note and the agreement had extended to one of the makers of the note a credit in merchandise to the amount of the note, and has also extended the privilege of ordering an amount of goods equal to the remittances sent, thus granting a continuous credit therefor, to secure the payment of the same, the signers of the note have become joint and several makers and sureties thereon, and further providing that on default the plaintiff could enforce payment of the note. The maker other than the debtor was a surety, and not a guarantor, and was not released by the fact that the creditor extended credit in excess of the amount stipulated in the contract and extended time of payment of the balance. *Rouss v. King*, 48 S. E. 220, 221, 69 S. C. 168 (quoting and adopting *Stearns, Suretyship*, § 6).

In some respects contracts of suretyship and guaranty are identical, and the terms "surety" and "guaranty" are oftentimes used colloquially as interchangeable expressions of collateral liability. A guarantor has the same right as the surety, by written notice, to compel the institution of a suit against the principal, but in the case of the surety the obligation is primary, and in that of the guarantor secondary, and arises only on the default or failure of the principal to perform his undertaking. The consideration for the contract of suretyship is a credit, indulgence, or benefit given the principal while that for a "guaranty" is a benefit flowing to the guarantor. No particular or formal phrase is required to create a contract of surety, and the courts may disregard formal expressions to ascertain whether it exists. *Fields v. Willis*, 51 S. E. 280, 281, 123 Ga. 272 (quoting and adopting definition in *Civil Code* 1895, §§ 2966, 2969, 2974; *Stern's Law of Suretyship*, § 6; *Manry v. Waxelbaum*, 33 S. E. 703, 108 Ga. 17; *Baldwin Fertilizer Co. v. Carmichael*, 42 S. E. 1003, 116 Ga. 763; *Wright v. Shorter*, 56 Ga. 76).

The "contract of a guarantor" is collateral and secondary, and in this respect differs from the contract of a surety, which is direct. In general the guarantor contracts to pay if by the use of due diligence the debt cannot be made out of the principal debtor, while the surety undertakes for the payment and so is responsible at once if the principal debtor makes default. The undertaking of a surety is primary; that of a guarantor,

collateral and secondary. One who absolutely guarantees payment of a debt is in every respect essentially a surety. *Rouse v. Wooten*, 53 S. E. 430, 431, 432, 140 N. C. 557, 111 Am. St. Rep. 875, 6 Ann. Cas. 280 (quoting and adopting *Kearnes v. Montgomery*, 4 W. Va. 29; *Hammel v. Beardsley*, 17 N. W. 858, 31 Minn. 315).

While there is a distinction between contracts of "guaranty" and suretyship, it is a distinction without a very substantial difference, in so far as liability is concerned. It makes no sort of difference whether the consideration of the contract is a benefit flowing to the maker, to the third party for whose benefit the contract was made, or results in an injury to the promisee. In either event the substance of the contract is the same, and the maker thereof undertakes to pay the debt if it is not paid by the party for whose benefit the contract was made, whether it be a guaranty or a suretyship. *A. B. Small Co. v. Claxton*, 57 S. E. 977, 979, 1 Ga. App. 83.

Under *Civ. Code* 1895, § 2966, the test by which to distinguish a contract of "guaranty" from one of "suretyship" is whether the consideration is for the benefit of the alleged guarantor, in which case the contract is one of guaranty; or whether it is for a benefit to the principal, in which case the contract is one of suretyship. *Schlittler & Johnson v. Deering Harvester Co.*, 59 S. E. 342, 343, 3 Ga. App. 86.

A surety and a guarantor have this in common, that they are both bound for another person. Yet there are points of difference between them which should be carefully noted. A "surety" is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Where a person is appointed agent, and signs a contract containing stipulations as to his duties and compensation, and afterwards, in a different contract, signed by two other persons, to which the agent is not a signatory party, it is agreed that the signers thereof will, upon the agent's failure to pay and notice thereof, pay his indebtedness arising under the agency contract or otherwise, the liability of the signers of the latter contract is that of guarantors and not of sureties, and they cannot be sued jointly with the principal debtor. *Musgrove v. D. E. Luther Pub. Co.*, 63 S. E. 52, 53, 5 Ga. App. 279 (quoting and adopting definition in 1 *Brandt, Sur.* [3d Ed.] § 2).

#### As warranty

While the words "guaranty" and "warranty" are often used interchangeably and with the same effect, there is, in strict legal contemplation, a difference between them; a "guaranty" being the assurance of the pay-

ment of a debt or the performance of a duty or contract by another person, while a "warranty" is an assurance of the title or quality of property. *Gay Oil Co. v. Roach*, 125 S. W. 122, 123, 93 Ark. 454, 27 L. R. A. (N. S.) 914, 137 Am. St. Rep. 95.

The words with "guarantee against leakage" in an accepted order for a certain number of barrels of oil in effect state that the barrels are warranted against leakage; "guarantee" being used synonymously with warranty. *Gay Oil Co. v. Roach*, 125 S. W. 122, 124, 93 Ark. 454, 27 L. R. A. (N. S.) 914, 137 Am. St. Rep. 95.

In popular parlance the words "guaranty" and "warranty" are used interchangeably without reference to any difference in meaning. While the term "warranty" is applied to a contract as to title, quality, or quantity of something sold, and the word "guaranty" is held to be a contract by which one person is bound to another for the fulfillment of a promise or engagement of a third party, the two words are derivatives from the same root and are identical in significance and effect. In the stipulation in a note given for the purchase money of a mule that the seller "does in no wise guarantee except in title," the word "guarantee" is used in the sense of a warranty. *Branch v. James & Peddy*, 60 S. E. 1027, 4 Ga. App. 90 (citing and adopting *McNeel v. Smith*, 22 S. E. 119, 106 Ga. 215; *Jackson v. Langston*, 61 Ga. 302).

A petition which alleges that defendant sold to plaintiff oil to be used as a cooling agent for the cylinder and engine of an automobile owned and operated by plaintiff; that defendant "guaranteed" that the oil was not inflammable and was safe as a cooling medium; that, believing in the truth of defendant's representations, plaintiff purchased the oil, and it was placed in his automobile; that the oil was inflammable and was not safe for use as a cooling medium; that it ignited, and plaintiff's machine was burned and destroyed; and that defendant's representations were knowingly false—stated a cause of action in contract, and not in tort; the averment that the oil was "guaranteed" to be noninflammable and safe being the equivalent of an averment that there was a warranty of the character and quality thereof. *Conkling v. Standard Oil Co.*, 116 N. W. 822, 824, 15 S. Iowa, 593.

#### GUARANTEE COMPANY

Since an "insurance company" exercises no special or exclusive privilege not allowed by law to natural persons, it is not like a "guaranty or surety company," which may, by statute, be the sole surety in all cases where by law two or more sureties are required. An insurance company is not a guaranty or surety company on which Ky. St. § 4077, imposes a franchise tax. *Etna Ins. Co. v. Coulter*, 74 S. W. 1050, 1052, Ky. 787.

#### GUARANTY OF COLLECTION

See Guaranty of Payment and Collection.

##### Guaranty of payment distinguished

"The fundamental distinction between a 'guaranty of payment' and 'one of collection' is that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor without taking any step to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case, the undertaking is that, if the demand cannot be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor and a failure to collect of him by those means are conditions precedent to the liability of the guarantor, and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor." An agreement indorsed by the payee of notes on the notes and chattel mortgage securing them on assigning them, "by agreement with recourse after all security has been exhausted," is a "guaranty of collection." *Smith v. Bradley*, 112 N. W. 1062, 1063, 16 N. D. 306 (quoting *McMurray v. Noyes*, 72 N. Y. 523, 28 Am. Rep. 180).

#### GUARANTY OF PAYMENT

A letter written by the father of one of the makers of a note directed to the indorsee, reciting, "I have sworn off going on notes, but want to help my son, and, if he should not pay the \$3,000 note, I will see that it is fixed and told the banker that I would," signed, etc., constituted a "guaranty of payment" of the note, according to its tenor and legal effect; the word "fixed" in such letter being used in the sense of "pay." *McCauley v. Cross* (Tex.) 111 S. W. 790, 791.

##### Guaranty of collection distinguished

Guaranty of collection distinguished, see Guaranty of Collection.

#### GUARANTY OF PAYMENT AND COLLECTION

Where a guaranty of a bond recited; "I hereby guarantee the payment and collection of the said bond and mortgage and promise to pay the same at maturity," the covenant related to payment and not merely to collection, giving the holder an election to proceed in the first instance either against the principal or the guarantor. *Loos v. McCormack*, 93 N. Y. Supp. 1088, 1089, 107 App. Div. 8.

#### GUARANTY OF QUALITY

Where defendants, in the business of canning tomatoes, authorized a broker to dispose of the product in the Chicago market, and on the making of a sale the "bought" note given by the purchaser to the broker

called for the "usual guaranty against swells and quality," and specified "terms regular, less one-half per cent. cash, ten days," but the "sold" note delivered by the broker to the purchaser did not contain such requirements, but called for "standard" tomatoes and "cash, less one and one-half per cent.," the notes did not fail to show a contract, on the theory that there was a material variance between the notes; it appearing that in the Chicago market, according to the usages of the trade, all such sales were made on "regular terms," meaning that the buyer was to have a credit of 60 days, with a discount privilege of 1½ per cent. in case of cash payment within 10 days, that a guaranty against swelling of the cans was customary, and that a guaranty of quality meant a "standard" can. *Eau Claire Canning Co. v. Western Brokerage Co.*, 73 N. E. 430, 432, 213 Ill. 561.

## GUARD

See Cattle Guard; Properly Guard; Railroad Cattle Gap or Guard; Securely Guarded or Fenced; Shuttle Guard.

The meaning of the word "guard" as a verb is suggested by the definition of the word as a noun, and that definition, as given in the Standard Dictionary, is: "Any one of various protecting or defensive devices for wearing or for attaching to an object as a machine or implement." The failure of a manufacturer to guard the cover of a vat in his plant while removed from the vat is not a failure to comply with the Factory Act, requiring an employer to guard vats in his plant, and the liability of the manufacturer for injuries resulting in consequence of the unguarded cover is governed by the common law. *Bessler v. Laughlin*, 79 N. E. 1033, 1034, 168 Ind. 38.

A self-feeding attachment to an ordinary rotary ripsaw, which was a hand-feeding machine, usually and customarily operated and fed by hand, which attachment was a complicated machine, having an elaborate arrangement of belts, cogwheels, pulleys, and ratchets, some of which were in as much need of guarding as the saw itself, was not a guard such as was contemplated by the provision of the factory act requiring the operator of a factory, mill, or workshop where machinery is used to provide and maintain reasonable safeguards for all saws. *McIntosh v. Sawmill Phoenix*, 94 Pac. 930, 931, 49 Wash. 152.

The "guard" or "spreader," the negligent removal of which from a ripsaw was alleged as a cause of action, was used to prevent the danger every time the saw ripped a piece of timber of the piece flying back and striking some one. It stood a short distance beyond the saw and projected against the edge of the saw catching the piece of timber, if the "off bearer" helping to operate the machine failed to catch it. Such spreader or guard was

a necessary part of the ripsaw, and it was negligence to run the machine without it. *Merritt v. Victoria Lumber Co.*, 35 South. 497, 500, 111 La. 159.

A "guard" is a brass rail that goes along over the brass plate under which clothes are pushed in a laundry mangle, designed to protect workmen in operating the machine. *Coulter v. Union Laundry Co.*, 87 Pac. 973, 974, 34 Mont. 590.

## GUARD WIRE

A "guard wire" is an appliance in common use for the purpose of preventing contact between trolley wires and other wires. *Mahan v. Newton & B. St. Ry. Co.*, 75 N. E. 59, 61, 189 Mass. 1.

"Guard wires," as they are called, are wires placed directly above the top wires of telephone or telegraph or other system of electric wires, extended from pole to pole to secure protection against contact by means of sagging between the wires protected and those of some other system. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 65 N. E. 329, 340, 199 Ill. 324.

## GUARDIAN

See Natural Guardian; Quasi Guardian. Discharge of guardian, see Discharge. Voidable appointment, see Voidable.

Under the statute prohibiting a saloon keeper from permitting a minor to visit or remain in the saloon unless accompanied by his father, mother, or guardian, a "guardian" is one occupying under the law that relation to the minor which the law creates between parent and child, or which is created by some order of court, and hence the leader and instructor of a band was not the guardian of minor members thereof. *State v. Johnson*, 121 N. W. 785, 787, 23 S. D. 298, 22 L. R. A. (N. S.) 1007.

Under Pen. Code, § 290, making it a misdemeanor to admit children under 16 years of age to, or allow them to remain in, any place of entertainment injurious to health or morals, etc., unless accompanied by parent or guardian, the word "guardian" does not mean a guardian appointed by the court; and if children be sent or taken to a place of entertainment by a person other than their parents or legal guardian, such as elder brother or sister, or a neighbor or friend, he or she is their guardian for the time being within the statute, unless excluded for some reason by law. *People v. Samwick*, 111 N. Y. Supp. 11, 12, 127 App. Div. 209.

Where a will designates persons as "joint guardians of the estate of my three children," the term "guardian" has a definite signification, and the powers and duties of that functionary are regulated by statute, and he is subject to control and investigation by the surrogate. The functions which



these persons would exercise pursuant to this will would be entirely those of guardianship, and their authority would end as to each child with his minority. There is nothing to indicate that the testator used the word "guardians" with any other than the ordinary signification. There is no attempt to create trustees. *Kellogg v. Burdick*, 96 N. Y. Supp. 965, 967, 110 App. Div. 472.

Gen. Laws 1896, c. 82, § 11, provides that an insane person may be removed to and placed in the Butler Hospital by their parents or parent or guardians, if any there be, and if not, by their relatives and friends on a certificate from two practicing physicians in good standing, etc. Held, that the term "guardian" included those of foreign, as well as domestic, appointment, so that a nonresident insane person might be properly confined in such hospital on the request of his nonresident guardian. *In re Crosswell's Petition*, 66 Atl. 55, 56, 28 R. I. 137, 13 Ann. Cas. 874.

**As owner**

See Owner.

**As trustee of express trust**

See Trustee of Express Trust.

**GUARDIAN AD LITEM**

Guardian including, see Guardian.

The guardian and next friend in conducting a civil action are a "species of attorney, whose duty it is to bring the rights of the infant to the notice of the court," and the authority of each is limited to the proceeding in which he is appointed. *Williams v. Cleaveland*, 56 Atl. 850, 853, 76 Conn. 426.

"There is no substantial difference between a guardian ad litem and a prochein ami. The former denomination is usually applied when the representation is for an infant defendant, and the latter where it is for an infant plaintiff." *Vaile v. Sprague*, 78 S. W. 609, 610, 179 Mo. 393.

"A 'guardian ad litem' is a special guardian appointed solely for the purpose of carrying on litigation and preserving the interests of his ward in matters pending before the courts. He has no right to the possession of real property of his ward or to the rents and profits therefrom. He gives no bond and has only special duties. For the purpose of taking care of the estate a general guardian should be appointed." *In re Robertson's Estate*, 125 N. W. 1093, 1095, 86 Neb. 490.

**GUARDIAN BY NATURE**

Parents are guardians by nature and for nurture of all children born to them in lawful wedlock, under the laws of the state. *In re Wright*, 112 N. W. 311, 312, 79 Neb. 10.

**GUARDIAN DE SON TORT**

The term "quasi guardian" or guardian de son tort has been applied to persons who,

without legal appointment or qualification, assume the functions of a guardian by exercising control over the person, or estate, or both, of a minor. He is subject to all the responsibilities that attach to a legally constituted guardian or trustee. If he takes advantage of the confidence reposed, or of the means afforded him by such relation, by buying up outstanding debts of the estate, for instance, at an under rate, and using them with or without the sanction of a judicial proceeding to acquire in his own name the valuable lands of the infant wards, he is guilty of fraud and breach of trust entitling the infants to the interposition of a court of equity. He who arrogates to himself functions of a guardian will be held to stricter account in chancery than a regularly appointed guardian. So the agent or husband of an administratrix who assumes control and management of the estate, and uses the trust funds for his private purposes, makes himself liable to the infants as a trustee de son tort. *Zeldeman v. Molasky*, 94 S. W. 754, 756, 118 Mo. App. 106 (quoting and adopting the definition in *Werner*, Am. Law Guard. [1897] p. 76. Citing *Griames v. Wilson* [Ind.] 4 Blackf. 331; *Hanna v. Spott's Heirs*, 5 B. Mon. [44 Ky.] 362, 43 Am. Dec. 132; *Johnson v. Smith's Adm'r*, 27 Mo. 591).

**GUARDIAN OF THE PERSON**

"A guardian of the person" is one who has been lawfully invested with the care of the person of an infant whose father is dead, and is considered as standing in the place of the father. *Jordan v. Smith*, 63 S. E. 595, 596, 5 Ga. App. 559.

**GUARDIAN'S FEES**

As costs, see Costs.

**GUARDIAN'S SALE**

As judicial sale, see Judicial Sale.

**GUARDIANSHIP**

"Guardianship" is a trust which is dual in its nature involving two distinct and separate functions, viz., the control of the person of the ward and the management of his estate. *United States v. Hall*, 171 Fed. 214, 218.

Under Act June 28, 1906, c. 3572, 34 Stat. 539, relating to the Osage Indians, an allottee of that tribe who has not received a certificate of competency as therein provided is in charge of a superintendent, and is an Indian over whom the Interior Department exercises "guardianship" within the meaning of Act Jan. 30, 1897, c. 109, 29 Stat. 506, which makes it a criminal offense to sell or give liquor to such an Indian. *Mosier v. United States*, 198 Fed. 54, 56, 117 C. C. A. 162.

**GUESS**

"Suppose" and "guess" are frequently used to express one's opinion, though more

apt to express conjecture. *Council v. Mayhew*, 55 South, 314, 317, 172 Ala. 295.

The word "guess" technically implies a doubt; but, where a juror on his examination used such expression merely as a colloquialism, it was not to be understood in its literal or technical sense. *Croft v. Chicago, R. I. & P. Ry. Co.*, 109 N. W. 723, 726, 134 Iowa, 411.

The term "guess" imports uncertainty. It is at best a conjecture, a random judgment, and a guesser is one who gives an opinion without means of knowing. *Stevens v. Cincinnati Times-Star Co.*, 73 N. E. 1058, 1061, 72 Ohio St. 112, 106 Am. St. Rep. 536.

### GUESSING CONTEST

As lottery, see Lottery.

## GUEST

See, also, Lodger.

A guest is a traveler or transient comer who puts up at an inn for a lawful purpose to receive its customary lodging and entertainment. *De Lapp v. Van Closter*, 118 S. W. 120, 122, 136 Mo. App. 475 (quoting Words and Phrases).

The universal rule seems to be that one cannot be the "guest" of a hotel unless he procure some accommodation. He must procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper before he becomes a guest. *Tulane Hotel Co. v. Holohan*, 79 S. W. 113, 114, 112 Tenn. 214, 105 Am. St. Rep. 930, 2 Ann. Cas. 345.

The word "guests" in Acts 1899, c. 178, requiring every innkeeper or proprietor of every hotel over two stories in height to provide every lodging room above the second story used for the accommodation of "guests" a rope or rope ladder for the escape of the lodgers therein in case of fire, etc., includes a regular boarder. *Adams v. Cumberland Inn Co.*, 101 S. W. 428, 429, 117 Tenn. 470.

### Boarder distinguished

See Boarder.

### Keeping horse sufficient

Where plaintiff did not stop or intend stopping at the defendant's inn, but stayed with a son-in-law, leaving his horse in charge of the defendant's hostler, he was not a "guest" of the inn, and they were not liable for the horse on its being stolen. *Healey v. Gray*, 68 Me. 489, 490, 28 Am. Rep. 80.

An innkeeper provided a lot and stables in which guests were permitted to keep their horses without charge, but charged for feed when furnished. Plaintiff drove into the lot, unhitched his mule, and placed it in a stable pointed out by a boy in charge, and left the premises without entering the inn or having any agreement with the keeper. He stated to the boy that he would return and feed his

mule, and testified that he intended to take dinner at the inn with another person who accompanied him and who dined there, but that he was prevented from doing so by injury to the mule. Held, that plaintiff was not a guest of the inn so as to render the keeper responsible for the injury to the mule. *Brewer v. Carswell*, 64 S. E. 674, 676, 132 Ga. 563, 23 L. R. A. (N. S.) 1107, 131 Am. St. Rep. 216, 16 Ann. Cas. 936.

### Traveler

A traveler, who visits an inn to avail himself of any sort of entertainment offered, and is received by the innkeeper for the purpose of entertaining him, is a "guest," even though he does not register. *Hill v. Memphis Hotel Co.*, 136 S. W. 997, 998, 124 Tenn. 376 (citing 22 Cyc. p. 1075; *Overstreet v. Moser*, 88 Mo. App. 72; *Walling v. Porter*, 35 Conn. 183; *Pullman Palace Car Co. v. Lowe*, 44 N. W. 226, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325; *Wintermute v. Clark* [N. Y.] 5 Sandf. 247).

A "guest" is a transient who resorts to and is received at an inn for the purpose of obtaining the accommodations which it purports to afford. In some instances a "guest" is defined as a traveler or wayfarer. Any one away from home receiving the accommodations of an inn as a traveler is a "guest," and entitled to hold the innkeeper responsible as such. A "guest" is a traveler or transient comer who puts up at an inn for a lawful purpose to receive its customary lodging and entertainment. A "guest" is a traveler or wayfarer who puts up at an inn. It is said that it is not now deemed essential that a person should have come from a distance to constitute a guest. Distance is not material, and a townsman or neighbor may be a traveler, and therefore a guest, as well as he who came from a foreign country. *De Lapp v. Van Closter*, 118 S. W. 120, 121, 122, 136 Mo. App. 475 (quoting and adopting *Overstreet v. Moser*, 88 Mo. App. 72; *Curtis v. Murphy*, 22 N. W. 825, 63 Wis. 4, 53 Am. Rep. 242; citing 8 Words and Phrases).

### GUEST (In Liquor Law)

Casual callers at a hotel to whom sandwiches are incidentally served with drinks are not "guests" within the meaning of Liquor Tax Law, § 31, subd. 2, providing that the keeper of a hotel may sell liquor to the guests of such hotel with their meals, in that they do not resort to the hotel for the purpose of obtaining a meal. In re *Cullinan*, 83 N. Y. Supp. 581, 582, 41 Misc. Rep. 3.

Where witness went to defendant's house to order milk, and while there was invited by defendant to sit at his table and drink whisky with defendant and another, without demand for payment, it cannot be said as a matter of law that witness was not a "guest," defined to be a visitor or person received or entertained in one's house or at

one's table without pay, so that the furnishing of liquor to him under such circumstances was violative of the local option law. *People v. Hancock*, 132 N. W. 443, 444, 166 Mich. 654.

Within the provision of the liquor tax law against the sale of liquor on Sunday, but excepting sales by the keeper of a hotel to his guests with their meals, or in their rooms, and defining "guest" as a person who, during the hours when meals are regularly served therein, resorts to a hotel for the purpose of obtaining, and actually orders and obtains, at such time, and in good faith, a meal, the test of who is a "guest" is his intent and desire to procure a meal, and it is essential that the guest should evince, at least apparently, a desire to partake of a meal. An act of a landlord in thrusting before a person, who has ordered only a drink, an unwanted, unordered, unpaid for, and uneaten sandwich, does not meet the requirement of the statute. *Clement v. Beers*, 110 N. Y. Supp. 99, 103, 126 App. Div. 1.

In a statute making it unlawful to sell liquor on Sunday, but providing that the holder of a tax certificate who is the keeper of a hotel may sell liquor to the guests with their meals, "hotel" is defined as a building regularly used as such for the feeding and lodging of guests, and "guest" is defined as one who in good faith, during the hours when meals are served, resorts to the hotel for the purpose of obtaining and actually orders and obtains, a meal. On a petition for the revocation of a liquor license, it was admitted that the premises conformed to the law with respect to the requirements of a hotel, but it was shown that on a Sunday agents of the excise department entered a sitting room at the rear of the barroom, and found the room furnished with tables, and people sitting about at tables ordering and being served with drinks, that the agents purchased sandwiches, which were served, and that they then purchased drinks. It appeared that that there were no knives or forks on the tables, and none of the usual appliances for a meal. Held, that the facts showed a violation of the statute. *Clement v. Martin*, 102 N. Y. Supp. 37, 38, 117 App. Div. 5.

In proceedings to cancel a liquor tax certificate because of sales made on Sunday, where respondent attempts to show sales made in a hotel, he must show sales to "guests" within Liquor Tax Law, § 31k, subd. 2, defining a "guest" as a person who, when meals are regularly served, resorts to the hotel and orders a meal in good faith, and the service of a sandwich costing five cents to a casual visitor who orders liquor does not constitute service to a "guest." In *re Cullinan*, 92 N. Y. Supp. 802, 803, 45 Misc. Rep. 497.

Under Liquor Tax Law, § 31, defining a hotel as a building regularly kept open for

the accommodation of all able to pay for their entertainment and who, without any stipulated engagement as to the duration of their stay, or as to compensation, are supplied with meals, lodgings, and attention, and in which the only "other dwellers" are the family and servants of the hotel keeper, where a building contained rooms of the size and number required by the statute which were kept open and free for the accommodation of transient "guests" who might apply, persons who occupied some of such rooms continuously at a stipulated weekly or monthly rental should be regarded as "guests" and not "other dwellers" within such statute. *Cullinan v. Clark*, 93 N. Y. Supp. 256, 257, 46 Misc. Rep. 188.

Under Liquor Tax Law, § 31, excepting from the prohibition against the sale of liquor on Sundays sales by hotel keepers to guests, and defining a guest of a hotel as a person who, during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time in good faith, a meal therein, in order to be a "guest" a person must resort to a place for the primary purpose of obtaining in good faith a meal, which purpose, when effectuated by the service on the part of the hotel keeper of such meal, draws with it as an incidental and secondary matter the right to procure and serve liquors. Where the evidence showed that the liquor was sold on Sunday to persons who announced as their essential purpose the desire to procure liquor, and did not desire a meal, a verdict for the hotel keeper was against the weight of evidence, though there was evidence that his waiters insisted on serving with the liquor some trifling refreshments, which were carried away untasted. *Cullinan v. O'Connor*, 91 N. Y. Supp. 628, 630, 100 App. Div. 142.

## GUIDE LINES

See Snub Ropes.

## GUILTY

See Plea of Guilty.

A verdict of "guilty" implies a finding upon every element essential to constitute the offense as charged, but a verdict which convicts of but one of several essential elements of an offense is insufficient to sustain a conviction for the offense charged. *Kimball v. Territory*, 115 Pac. 70, 71, 13 Ariz. 310.

Under a statute requiring the jury in a bastardy proceeding to find whether accused be the father of such illegitimate child, a verdict of "guilty" authorizes a record that defendant was guilty, and the putative father of the child, since the verdict of "guilty" could mean nothing else than that he was guilty of the accusation. *Gaskill v.*

Overseer of Poor of Downe Tp., 36 N. J. Law, 356, 357.

The word "guilty," in a verdict finding defendant "guilty" of murder in the first degree, was a self-corrective clerical error for "guilty." *Webb v. State*, 34 South. 1011, 138 Ala. 53.

### GUILTY AS CHARGED

Where a charge in an information respecting a threat to accuse another of a crime or offense was taken from the jury, and the case submitted upon another charge in the information respecting a threat to do injury to the person, property, business, or calling of another, a verdict finding accused "guilty as charged" must be construed as a conviction only of the offense submitted, the term "guilty as charged" meaning guilty as charged in the information under the court's instructions. *State v. Schultz*, 116 N. W. 259, 571, 135 Wis. 644.

An instruction, on a prosecution under an indictment charging burglary and larceny, that if the jury believe defendants alone, or with C., broke and entered the store of H., and that such breaking and entering was without the consent of H., and defendants, when the light was turned on, were in the act of stealing, they are guilty as charged regardless of who actually broke open the store, and of the fact that H. had agreed to pay C. for assisting in the detection and apprehension of defendants, is not erroneous, though the term "guilty as charged" means guilty of burglary, on the ground that the breaking and entering by C. was with the consent of H.; there not only being evidence that H. did not give his consent thereto, but such consent being expressly negated by the instruction. *Dees v. State*, 42 South. 605, 606, 89 Miss. 754.

A verdict of "guilty as charged in the indictment," which charged grand larceny, fails to specify the degree as grand or petit larceny. *McLane v. Territory*, 71 Pac. 938, 8 Ariz. 150.

### GUILTY CONNECTION

The words "guilty connection" have no definite meaning as descriptive of any particular offense. So a case stating that evidence was introduced to show a guilty connection between defendant charged with murder and his codefendant, the wife of deceased, does not show that any conspiracy was proved so as to render admissible evidence of her acts and declarations, showing merely her feelings toward her husband. *State v. George*, 29 N. C. 321, 324.

### GUILTY OF ADULTERY

Where a husband had committed adultery and his offense had been condoned, he was not "guilty of adultery" within the meaning of a statute providing that if, in a suit for divorce for adultery, it appears that

both parties have been guilty of adultery, no divorce shall be decreed. *Storms v. Storms*, 64 Atl. 700, 701, 71 N. J. Eq. 549.

### GUILTY PARTY

The mere fact that a woman's prior undissolved marriage renders her subsequent marriage void does not make her "the guilty party" in a proceeding to nullify the marriage, within Pub. St. 1901, c. 175, § 13, authorizing an order against the guilty party providing for the support of a child. *Bickford v. Bickford*, 69 Atl. 579, 580, 74 N. H. 448.

A decree granting a wife a divorce for the husband's cruel and inhuman treatment concludes him as the "guilty party" within Code, § 3181, which provides that a divorce decree shall forfeit all rights of the guilty party under the marriage. *Hamilton v. McNeill*, 129 N. W. 480, 481, 150 Iowa, 470, Ann. Cas. 1912D, 604.

### GUINEA FOWL

As poultry, see Poultry.

### GULCH

As water course, see Water Course.

### GUM

See In the Gum.

In an indictment for murder charging the killing to have been done with a "gum," the word "gum" cannot mean anything else than "gun," as there is no such thing as a "gum" with which a man could be shot. *Simmons v. State*, 48 South. 606, 607, 158 Ala. 8.

### GUMBO

"Gumbo" is a character of earth which holds water for a great length of time. *Jones & Jones v. Coofey Lake Club*, 98 S. W. 82, 83, 122 Mo. App. 113.

### GUN

See Parts or Fittings of Guns.

The word "gun" is a generic term and includes pistol. According to Webster's Dictionary, a "gun" is "any firearm for throwing projectiles by the explosion of gunpowder." In common usage the words "pistol" and "gun" are used interchangeably. *State v. Barrington*, 95 S. W. 235, 263, 198 Mo. 23.

As deadly weapon

See Deadly Weapon.

### GUN COTTON

The explosive nitrate of cellulose made by digesting clean cotton in a mixture of nitric and sulphuric acid is commonly known

as "gun cotton." *Wolff v. E. I. Du Pont de Nemours & Co.*, 122 Fed. 944, 945.

### **GUNPOWDER**

Rev. St. §§ 4475, 4476, relating to the packing and shipment of "gunpowder," include metallic cartridges containing gunpowder. *United States v. Giordani*, 163 Fed. 773, 778.

### **GUNSHOT WOUNDS**

Where an indictment charged accused with inflicting a mortal wound on deceased "with a revolving pistol," and later charged that the wounds were "gunshot wounds," it was not fatally defective for indefiniteness and uncertainty; the term "gunshot wounds" being broad enough to include wounds made by a "pistol." *State v. Barrington*, 95 S. W. 235, 263, 198 Mo. 23.

### **GUT**

Under Code 1904, § 1339, providing that the limits of lands lying on the shores of the sea, and the rights and privileges of the owners thereof, shall extend to low-tide mark, but no farther, the limits of marsh lying below high tide, to which the owner of the shore land is entitled, do not stop with a "gut" or channel which runs from a bay up across the marsh, in a direction more or less

parallel with the shore, if such channel ebbs dry at ordinary low-water mark, but the part of the marsh to which he is entitled extends across such channel to ordinary low tide. *Whealton & Wisherd v. Doughty*, 72 S. E. 112, 114, 112 Va. 649.

### **GUTTER**

The structures common to all highways for collecting surface water and keeping it out of the traveled part of the road are usually called "ditches" or "gutters" and are not sluiceways, within the meaning of a statute making towns liable for damages to any person traveling on a sluiceway by reason of any defect therein. *Drew v. Town of Bow*, 65 Atl. 831, 74 N. H. 147.

#### **As paving**

See Pave—Pavement.

### **GYMNASTIC ASSOCIATION**

As educational institution, see Educational Institution.

### **GYPSUM**

As mineral, see Mineral.

### **GYPSUM LAND**

As mineral land, see Mineral Land.

## H

## HABEAS CORPUS

The writ of habeas corpus is a common-law writ of ancient origin designed as a speedy method of affording a judicial inquiry into the course of any alleged unlawful custody of an individual or any alleged unlawful actual deprivation of personal liberty. *Porter v. Porter*, 53 South. 546, 547, 60 Fla. 407, Ann. Cas. 1912C, 867.

Habeas corpus is for the benefit of those unlawfully restrained of their liberties, and this means physical, and not moral, restraint. *In re Dykes*, 74 Pac. 506, 507, 13 Okl. 339.

"Habeas corpus" is a writ whose purpose is to procure liberation of those imprisoned, without sufficient or proper cause; it being the great prerogative writ. *Ex parte Johnson*, 98 Pac. 461, 464, 1 Okl. Cr. 414.

The "writ of habeas corpus" is used to institute a proceeding for the vindication of the right to personal liberty. *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 500, 507, 127 Wis. 468 (citing *State ex rel. Durner v. Huegin*, 85 N. W. 1046, 110 Wis. 189, 222, 62 L. R. A. 700).

"The writ of 'habeas corpus' is the remedy which the law gives for the enforcement of the civil right of personal liberty." *Winovich v. Emery*, 93 Pac. 988, 989, 33 Utah, 345 (quoting and adopting definition of Chief Justice Waite in *Ex parte Tom Tong*, 2 Sup. Ct. 872, 108 U. S. 559, 27 L. Ed. 826).

The purpose of proceedings in "habeas corpus" is to determine whether or not the person instituting them is illegally restrained of his liberty. *In re Moyer*, 85 Pac. 190, 192, 35 Colo. 159, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189.

A "writ of habeas corpus" "is the process provided by law for deliverance from illegal confinement. \* \* \* In regard to extradition, this writ is indicated by the law itself as the special remedy available to the citizen against the misuse and abuse of that proceeding. \* \* \* The law provides for no hearing to the alleged fugitive before the executives of the two states, and seems to recognize the fact that he has no redress except in this writ of high privilege—this writ of habeas corpus." *Barriere v. State*, 39 South. 55, 56, 142 Ala. 72 (quoting and adopting definition in *Ex parte Slauson*, 73 Fed. 667).

The writ of "habeas corpus" is a writ of right and is sometimes issued upon very informal application. There is no such practice as that of moving to quash such writ because of formal defects in the application. The inquiry in such cases is not as to the technical formality of a showing made to the court for the issuance of the writ but as to the legality of the alleged detention of

the prisoner. In such inquiry, the parties are not confined to the matter specifically set forth in the application for the writ, but may go outside of these and inquire into any matter that affects the legality of a detention. *Crooms v. Schad*, 40 South. 497, 498, 51 Fla. 168.

The writ of "habeas corpus" is a summary proceeding to secure personal liberty. It strikes at unlawful imprisonment or restraint of the person by state or citizen, and by the most direct method known to the law learns the truth and applies the remedy. It tolerates no delay except of necessity, and is hindered by no obstacle except by the limits set by the law of its creation. *People ex rel. Duryee v. Duryee*, 81 N. E. 313, 314, 188 N. Y. 440.

"The writ of 'habeas corpus,' which has been denominated 'the great writ of liberty,' is not only to secure the right of personal liberty to one who has been illegally deprived thereof, but also to insure a speedy hearing and determination of the questions involved and as to the right of a petitioner to be released from imprisonment." Exceptions do not lie to the discharge of a prisoner upon habeas corpus. *Stuart v. Smith*, 644 Atl. 663, 664, 101 Me. 397.

The object of the writ of "habeas corpus" is to release a citizen from any illegal restraint of his liberty, and it is the proper remedy to secure the release of one alleged to be illegally restrained under a writ of ne exeat, where it appears a petitioner was in custody of the surety on his bail bond. *Ex parte Messervy*, 61 S. E. 445, 446, 80 S. C. 285.

One under arrest, but at large on bail, is entitled to a writ of "habeas corpus" the same as if the arrest was accompanied by actual imprisonment: the purpose of the writ being to test the right of the court or other body issuing the process to detain the person for any purpose by restraining him of his right to go without question. *Mackenzie v. Barrett*, 141 Fed. 964, 966, 73 C. C. A. 280, 5 Ann. Cas. 551.

#### As appellate in nature

The writ of "habeas corpus" is not endowed with the functions of a writ of error or other proceeding for the review and correction of errors. *Hovey v. Sheffner*, 93 Pac. 305, 308, 16 Wyo. 254, 15 L. R. A. (N. S.) 227, 125 Am. St. Rep. 1037, 15 Ann. Cas. 318 (citing *Kingen v. Kelley*, 28 Pac. 36, 3 Wyo. 566, 15 L. R. A. 177; *In re McDonald*, 33 Pac. 18, 4 Wyo. 150; *Miskimmins v. Shaver*, 58 Pac. 411, 8 Wyo. 408, 49 L. R. A. 831; *Fisher v. McDaniel*, 64 Pac. 1056, 9 Wyo. 457, 87 Am. St. Rep. 971; *Younger v. Hehn*, 75 Pac. 443, 12 Wyo. 289, 109 Am. St. Rep. 986; *Holli-*

baugh v. Hehn, 13 Wyo. 269, 79 Pac. 1044); Felts v. Murphy, 26 Sup. Ct. 366, 368, 201 U. S. 123, 50 L. Ed. 689 (citing Ex parte Bigelow, 5 Sup. Ct. 542, 113 U. S. 328, 28 L. Ed. 1005; Ex parte Lennon, 17 Sup. Ct. 658, 166 U. S. 548, 552, 41 L. Ed. 1110, 1112; In re Eckart, 17 Sup. Ct. 638, 166 U. S. 481, 41 L. Ed. 1085).

"The writ of habeas corpus is a writ of liberty and not of error, and it will issue, not for the purpose of correcting errors in a proceeding of a court of competent jurisdiction, but rather for the purpose of determining the legality of the restraint." In re McMonies, 106 N. W. 456, 75 Neb. 702.

A writ of habeas corpus is available only to determine the question of jurisdiction and power of the custodian to hold petitioner against his will and cannot be utilized as a revisory remedy. Kroschel v. Munkers, 179 Fed. 961, 963.

The writ of "habeas corpus" cannot be used to perform the office of a writ of error or appeal, and should be limited to cases in which the judgment and sentence of the court attacked is clearly void. Ex parte Justus, 104 Pac. 933, 935, 3 Okl. Cr. 111, 25 L. R. A. (N. S.) 483.

The writ of "habeas corpus" is not designed to operate as a writ of error or certiorari, dealing, not with irregularities or errors which render the proceeding voidable, but only such as render it absolutely void. Ex parte Patman, 95 Pac. 622, 624, 1 Okl. Cr. 141 (quoting Perry v. State, 41 Tex. 489).

The writ of "habeas corpus" is not in the nature of, nor is it to be used as a substitute for, proceedings in error. A finding or decision of the inferior court, no matter how erroneous, if it does not affect its jurisdiction, is not subject to attack in this collateral proceeding. The office of the writ is to determine the legality of the particular imprisonment, and the facts to be considered in determining that question are jurisdictional facts. Younger v. Hehn, 75 Pac. 443, 444, 12 Wyo. 289, 109 Am. St. Rep. 986.

"Habeas corpus" cannot operate as an appeal or writ of error, and the examination into the imprisonment of a party under the sentence or order of a court is to extend only to the jurisdiction and authority to render the judgment." In re Clark, 78 Pac. 475, 476, 28 Utah, 268.

The writ of "habeas corpus" is not for the purpose of reviewing errors, and is only authorized in those cases where the court has acted without jurisdiction. People ex rel. Freeman v. Murphy, 72 N. E. 902, 904, 212 Ill. 584.

A writ of "habeas corpus" cannot be made the basis of a review of a judgment of a court of competent jurisdiction, where proceedings were had under a constitutional statute giving the court the authority to ex-

amine into the charges and to convict or acquit accused when the proceedings showed no attempt to exert the jurisdiction of the court in excess of its authority; the proceedings under the writ being confined to examination of the record with a view of determining whether the person was restrained of his liberty or is detained without warrant of law. Harlan v. McGourin, 31 Sup. Ct. 44, 46, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849.

"The writ of 'habeas corpus' is not the equivalent of an appeal or writ of error. It is not a proceeding to correct errors which may have occurred in a trial of the case below. It is an attack directly upon the validity of the judgment, and, as has been frequently said, it cannot be transformed into a writ of error." The silence of the Circuit Courts of Appeals (Act March 3, 1891 [26 Stat. 826, c. 517]), on the subject of "habeas corpus," prevents a Circuit Court of Appeals from issuing a writ of "habeas corpus" as an original and independent proceeding, although, in view of section 12 of that act, giving such courts the powers specified in Rev. St. § 716, it may issue such a writ in cases when necessary for the exercise of a jurisdiction already existing. Whitney v. Dick, 26 Sup. Ct. 584, 586, 202 U. S. 132, 50 L. Ed. 963.

A writ of "habeas corpus" cannot perform the function of a writ of error. Federal courts have no power to interfere by "habeas corpus" with the imprisonment of a person under a judgment of conviction of a crime in a state court, if that court had jurisdiction to try the case, and jurisdiction over the person of the accused, and did not lose such jurisdiction during the trial. The federal courts will not release, on habeas corpus, a person convicted of murder in the first degree in a state court, on the theory that that court lost its jurisdiction to proceed in the trial because it charged the jury, in accordance with the admission of counsel for the accused, that the only question for their consideration was the degree of murder of which the accused was guilty. Valentina v. Mercer, 26 Sup. Ct. 368, 370, 201 U. S. 131, 50 L. Ed. 693.

A proceeding by "habeas corpus" is a collateral attack on a judgment committing petitioner to custody, and cannot succeed unless the judgment is void for want of jurisdiction; the writ being unavailable for the correction of errors, no matter how gross. Tullis v. Shaw, 83 N. E. 376, 377, 169 Ind. 662.

The writ of "habeas corpus" will not issue unless the court under whose warrant petitioner is held is without jurisdiction, and it cannot be used merely to correct errors. Ordinarily the writ will not be granted when there is a remedy by writ of error or appeal, yet, in rare and exceptional cases, it may be issued, although such remedy exists. Riggin v. United States, 26 Sup. Ct. 147, 148, 199 U. S. 547, 50 L. Ed. 303.

**As cause**

See Cause (In Practice).

**As civil or criminal proceeding**

"Habeas corpus" proceeding is not intended to be summary and is not a "criminal proceeding" permitting admission to bail pending an appeal from the order dismissing the petition. *Orr v. Jackson*, 128 N. W. 958, 960, 149 Iowa, 641.

"Habeas corpus" proceedings are "civil" and not "criminal." *Winnovich v. Emery*, 93 Pac. 988, 989, 33 Utah, 345.

A proceeding in "habeas corpus" is in its nature civil. *In re Jewett*, 77 Pac. 567, 569, 69 Kan. 830.

A "habeas corpus" proceeding is a civil proceeding, and an order for the discharge of the prisoner made therein is appealable. *Garfinkle v. Sullivan*, 80 Pac. 188, 189, 37 Wash. 650.

The term "civil action" includes a proceeding in "habeas corpus" to determine the legality of an imprisonment or to determine the custody of an infant. *Martin v. District Court of Second Judicial Dist.*, 86 Pac. 82, 83, 37 Colo. 110, 119 Am. St. Rep. 262.

**As criminal case or cause**

See Criminal Case or Cause.

**Determination as to custody of children**

The object of the writ of "habeas corpus" is to free a person from illegal restraint, and, when there is no such restraint, the writ cannot be used to decide a contest as to the right to the custody of a child, except when the contest is between the parents of the child. As stated by Chancellor Kent in *Wollstonecraft's Case* (N. Y.) 4 Johns. Ch. 80, the sole function of the writ, respecting the custody of a child, is "to release the infant from all improper restraint, and not to try, in this summary way, the question of guardianship, or to deliver the infant over to the custody of another; that it is only to deliver the party from illegal restraint, and, if the infant is competent to form and declare an election, then to allow the infant to go where it pleases, and, if too young to form a judgment, then the court is to exercise its judgment for the infant." *In re Parker*, 56 S. E. 878, 879, 144 N. C. 170 (citing *Revisal* 1905, § 1853; *State v. Cheeseman*, 5 N. J. Law, 445; *State v. Clover*, 16 N. J. Law, 419; *Foster v. Alston*, 7 Miss. 406).

**Examination of jurisdictional questions**

A writ of "habeas corpus" only reaches jurisdictional error; it cannot properly be made to perform the office of a writ of error. By the common law, if the court in any given case has authority, under any circumstances, to render judgment imprisoning the accused, the error in reaching the one pronounced is judicial, remedial by writ of er-

ror; if the court has no such authority, the error is jurisdictional, remedial by writ of habeas corpus. In case a judgment in any criminal action is grounded on an unconstitutional law, it has no legitimate basis and is void; hence a person imprisoned thereunder may obtain his release by writ of habeas corpus. *Servonitz v. State*, 113 N. W. 277, 278, 133 Wis. 231, 126 Am. St. Rep. 955.

**As special proceeding**

See Special Proceeding.

**HABEAS CORPUS AD SUBJICIENDUM**

In England the writ of "habeas corpus ad subjiciendum" was one of the high prerogative writs by which English courts acquired jurisdiction of a person actually imprisoned or deprived of his liberty. *Clifford v. Williams*, 131 Fed. 100, 101.

**HABEAS CORPUS AD TESTIFICANDUM**

A writ of "habeas corpus ad testificandum" is not the high prerogative writ of habeas corpus, but is merely the ancient common-law precept to bring a prisoner into court to testify, and is the process of the court from which it is issued, though it emanates from a judge in chambers. *In re Thaw*, 166 Fed. 71, 75, 91 C. C. A. 657.

**HABENDUM**

The purpose of a "habendum" is to define the estate granted; and, if the whole instrument shows that it was intended by the habendum clause to restrict or enlarge the estate conveyed by the granting clause, the habendum controls. *Pack v. Whitaker*, 65 S. E. 496, 498, 110 Va. 122.

**As contradicting or defeating estate granted**

The office of the "habendum" in a deed is to lessen, enlarge, explain, or qualify the premises, but not to contradict or be repugnant to the estate granted therein. *Bryan v. Eason*, 61 S. E. 71, 73, 147 N. C. 284.

In Alabama the granting clause prevails over the recitals or "habendum" clause of a deed in case of conflict as to the estate conveyed. *Dickson v. Wildman*, 183 Fed. 398, 403, 105 C. C. A. 618; *Id.*, 175 Fed. 580.

**As enlarging subject-matter of grant**

It is the office of the "habendum" in a deed to sometimes enlarge the estate granted, but never to extend the subject-matter of the grant, and nothing can be limited therein which has not been given in the premises; because the premises being the part of the deed in which the thing is granted, it follows that the "habendum," which is only used for limiting the certainty of the estate, cannot increase the gift, for in that case the grantee would in fact take nothing which was never given to him. A habendum clause in a deed reading, "To have and to hold the same



\* \* \* and all the estate \* \* \* either now or which may hereafter be acquired, or the said grantee or his heirs and assigns," does not convey after-acquired property, but merely confirms in the grantee any estate in the land specifically granted which the grantor might thereafter acquire. *Bessemer Irrigating Ditch Co. v. Woolley*, 76 Pac. 1053, 1055, 32 Colo. 437, 105 Am. St. Rep. 91 (citing *Manning v. Smith*, 6 Conn. 289; 2 Greenl. Cruise, Real Prop. 349).

## HABIT

See Intemperate Habits.

The "habit" of a person contemplates a course of conduct which is customary, and shows that he has acquired a tendency to pursue that course of conduct from frequent repetitions of the same acts, and does not contemplate occasional or exceptional acts. *Metropolitan Life Ins. Co. v. Shane*, 135 S. W. 836, 838, 98 Ark. 132.

### Single or occasional acts

"An occasional excess in the use of intoxicating liquor does not constitute a 'habit' or make a man intemperate, within the meaning of a policy of insurance. \* \* \* The 'habit' of using intoxicating liquor to an excess is the result of indulging a natural or acquired appetite by continued use until it becomes a customary practice. This 'habit' may manifest itself by delayed or periodical intoxication or drunkenness. When the general habits of a man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits." *Puls v. Grand Lodge A. O. U. W. of North Dakota*, 102 N. W. 165, 166, 13 N. D. 559 (quoting and adopting definition in *Bac. Ben. Soc. § 231*). See, also, *Provident Sav. Life Assur. Soc. v. Exchange Bank of Macon*, 126 Fed. 360, 361, 61 C. C. A. 310.

## HABITATION

Change of habitation, see Change.

In the law of process and attachment "residence" and "habitation" are generally regarded as synonymous. A "resident" and an "inhabitant" mean the same thing. A person resident is defined to be "one dwelling or having his abode in any place"; an inhabitant, "one that resides in a place." *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 259, 54 W. Va. 32 (citing *Drake, Attachment*).

## HABITUAL

The use in the court's charge of the words "habitual" and "habitually," to qualify the alleged conduct of the husband in dealing with his wife's land, did not require the husband's acts to be so often repeated as to form a habit, but they meant that, if the wife

ratified all contracts assumed to have been made by the husband, his agency might be implied. *Marks v. Herren*, 83 Pac. 355, 356, 47 Or. 603.

## HABITUAL ASSOCIATION

Evidence that defendant occasionally went to the room of a prostitute at night for an immoral purpose did not show "habitual association" with a prostitute, within Pen. Code 1911, art. 636, providing that all male persons who habitually associate with prostitutes shall be deemed vagrants. *Ellis v. State (Tex.)* 145 S. W. 339.

## HABITUAL AVOCATION

A nonresident of a county owned property there which he managed and received the rents from, and also collected rent from property which he owned as cotenant with another, receiving a commission from his cotenant for collecting the latter's share. He formerly lived and transacted business in the county, having an office in a dwelling house owned by him, and, when he was in the county collecting rents, he called at the office, upon which his business sign still remained. Held, that he was not engaged in regular business or "habitual avocation" or employment, within Code, art. 75, § 132, authorizing any one so engaged to be sued in the county in which the business is carried on. *State, to Use of Gemundt, v. Shipley*, 57 Atl. 12, 98 Md. 657.

## HABITUAL CARNAL INTERCOURSE

Evidence of prosecutrix that she had intercourse with defendant six times while she was working in his family as general servant for seven months, and that four of such acts of intercourse occurred in the house, was insufficient to sustain an indictment charging "habitual carnal intercourse" without living together. *Boswell v. State*, 85 S. W. 1076, 1077, 48 Tex. Cr. R. 47, 122 Am. St. Rep. 731.

## HABITUAL DRUNKARD

See Habitual Drunkenness or Intoxication; Habitual Intemperance.

See, also, Inebriate.

One is an "habitual drunkard," within the law making habitual drunkenness ground for divorce, who has a fixed and irresistible habit of drunkenness, having by frequent indulgence lost the power to control his appetite, and it is not necessary that he be continually drunk or that his drunkenness incapacitate him for work; for a man may be an habitual drunkard, and yet be sober for days and weeks. *Tarrant v. Tarrant*, 137 S. W. 56, 57, 156 Mo. App. 725.

Under *Bouvier's* definition of an "habitual drunkard," a person given to inebriety or the excessive use of intoxicating drink, who has lost the power or will, by frequent indulgence, to control his appetite for it, to be an habitual drunkard within the divorce

laws it is not necessary that the person is constantly drunk or necessarily incapacitated to transact his business, but it is sufficient if he has a fixed habit of frequently and repeatedly getting drunk when the opportunity presents itself, or has lost the will power to resist the temptation. *O'Kane v. O'Kane*, 147 S. W. 73, 103 Ark. 382, 40 L. R. A. (N. S.) 655.

"One is an 'habitual drunkard' within the meaning of the divorce laws, who has a fixed habit of frequently getting drunk. It is not necessary that he be constantly or universally drunk, nor that he have more drunken than sober hours. It is enough that he had the habit so firmly fixed upon him that he becomes drunk with recurring frequency periodically, or that he is unable to resist when the opportunity and temptation is presented." Page v. Page, 86 Pac. 582, 584, 43 Wash. 293, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054.

#### Inability to control appetite

"Habitual drunkards" are persons who have lost the power or will to control their appetite for intoxicating liquors or narcotics and have the fixed habit of drunkenness. *Leavitt v. City of Morris*, 117 N. W. 393, 395, 105 Minn. 170, 17 L. R. A. (N. S.) 984, 15 Ann. Cas. 961 (citing 4 Words and Phrases, p. 3202).

An "habitual drunkard," as used in Rev. St. 1899, § 3017, imposing a penalty for selling to such a person after notice from his wife not to do so, is a person given to inebriety or the excessive use of intoxicating drinks to the extent that he has lost the power or will, by frequent indulgence, to control his appetite. *Jackson County ex rel. Farley v. Schmid*, 124 S. W. 1074, 1075, 141 Mo. App. 229.

#### HABITUAL DRUNKENNESS OR INTOXICATION

"Habitual drunkenness," within the Divorce Law (Comp. Laws, § 8621), means not that the person is in the habit of becoming intoxicated occasionally, but that his habit of indulging in intoxicating liquors is so firmly fixed that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where liquors are sold. *Lentz v. Lentz*, 137 N. W. 229, 232, 171 Mich. 509.

"Habitual drunkenness," as a statutory ground for divorce, means an irresistible habit of getting drunk, a fixed habit of drinking to excess, such frequent indulgence to excess as to show a formed habit and inability to control the appetite. *Garrett v. Garrett*, 96 N. E. 882, 885, 252 Ill. 318. Occasional intoxication is not "habitual drunkenness." *Donley v. Donley*, 131 S. W. 356, 150 Mo. App. 660.

2 Wds. & P. 2d Ser.—52

#### HABITUAL INTEMPERANCE

"Habitual intemperance," as a ground for separation, means the custom or habit of getting drunk; ordinary beer drinking, short of intoxication, furnishing no ground for such a charge. *Schaub v. Schaub*, 42 South. 249, 250, 117 Ga. 727.

#### Use of drugs

The morphine habit, contracted through the necessary use of the drug to alleviate unendurable pain, does not constitute "habitual intemperance," within Rev. Codes 1905, § 4054, defining habitual intemperance as ground for divorce to be that degree of intemperance from the use of morphine, etc., which disqualifies the person a great portion of the time from properly attending to business. *Rindlaub v. Rindlaub*, 125 N. W. 479, 484, 19 N. D. 352.

#### HABITUALLY

The use in the court's charge of the words "habitual" and "habitually," to qualify the alleged conduct of the husband in dealing with his wife's land, did not require the husband's acts to be so often repeated as to form a habit, but they meant that, if the wife ratified all contracts assumed to have been made by the husband, his agency might be implied. *Marks v. Herren*, 83 Pac. 385, 386, 47 Or. 608.

#### HACKNEY COACH

A "hackney coach" is a coach which is hired out. *Burton v. Monticello & Burnside Turnpike Co. (Ky.)* 109 S. W. 319.

#### HAD

See Duly Had.

#### HAIR

##### HAIR PRESS CLOTH

Camel's-hair press cloth is dutiable as manufactures of "wool," under Tariff Act, rather than as "hair press cloth." *Oberle & Henry v. United States*, 165 Fed. 53, 55, 91 C. C. A. 139.

The provision in the Tariff Act for "hair press cloth" is not limited to fabrics composed of the same material (horsehair) as the other articles enumerated in said paragraph. *E. & W. H. Caldwell v. United States*, 141 Fed. 487, 488.

#### HALF

See Easterly Half; Eastern One-Half; East Half; West Half.

##### As half in quantity

Where there is nothing to suggest the contrary, the word "half" in connection with the conveyance of a part of a tract of land is interpreted as meaning half in quan-

tity. *Gunn v. Brower*, 105 Pac. 702, 703, 81 Kan. 242.

The word "half," in its literal significance, is a quantitative term, and when applied to anything capable of division into two equal parts means one of those parts. Parol evidence is not admissible to prove that a conveyance of the "north half" of a tract of land was intended to mean half of the north and south length of the tract, and not to mean one-half of the area, since the word "half," used in reference to plats, other than those of a governmental survey, has no technical meaning, other than its ordinary meaning as a quantitative term. *Robinson v. Taylor*, 123 Pac. 444, 445, 68 Wash. 351.

The words "east half and west half" in a description in a deed naturally import an equal division; but they may lose that effect when it appears that at the time the deed was made some fixed boundary or monument divided the premises somewhere near the center, so that the words referred more properly to one of such parts than to a mathematical division which had never been made. *People v. Hall*, 88 N. Y. Supp. 276, 279, 43 Misc. Rep. 117; *Gunn v. Brower*, 105 Pac. 702, 703, 81 Kan. 242.

#### HALF BLOOD

The phrase "of the 'half blood'" necessarily signifies that the consanguinity is collateral rather than lineal. *Finley v. Abner*, 129 Fed. 734, 735, 64 C. C. A. 262; *Finley v. Abner*, 69 S. W. 911, 915, 4 Ind. T. 386.

As ordinarily understood by white people, a person of white and Indian parentage is deemed to be of mixed blood, without regard to the source of the Indian blood, and therefore, when, in a convention with Indians, "half or mixed bloods" are included, no distinction can be drawn between those who derive the Indian blood from the father and those who derive it from the mother. *Sloan v. United States*, 118 Fed. 283, 288.

**As brother**

See Brother.

#### HALF LINE VOYAGE

The "half line" plan in the fishing business is an arrangement between the owners of a fishing vessel and a master and his crew, whereby the master undertakes a fishing voyage, in which the gross proceeds of the catch, less certain deductions, are shared equally between the vessel and the master and crew; the latter half share, after payment for certain things charged to the master and crew as a body, being divided among them share and share alike. The voyage is a "half line voyage." *Welch v. Fallon*, 181 Fed. 875, 876.

#### HALF SECTION LINE

A road was ordered by the authorities of a county along a "half section line." In a contest over the location of such line be-

tween the owners of premises on opposite sides of the road, in which contest the county was not interested, it was held that the line of a division fence jointly built between the holdings of the contending parties, to which each party had occupied and maintained possession for more than 10 years, was rightly adopted by the trial court as the "half section line," within the meaning of the proceedings locating such road. *Nance County v. Russell*, 97 N. W. 320, 321, 5 Neb. (Unof.) 97.

#### HALF TURN

A "half turn," as used in the irrigation law, consists in the right to take water every 10 or 12 days for 19 or 20 hours, while a "whole turn" is the right to take water every 20 or 21 days for 39 hours. *Bartholomew v. Fayette Irr. Co.*, 86 Pac. 481, 31 Utah, 1, 120 Am. St. Rep. 912.

#### HALL

See Dance Hall; Town Hall.

As public utility, see Public Utility.

#### HAMMER

See Flogging Hammer.

As machinery, see Machinery.

#### HAMMER TEST

"Hammer test" is the usual method of testing to find out whether a piece of wood is solid to the core when it appears to be solid on the outside. *McGrath v. Delaware, L. & W. R. Co.*, 55 Atl. 242, 243, 69 N. J. Law, 331.

#### HAND

See By Hand; In Hand; In the Hands of; Lose a Hand; Moved by Hand; On Hand; Wrought by Hand.

Comparison of hands, see Comparison of Writings.

Loss of hand, see Loss of Limb.

"An injury to the thumb is an injury to the hand, for the thumb is but a part of the 'hand.' Lexicographers say that the hand is composed in part of the fingers. It consists of the metacarpus, or palm, and the digits, or fingers, and may include the carpus or wrist." *Gerhart v. Metropolitan St. R. Co.*, 112 S. W. 12, 13, 132 Mo. App. 546 (citing and adopting *Rogers v. Modern Woodmen of America*, 111 S. W. 518, 131 Mo. App. 353).

**As deadly weapon**

See Deadly Weapon.

#### HAND AND SEAL

My hand and seal, see My.

#### HAND BAG

Dutiable as articles in part of beads, see Articles Within Tariff Act

**HAND CAR**

As car, see Car.

As tool, see Tools—Tools of Trade.

**HAND SEWING NEEDLE**

The provision in Tariff Act for "hand sewing" needles relates to such as are used by persons generally who use needles, and does not include surgical needles. *A. J. Woodruff & Co. v. United States*, 138 Fed. 946, 947.

**HAND TOOL**

An ordinary ladder is to be classed with other ordinary "hand tools." *Sheridan v. Gorham Mfg. Co.*, 66 Atl. 576, 577, 28 R. I. 256, 13 L. R. A. (N. S.) 687.

**HANDED DOWN**

The term "handed down," as used in a record reciting that "the said indictment and proceedings are 'handed down' to the quarter sessions, there to be proceeded with according to the law," is equivalent to the term "ordered to be delivered," and such record is sufficient to give the quarter sessions jurisdiction; either form being sufficient to show that the trial and the indictment is committed to the inferior court. *Engeman v. State*, 23 Atl. 676, 678, 54 N. J. Law, 247.

**HANDHOLD**

A "handhold" is an iron rod intended to assist railroad employes in riding on the footboard of the engine. *Pollard's Adm'x v. Kentucky & I. Bridge & R. Co. (Ky.)* 97 S. W. 735. Or to assist them in getting on and off a car. *Missouri, K. & T. Ry. Co. of Texas v. Box (Tex.)* 93 S. W. 134, 136.

**HANDMADE PAPER**

The handmade papers covered by the Tariff Act, enumerating "writing, letter, handmade, drawing, \* \* \* and typewriter paper," are not only those used as writing papers, but also that suitable for other uses, as handmade India transfer paper used for making lithographic transfers and in printing. *Edward Benneche & Bro. v. United States*, 153 Fed. 861, 862, 83 C. C. A. 43.

So-called "marbleized paper," which is made by hand, held dutiable as surface-coated paper under the Tariff Act and not as "handmade paper." It is excluded from the latter paragraph because not ejusdem generis with the classes of paper there enumerated. *Seyd v. United States*, 152 Fed. 657, 658.

Handmade printing paper, suitable for books and newspapers, is more specifically provided for under the Tariff Act as "printing paper \* \* \* suitable for books and newspapers," than as "handmade \* \* \* paper," under said act. *Miller, Sloane & Wright v. United States*, 128 Fed. 469, 470; *United States v. Miller, Sloan & Wright*, 135 Fed. 349, 68 C. C. A. 131.

Handmade paper suitable for printing books and newspapers is dutiable as "printing paper \* \* \* suitable for books and newspapers," under the Tariff Act, rather than as "handmade \* \* \* paper." *Davies, Turner & Co. v. United States*, 172 Fed. 298, 299.

**HANDS OF JUSTICE**

See At the Hands of Justice.

**HANDKERCHIEF**

The provision in the Tariff Act for "handkerchiefs \* \* \* unfinished," held to include cloth cut into pieces which are in the shape of squares and other geometrical figures, and which in that shape are principally used in the manufacture of handkerchiefs. *Meyer v. United States*, 138 Fed. 974, 975.

**HANDLE****Handling freight**

Defendant maintained a wharf structure at Nome, and was also engaged in the sale of coal for the joint account of itself and the seller. Defendant guaranteed the seller's advances in a sufficient sum to realize a net profit of 50 cents a ton on the coal sold and a further interest in the net proceeds of the sale of the coal and the profit in excess of 50 cents a ton; defendant regulating the selling price of the coal. Held that coal handled under such contract from vessels by means of defendant's wharf structure constituted "freight handled," within Act June 6, 1900, c. 786, § 29, 31 Stat. 330, 331, requiring persons maintaining public docks, wharves, and warehouses in Alaska to pay a license fee of 10 cents per ton on freight handled or stored. *John J. Sesnon Co. v. United States*, 182 Fed. 573, 579, 105 C. C. A. 111.

**HANDLING**

See Rough Handling.

**HANDWRITING**

Experts in handwriting, see Expert.

**HAPPEN****As happen to exist**

The word "happen," in its strictest, literal sense, signifies an unexpected event. It is also not uncommonly used as synonymous with "occur," "take place," "exist," and "happen to be." And where an act provided that all vacancies in the State Board of Elections shall be filled by joint vote of the General Assembly, except vacancies occurring when it is not in session, when, if the office of only one member is vacant, the remaining members of the board shall fill the vacancy, and if they fail to do so it shall be filled by the

Secretary of State, Comptroller, and Treasurer, and that if there be more than one vacancy it shall be filled by appointment by such officers, it was held, in view of the meaning of "vacant," which means "without an incumbent," regardless of when or how it became vacant, and of the words "occur" and "happen," which are synonymous and mean "existing" or "to be found," that the Comptroller, Secretary of State, and Treasurer were authorized to fill two or more vacancies in the board of elections during recess of the Legislature, whether such vacancies occurred during recess or while the Legislature was in session. *Richardson v. Young*, 125 S. W. 664, 686, 122 Tenn. 471 (citing *Fritts v. Kuhl*, 17 Atl. 102, 51 N. J. Law, 192).

## HAPPINESS

See Pursuit of Happiness.

## HARBOR

"Harboring" means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or harbinger thereof, as affecting liability for injuries caused by it. *Wood v. Campbell*, 132 N. W. 785, 28 S. D. 197; *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 104 Pac. 1015, 1017, 1026, 17 Idaho, 63, 25 L. R. A. (N. S.) 691, 20 Ann. Cas. 60 (quoting and adopting definition in 2 Cyc. p. 379).

"Harboring thieves" means to give them shelter or lodging, or entertain them as guests. *State v. Modlin*, 95 S. W. 345, 346, 197 Mo. 376.

"Harboring," is defined by the International Dictionary, as giving refuge, shelter, or protection to; to furnish lodging for; and its use in a verdict in a prosecution for permitting an unmarried female to remain in a house of prostitution as the equivalent of the statutory description of the crime, "shall suffer or permit any unmarried female \* \* \* to live, board, stop, or room in such house," is allowable. Hence a verdict finding defendant "guilty of harboring a female under the age of 18 years in a house of prostitution, in manner and form as charged in the indictment," is not defective for using "harboring" as an equivalent of "suffering or permitting to live, board, stop, or room," but is defective, in that it does not find that defendant is the keeper of the house, and that the female harbored is unmarried. A verdict finding defendant guilty or guilty as charged in the indictment is sufficient. *People v. Lee*, 86 N. E. 573, 574, 237 Ill. 272.

"\* \* \* To harbor" is to receive clandestinely, or without legal authority, for the purpose of concealing him, that another, having the right to the legal custody of such person, shall be deprived thereof, \* \* \* or, in a less technical sense, it is the recep-

tion of persons improperly." In an action for the abduction of a child, a witness was asked to state what the child told him, shortly before she went to defendants, as to what defendant had promised her if she would go there. Held, that the question was properly excluded as calling for hearsay evidence. *Baumgartner v. Eigenbrot*, 60 Atl. 601, 603, 100 Md. 508.

## HARBOR (Noun)

### As a boundary

A statute incorporating a township and fixing its boundaries as "on the southeast by New York Harbor," etc., fixes the boundaries of the township so as to include lands under the water of the harbor to the boundary line of the state, since a harbor is a recess in the coast line of a body of water in which ships can be sheltered, and it may extend to a line inside of which vessels may find protection, and the word has a more extended meaning than "shore," which when applied to a tide water bay usually means the part between ordinary high and low water marks. *Leary v. Jersey City*, 189 Fed. 419, 428.

## HARD ACTION

The class of actions known as "hard actions" include penal actions and actions ex delicto, such as actions of slander, libel, and the like. Where the plaintiff is entitled to nominal damages only, a judgment for defendant will be affirmed. *Cronemiller v. Duluth-Superior Milling Co.*, 114 N. W. 432, 433, 134 Wis. 248.

## HARD DRINKER

One who at times indulges in the use of liquor to such an extent as to produce delirium tremens may be termed a "hard drinker." *Reld v. Singer Mfg. Co.*, 107 S. W. 310, 311, 128 Ky. 50.

## HARD LABOR

The Supreme Court, having appellate jurisdiction in criminal cases only as to questions of law when the punishment of death or imprisonment at hard labor may be inflicted or a fine exceeding \$300 or imprisonment exceeding six months is actually imposed, has no jurisdiction of an appeal from a conviction of selling intoxicants without a license where the sentence was to pay a fine of \$300 and costs, and be confined in the parish jail for six months, etc., the offense charged not being punishable by death or imprisonment at hard labor; Act No. 66 of 1902, making the selling of liquors without license punishable by fine not less than \$100 or more than \$500, and, in default of payment of fines and costs, by imprisonment within the discretion of the court or by fine and imprisonment, Act No. 107, of 1902, § 8, prescribing penalties for different grades of

the offense of selling liquors without a license, imposing fines and imprisonment of less than six months, and Act No. 176 of 1908, § 3, imposing a penalty for selling intoxicants in quantities less than five gallons without license of a fine or by imprisonment in the parish jail for not exceeding two years, the term "hard labor" as used in the Constitution referring to such labor to be performed in the State Penitentiary. *State v. Hamilton*, 54 South. 482, 128 La. 91.

## HARD ROAD

### Gravel road

Where a certificate of a special tax levy made by the commissioners of highways designated the levy as for "hard" roads, and referred particularly to the vote taken on the petition, both of which were for levying a tax for "gravel" roads, there was no material variance between the certificate and the petition; a gravel road being a "hard road." *People ex rel. Martin v. Robeson*, 97 N. E. 687, 253 Ill. 456.

## HARDPAN

A stratum of hard-baked clay is known as "hardpan." *Newport v. Temescal Water Co.*, 87 Pac. 372, 373, 149 Cal. 531, 6 L. R. A. (N. S.) 1098.

## HARDWARE TRADE

A druggist, in so far as he sells cutlery, is engaged in the "hardware trade," and hence where plaintiff, a wholesale dealer, sold razors to defendant under a contract stipulating that plaintiff would insert an advertisement in a newspaper containing defendant's name as the selling agent of the razors for that town in the hardware trade, such stipulation amounted to a contract that defendant should be considered the sole agent for sale of the razors in the hardware trade at such point, and a sale of such razors to a druggist doing business in the same block as defendant during the period covered by the contract, and permitting such druggists to sell the razors at a less price than defendant was allowed to sell them, was a breach of the contract. *Silberstein v. Gutteridge*, 77 Atl. 792, 793, 80 N. J. Law, 117.

## HARE'S COMBINGS

As to combings of loose or dead hair obtained in preparing rabbit or hare skins, which are commercially known as "hares' combings" or "fur waste," and which, after further treatment, are used as an adulterant in cheap bats, held, that they are dutiable as waste under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, 30 Stat. 194, and not as furs prepared for hatters' use under paragraph 426, 30 Stat. 151, nor free of duty as "furs, undressed," under section 2, Free

List, par. 561, 30 Stat. 194. *United States v. Hatters' Fur Exchange*, 153 Fed. 595, 596.

## HARM

See Bodily Harm; Great Bodily Harm.

## HARMLESS

See Hold Harmless; Save Harmless.

## HARMLESS BEVERAGE

Nonintoxicating malt liquor is not a "harmless beverage." *Ex parte Flake* (Tex.) 149 S. W. 146, 154.

## HARNESS

To warrant a conviction under the law making the theft in the nighttime of any harness grand larceny, it is not necessary that the property stolen comprise all the parts of a complete harness. *State v. Wortman*, 98 Pac. 217, 78 Kan. 847.

### As machinery

See Machinery.

### As part of team

See Team.

### As tool

See Tools—Tools of Trade.

## HARVEST

Plaintiff rented to defendant about 1,200 acres of rice land at a rental of \$5 an acre for all land covered by the lease and "harvested." The rice was actually raised and cut on 1,040 acres, and the residue was utilized for making levees upon which no rice was actually raised or harvested; the levees consisting of narrow strips of land about six inches high inclosing the land in small irregular areas for the purpose of retaining the water pumped upon the land for irrigation. The levees were essential to raising the rice crop on the irrigated land. Held, that the acreage utilized for leaves was "harvested" within the meaning of the lease so as to entitle the owner to rent therefor; nothing in the lease showing a contrary intention. *Reinking v. Goodell*, 133 N. W. 774, 776.

## HAS APPEALED

A notice that a party "has appealed" from a judgment is sufficient notice that he "appeals" from the judgment. The words "intends to appeal," "will appeal," or "give notice of their application to appeal" are equivalent to and have the same effect as the more direct phraseology of the statute—that is, each will effect an appeal. *James v. James*, 77 Pac. 1082, 35 Wash. 655 (citing *Ranahan v. Gibbons*, 62 Pac. 773, 23 Wash. 255; *In re Murphy's Estate*, 66 Pac. 424, 26 Wash. 222; *Brown v. Calloway*, 75 Pac. 630, 34 Wash. 175).

**HAS BEEN**

See Have Been.

**HAT**

Merchandise, consisting of wide braids or plaits of straw, fastened together so as to form rectangular strips measuring about 18 by 36 inches, are not dutiable as hats partly manufactured, under the Tariff Act, but as straw braids or plaits, "suitable for making or ornamenting hats," etc. *Samuel Schiff & Co. v. United States*, 140 Fed. 63, 64.

**HAT CROWNS**

Dutiable as articles composed of gelatin spangles, see Articles within Tariff Act.

**HATCH**

As appliances, see Appliances.

The principal purpose of a "hatch" on a vessel is to permit access to and from the respective decks which it connects. *Jones v. Moran Bros. Co.*, 88 Pac. 626, 627, 45 Wash. 391.

**HATCHET**

As dangerous weapon, see Dangerous Weapon.

**HATRED**

See Public Hatred.

A publication charging that plaintiff's daughter attempted to become the master of her household, and that this quality was inherited from plaintiff, who had her husband in abject subjection, was actionable under the statute defining libel as a defamation in writing tending to expose one to public hatred, public hatred being public or general dislike or antipathy, and "hatred" meaning to have little regard for or to despise, and the conduct attributed to plaintiff is such as to bring a woman into general disrepute and ridicule. *McDavid v. Houston Chronicle Printing Co. (Tex.)* 146 S. W. 252, 259.

**HAULING**

The process of sticking lumber which consists of placing thin strips of wood between layers of boards or timber to secure circulation of air, and the consequent seasoning of the lumber without warping or decay, is not a necessary incident of hauling lumber but a distinct and independent branch of work, and a contract to "haul" will include loading and unloading, but will not include sticking, because not all lumber is required to be stuck. Under Rev. St. c. 93, § 46, giving a lien for cutting, hauling, rafting, and driving logs or lumber, a lien is not created for sticking lumber. *Hutchins v. Blaisdell*, 75 Atl. 291, 292, 106 Me. 92.

**As carriage of goods in car or vehicle**

According to Worcester's Dictionary, the word "haul" means: (1) To drag with force or violence, to pull, to draw, to tug, to drag; (2) to carry or convey in a cart or other vehicle. In section 2 of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, which makes it unlawful for any railroad engaged in interstate business "to permit to be hauled or used on its line any car 'used in moving interstate traffic,' not equipped with automatic couplers, the phrase "used in moving interstate traffic" does not mean that a car must be actually loaded and on its journey from one state to another in order to be within the provisions of the act, but only that it has been and is intended to be, so used whenever required, and it is a violation of the act to move such a car not equipped with automatic couplers from one state to another as a part of a train, although it is empty at the time; nor is the mere fact that it is destined to a repair shop a defense. *United States v. St. Louis, I. M. & S. R. Co.*, 154 Fed. 516, 518.

**Kind of conveyance**

The term "hailed by wagon" does not, in the common acceptance of the term, mean transportation by rail or steamboat, and hence, where by the terms of a contract plaintiff was to receive for hauling stone 75 cents per cubic yard for every mile the stone was "hailed by wagon," transportation of the stone by rail or steamboat was not within the meaning of the contract. *Campbell v. Trustees Cincinnati South. Ry. (Ky.)* 6 S. W. 337, 338.

**HAUTEVILLE STONE**

As marble, see Marble.

**HAVE**

See May Have; To Have and to Hold.

In a vote of a municipality by which those voting decided "to have" a townhall, the term "to have" was a comprehensive term, including, not only the meaning of the phrase "to build," but any other method which might have been proposed for the establishing of a townhouse or townhall and were the proper words to carry into effect their intention "to have" and not build. *Anderson v. Parker*, 64 Atl. 771, 773, 101 Me. 416.

**Ownership implied**

The words "have" and "hold," in a will providing that the residue of the estate is devised to the testator's wife to "have, hold, use and enjoy" during her life, except a sum bequeathed to her absolutely, and the balance to her exclusive use for life, manifest an intention that she should receive the property into her custody and retain the same during her life. The language does not indicate an intention that she should encroach at her dis-

cretion on the principal. *Scott v. Scott*, 114 N. W. 881, 882, 137 Iowa, 239, 23 L. R. A. (N. S.) 716, 126 Am. St. Rep. 277.

Testator bequeathed all his property, real and personal, to his wife, to have, hold, use, and dispose of as she might see fit during her life, giving to her full power and authority to sell, convey, and transfer all or any part of the same, fully and absolutely, so as to pass complete title to purchasers or grantees from her, and that whatever of such property or its proceeds remained in her hands at her death should go to their daughters. Held, that though the words "to have and to hold," if standing alone, in connection with the words "during her life," would be effective to qualify the estate devised so as to vest the widow with a life estate only, yet when coupled with the words "use" and "dispose of" as she might see fit, they indicated that the whole title was intended for the widow's use and disposition, and hence the will conferred on her full authority to sell or mortgage the fee, under B. & C. Comp. §§ 5336, 5573, providing that a devise of real property shall be taken as a devise of all the testator's interest subject to his disposal, unless it clearly appeared from the will that he intended to devise a lesser estate. *Bilger v. Nunan*, 186 Fed. 665, 668.

According to the Century Dictionary, the word "have," one of the synonyms of "possess," may apply to a temporary or to a permanent possession of a thing. Thus it has been held that to have cigarettes in one's possession for smoking did not constitute owning or keeping cigarettes in violation of law. *State v. Lowry*, 77 N. E. 728-734, 166 Ind. 372, 4 L. R. A. (N. S.) 528, 9 Ann. Cas. 350.

#### Present time imported

As used in the statute providing that, in suits for the infringement of a patent, the federal court shall have jurisdiction in the district of which defendant is an inhabitant, or in any district in which defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business, the words "have a regular and established place of business" relate to the time of bringing the suit, and it is not necessary that defendant should have had a regular and established place of business within the district at the time the act of infringement was committed therein. *Underwood Typewriter Co. v. Fox Typewriter Co.*, 158 Fed. 476, 483.

#### HAVE BEEN

In a statute which provides that the judge of the district court or judge pro tem., before whom a case "has been" or shall be tried, shall have power to sign and settle a case-made within one year from the making of any final order or the rendering of any final judgment if the same has been legally

served upon the adverse party, notwithstanding that the term of office of any such judge or judge pro tem. may have expired after the rendition of any such judgment or the making of such order, provided such case-made has been served within the time previously fixed by such judge or judge pro tem., the words "has been" apply to different classes of cases: (1) To a case to be tried in the future, of which it may be said at a future time that it "has been" tried; (2) to a case which at the time the act took effect had been tried, and of which the trial judge still had jurisdiction to settle; and (3) to a case which, when the act took effect, had been tried, but of which the trial judge had lost all jurisdiction. In view of this meaning of the words, the statute has a prospective and not a retrospective operation and confers no power upon a trial judge, who had, prior to its passage, lost jurisdiction to settle a case-made. *Walton v. Woodward*, 84 Pac. 1028, 1029, 73 Kan. 238.

The words "have been or hereafter may be," in a statute by which titles to real property, vested in any person or persons who "have been or hereafter may be" in the actual, open, adverse possession, are declared good, unequivocally express an intention that the statute shall have a retrospective operation in the sense of giving effect to adverse possession occurring before it became a law, and prevent the application of the rule of interpretation that statutes are to be given a prospective rather than a retrospective operation. *Schauble v. Schultz*, 137 Fed. 389, 391, 69 C. C. A. 581.

In a bill for divorce a vinculo, filed June 16, 1906, in the county court of Cleburne county, which alleged that complainant, a resident of Cleburne county, was married May 3, 1906, and that he and his wife lived together until June 4, 1906, most of the time residing in Cleburne county, and that complainant "has been a bona fide resident of Cleburne county for more than three years," and that respondent's particular place of residence was unknown, the verb "has been," descriptive of past action, referred the residence to a period before the bill was filed, but did not make a part of the period so averred the year next before the bill was filed, and "most" signified, not all, but nearly all, of the time between the marriage and the date of the bill. The averment of more than three years' bona fide residence was insufficient as a jurisdictional averment of residence for "one year next preceding the filing of the bill," and hence that a decree entered on the bill was void on collateral attack. *Martin v. Martin*, 55 South. 632, 634, 173 Ala. 106.

#### HAVE CHARGE OF

A treasurer of a corporation, merely empowered by the by-laws to "have charge of and be responsible for" the securities of the corporation, has no authority to change the



registration and sell certain of its bonds without special authority. *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 87 N. Y. Supp. 348, 353, 92 App. Div. 491.

An employé who had nothing to do with the starting of cars on a railway at a mine, and whose only duty was from his position on the ground to sprag the wheels of the cars, did not have charge of cars within Code 1896, § 1749, subd. 5, making an employer liable for injuries to an employé from the negligence of a person having the control of any car on a railway. *Woodward Iron Co. v. Curl*, 44 South. 969, 972, 153 Ala. 215.

### HAVE FOR SALE

Where defendant was a jobber of candy and admitted that he had purchased candy from which samples shown to be adulterated were taken, that he had such candy at his place of business, and did not contend that the candy was bought for any other purpose than for resale in the course of his business, it sufficiently appeared that the candy was kept for sale within New York Sanitary Code, § 68, punishing any person who shall "have for sale" adulterated food in the city of New York. *People v. Grenberg*, 119 N. Y. Supp. 325, 326, 134 App. Div. 599.

### HAVING

The word "having," in Rev. St. 1899, § 3018 (Ann. St. 1906, p. 1729), which forbids a dramshop keeper to keep, exhibit, or use, or suffer to be kept, exhibited, or used in his dramshop, a piano, organ, or other musical instrument whatever, "for the purpose of performing upon or having the same performed upon in such dramshop," is not synonymous with "permitting," but imports making an arrangement to have an act done. Hence, while a Regina Concerto, which is a musical machine set playing by dropping a coin in a slot, and thereby releasing the spring setting the machinery in motion, is a musical instrument, and winding it up and dropping a coin in the slot constitutes performing on it, it is not such a musical instrument as the Legislature meant to designate in the statute, which meant the keeping of an instrument with the intention of the dramshop keeper to perform on it himself or engaging some one else to do so. *Thiebes-Stierlin Music Co. v. Weiss*, 121 S. W. 1099, 1101, 142 Mo. App. 598.

A statute providing that no person "having a \* \* \* wife \* \* \* shall" by his will devise to any charitable institution more than one-half of his estate after the payment of his debts refers to the family status of the testator at the time of his death, and not at the time of the making of his will, and the statute is confined to cases where a husband leaves a wife surviving;

the word "having" being construed to mean "leaving." *St. John v. Andrews Institute for Girls*, 102 N. Y. Supp. 808, 820, 117 App. Div. 698, judgment modified *St. John v. Andrews Institute for Girls*, 83 N. E. 981, 985, 191 N. Y. 254, 14 Ann. Cas. 708.

### HAVING NO HEIR

Where testator, dying in 1883, devises a farm to his son W. and his heirs, and "if W. has no heir" to F. or next nearest kin, the quoted expression is equivalent to "if W. shall die without issue," and, under the rules of construction existing before Act July 9, 1897 (P. L. 213), imports a general and indefinite failure of issue, so that W., the first taker, will take an estate in fee simple. *Horton v. McCall*, 82 Atl. 472, 473, 233 Pa. 405.

### HAVEN

Waters inclosed in whole or in part by a breakwater or other artificial structure to afford a protected anchorage, as well as those so inclosed by natural land, constitute a "haven," within Rev. St. §§ 5346, 5361, 5362, making certain acts offenses against the United States when committed "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state." *Ex parte O'Hare*, 179 Fed. 662, 665, 103 C. C. A. 220.

### HAWKER

A "hawker" is one who sells wares by crying them in the streets. *Eaton v. People*, 104 Pac. 407, 408, 46 Colo. 361.

A "hawker" or "peddler" is an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers by delivering the goods at the time of the sale, in contradistinction to the trader who has goods to sell and sells them in a fixed place of business. *State v. Bayer*, 97 Pac. 129, 131, 34 Utah, 257, 19 L. R. A. (N. S.) 297.

"Persons who travel from town to town, from one plantation to another, by land or by water, carrying to sell or exposing to sale any rum, sugar, or other goods, wares, or merchandises, are included in the general terms 'hawkers' and 'peddlers.'" "Hawkers and peddlers are persons who practice carrying merchandise about from place to place for sale, as opposed to traders, who sell at established shops." *State v. Ivey*, 53 S. E. 428, 430, 73 S. C. 282 (quoting and adopting definition in *State v. Belcher* [S. C.] 1 McMul. 42).

The primary idea of a "hawker and peddler" is that of an itinerant trader, who carries goods about and actually sells them,

in contradistinction to a "trader," who sells goods at a fixed place of business. *Collender v. Reardon*, 123 N. Y. Supp. 587, 589, 138 App. Div. 738 (citing *Commonwealth v. Ober*, 12 Cush. [66 Mass.] 493; 21 Cyc. p. 367).

The popular meaning of "hawker and peddler," and the meaning indicated by the derivation of the words, involves the idea both of carrying goods for sale and of an itinerant vender. *Allport v. Murphy*, 116 N. W. 1070, 1072, 153 Mich. 486.

A "hawker" or "peddler," as defined by Laws 1909, p. 293, c. 248, § 1, is one who has no fixed place of trade, but travels from place to place and from house to house, though he sells by sample and does not carry his wares with him, or even if he does not make an immediate sale, but enters into an executory contract for a future sale for future delivery. *State ex rel. Mudeking v. Parr*, 123 N. W. 408, 410, 109 Minn. 147, 134 Am. St. Rep. 759.

The words "peddler" and "hawker," within Kirby's Dig. § 5438, authorizing cities to license, etc., hawkers and peddlers, are used in the ordinary and common-law acceptation of the term and the sense in which the words are used in Const. art. 16, § 5, authorizing the General Assembly to tax such persons. *City of Conway v. Waddell*, 118 S. W. 398, 400, 90 Ark. 127.

One having a license under Laws 1896, p. 315, c. 371, for hawking and peddling, and having a permit from the clerk of a city to peddle within the city, has no right to set up boxes as a stand in a public street and maintain the same there for a considerable length of time; the business of "hawking and peddling" involving the practice of carrying merchandise from place to place for sale with brief temporary stops, and not including the right to take for any considerable length of time exclusive possession of any part of a highway. *Eggleston v. Scheibel*, 112 N. Y. Supp. 114, 115, 60 Misc. Rep. 250.

#### Local merchant

A grocer who takes orders for goods, fills them at his store, and delivers them by wagon to customers in a neighboring village is not a "hawker of goods by retail, by sample, or by taking orders, or otherwise," so as to be within the provision of an ordinance of the village imposing a license tax on such hawkers. *Village of Scribner v. Mohr*, 132 N. W. 734, 735, 90 Neb. 21, Ann. Cas. 1912D, 1287.

#### Peddler synonymous

A "hawker" is one who sells wares from place to place, or by crying them in the street, and the word is used as synonymous with "peddler," in statutes regulating the vending of goods. *Village of Scribner v. Mohr*, 132 N. W. 734, 735, 90 Neb. 21, Ann. Cas. 1912D, 1287.

The word "hawker" is synonymous with peddler, defined by Rev. St. 1899, § 8861, to be a person selling patents, patent rights, patent or other medicines, lightning rods, goods, wares, or merchandise, except pianos, organs, sewing machines, books, charts, maps, and stationery, and agricultural and horticultural products, including milk, eggs, butter, and cheese, by going from place to place to sell the same. *State v. Looney*, 97 S. W. 934, 936, 214 Mo. 216, 29 L. R. A. (N. S.) 412.

#### Picture agent

An agent of a foreign corporation engaged in making portraits by photographic enlargement, who delivers such portraits to customers who have previously ordered the same made and collects therefor, is not a "hawker," within the meaning of an ordinance imposing a license tax on persons engaged in such occupations merely because, as an incident to delivery, he sells the customer a frame for the portraits if desired. "The leading primary idea of a 'hawker' or 'peddler' is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place." *Chicago Portrait Co. v. City of Macon*, 147 Fed. 967, 969 (quoting and adopting definition in *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 387, 39 L. Ed. 430, which quotes with approval the language of Chief Justice Shaw, of Massachusetts, in *Commonwealth v. Ober*, 12 Cush. 493).

#### Soliciting of orders for goods

Acts 1904, p. 108, No. 49, relating to license taxes of hawkers and peddlers, does not classify drummers representing foreign mercantile houses soliciting or selling by sample as hawkers or peddlers or impose license taxes on them. *Saal v. Fortner*, 49 South. 997, 998, 124 La. 112.

A city ordinance made it an offense to pursue the occupation of a hawker or peddler, without a license, and defined a hawker or peddler as including any person who should travel from house to house for the purpose of selling, offering for sale, or soliciting orders for goods, wares, or merchandise by sample. A New Jersey corporation engaged in the sale and distribution of teas and spices maintained a warehouse in another city in Michigan, from which its trade in Michigan was supplied. The corporation furnished defendant with a horse and wagon, and he solicited orders from door to door, and at intervals ordered from the warehouse in Michigan sufficient goods to fill the orders, whereupon he delivered the goods, collected the price, retained a commission, and remitted the balance. Held, that not having had a license, he was properly convicted under the ordinance. *City of Alma v. Clow*, 109 N. W. 853, 854, 146 Mich. 443.

Defendant was employed by a foreign corporation to take charge of a crew of canvassers to sell perfumery. The goods were shipped to defendant in complainant city, done up in packages containing 10 bottles. These were left by defendant's canvassers with householders or children to be retained or disposed of to others; premiums being given for sales. A collector employed by the corporation, with whom defendant had no connection, followed the canvassers and collected the proceeds of perfumery sold, etc.; the proceeds being forwarded to the corporation, which paid the expenses of defendant and her canvassing crew. Held, that defendant was a "hawker or peddler," within a city ordinance imposing a license tax on such persons selling drugs, toilet articles, perfumes, etc., and defining the term "hawker or peddler" as a person going about from house to house and offering to sell articles of trade or commerce to be delivered then or in the future. *City of Muskegon v. Hanes*, 112 N. W. 1077, 1078, 149 Mich. 460.

#### Farmer retailing produce

Webster defines a "hawker" as one who hawks; a peddler; to sell goods by outcry in the streets—and a "peddler" as one who sells by traveling; one who peddles; a traveling hawker; one who carries about small commodities on his back or cart or wagon and sells them. A farmer, with no other trade or occupation, is not a "hawker" or "peddler" because he slaughters his cattle, hogs, or sheep on his farm and retails them in the city. *Ex parte Snyder*, 79 Pac. 819, 822, 10 Idaho, 682, 68 L. R. A. 708.

A farmer who takes his farm products to a city and sells them from place to place is not a hawker or peddler within the understood meaning of such terms. The terms "hawker" and "peddler," as used by the courts of this country, are treated as equivalents in law. "Hawkers" and "peddlers" are persons who carry merchandise from place to place for sale, as opposed to traders, who sell at an established shop. *City of St. Louis v. Meyer*, 84 S. W. 914, 918, 185 Mo. 583 (citing *Hall v. State*, 23 South. 121, 39 Fla. 668; *Commonwealth v. Ober*, 12 Cush. [66 Mass.] 493; *Bish. St. Crimes*, § 1074; *Fisher v. Patterson*, 13 Pa. 336; *City of South Bend v. Martin*, 41 N. E. 315, 142 Ind. 31, 29 L. R. A. 531; *Emert v. Missouri*, 15 Sup. Ct. 367, 156 U. S. 296, 39 L. Ed. 430).

#### Lunch wagon proprietor

A person operating a lunch wagon at a fixed place in a street daily, between certain fixed hours, is not a "hawker," within a statute defining "hawkers" and "peddlers" as persons who travel about, either on foot or in wagons, carrying and exposing for sale goods. *Commonwealth v. Morrison*, 83 N. E. 415, 416, 197 Mass. 199.

#### Sale of theater ticket

Since a theater ticket is a mere license, evidence of a right to enter a theater and occupy a definite seat during a performance, and not merchandise, the offering of such ticket for sale does not constitute "hawking" and "peddling," so as to require a license for the sale thereof; such terms referring to the manner in which the business is carried on, and not to the business itself. *People v. Marks*, 120 N. Y. Supp. 1106, 1109, 64 Misc. Rep. 679.

#### HAY

See *Good Merchantable Hay*; *Shock of Hay*.

As materials, see *Materials*.

#### HAY STACK

See *Stack*.

#### HAYBOTE

"Haybote" is the right to a sufficient supply of wood for repairing hedges and fences. *Anderson v. Cowan*, 101 N. W. 92, 93, 125 Iowa, 259, 68 L. R. A. 641, 106 Am St. Rep. 303.

#### HAZARD

See *Game of Hazard or Skill*; *Moral Hazard*; *Railroad Hazard*.

Increased hazard, see *Increased*.

To engage in a wager of any kind is a "hazard," within Ky. St. 1903, § 1977, punishing one engaged "in any hazard or game," on which money is bet, won, or lost. One engaging in a shooting match on which there was money bet, won, and lost does not violate the statute, but engaging in the betting on the match constitutes the offense. *Commonwealth v. Davis* (Ky.) 102 S. W. 327 (quoting and adopting the definition in *Cheek v. Commonwealth*, 37 S. W. 152, 100 Ky. 2).

The word "hazard," as used in a statute forbidding any person to maintain any lottery, scheme, or device for the "hazarding" of money or valuable thing, means chance, and the chance referred to is that chance which is employed in connection with lottery schemes, where the attempt is to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity. If the result in a given transaction could be accomplished or foretold by the exercise of skill or foresight, its ascertainment would not be attributed to chance, but to the exercise of skill or foresight, and consequently to design. Chance and design are exactly opposite, and the presence of either will exclude the other. Where design enters into a transaction, it immediately partakes of the nature of contract, and will be governed by other princi-

ples. In the gaming sense there is no chance whatever where either party has means of knowing the result at the inception of the wager. There may be fraud, but not chance. The International Dictionary gives the general definition of chance as "the unknown or undefined cause of events that to us are uncertain or not subject to calculation; luck; fortune." 6 Cyc. p. 890, defines chance thus: "Possibility; hazard; risk; or the result or issue of uncertain and unknown conditions or forces neither understandingly brought about by one's act nor pre-estimated by one's understanding." *Russell v. Equitable Loan & Security Co.*, 58 S. E. 881, 885, 129 Ga. 154, 12 Ann. Cas. 129.

#### As risk

The term "hazard," as used in a fire policy, means the incurring of the possibility of loss or harm for the possibility of a benefit; the insurer undertaking to indemnify the insured against the possibility of a loss by fire for an agreed consideration paid in advance; the hazard consisting of the possibility of a loss by fire indicated by the sum of all dangers resulting from the recognized exposure, including losses from incendiary fires communicated from other premises. *Hartford Fire Ins. Co. v. Dorroh (Tex.)* 133 S. W. 465, 468.

"Hazard of litigation," to which a purchaser must not be subjected, refers to a hazard which is to be determined by the chance of successful attack, as viewed by the court in the suit for specific proceedings. *Barger v. Gery*, 53 Atl. 483, 485, 64 N. J. Eq. 263.

#### HAZARDOUS

The work of an assistant piano mover is not "hazardous," as distinguished from ordinary manual labor. *McIntosh v. Jones*, 93 Pac. 557, 560, 36 Mont. 467, 14 L. R. A. (N. S.) 933.

#### HAZARDOUS NEGLIGENCE

Where one poured kerosene oil from a can on wood and kindling in a stove in which she knew there were live coals, and there was an explosion of the can, resulting in her being seriously burned, she was charged, as a matter of law, of being guilty of "hazardous negligence" precluding a recovery for the injury from the manufacturer of the oil on the ground that it was below the legal standard of safety. *Riggs v. Standard Oil Co.*, 130 Fed. 199, 204.

#### HE

That a magistrate, in an order fixing bail, in two instances used the pronoun "he" for the pronoun "she" does not affect the magistrate's jurisdiction previously exercised in deciding that the evidence was sufficient to satisfy him that a crime had been committed and that there was sufficient

cause to believe that defendants had committed it, and to issue a commitment thereon. *People ex rel. Wilson v. Warden of City Prison*, 107 N. Y. Supp. 1103, 1104, 123 App. Div. 288.

An instruction that a witness may be impeached by showing "he" or "she" has made different statements out of court, and that such impeaching evidence may be considered in determining the weight of the testimony of such witness, and "his" credibility, is not erroneous because of the use of the word "he," as, under the statute, terms denoting the male gender include also the female. *Marlek v. State*, 94 S. W. 469, 49 Tex. Cr. R. 428.

Rev. St. 1895, art. 3499, provides that any minor over 19 years of age may proceed before the district court of the county of his residence to have his disabilities as a minor removed. Article 3500 provides that if it shall appear that the grounds are sufficient, and that it is advisable for the minor to have his disabilities removed, a decree therefor may be entered. Article 3501 provides that after the removal of disabilities the minor shall be deemed of full age, except that he cannot vote, until he reaches the full age. Held, in view of article 3268, chs. 3, 6, providing that in construing civil statutes the masculine gender shall include the feminine and neuter, and that in all interpretations the court shall look for the intention of the Legislature, keeping in view the old law, the evil and the remedy, and of Final Title, § 3, providing that the rule that the revised statutes, though in derogation of the common law, shall be liberally construed, the use of the words "he" and "his" were not intended to exclude the female minor, and she can have her disabilities removed thereunder. *Texas Cent. R. Co. v. Wheeler*, 116 S. W. 83, 86, 52 Tex. Civ. App. 603.

#### HEAD

See Side Head.

An allegation that plaintiff was seriously and permanently injured through his "head," skull, eyes, and bruises to his right leg and body, does not include an injury to the organs of hearing. *Keefe v. Lee*, 90 N. E. 344, 346, 197 N. Y. 68, 27 L. R. A. (N. S.) 837.

#### HEAD OF BUREAU

The person in charge of the branch office of the bureau for the collection of revenue from the sale and use of water in the borough of Brooklyn was not the "head of a bureau," within New York Charter, § 1543, providing that the heads of departments shall have power to remove certain officers, but that no head of a bureau shall be removed until he has been allowed an opportunity of making an explanation. *People v. Oakley*, 87 N. Y. Supp. 856, 859, 93 App. Div. 535.

**HEAD OF COVE**

The words "head of the cove," in their natural significance, mean that place farthest up the cove where the water stands at high water, and not down the cove at low-water mark at a place near the mouth of the cove. *Whitmore v. Brown*, 61 Atl. 985, 987, 100 Me. 410.

**HEAD OF DEPARTMENT**

See Head of Principle Department.

Civil Service Law (P. L. 1908, p. 235), which was adopted by the voters of Jersey City, specifies in section 11 that "unclassified service," which shall include "all heads of departments" elected by the governmental body of the city, are not subject to the provisions of the act. Jersey City Charter (P. L. 1871, p. 1094), in section 29, specifies the duties of the city clerk to include the custody of city books, etc., the countersigning of licenses, and all evidences of city indebtedness, the custody of the seal, acting as clerk to the board of aldermen and keeping the record of all ordinances, etc., and the issuance of all licenses and collection of fees therefor, etc. P. L. 1907, p. 34, authorizes the clerk, with the consent of the board of aldermen or common council, to appoint such clerks and assistants as the public business may require, and to fix the salaries of such assistants. P. L. 1895, p. 330, authorizes him to designate from the clerks in his office a clerk to act as city clerk during his absence or disability. Held, that such clerk is the head of a department of a municipality, and is therefore within the "unclassified service," and not entitled to hold office until removal or discharge within the terms of the act. *Fagen v. Morris*, 84 Atl. 1067, 1068, 83 N. J. Law, 3.

The words "head of a department" in the civil service act of 1908 (P. L. 1908, p. 235), providing that the head of a department, office, or institution in which a position classified under the act is to be filled shall notify the commission which shall certify the names of candidates, etc., refer to an officer having a clerical or other force under him appointed by him, and do not include the board of chosen freeholders created by P. L. 1900, p. 168, relating to the government of counties and creating a board of chosen freeholders, since the board is the county legislature and the classified service does not include officials with a fixed statutory term who are appointed by the board. *McKenzie v. Elliott*, 72 Atl. 47, 49, 77 N. J. Law, 43.

**HEAD OF A FAMILY**

As to what constitutes family in the phrase "head of a family," see Family.

One having a wife and three minor children is the "head of a family," within the exemption statutes. *Garner v. Freeman*, 42 South. 767, 769, 118 La. 184, 118 Am. St. Rep. 361.

The "head of the family" is generally the husband and father. *Baum v. Turner* (Ky.) 76 S. W. 129, 130. See, also, *Blount v. Medbery*, 94 N. W. 428, 429, 16 S. D. 562 (citing Comp. Laws 1887, § 2587).

According to Cobbe's Ann. St. 1903, § 6214, the phrase "head of a family" includes every person who is residing on the premises with him or her and under his or her care and maintenance, his or her minor child, or the minor child of his or her deceased wife or husband. *Palmer v. Sawyer*, 103 N. W. 1088, 1089, 74 Neb. 108, 12 Ann. Cas. 715.

**Husband during absence or separation of wife**

A divorced husband who by the decree has been deprived of the custody of his minor child, and is required to pay to the mother a stated sum for its support, which allowance is made a lien on the former homestead, is not the head of a family entitled to a homestead exemption, under the statute which exempts the homestead of the head of a family from forced sale, and defines the phrase "head of a family" to mean the husband or wife, when the claimant is a married person, or any person who has been residing on the premises with him, his child, a minor brother or sister, etc. *Holcomb v. Holcomb*, 120 N. W. 547, 548, 18 N. D. 561, 21 Ann. Cas. 1145.

Where a bankrupt and his wife had separated by mutual consent a short time before the bankruptcy, and she had received approximately half of the property, and had removed with an adopted child to another town, where she remained, leaving him with no property, except a small stock of merchandise, he ceased on such separation to be the "head of a family," within the meaning of the homestead provision of the Constitution of South Carolina, and is not entitled thereunder to the allowance of a homestead exemption out of the remaining property. *In re Finklea*, 153 Fed. 492, 493 (citing *Fant v. Gist*, 15 S. E. 721, 36 S. C. 576; *Cooper v. Cooper*, 24 Ohio St. 488).

**Single person supporting relatives**

Where decedent, after retiring from business, went to reside with his sisters, and furnished a part of the coal and provisions, he was under no obligation to support any of the members of the household, including complainant, a ward of one of his deceased sisters, and was not the head of the family so as to render his estate responsible for services rendered therein by the ward. *Pearre v. Smith*, 73 Atl. 141, 143, 110 Md. 531.

An unmarried woman occupying land as her homestead and supporting relatives, whom she is under moral obligations to care for, is the "head of a family," within the meaning of the exemption law. *American Nat. Bank v. Cruger*, 71 S. W. 784, 788, 31 Tex. Civ. App. 17.

A head of a family is one who contracts, supervises, and manages the affairs about the house, not necessarily a father or a husband. A person furnishing a home for himself, his mother, two minor brothers, and an invalid sister, and furnishing the groceries and money for their support, is the "head of a family," within the statute fixing the amount of wages which shall be exempt. *Jarboe v. Jarboe*, 79 S. W. 1162, 1163, 106 Mo. App. 459 (quoting *Ridenour-Baker Grocery Co. v. Monroe*, 43 S. W. 633, 142 Mo. 165).

Where defendant, a widow, had cared for her granddaughter for nearly 12 years since the child's birth at her home, and the child's parents were unable to care for her, and had surrendered the child to defendant, for whom she had a peculiar love, she was under a moral obligation to continue to support the child, and hence while so doing and living with the child on the premises in question was the "head of a family," and entitled to hold the premises exempt as a residence homestead. *First Nat. Bank v. Sokolski* (Tex.) 150 S. W. 312, 314.

An unmarried man is the "head of a family" within the exemption laws, if he contributes in part to the support of those who have a moral, though not a legal, claim on him, or if he controls, supervises, and manages the affairs of the household. *Forbes v. Groves*, 115 S. W. 451, 452, 134 Mo. App. 729.

An unmarried man, living with his father and mother, his father owning a part of the household goods, and he a part, though supplying a part or all of the necessities, was not the "head of a family," within the homestead act. *Fehd v. City of Oskaloosa*, 117 N. W. 989, 139 Iowa, 621.

Under Const. S. C. art. 3, § 28, providing there shall be exempt "to every head of a family residing in this state, whether entitled to an exemption in lands or not, personal property to the value of \$500," as construed by the state Supreme Court, the head of a family is one who controls, supervises, and manages a house and has living with him, and is supporting some person whom it is either his moral or legal duty to support; and a bankrupt who was a single man, living alone, and whose parents were living, is not the head of a family and entitled to the exemption because he was at the time of his bankruptcy paying the board and expenses of a sister at a school. *In re McGowan*, 170 Fed. 493, 494.

#### Widow

After the death of the husband, the mother is the head of the family, and, if the husband had a homestead, it passes to his wife. *Harrelson v. Webb*, 50 South. 833, 834, 124 La. 1007, 134 Am. St. Rep. 529.

#### Widow without children

Where all the children of a family have arrived at majority on the dissolution of the

family by the permanent removal of its members and the death of the father, leaving the mother as the sole remaining member of the former family, such mother ceases to be the head of the family, within Const. 1885, art. 10, § 1, and she may, unless otherwise incapacitated, devise the same by her will. *In re Advisory Opinion to the Governor*, 55 South. 865, 867, 62 Fla. 7.

Under Rev. St. 1909, § 6704, which provides that "the homestead of every housekeeper or head of a family consisting of a dwelling house \* \* \* which is or shall be used by such housekeeper or head of a family as such homestead shall \* \* \* be exempt from attachment and execution," the primary object is the protection of the family as distinguished from the individual; and the term "family" implies dependence, and any number of persons more than one living together under the same roof with some one of their number as head, who controls the affairs of the household, and upon whom the others, or some of them, are by reason of legal or moral obligation dependent, constitute a family, and the person in control the "head of a family," and hence a widow who purchased land and resided thereon alone with no one depending upon her was not the head of a family within the statute. *Elliott v. Thomas*, 143 S. W. 563, 564, 161 Mo. App. 441.

Comp. St. 1909, c. 36, § 2, provides that if a claimant is not married, but is the "head of a family," within section 15, a homestead may be selected from any of his or her property. Section 15 provides that the phrase "head of the family," as used in the chapter, includes the husband when the claimant is a married woman, or every person who has resided on the premises with her and under her care and maintenance. A house and part of certain lots in an incorporated city were purchased by a widow whose only child was an adult married son, living in another state. She lived in the house and rented rooms, but had no one under her care and maintenance. Held, that she was not the "head of a family" so that her property would be exempt as a homestead. *Brusha v. Phipps*, 126 N. W. 856, 857, 86 Neb. 822.

#### Widower with adopted child

Where a granddaughter was living with her grandfather at his home at the time of his death, and he had supported and maintained her from her birth until his death, a period of about ten years, he was at the time of his death the "head of a family" residing in the state, and entitled to an exemption of the lots comprising his homestead from the payment of his debts. *Adams v. Clark*, 37 South. 734, 736, 48 Fla. 205.

#### Wife

Upon the insanity of a husband and his confinement in an asylum, his wife becomes the "head of the family," and may change

her place of residence to another state, regardless of the fact that her husband remains in confinement in the state of her former residence. *McKnight v. Dudley*, 148 Fed. 204, 206, 78 C. C. A. 162 (citing *Haddock v. Haddock*, 201 U. S. 562, 571, 583, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1).

Under Rev. St. 1898, § 1154, defining the phrase "head of a family," as used in the homestead statute, to include the husband or wife when the claimant is a married person, and prescribing the circumstances under which others are deemed heads of families, when considered in connection with section 1149, providing that a failure to make the declaration of a homestead shall not impair the homestead right, and other sections declaring that, if a homestead claimant is married, the homestead may be selected from the separate property of the husband, or with the consent of the wife, from her separate property, and that it shall be the privilege of either husband or wife to claim a homestead, the husband is no more designated the head of a family than is the wife, and an answer by a wife, in an action to enforce a mechanic's lien against her property, which alleges that she is the head of a family, consisting of herself and husband and children, that the property is her homestead for herself and family, sufficiently pleads her homestead right as against a demurrer not challenging the answer for want of facts, but which proceeds on the assumption that no exemption of a homestead can be asserted against a mechanic's lien. *Volker-Scowcroft Lumber Co. v. Vance*, 88 Pac. 896, 897, 32 Utah, 74, 125 Am. St. Rep. 828.

A husband residing in South Dakota having mortgaged certain personalty to an Iowa bank, the property was voluntarily sold with the knowledge and consent of both husband and wife, and the proceeds, after paying the bank's claim, were deposited therein. The husband became insane, and was placed in an asylum in South Dakota, and there was no proof that he had ever been a resident of Iowa. The balance of the proceeds having been garnished in an action in Iowa against husband and wife, she moved to quash the garnishment before trial on the ground that the property was exempt, and that she had moved to and was a resident of Iowa. Held, that since the husband's insanity did not make the wife the head of the family or transfer title to the property to her, and the property never having been exempt to the husband because of his nonresidence, the wife could not successfully claim that it was exempt to her, and that the proceeds were not subject to garnishment. *Union County Inv. Co. Messix*, 132 N. W. 823, 826, 152 Iowa, 412.

#### Wife supporting family

The "head of a family" is one who controls, supervises, and manages the affairs

about the house, but the husband is not always the head. So a liberal construction of our statutes for the purpose of preserving the home will consider the wife, who is supporting herself and her minor children, as the head of the family, when for any reason the husband is entirely incapacitated to take that position. *Weatherington v. Smith*, 112 N. W. 566, 568, 77 Neb. 369.

While a husband and wife are living together, the husband is the head of the family, and the house occupied by them may properly be denominated as his house, though the wife pays the rent and supports the husband. *Patterson v. State*, 69 S. E. 591, 8 Ga. App. 454.

Under article 244 of the Constitution of 1898, a right of exemption is granted to the extent and upon the things therein specified, not only to every "head of a family," but to every person having a person or persons dependent upon "him" or "her" for support. While it is true that the husband, so long as the marriage continues, is in one sense "the head of the family," it does not follow that the burden and duty of supporting the family does not under some circumstances rest upon the wife (Civ. Code, art. 2435), and that condition of things is shown to exist in this case. That fact with its legal consequences is not affected because the husband may give his time and attention to the conducting of the wife's business. The utmost that can be claimed is that he thereby contributes something towards his own support. *Ginsberg v. Groner*, 41 South. 569, 571, 117 La. 268.

#### In Indian treaties

The Indian treaty of 1855, providing for the setting apart of designated tracts of the Umatilla Indian reservation to families of Indians for permanent homes, and the allotment act of 1883, authorized an allotment to each head of a family, each single person over 18 years of age, each orphan child under that age, and each child under 18 not otherwise provided for. Held, that an Indian woman who was a member of one of the confederated tribes being married to a white person, became herself the head of a family, and her children of the half-blood were entitled to allotments. *Smith v. Bonifer*, 154 Fed. 883, 889 (citing *Hy-yu-tse-milkin v. Smith*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039).

#### HEAD OF PRINCIPAL DEPARTMENT

Under civil service law (Laws 1895, c. 313), the tax commissioner in the city of Milwaukee, is the "head of a principal department," having power to appoint the ward assessors as his "subordinates" and the power to remove them, anything in the city charter, existing at the date of the enactment, to the contrary notwithstanding. *State ex rel. Hayden v. Arnold*, 138 N. W. 78, 83, 151 Wis. 19.

**HEAD OF WATER**

See Eight-Foot Head of Water.

"Head of water" is the quantity entering the intake of any canal or ditch. *Hough v. Porter*, 98 Pac. 1083, 1102, 51 Or. 318.

A "head of water" is that quantity which will flow each second through an opening one foot square. *Watkins Land Co. v. Clements*, 86 S. W. 733, 734, 98 Tex. 578, 70 L. R. A. 964, 107 Am. St. Rep. 653.

In view of the amendment of 1905 (Laws 1905, c. 339), a "sufficient" supply of water to run the mills, etc., did not mean the natural flow of the river, but only "sufficient water" for that purpose when the rights of others having property which might be affected by the use of the water were considered; the word "head" being used in the original act in the sense of "reserve," nor was it required that sufficient water be vented at any time without regard to the dam company's duty to the public of driving logs through the dam. *Milo Electric Light & Power Co. v. Sebec Dam Co.*, 84 Atl. 941, 943, 109 Me. 427.

**HEAD TO HEAD GAME**

A game of dice, in which one person sits behind the table and takes all the bets of the persons playing on the outside, the dice being thrown by the parties alternately, is not an ordinary game of "craps," or what is termed as "head to head game," but is a "banking game," punishable under Pen. Code 1895, art. 388, providing that any person who shall bet at any gaming table or bank shall be punished. *Faucett v. State*, 79 S. W. 548, 46 Tex. Cr. R. 113.

**HEADLINE**

The "headline" of a newspaper or other publication is a summary of index of that which follows. An "article" is defined to be "a literary composition on a specific topic, forming an independent portion of a book or literary publication, especially of a newspaper, magazine, review, or other periodical." In a certain sense, the "headline" is a part of the "article" or chapter which follows, but, strictly speaking, it is separate, and the term conveys a different meaning than that of the "article" or chapter itself. Proof of a "headline" attached to a newspaper article is insufficient to sustain an allegation in an indictment charging that the "article" itself was libelous. *Miller v. State*, 99 S. W. 533, 81 Ark. 359 (quoting from *Webst. Dict. and Cent. Dict.*).

**HEALER**

Healer by magic as physician, see Physician.

**HEALING ACT**

A "healing act" is one that cures some defect in a proceeding which the Legislature

could have authorized in the first instance. *Lockhart v. City of Troy*, 48 Ala. 579, 584; *State ex rel. Gamble v. Hubbard*, 41 South. 903, 905, 906, 148 Ala. 391.

**HEALTH**

See Good Health; Sound Health.

The term "health," used in connection with physical condition, includes appetite. *City of Cedartown v. Brooks*, 59 S. E. 836, 838, 2 Ga. App. 583.

**HEALTH OFFICER**

As employé, see Employé.  
Expenses of, see Expenses.

**HEALTHY**

The words "sound," "active," and "healthy," as used in a petition, in an action for personal injuries, alleging that, before being injured, plaintiff was a sound, healthy, and active woman, are comparative terms, and she was entitled to recover damages for such injury as aggravated a previously diseased physical condition. *Green v. Houston Electric Co.*, 89 S. W. 442, 445, 40 Tex. Civ. App. 260.

**HEAR**

See, also, Audit.

"To 'hear' implies that some one is before the court to speak." *Hoffman v. Newell*, 20 N. Y. Supp. 432, 433 (quoting and adopting definition in *Brown, Jur.* § 41).

**HEAR AND DETERMINE**

In Portland Reincorporation Act (Sp. Laws 1903, p. 161) § 400, which prescribes the manner of making reassessment for an improvement when the original assessment is set aside, or the council is in doubt as to its validity, and directs that notice shall be given to owners of property who within 10 days may file objections, and at the time appointed the council shall "hear and determine" the same, the words "hear and determine" import a judicial investigation and settlement of an issue of fact implying weighing of testimony offered, and hence the statute is not complied with by referring objections to a reassessment to the committee on streets, after being read and adoption of their report that objections be placed on file and the reassessment affirmed. *Applegate v. City of Portland*, 99 Pac. 890, 891, 53 Or. 552 (citing 4 Words and Phrases, p. 3235).

The power of the General Assembly under Const. 1875, art. 6, § 12, and section 3 of the amendment to that article of 1884 (Ann. St. 1906, p. 243) to provide for the "hearing and determination" of causes by the courts to which they have been transferred, is not a power to confer jurisdiction upon a court which otherwise had no jurisdiction, but only authorizes transfers to a court of



cases of which, by constitutional alterations in the law, the court had already been vested with jurisdiction. *State ex rel. Dunham v. Nixon*, 133 S. W. 336, 339, 232 Mo. 98.

## HEARD

See Right to be Heard by Counsel.

## HEARING

See Final Hearing; On Hearing in Equity; Set for Hearing.

Any hearing, see Any.

"A 'hearing' includes the trial—a hearing on a motion or in a proceeding of any other character." *State ex rel. Nissler v. Donlan*, 80 Pac. 244, 247, 32 Mont. 256.

"Hearing" is technically applicable to chancery proceedings, and is used in contradistinction to "trial," which is properly applicable to law actions; but in modern usage the two words sometimes overlap in meaning. "Final hearing" is sometimes used to describe that stage of proceedings relating to the determination of a suit upon its merits, as distinguished from those of preliminary questions. However, "hearing" is frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceedings subsequent to its inception, and may include proceedings before an auditor. An auditor is improperly appointed in a proceeding under a statute requiring that "all hearings shall be in open court." *McArthur Bros. Co. v. Commonwealth*, 83 N. E. 334, 335, 197 Mass. 137.

The essence of a "hearing," such as on a taxpayer's objections to a street improvement assessment, is the right, not merely the privilege to support one's contention or position by argument, however brief, and if need be by proof, however formal, before a tribunal authorized to act and willing and ready to do so. *City and County of Denver v. State Inv. Co.*, 112 Pac. 789, 792, 49 Colo. 244, 33 L. R. A. (N. S.) 395.

Under Act May 13, 1901 (P. L. 191), authorizing the court of common pleas, on hearing, to issue mandamus to the commissioners of counties to proceed under the provisions of the act for the erection of a bridge, the term "hearing" means the session of any court, or of an adjunct thereof, for considering the proofs in a case, or the receiving of facts and arguments thereon for the sake of deciding correctly. *Lewisburg Bridge Co. v. Union County*, 81 Atl. 324, 329, 232 Pa. 255 (citing 4 Words and Phrases, p. 3237).

In Act March 3, 1891, c. 517, § 7, 26 Stat. 828, creating the Circuit Courts of Appeals, as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666, and Act June 6, 1900, c. 803, 31 Stat. 660, relating to appeals from Circuit and District Courts, and providing that "where upon a hearing in equity \* \* \* an in-

junction shall be granted or continued or a receiver appointed, by an interlocutory order or decree \* \* \* an appeal may be taken from such interlocutory order or decree," the phrase "hearing in equity" does not mean the trial of an equity cause on the merits; the right of appeal being given from an "interlocutory" order or decree, which means one entered pending the cause and before final hearing on the merits, and disposing of some intervening matter relating to the cause. *Taylor v. Breese*, 163 Fed. 678, 683, 90 C. C. A. 558.

In Act Cong. April 14, 1906, c. 1627, § 7, 34 Stat. 116, providing that where, on a "hearing in equity" in a District or Circuit Court or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, an appeal may be taken within 30 days from the entry of the order, the phrase "hearing in equity" technically means the trial of the case, including the introduction of evidence, the argument of solicitors, and the decree of the chancellor, resulting in a final decree; but, as applied to proceedings resulting in an interlocutory order, within section 7, it means the hearing of the motion, the introduction of evidence thereon by affidavit or otherwise, the argument of solicitors, and the order of the chancellor. *Root v. Mills*, 168 Fed. 688, 689, 94 C. C. A. 174. So, where the court refused to read proper affidavits on an order to show cause why an injunction should not issue, and orders an injunction, there is a "hearing in equity," within this act, and the order is appealable. *Shubert v. Woodward*, 167 Fed. 47, 52, 92 C. C. A. 509. But where defendant had instituted suit at law against complainant for breach of contract, and complainant filed a bill on the equity side of the court for cancellation of the contract and to enjoin proceedings at law, and pending hearings on demurrer to the bill and other proceedings in the equity suit, the proceedings in the action at law were stayed by an agreement of counsel in open court, but counsel for defendant, on the overruling of a demurrer to complainant's bill, stated that defendant did not wish to be further bound by such agreement, and the court entered an order before trial restraining defendant from proceeding in the action at law until further order of the court, it was held that such restraining order was not an injunction granted or continued on a "hearing in equity," and was not, therefore, appealable under this act. *Pressed Steel Car Co. v. Chicago & A. R. Co.*, 192 Fed. 517, 519, 113 C. C. A. 73. So, also, where a bill for the removal of trustees under a will and for the appointment of a receiver was filed October 25, 1907, and on the same day on an ex parte hearing a receiver was appointed. On November 2d defendants moved to modify such order of appointment to permit the trustees to collect certain income, which motion

on November 9th was argued and denied. On December 5th defendants moved to discharge the receiver and dissolve an injunction incidental to the receivership, which was denied on February 21st, whereupon on March 2d defendants applied for permission to appeal. Held, that defendants, by their motion of November 2d to modify the order appointing the receiver, acquiesced therein, such application constituted a "hearing," within section 7, and hence defendant's application for appeal was too late. *Root v. Mills*, 168 Fed. 688, 689, 94 C. C. A. 174.

The "hearing" contemplated by Acts 1891-92, c. 510, providing that if, on a hearing, the county judge has reasonable cause to suspect that one has sold liquor without a license, the latter shall be required to enter into a bond for an observance of the revenue laws, means a sufficient inquiry to show probable cause to suspect, and the finding of an indictment, the appearance of accused to answer the same, and the giving of a bond required of him measure up to a compliance with the statute. *Anderson v. Commonwealth*, 54 S. E. 305, 105 Va. 533.

#### Testimony required

The word "hearing," in a by-law of a beneficial association, which provides for a hearing before the supreme board of trustees on death claims, the claimant to appear, give evidence to establish his claim, etc., means a right to present testimony and the right to hear and meet testimony presented against claimant, and, where a claim is rejected on testimony obtained when claimant was not present and of which he knew nothing, there was no hearing, though the claimant was permitted to introduce testimony tending to support the claim, and, where the association rejected a claimant's claim because of testimony admitted against objection and which the law positively prohibited, there was a denial of a hearing. *Dick v. Supreme Body of International Congress*, 101 N. W. 564, 566, 138 Mich. 372.

Where the petition was presented to and read by the board of supervisors, and petitioners' witnesses were present and a statement made as to what would be proved by them, it was a sufficient hearing of the parties within Code 1906, § 4400, providing that in a proceeding to lay out a street the court shall hear the parties, although the board refused to let the witnesses testify. *Strahan v. Board of Sup'rs of Attala County*, 44 South. 857, 91 Miss. 529.

#### Witness

The words "hearing" and "proceeding," as used in Acts 1897, p. 137, c. 14, § 6, providing that a person offending against sections 1 and 2, which define various offenses which are made felonies by section 7, is a competent witness against another person so offending, and may be compelled to testify upon "any trial, hearing, proceeding, or inves-

tigation" in the same manner as any other person, are terms that pertain to proceedings of a criminal nature and mark different steps in a criminal prosecution. Thus "proceeding" relates to proceedings before a grand jury when the state is proceeding by indictment or presentment; the word "hearing" may relate to the trial of the cause upon final hearing of a preliminary hearing before the committing magistrate; but in all cases the state contemplates the same sort of criminal proceeding against a person offending. Hence an offender can be compelled to testify only in some criminal trial, hearing, proceeding, or investigation of some offense under the act, and cannot be compelled to testify or be punished for contempt for failure to testify in a civil proceeding. *Lindsay v. Allen*, 82 S. W. 648, 649, 113 Tenn. 517.

#### HEARING ANEW

Rev. Codes, § 1953, providing that on appeal from the county commissioners to the district court the matter must be heard anew, requires the district court to try the case as though originally brought therein, and it must be proved in the same way as before the commissioners, and the affirmative and burden of proof is with the same party. *Gardner v. Blaine County*, 99 Pac. 826, 827, 15 Idaho, 698.

#### HEARING DE NOVO

A statute providing that a proceeding shall be "heard de novo" implies that the proceeding has been already once heard before being called for hearing under the statute. *Collier v. Carter*, 60 Atl. 104, 105, 100 Md. 381.

#### HEARSAY EVIDENCE

"Evidence, oral or written, is called 'hearsay' when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *King v. Bynum*, 49 S. E. 955, 956, 137 N. C. 491 (citing *Coleman v. Southwick* [N. Y.] 9 Johns. 45, 6 Am. Dec. 253; *State v. Haynes*, 71 N. C. 79). See, also, *Davis v. State*, 61 S. E. 404, 405, 4 Ga. App. 318.

"Hearsay evidence" is that which is learned from some one else, whether by word of mouth or otherwise. In other words, it is anything which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person. Thus, in a prosecution for receiving stolen property, evidence that B. told witness that he (B.) and other boys had stolen the property and had sold it to defendants, and that defendants had requested them to steal it and other property and bring it to them and had furnished means for stealing the property, was inadmissible as hearsay. *State v. Levy*, 68 S. W. 562, 563, 168 Mo. 521 (quot-

ing and adopting definition in 3 Rice, Ev. 134). It is a mere recital by a third party. Thus, in an action by a bank to recover the proceeds of drafts purporting to have been drawn by it upon another bank, the monthly statement rendered by the drawee to plaintiff showing the amount of the drafts and the date of their payment was objectionable as hearsay. *Clifford Banking Co. v. Donovan Commission Co.*, 94 S. W. 527, 532, 195 Mo. 262. And so, where a railway employé was injured while assisting laborers to put a hand car on the track, remarks made just after the accident, by the foreman who did not see it, were "hearsay." *St. Louis Southwestern Ry. Co. of Texas v. Brisco*, 100 S. W. 989, 990, 42 Tex. Civ. App. 321. But where a witness, while in the discharge of his duties as night foreman in a lumber yard, passed daily over a piece of a railroad track in the yard, his testimony that he had never heard of a broken main alleged to have caused the soft condition of the track at the place of an accident was not objectionable as "hearsay." *Kirby Lumber Co. v. Chambers*, 95 S. W. 607, 611, 41 Tex. Civ. App. 632. So, in an action against a carrier for conversion of corn alleged to be No. 2, evidence that witness sold the balance of the same lot to the dealers at the point of shipment of the corn in question, and that no complaint was ever made by any of the purchasers thereof, was not objectionable as "hearsay." *St. Louis Southwestern Ry. Co. of Texas v. Arkansas & Texas Grain Co.*, 95 S. W. 656, 660, 42 Tex. 125. And where it was shown that defendant had been riding a horse, had hitched it at a certain tree, and had attempted to get on the horse when pursued, evidence of a witness that on the evening after the killing he saw some horse tracks where a horse had been tied at the tree was not inadmissible as "hearsay." *Doss v. State*, 95 S. W. 1040, 1041, 50 Tex. Cr. R. 48.

Hearsay evidence denotes that kind of evidence which does not derive its value solely from the credit to be given the witness testifying, but rests in part on the veracity and competency of some other person from whom the witness may have received his information, and is inadmissible because the person on whose credibility the evidence rests did not make the statement under oath, because there is no opportunity to cross-examine him, and because it affords too great a latitude for deception or misapprehension. *Louisville & N. R. Co. v. Murphy*, 150 S. W. 79, 82, 150 Ky. 176.

Under Rev. Codes, § 7862, providing that a witness can testify to those facts only which he knows of his own knowledge, etc., a witness may not give hearsay evidence which signifies evidence not founded on the personal knowledge of the witness; "hearsay" denoting the kind of evidence not deriving its value solely from the credit to be

given a witness, but resting also in part on the veracity of others. *State v. Crean*, 114 Pac. 603, 607, 43 Mont. 47, Ann. Cas. 1912C, 424.

A sort of distinction is allowed between "hearsay" and "reputation." Yet "reputation" is nothing more than hearsay derived from those who had the means of knowing the fact, and may exist when those best acquainted with the fact are dead. Still it is a general rule that reputation is evidence as to general character as to the fact of legitimacy, relationship, pedigree, rights of common, rights of way, and all rights depending upon custom or prescription. *Scott v. Blood*, 16 Me. 192, 196.

## HEAT—HEATING

See Properly Heat.

The words "heat" and "heating," as used in a ship's bill of lading in stating the causes of damage to cargo for which she will not be liable, are synonymous. *The Good Hope*, 197 Fed. 149, 150, 118 C. C. A. 573.

## HEATING PLANT

As furniture, see Furniture.

## HEAT OF PASSION

See Sudden Heat and Passion.

"Heat of passion," in the law of homicide, means something more than mere anger or irritation. It means that at the time of the act the reason is disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment. *Ryan v. State*, 92 N. W. 271, 275, 115 Wis. 488.

To constitute "heat of passion" as reducing murder to a lesser crime, the state of mind must be such that the suddenly, excited passion suspends the exercise of judgment and dominates volition so as to exclude premeditation and a previously formed design, though of short duration, but it is not essential that the transport of passion shall be so overhearing as to destroy volition or the reasoning faculty. *Olds v. State*, 33 South. 296, 299, 44 Fla. 452.

"Heat of passion" is not used in its technical sense in reference to murder in the second degree, where the intent to kill is in a heat of passion, but as a condition of the mind contradistinguished from a cool state of the blood. *State v. Robertson*, 77 S. W. 528, 530, 178 Mo. 496.

An instruction on the theory that the homicide, though intentional, was in the heat of blood or violent passion, and on sufficient provocation, reducing the offense from murder to manslaughter, was not bad because omitting the words "without malice." as "heat of passion" necessarily includes

"without previous malice." *State v. Crawford*, 66 S. E. 110, 115, 66 W. Va. 114.

The words "when perpetrated without a design to effect death and in a 'heat of passion,'" in the statutory definition of manslaughter in the first degree, are employed by the Legislature merely to express the distinction between this degree of manslaughter and the more-serious crime of murder. The phrases "in the heat of passion" and "without a design to effect death" should be considered as one clause descriptive of that "wickedness of disposition and hardness of heart" constituting the "malice aforethought" which has always been regarded as an essential element in murder. *State v. Edmunds*, 104 N. W. 1115-1117, 20 S. D. 135.

To reduce homicide from the degree of murder to that of manslaughter it must have been committed upon a sudden quarrel or heat of passion, and, where a person who is sufficiently wronged by another to arouse in him that heat of passion which, if life were taken immediately, would make the crime manslaughter, after sufficient cooling time has intervened, kills deceased, the homicide will be deemed the result of deliberation; and where defendant was informed by his wife that she had committed adultery with deceased, the first time under violence, searched for deceased, took a journey by train to his home, and shot him 17 hours after he had been first informed, there had been a sufficient cooling time and his acts could not be said to have been committed in such "heat of passion" as would reduce the homicide to manslaughter. *People v. Ashland*, 128 Pac. 798, 801, 20 Cal. App. 168.

#### As caused by just or lawful provocation

"'Heat of passion' means a heated state of the blood, caused by a lawful or just provocation, which deprives one of the power of self control." *State v. Brown*, 79 S. W. 1111, 1112, 181 Mo. 192; *State v. Forsha*, 88 S. W. 746, 751, 190 Mo. 296, 4 L. R. A. (N. S.) 576.

The "heat of passion" contemplated by the statute, which would reduce a killing from murder in the first or second degree to manslaughter in the fourth degree, is that heat of passion which is produced by a lawful provocation, as that term was understood at common law. *State v. Myers*, 121 S. W. 131, 136, 221 Mo. 598 (quoting and adopting definition in *State v. Bulling*, 15 S. W. 373, 16 S. W. 830, 105 Mo. 225). See, also, *State v. Gleseke*, 108 S. W. 525, 529, 209 Mo. 331.

The term "heat of passion," as used in Rev. St. 1898, § 4361, defining manslaughter in the third degree, means such mental disturbance caused by a reasonably adequate provocation as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the

voice of reason, make him incapable of forming and executing a distinct intent to 'take life, and cause him uncontrollably to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart; but, as so defined, the term is not inconsistent with intelligent action, implying a consciousness of what one is doing, and hence an instruction that "heat of passion" means a temporary dethronement of reason, engendered by provocation, and rendering the slayer incapable of forming a design to kill, was erroneous. *Johnson v. State*, 108 N. W. 55, 62, 129 Wis. 146, 5 L. R. A. (N. S.) 809, 9 Ann. Cas. 923; *Dillon v. State*, 119 N. W. 352, 355, 137 Wis. 655, 16 Ann. Cas. 913 (citing *Johnson v. State*, 108 N. W. 55, 59, 129 Wis. 146, 160, 5 L. R. A. [N. S.] 809, 9 Ann. Cas. 923).

In a murder trial, it was not error to refuse to give as part of the definition of "heat of passion" a statement that heat of passion does not contemplate such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily, where "heat of passion" was completely defined, the omitted statement being merely illustrative. *Dillon v. State*, 119 N. W. 352, 355, 137 Wis. 655, 16 Ann. Cas. 913.

#### HEATSTROKE

The New International Dictionary treats the word "sunstroke" as a synonym of heatstroke, which it defines thus: "The effect produced upon the body by exposure to intense heat, whether from the sun, from furnaces, or from the atmosphere"—and the Universal Encyclopedia defines it as "fever due to excessive heat but most commonly to exposure and the direct heat of the sun; indirect solar heat or artificial heat may have the same effect." *Continental Casualty Co. v. Johnson*, 85 Pac. 545, 546, 74 Kan. 129, 6 L. R. A. (N. S.) 609, 118 Am. St. Rep. 308, 10 Ann. Cas. 851.

#### HEAVY

One meaning of "heavy" is having the heaves, as heavy horses. *Overhulser v. Peacock*, 128 S. W. 526, 527, 148 Mo. App. 504.

#### HEAVY ARTICLE

Describing a stick as "heavy," in charging an assault by means likely to produce great bodily injury, imparts no certain information and is not a sufficient description of the means used. The term is relative. A stick, which in the hands of one person would be considered heavy, in the hands of another might be deemed light, and it might be heavy to the extent that it would be unwieldy and useless. A "heavy wooden stick" is not *ex vi termini* a deadly weapon. *People v. Perales*, 75 Pac. 170, 172, 141 Cal. 581.

#### HEAVY TRANSPORTATION

See Vehicle for Heavy Transportation.

**HEDGE**

See Fence.

**HEDGING CONTRACT**

"Hedging," as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product or the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired." *Cleage v. Laidley*, 149 Fed. 346, 352, 79 C. C. A. 284 (quoting and adopting definition in *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031).

It is a manufacturer's and merchant's insurance against price fluctuation of materials, and no more dammnatory than insurances of property and life. *Board of Trade of City of Chicago v. L. A. Kinsey Co.*, 130 Fed. 507, 508, 512, 64 C. C. A. 669, 69 L. R. A. 59. See, also, *State v. McGinnis*, 51 S. E. 50, 52, 138 N. C. 724.

"Hedging," in transactions in buying and selling grain through a broker, means that the principal will, for all grain purchased by him, sell or obtain a contract through his broker to sell a like amount for future delivery. *John Miller Co. v. Klovstad*, 105 N. W. 164, 165, 14 N. D. 435.

**HEED**

The word "heed" means "hear," and hence where the petition, in an action for the death of a fireman in a collision between a hose wagon, responding to a fire call, and a street car, alleged that the company was negligent because its motorman did not pay any "heed" to the ringing of the gong on the hose wagon, and the evidence showed that the motorman did not hear the approaching hose wagon, the court properly submitted the question of the motorman's negligence in not hearing the approaching hose wagon in time to avoid the accident. *Engvall v. Des Moines City Ry. Co.*, 121 N. W. 12, 14, 145 Iowa, 560.

**HEEDLESS**

The words "heedless" and "reckless" imply negligence. Thus a complaint for injuries caused by the explosion of a powder magazine, which alleges that the explosion was the result of the reckless and heedless act of defendant's servant in igniting the powder, alleges negligence. *Fisher v. Western Fuse & Explosives Co.*, 108 Pac. 659, 661, 12 Cal. App. 739.

**HEIFER**

As cow

See Cow; Milch Cow.

A "helfer," is a young cow. *State v. Minnick*, 102 Pac. 605, 607, 54 Or. 86.

**HEIGHT**

See Corresponding Height; Effective Height.

**HEIR****HEIRS**

See Bodily Heirs; Die Without Heirs; Expectant heir; Forced Heir; Having No Heir; Inherit as Heirs; Lawful Heirs; Legal Heirs; Lineal Heirs; Personal and Lawful Heir; Person Who Would Inherit as Heir; Remaining Living Heirs; Right Heir; Sole Heir; Their Heirs; Unknown Heirs.

Any heir, see Any.

Minor heir, see Minor.

My legal heirs, see My.

"An 'heir' is one upon whom the law casts an estate of inheritance immediately upon the death of the owner, and the rights of heirs are considered as arising at the moment of the death of the ancestor." In re *Milliken's Estate*, 55 Atl. 853, 206 Pa. 149 (quoting and adopting definition in 2 Blackstone, 201; Williams, Executors, 404). See, also, *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587 (quoting and adopting definition in *Brown v. Merchants' Bank of Appleton City*, 66 Mo. App. loc. cit. 431).

The word "heirs" in its ordinary or customary sense means the kindred of the decedent upon whom the law casts the estate in real property in the absence of a devisee, and has reference to the law of succession. *Hays v. Wyatt*, 115 Pac. 13, 15, 19 Idaho, 544, 34 L. R. A. (N. S.) 397 (citing 4 Words and Phrases, p. 3241).

The word "heirs," as applied to persons who are to take in remainder, being a technical word having a definite legal signification, when unexplained and uncontrolled by the context, must be interpreted according to its technical import, as designating the person appointed by law to succeed to the realty in case of intestacy. *Aetna Life Ins. Co. v. Hopkin*, 94 N. E. 669, 671, 249 Ill. 406.

The word "heirs," while strictly defined to consist only of those of a decedent's kindred who on his death are entitled to inherit his real estate, is nevertheless often used by a testator to include those entitled to share both in his real and personal property. In re *Line's Estate*, 70 Atl. 791, 793, 221 Pa. 374, 19 L. R. A. (N. S.) 293.

In its legal and technical sense, the word "heirs" is understood as designating those appointed by law to succeed in case of

intestacy, and, when occurring in a will unaccompanied by qualifying or explanatory expressions, it must be allowed that meaning, and those only come within the class so described, who would take under the intestate laws, and, where qualifying expressions are relied on to give another than the technical meaning, they must be so direct and unequivocal as to imperatively require such interpretation. In *re Beck's Estate*, 74 Atl. 607, 608, 225 Pa. 578. See, also, *Ackerman v. Ackerman*, 34 Pa. Super. Ct. 162, 167.

In its primary, technical meaning, the word "heirs" is used to express the relation of persons to some deceased ancestor and, when it is used in a will to point out legatees or devisees, its primary, legal meaning should be given to it, unless it is clearly shown to have been used in a different sense. Thus the word "heirs," in a devise for life with remainder to the devisee's heirs, was, in the absence of anything to the contrary, used in its ordinary legal sense, and could not be construed as meaning either the children of the devisee or her heirs living at the death of testator. *Gerard v. Ives*, 62 Atl. 607, 609, 78 Conn. 485.

The word "heirs" used in a will to point out legatees or devisees is given its primary meaning so as to include only those who, in the absence of a will, are by law entitled to inherit by descent, unless it clearly appears that testator used the word in a different sense. *Nicoll v. Irby*, 77 Atl. 957, 958, 83 Conn. 530.

The word "heirs" in a will may mean children, and it may mean some other class of heirs, not including all, where the context of the entire will plainly shows such purpose. *Smith v. Winsor*, 88 N. E. 482, 484, 239 Ill. 567.

In the civil law "heir" has a more extended signification than in the common law. The term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the parent or by operation of law, and whether the property be real or personal in its nature. *Morin v. Holliday*, 77 N. E. 861, 862, 39 Ind. App. 201 (quoting and adopting definition in *Kelley v. Vigas*, 112 Ill. 242, 54 Am. Rep. 235).

While the word "heirs" has its technical common-law meaning, restricting it to those who take by inheritance only, though by the civil law it applies to all persons who are called to the succession whether by the act of the party or by operation of law, the phrase "their heirs shall receive the succession," as used in a treaty, refers to the right of succession of those who receive by testament, as well as those who receive by operation of law. In *re Stixrud's Estate*, 109 Pac. 343, 349, 58 Wash. 339, 33 L. R. A. (N. S.) 632.

The word "heirs," when used in a conveyance to designate the class of persons to

whom an estate is conveyed, should be given its technical meaning, unless some other language in the conveyance clearly shows that the word was intended to have a different meaning, or unless the circumstances of the case are inconsistent with such meaning. *Irvin v. Stover*, 67 S. E. 1119, 1121, 67 W. Va. 356.

The term "heirs" may be used as a word of limitation or as a word of purchase, according to the context. A deed executed by children to a widow according to an agreement for distribution, which granted unto her and her "heirs" and "assigns" certain land "during her natural lifetime," created but a life estate only; the use of the word "heirs" not bringing the instrument within the rule in *Shelley's Case*. *Miller v. Mowers*, 81 N. E. 420, 423, 227 Ill. 392.

The word "heirs" is sometimes used in its strict primary sense as including only one to whom an estate had already descended from a deceased ancestor, while in other cases it applied to one whose ancestor is living. "It is sometimes held to mean those who take only by right of blood relationship, and in other cases covers adopted children and persons not heirs of the body who take by operation of law. It has been used in a limited sense to designate children alone, or in a more comprehensive sense to include children and grandchildren and also husband and wife. It has been held to include legatees and next of kin as well as other classes of those who may become entitled to the property of another upon his death; the construction in each case depending upon the intention with which the term was used in the instrument or statute, and that is to be determined largely from the context of the instrument or statute and the circumstances surrounding or inducing the execution or enactment of the same." The term "unknown heirs," as used in the sections of the Code providing for service by publication in cases relating to real property and where the relief demanded is to exclude defendants from any interest, title, or estate in real property, means all kinds of heirs, including heirs of heirs of such defendants as well as the legatees of heirs. *Howell v. Garton*, 108 Pac. 844, 845, 82 Kan. 495.

"Heirs," in a state grant to the "heirs" of a certain person, are those who would have inherited the right granted had it existed at such person's death. *Waterman v. Charlton*, 120 S. W. 171, 172, 102 Tex. 510.

In a conveyance to grantees and heirs forever providing that one of said grantees shall have no power to sell or alienate or to subject the estate to his debts, "heirs" is a word of inheritance and not of purchase, and no title vests in the children of such grantors. *Scott v. Noel* (Ky.) 45 S. W. 517.

Testatrix devised her real estate to her daughter, then to her "heirs," but, if the

daughter should die leaving "no heirs of her own," then the land should be sold and the money divided into equal parts, to be paid to others. Another clause made the daughter executrix. Held, that the word "heirs" in the first clause was used in its legal technical sense to mean all persons who would succeed to the estate in case of intestacy, but that the fee which would have been conveyed by such clause was limited by the subsequent provision that, if the daughter should die leaving no "heirs of her own," the property should be sold, etc., and, the daughter having been named as executrix, the death contemplated was one occurring at any time, and not necessarily before the death of the testatrix, so that the daughter took a base fee. *Ahlfield v. Curtis*, 82 N. E. 276, 277, 229 Ill. 139.

In a benefit certificate payable to insured's wife "and heirs," the word "heirs" has reference to the heirs of the beneficiary. *Mutual Life Industrial Ass'n of Georgia v. Scott*, 54 South. 182, 183, 170 Ala. 420.

In a will postponing disposition of testator's principal estate until after the death of his wife and his three children, there were clauses giving to the wife one-third of the income during her life, and distributing the remainder of the income to the children in specified shares. Then followed these clauses: "Item. Upon the death of my wife I do order that the one-third of the income hereby bequeathed to her shall be distributed among my surviving three children." "Upon the death of any of my three children, I do order the portion bequeathed to him or her to be distributed among his or her heirs." Held: That the word "heirs" is used as a substitutionary term, and, when taken in connection with the context, shows a testamentary intent that each installment of income, when it accrues (from and after the death of any of the three children and until the death of the last survivor), shall be distributed among those who, at the time it accrues, are appropriately to be described as "his or her heirs"; and that, where a deceased child of the testator leaves issue living at the time the income accrues, such issue are "his or her heirs," within the meaning of the clause. In *re Smisson*, 82 Atl. 614, 616, 79 N. J. Eq. 233.

Where a grantor in consideration of love and affection towards his son, and his son's heirs lawfully begotten, granted land to the son and his lawful heirs, to have and to hold unto the son "and the children of his body, their heirs and assigns," the son at the time having two children, the deed vested in the son an estate tail which was converted by the statute into a fee, it being presumed that the word "heirs" was used in the legal sense, excluding one from being an heir of a living person, and the word "children," though in legal acceptance a word of pur-

chase, being equivalent in such deed to the word "heirs" or "issue." *Wallace v. Hodges*, 49 South. 312, 313, 160 Ala. 276.

Where the words, "heirs, administrators, and executors," or words of similar import, are added to the designation of a testamentary trustee by name, the will excludes the idea of a personal trust, as it is impossible for a testator to know who the heirs, administrators, and executors of a person named as trustee may be. *Dodge v. Dodge*, 71 Atl. 519, 521, 109 Md. 164, 130 Am. St. Rep. 503.

The words "heirs, legatees, devisees, administrators, executors and trustees," in Gen. Revenue Law 1902, §§ 21-41 (Laws 1902, pp. 49-57, c. 3), imposing on such persons an inheritance tax, comprises all of the persons who have succeeded to the property, the administrators and executors for the purpose of administration, the trustees to carry out any trust, and the heirs, legatees, and devisees at final distribution or at death so far as real estate is concerned. In *re Macky's Estate*, 102 Pac. 1075, 1078, 46 Colo. 79, 23 L. R. A. (N. S.) 1207.

A claim against the city for the instantaneous death of plaintiff's intestate, through the city's negligence, stated that the claim was for damages sustained by his estate, legal representatives, and heirs, and that his estate, legal representatives, and heirs claimed a specified sum as damages. Held, that the words "legal representatives" were not used in their strictly technical sense as executors or administrators, nor was the word "heir" used in its primary and technical sense as one who, by reason of birth in lawful wedlock, inherits real property, but that the expression, "estate, legal representatives, and heirs," was used with the idea of using words broad enough in their significance to include all persons having claims against the city on account of the death, and hence the claim was sufficient as a basis for an action for the benefit of the widow under the statute. *Moyer v. City of Oshkosh*, 139 N. W. 378, 380, 151 Wis. 586 (citing 4 Words and Phrases, pp. 3241, 3264; 5 Words and Phrases, pp. 4070, 4079).

Where testator by his will created two trust funds, the income of one to be paid, at the discretion of the trustee, to the beneficiary of the fund, and the principal and interest of the other, at the discretion of the trustee, to the beneficiary, and created also an accumulation of interest as to the latter fund, which was invalid, and directed, in one case, that at the death of the beneficiary the principal, with any accrued interest, should be paid to the testator's heirs, and, in the other, that any portion of the trust fund remaining at the death of the beneficiary and any income thereof should be paid to the testator's heirs, the funds were to be paid to those who answered the description of

"heirs" at the time of the distribution of each fund. In *re Southworth's Estate*, 102 N. Y. Supp. 447, 448, 52 Misc. Rep. 86.

Laws 1895, c. 98 (Pol. Code, § 544), makes the amount incurred by a county for maintenance of an insane person in a hospital for the insane a charge against the estate of the insane person, provided that he "has no heirs within the United States dependent on said estate for support, and that no real property shall be sold during the life of the insane person." Held, that the statute did not exempt the whole estate where only part of the heirs were dependent on the insane person; the term "estate," as used therein, not being equivalent to "property" in the popular meaning, and the words "heirs dependent on said estate" not being equivalent to the words "person dependent on said estate"; so that, where only one heir was dependent on an insane person, the remainder of the estate left after the insane person's death was liable to the county's claim for maintenance. *Minnehaha County v. Boyce* (S. D.) 138 N. W. 287, 289.

#### As word of limitation

The words "heirs" or "heirs of the body," in their primary and strict legal meaning, are words of limitation, and not of purchase, and must be so construed, unless the language employed clearly indicates that they are intended to convey another and different meaning clearly indicated by the instrument. *Newhaus v. Brennan*, 97 N. E. 938, 940, 49 Ind. App. 654. See, also, *Brown v. Brown*, 101 N. W. 81, 82, 125 Iowa, 218, 67 L. R. A. 629.

Ordinarily, the word "heirs," or "heirs of their body," are words of limitation, and by their own force convey the idea of a fee-simple estate. *Brumley v. Brumley* (Ky.) 89 S. W. 182, 183.

The word "heirs" in a will is a word of limitation and not of purchase. In *re Allison*, 102 N. Y. Supp. 887, 891, 53 Misc. Rep. 222.

"The word 'heirs,' in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as 'heirs.'" *De Vaughn v. Hutchinson*, 165 U. S. 566, 578, 17 Sup. Ct. 461, 41 L. Ed. 827.

The word "heirs" used in the general legal sense is a word of limitation, and no intention of a testator, however clearly expressed, can change it into a word of purchase. Thus where testator devised a residue to his wife to have and to hold unto her and her heirs and assigns forever, but if she married again one-half of the estate should go to certain legatees, the widow took a fee. *Rissman v. Wierth*, 77 N. E. 108, 109, 220 Ill. 181, 110 Am. St. Rep. 243.

The word "heirs" is a word of limitation, and not of purchase, and, when used in

a will, its legal intendment is to designate a class of persons who are to take in succession from generation to generation, the law effectuating this purpose by declaring a fee to pass to the first taker. *Connor v. Gardner*, 82 N. E. 640, 644, 230 Ill. 258, 15 L. R. A. (N. S.) 73 (citing *Kales*, *Future Int.* § 129; *Schaefer v. Schaefer*, 31 N. E. 136, 141 Ill. 337; *Strawbridge v. Strawbridge*, 77 N. E. 78, 220 Ill. 61, 4 L. R. A. (N. S.) 948, 110 Am. St. Rep. 226).

The word "heirs" in a will is one of limitation unless clearly used to designate individuals answering the description of heirs at the death of a party. Thus in a will by which testator devised realty described to his son in fee simple and by a codicil he revoked the gift and provided that the property should vest in the son for life, and, at his death, the remainder in fee simple should vest in his heirs, the word "heirs" was used as one of limitation, and, under the rule in *Shelley's Case* and *Burns' Ann. St.* 1908, § 3094, providing that any estate which, according to common law, would be adjudged a fee tail, shall be a fee, the son took an estate in fee simple. *Lee v. Lee*, 91 N. E. 507, 508, 45 Ind. App. 645.

Unless it is necessary to effectuate the manifest intention of a testator, the word "heirs" is a word of limitation. *Jabine v. Sawyer* (Ky.) 78 S. W. 140, 141.

A devise or bequest to the testator's wife "and her heirs" lapses by the death of the devisee prior to that of the testator, so that the property descends as intestate property. The quoted words are words of limitation merely, and do not create a substituted devise. *Farnsworth v. Whiting*, 66 Atl. 831, 832, 102 Me. 296.

Where a remainder of one share of the residue of an estate was bequeathed to the life tenants, sisters and brothers mentioned or their heirs, the word "heirs" would be construed as a word of limitation, so that the brothers and sisters took the estate in fee. In *re Bentz's Estate*, 70 Atl. 788, 790, 221 Pa. 380.

Where a testator limited a remainder over in fee, in case his daughter should die without child or children her surviving, to his five children, or their heirs, if deceased, the word "heirs" was a word of limitation, and not of purchase. *Ortmayer v. Elcock*, 80 N. E. 339, 340, 225 Ill. 342.

The word "heirs," as used in a will providing that, if a daughter to whom all the real estate of testatrix was devised should die before her husband without having disposed of the property by will or leaving bodily heirs, the husband should take the real estate, with power to do with it as he desired, and providing that if the daughter should die, leaving heirs, before her father, he should enjoy the income during his life,



and at his death it should return to the daughter's heirs, means children, and is to be construed as a word of limitation. *Cralle v. Jackson* (Ky.) 81 S. W. 669, 670.

"Where a freehold is limited to one life, and by the same instrument the inheritance is limited, either mediately or immediately, to the heirs of his body, the first taker takes the whole estate either in fee simple or fee tail, and the word 'heirs' or 'heirs of the body' are words of limitation and not of purchase." *Snyder v. Greendale Land Co.*, 91 N. E. 819, 820, 48 Ind. App. 178.

In a trust deed providing that the trustee should sell the land and pay the proceeds to the sons of the grantor "and to their heirs and assigns," the word "heirs" is a word of limitation, and not of purchase. *Armour v. Murray*, 68 Atl. 164, 165, 74 N. J. Law, 351.

In deeds to property to the grantees and to their heirs and assigns and to the survivors or survivor, to them and the heirs and assigns of the survivors or survivor of them forever, the word "heirs" was not a word of purchase, but was used to designate the conveyance of an estate in fee, so that the deeds were not void as violative of the statute against perpetuities. *Root v. Snyder*, 126 N. W. 206, 211, 161 Mich. 200.

Where testator bequeathed to M. for life all of his property, etc., and at her death the remaining property to S. and her heirs, the word "heirs" was a word of limitation, and not of purchase, and constituted a devise of the remainder to S. in fee. *Underwood v. Magruder* (Ky.) 87 S. W. 1076, 1077.

Where an estate is so given that it is to go to every person who can claim as heirs to the first taker, the word "heirs" must be a word of limitation, and all heirs, taking as heirs, must take by descent. *Cook v. Councilman*, 72 Atl. 404, 407, 109 Md. 622.

The rule in *Shelley's Case*, is one of the "dogmas of the common law and is that, if one makes a limitation to another for life with the remainder over immediately or mediately to his heirs or heirs of his body, the heirs do not take remainders at all, but the word 'heirs' is regarded as defining or limiting the estate which the first taker has and his heirs take by descent and not by purchase. So, if a man by his will gives an estate to the devisee for life, with a remainder over to his own heirs, they do not, at common law, take as remaindermen by the will, but by descent as reversioners and heirs; that being regarded as the better title." *Robinson v. Blankinship*, 92 S. W. 854, 855, 116 Tenn. 394 (quoting and adopting definition in Washb. Real Prop. p. 525).

The rule in *Shelley's Case*, is "that when a freehold is devised to the ancestor for life, and by the same instrument it is limit-

ed, either mediately or immediately, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation, and not of purchase, and the ancestor takes the same in fee or in tail, as the case may be." *Burton v. Carnahan*, 78 N. E. 682, 683, 38 Ind. App. 612.

A devise to the bodily heirs named of testatrix's son, followed by a clause providing that such devisees shall not sell the land, which shall on their death revert to their "heirs," is within the rule in *Shelley's Case*, for the word "heirs" is a word of limitation and not of purchase, and the devisees take a fee-simple title. *Seay v. Cockrell*, 115 S. W. 1160, 1163, 102 Tex. 280.

Where a life estate is granted to one, with remainder to his heirs generally, the word "heirs," under the rule in *Shelley's Case*, must be construed as a limitation of the estate granted, and not as a word of purchase, and the grantee will take the entire estate granted. *O'Connell v. Pinnacle Gold Mines Co.*, 131 Fed. 106, 110.

The word "heirs" is one of limitation and not of purchase though preceded by the word "lawful." Thus, where a will contained a codicil to the effect that testator desired to change a former provision, bequeathing certain land to his son so that the latter should have the use, benefit, and control of the lands during his lifetime only, and at his death the lands should go to his "lawful heirs," the son, under the rule in *Shelley's Case*, took a fee, although there were extrinsic facts indicative of the testator's intention to give only an estate for life. *Deemer v. Kessinger*, 69 N. E. 28, 29, 206 Ill. 57.

The term "lawful issue" is not a technical term, and when used in a deed does not necessarily bring the deed under the rule in *Shelley's Case*, like the word "heirs," which is always a technical word, necessarily bringing the deed under the rule regardless of intention. *Hopkins v. Hopkins* (Tex.) 114 S. W. 673, 676.

A deed, in its premises, named a wife alone as grantee, and the granting clause conveyed to her alone, and the habendum clause was that she should hold forever in fee simple, provided that, if she should die without heirs, then title to vest in her husband, if living, and, should he be dead, a certain share to vest in the next legal heirs of the wife, the remainder in the next legal heirs of the husband. Held, that the attempted limitation to the next legal heirs of the wife, remainder to the next legal heirs of the husband, was ineffective to create any estate in them, the word "heirs" being used as a word of inheritance and not of purchase, and hence a deed from the wife and husband would pass an absolute fee. *Hamilton v. Sidwell*, 115 S. W. 204, 206, 131 Ky. 428, 29 L. R. A. (N. S.) 961.

A deed by a mother to a son, which conveys land described to the son, his heirs and assigns, and provides that on the death of the son and his wife without issue the land shall revert to the mother or her heirs, creates a reversion in the mother, which is a present estate, and, while the estate conveyed to the son may not be defeated, yet if a defeasance comes the reversion is to the mother; the reversion to the mother or her heirs being in legal effect a reversion to her alone, and the word "heirs" being a term of limitation and not of purchase. *Coomes v. Frey*, 133 S. W. 758, 759, 141 Ky. 740.

Testator declared that his whole estate should be kept together until his youngest daughter should arrive at 21, should marry or die, and that when either of those events happened, the whole should be divided among testator's children living at the time, share and share alike, that the portions passing to sons or daughters should not be liable for their debts or contracts, or for any debts or contracts of any husband which either one of the daughters might thereafter marry, but should be for the sole separate use of them and the heirs of their bodies forever. Held, that the word "heirs" was a word of limitation, so that the ancestors would take the whole estate. *Boyles v. Wagner*, 74 S. E. 380, 381, 91 S. C. 183.

Where a will devises land to one to have and to hold during his natural life, and at his death to his lawful "heirs," the word "heirs" is a word of limitation notwithstanding the qualification by the phrase "at his death." *Lacey v. Floyd*, 87 S. W. 665, 667, 99 Tex. 112.

A deed named E. S. "an His Heirs" as "party" of the second part, and the granting clause conveyed to the "party, Thir heirs and assigns." The habendum clause was to "the party of the second part, there heirs and assigns," warranting the title to the "party of the second part and his heirs and assigns forever." The deed was drawn on a printed form, and the words and letters underscored inserted by a scrivener of little learning who did not understand the meaning of the words used. The deed did not show by its context that the word "heirs" was intended to mean "children." Held, that the word "heirs" was used as a word of limitation, rather than of purchase, and the deed granted a fee simple to "E. S." *Big Sandy Co. v. Childers*, 147 S. W. 14, 15, 148 Ky. 527.

A deed written on a printed form which recited that it was entered into between the grantor, "party of the first part," and a person named "and her heirs party of the second part," and that the party of the first part for a specified consideration conveyed unto the party of the second part, "there heirs and assigns," described property, to have and to hold the same unto the party of the second part, "there heirs and assigns,"

and that the party of the first part covenanted with the party of the second part to warrant the title unto the "party of the second part and ther heirs and assigns," passes the fee to the person named as grantee; the word "heirs" not meaning children. *Senters v. Big Sandy Co.*, 147 S. W. 750, 751, 149 Ky. 11.

A deed by R. to his wife—the granting clause being, "I do hereby give, grant \* \* \* to said E. for and during her natural life, with reversion to myself or assigns, after her death," and the habendum clause being, "To have and to hold \* \* \* to said E. for \* \* \* her life as her own separate property, free from \* \* \* debts or liabilities of her husband; but after the death of my said wife, the property shall revert to me, if living, or if dead, to my heirs"—creates no estate in remainder in the children of the grantor and his wife, so as to deprive them of power to convey a fee-simple title to the property; the word "heirs" being used in its legal sense as word of inheritance and not of purchase. *Dooley v. Goodwin* (Ky.) 93 S. W. 47, 48.

Where a deed of gift recited that the grantors, in consideration of love and affection toward their son and his heirs lawfully begotten, granted described lands to the son and his lawful heirs, to have and to hold unto the son and the children of his body, their heirs and assigns, forever, and the son, at the time of the execution of the deed, had two children, it was held that the deed vested in the son an estate tail, which was converted by the statute into a fee; it being presumed that the word "heirs" was used in the legal sense, excluding one from being an heir of a living person, and the word "children," though in usual legal acceptance being a word of purchase, being equivalent to the word "heirs" or "issue." *Wallace v. Hodges*, 49 South. 312, 313, 160 Ala. 276.

Where a testator devised certain lands to his son, K. during his life, and after his death to be divided among his heirs as the law might direct, and further provided that, if any of the heirs of the testator should die leaving no lawful issue, their share or shares should be equally divided among the surviving heirs of the testator, it was held that K. took an estate in fee simple, defeasible on his death without issue him surviving; the word "heirs" being a word of limitation, and not of purchase. *Kennedy v. Kennedy*, 29 N. J. Law, 185, 187.

A husband conveyed land to his wife for life, remainder to their youngest son J. in fee, but if he died before maturity without issue, then to the next youngest son, to him and his lawful heirs or children forever, and in case he should die without children, then to the next youngest son and to his children, and so on to the next oldest son, and in the event of the death of all the sons without issue, then to the grantor's daughter and

her heirs forever. The youngest son J. was never married, but survived his two older brothers, the oldest of which died leaving children. Held, that the deed did not indicate an intent of the grantor to ingraft contingent remainders to possible grandchildren onto the conditional limitations to his several sons, nor to make such possible grandchildren joint purchasers with their respective fathers, but that the explanatory clause appended to the grant to each son was intended to restrict the descent in each case to the next youngest son "then alive," the varying phrases referring to "heirs or lawful heirs, or children," being understood as words of limitation intended only to convey a contingent base fee to the son, and not as words of purchase to the grandchildren, so as to vest the title to the entire property in the surviving children of the oldest son on the death of the youngest son without issue. *Farr v. Perkins*, 55 South. 923, 926, 173 Ala. 500.

A woman, in contemplation of a second marriage, vested her real and certain personal property in a trustee, for her sole and separate use during the marriage, reserving to herself a power of appointment by deed, for reinvestment, and by last will and testament, and after providing, amongst other things, estates out of the same for a child by the former, and the children of the pending marriage in the event she died, living her contemplated husband, provided in the settlement that, in the event she survived such husband, "then, at her death, the said trust estates shall descend to and be conveyed over by the trustee to the heirs at law of (her) the said Sarah B., whoever they may be, and this deed terminate." Held, that the words "heirs at law" limited her own estate, as an equitable fee, and did not designate the child of the former or the children of the contemplated marriage as purchasers under the settlement; and hence that, upon the death of her husband, she might compel the trustee to reconvey to her the settled property free from the trust. *Eaton v. Tillinghast*, 4 R. I. 276, 280.

The question in explaining a will is not what the testator meant, but what is the meaning of his words, and, where technical phrases or terms of art are used, it is fair to presume that the testator understood them, and hence a general provision in a will that all the property devised and bequeathed, unless otherwise specifically stated, shall vest in the devisees, their heirs and assigns, in fee simple, must be construed as words of limitation fixing the estate of such devisees, and cannot be construed as equivalent to children, and as showing an intention to prevent lapse by prescribing a line of succession, for the word "heirs" in its technical sense is a word of limitation, and not of substitution. *Galloway v. Darby* (Ark.) 151 S. W. 1014, 1016, 44 L. R. A. (N. S.) 782.

#### As word of purchase or description

Where a trust is created, by which the trustee is directed to invest the fund in "property, real or personal," as he may deem expedient, and pay over the "rents, profits, dividends, interest, or income," and at the termination of the trust to pay the fund to the heirs at law of the first life tenant, the "heirs at law" should be construed to include only those who would take real estate if the life tenant had died intestate. *Gardner v. Skinner*, 80 N. E. 825, 826, 195 Mass. 104.

In a will which provided that certain lands given to testator's daughter were given for her natural life and after her death were to go to such person or persons as should be her heir or heirs of land held by her in fee simple, the words "heir and heirs" were designatio personarum who should take the remainder, and such persons do not take by descent as heirs of the daughter, but by purchase from the testator; the daughter taking only a life estate, and the rule in *Shelley's Case* not applying. *Peer v. Hennion*, 76 Atl. 1084, 1085, 77 N. J. Law, 693, 29 L. R. A. (N. S.) 945.

A deed recited that it was made between R. of the first part and R. T. and L. T. of the second part, and "witnesseth, that for and in consideration of certain sums, have bargained and sold unto the said R. T. with this intention, and this deed of conveyance, to be deeded to the present wife of L. T. and her heirs by said R. T., and if she has no legal heirs at her death to revert back to R. T.'s nearest heirs; said R. doth sell and convey unto the said R. T. for his wife L. T., their heirs and assigns forever, the following described tract of land. \* \* \* To have and to hold unto the said R. T. for his wife L. T., their heirs and assigns, as above set forth forever." Held, that the word "heirs" (of L. T.) in the deed was a word of purchase and not of limitation, so that under the conveyance her heirs had a remainder in fee, dependent on the contingency that they survived her; otherwise the estate passed to the heirs of R. T. *Ex parte Porter* (Ky.) 97 S. W. 391.

Under Rev. Codes, § 3076, providing that when a remainder is limited to the heirs or heirs of the body of the person to whom a life estate in the same property is given, the persons who on the termination of the life estates, are the successors or heirs of the body of the owner for life are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life, the rule in *Shelley's Case* is abrogated and the term "heirs" is changed from a word of limitation to one of purchase. *Wilson v. Linder*, 110 Pac. 274, 275, 18 Idaho, 438, 138 Am. St. Rep. 213.

A deed to A. B. for life and in remainder to the "heirs" of his body forever does not

convey an estate in fee tail; it conveys only a life estate to A. B., and the remainder in fee vests immediately in those persons who will become the heirs of A. B. if they survive him, and they take by purchase, and not by inheritance. *Blake v. Stone*, 27 Vt. 475, 477; *Smith v. Hastings*, 29 Vt. 240, 244; *Gilkey v. Shepard*, 51 Vt. 546, 551.

The words "heirs at law," as used in a codicil which gave a certain sum in trust, the income to be paid equally to her sons, M. and J., so long as they might live and at the death of either or both to their "heirs at law," respectively, one-half to M.'s heirs and one-half to J.'s heirs, and at the death of their wives and children the property to be given directly and equally to the sons' grandchildren, was descriptive of the class thereafter defined as "wives and children." *Wolfe v. Hatheway*, 70 Atl. 645, 648, 81 Conn. 181.

#### Adopted child

In common parlance, the terms "heirs at law" and "lawful heirs" are used indiscriminately as synonymous and convertible terms, and, whenever either is used, they invariably refer to the heirs on whom descent is cast by law, and not to an heir by adoption. The relation of an heir by adoption is an exceptional and unusual one, and does not come within the ordinary and usual meaning of the words "lawful heirs," and those words ought not to be held *ex vi termini* to include an adopted heir. *Hockaday v. Lynn*, 98 S. W. 585, 589, 200 Mo. 456, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775 (citing *Reinders v. Koppelman*, 7 S. W. 288, 94 Mo. 338).

In a devise the word "heirs" in a general comprehensive sense includes all who stand in a relation to the ancestor that will entitle them to inherit on his death, and it includes an adopted child placed by the statute on an equality with children by birth for the purpose of inheriting from the adopting parent. The word "heirs" in a devise of real estate to testator's son, but, on his death without "heirs," to persons named, executed by testator who died before the statutes authorizing the adoption of a child and giving the child the right to inherit from the adopting parent, does not include adopted children of the son, though it means "children," and, on the death of the son without leaving children of his body, the property passes to the persons named. *Wallace v. Noland*, 92 N. E. 956, 957, 246 Ill. 535, 138 Am. St. Rep. 247.

It is only as to the adopting parent that the adopted child is made heir or next of kin by the statute (Comp. Laws 1897, § 8780) providing that an adopted child shall become the heir at law of the person adopting it, and the adopted child, therefore, is not heir by right of representation of the kindred of the person who adopted it. *Van Derlyn v. Mack*, 100 N. W. 278, 280, 137 Mich. 146, 66

L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879 (quoting *Helms v. Elliott*, 14 S. W. 930, 89 Tenn. 446, 10 L. R. A. 535).

Under St. 1876, p. 210, c. 213, providing that a person adopted shall take the same share of the property which the adopted parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and that he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in such position as if so born to him, a child adopted after the enactment of such statute, whose adopted father died in 1903, was not entitled to take as the "issue" or "heir" of her adopted father under the will of her adopted grandfather. *Blodgett v. Stowell*, 75 N. E. 138, 139, 189 Mass. 142.

#### Alien

Under Acts 22d Gen. Assem. c. 85, providing, in sections 1 and 2, that nonresident aliens are prohibited from taking or acquiring title to real estate by descent, devise, purchase, or otherwise, but that any nonresident may acquire and hold real property on condition that within a certain time from its purchase he place the same in the possession of a relation who shall comply with certain conditions, nonresident aliens are not heirs at law of a testator who bequeathed his property to his "heirs" at law, for to constitute one the legal heir of another he must have inheritable blood, and in this case the statute prohibits such aliens from taking the testator's realty either by descent or devise. *Mitchell v. Vest* (Iowa) 136 N. W. 1054, 1056.

#### Blood relations

The word "heirs," when applied to real estate devised, means persons so related to one by blood that he would take the estate in case of intestacy. *Bayley v. Beekman*, 117 N. Y. Supp. 88, 89, 62 Misc. Rep. 567; *Bayley v. Lawrence*, 118 N. Y. Supp. 286, 288, 133 App. Div. 888.

When the right of the heir to have the property of his ancestor was secured by the Magna Charta, an "heir" was not understood to mean one entitled to take by statute of descent, but the term meant a child or relative by blood. *Beals v. State*, 121 N. W. 347, 351, 139 Wis. 544.

Under Act Cong. Feb. 8, 1887, c. 119, § 5, 24 Stat. 389, relating to the allotments of lands to Indians, and providing that they should be held in trust for a certain number of years for the Indian, and in case of death for his heirs, a white person, a member of the tribe by adoption, is an "heir," though not of Indian blood. *Reed v. Clinton*, 101 Pac. 1055, 23 Okl. 610.

Testatrix was survived by two sisters, a brother, and certain nephews, nieces, grand-nephews, and grandnieces. She devised her residuary estate to her sisters for life, and to the survivor for life, and on the survivor's

death to the children then living of the two deceased sisters and to her brother, or to the heirs of either or any of them, if either or any of said children should die before such survivor, to be equally divided between them, share and share alike, per capita, and not per stirpes. Held, that the word "heirs" referred, both as to the realty and personalty, to the children of deceased nephews, who succeeded to the shares of their deceased parents, and who did not share per capita with the surviving nephews and nieces. *Bayley v. Beekman*, 117 N. Y. Supp. 88, 89, 62 Misc. Rep. 567.

Testatrix gave legacies to persons related to her by consanguinity and also to relatives of her deceased husband, and directed "any money remaining after my debts and expenses are paid to be divided between my heirs by my family herein named," excepting N., who was a legatee related to her by blood. Held, that the words "my heirs by my family herein named" did not embrace legatees who were related to the testatrix's husband only, and that those of the legatees named in the will, except N., take under this clause who would have been entitled to the estate had the testatrix died intestate, in the proportion in which they would take under the statute of distribution. *Jacobs v. Prescott*, 65 Atl. 761, 762, 102 Me. 63.

#### Children

See Child—Children.

The word "heirs" has a fixed legal meaning, which must be given it when used in a will, unless controlled by the context, but it may also be used in a nontechnical sense, and, when the context requires that it be so construed to effectuate testator's intent, it may be given the meaning of "children." *Castleberry v. Stringer* (Ala.) 57 South. 849, 850.

"Heirs" are those persons whom the law declares are entitled to the estate of a deceased person. The term will not be held synonymous with "children" unless it is made to appear by other provisions of the instrument that such was the clear intention of the testator. *Edmonds v. Edmonds' Devisees and Heirs* (Ky.) 102 S. W. 311, 312.

"Heirs" has been held to mean "children" in cases where it clearly appeared from the context that children then living were meant by the conveyor or testator. *Speight v. Askins*, 102 S. W. 74, 75, 118 Tenn. 749. See, also, *Middlesex Banking Co. v. Field*, 37 South. 139, 144, 84 Miss. 646; *Harkness v. Lisle*, 117 S. W. 264, 267, 132 Ky. 767; *Nutter v. Vickery*, 64 Me. 490, 499; *Suttle & Weaver Land & Improvement Co. v. Barker* (Ala.) 60 South. 157, 158.

The word "heirs" is often used with reference to persons bearing certain relations, such as that of children to living persons, but that is not a correct use of it, and it re-

quires knowledge of the intention of a person so using it to enable the court to ascribe to it such a meaning. *McFerrin v. Templeman*, 120 S. W. 167, 168, 102 Tex. 530.

While the word "children" as a rule is used in deeds and wills as a word of purchase, it is frequently used as a synonym for "heirs," and this may always be shown by or deduced from a consideration of the whole instrument. *Wilson v. Shumate*, 113 S. W. 851, 852, 130 Ky. 663.

"The term 'heirs at law' may be construed as children or grandchildren where such a construction will effectuate the grantor's intention and is consistent with legal principles." *Griffin v. Fairmont Coal Co.*, 53 S. E. 24, 45, 59 W. Va. 480, 2 L. R. A. (N. S.) 1115.

If it is apparent from the will that the testator used the words "heirs," "issue," and "children" interchangeably or synonymously, the court is warranted in construing them in like manner, so as to carry out the testator's intention. *Stisser v. Stisser*, 85 N. E. 240, 241, 235 Ill. 207 (citing *Gannon v. Peterson*, 62 N. E. 210, 193 Ill. 372, 55 L. R. A. 701; *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Leiter v. Sheppard*, 85 Ill. 242); *Shropshire v. Gault* (Ky.) 83 S. W. 590, 591; *In re Beck's Estate*, 74 Atl. 607, 608, 225 Pa. 578.

In order that the word "heirs," which has a fixed legal meaning as a word of limitation, may be construed as meaning "children," or be given a different meaning than that usually assigned to it, it must clearly and positively appear that it was so used. *Lamb v. Medsker*, 74 N. E. 1012, 1013, 35 Ind. App. 662.

"The word 'heirs' will be read as synonymous with the word 'children' and construed as a word of purchase when necessary to effectuate the purpose of the grantor in the deed." Thus in a deed, the consideration of which was paid by H., the words "and her children" in the granting and habendum clauses to "H. and her children" will be construed to be words of purchase and not of limitation, so that H. will take a life estate only and her children the remainder. *McFarland v. Hatchett*, 80 S. W. 1185, 1186, 118 Ky. 423.

The word "heirs" in a grant will be construed in the popular sense as meaning "children," when the entire grant shows clearly that such a meaning was in the mind of the grantor. Thus in a deed to the grantee and her heirs a restriction on alienation by the grantee is not alone sufficient to show clearly that the grantor used the term "heirs" as meaning children or otherwise than according to its recognized legal meaning. *Hauser v. St. Louis*, 170 Fed. 906, 908, 96 C. C. A. 82, 28 L. R. A. (N. S.) 426.

The words "heir or heirs," as used in *Mills' Ann. St. Colo.* § 1508, providing that for a wrongful death damages may be sued

tor and recovered by the "heir or heirs" of the decedent, are used in the sense of child or children; that is, lineal descendants. *Patek v. American Smelting & Refining Co.*, 154 Fed. 190, 191, 83 C. C. A. 284, 21 L. R. A. (N. S.) 273; *Hopper v. Denver & R. G. R. Co.*, 155 Fed. 273, 274, 84 C. C. A. 21 (citing *Hindry v. Holt*, 51 Pac. 1002, 24 Colo. 464, 39 L. R. A. 351, 65 Am. St. Rep. 235).

As used in a will making a bequest to testator's wife and the legal heirs of his son, and, in case his son should die without wife or heirs, then to the heirs of another, the words "heirs" and "legal heirs" meant "children." *Knowles v. Knowles*, 65 S. E. 128, 130, 132 Ga. 806.

As used in a deed conveying land, and retaining a life estate in the grantor with a right to dispose of the land with the consent of the grantee, the land after the grantor's death to belong to the grantee during her life, and at her death to descend to her heirs at law, the words "heirs at law" are synonymous with "children," and the grantee's children take a vested remainder. *Tanner v. Ellis* (Ky.) 127 S. W. 995, 997.

Deeds conveying land to A. "and the heirs of her body which she has or may have by B.," her husband, and to A. and the heirs of her body which "she has now or may have by B., my son," convey a fee simple to A. and her children by B. as tenants in common; the word "heirs" being so qualified as to leave no doubt that it was intended to mean "children." *Reeves v. Cook*, 51 S. E. 93, 95, 71 S. C. 275.

The word "heirs," in a provision that certain property should descend to testator's heirs and remain in their possession forever, and that his widow should have no dower in the land, but that it should be rented for the benefit of the heirs, was used in the sense of children. *Robison v. Gray* (Ky.) 97 S. W. 347, 348.

"Leaving no heir or heirs," within the terms of a will containing a limitation over in case my two sisters die "leaving no heir or heirs," is used synonymous with child or children, and the will must be construed accordingly. *Fairchild v. Crane*, 13 N. J. Eq. 105, 108.

Testator gave \$10,000 in bonds to a son in trust for his daughter B. to pay to her the income for life and at her death the principal to be divided among his "heirs" in accordance to the number of children which each might then have, division to be per stirpes, and gave the residue to his son and two daughters, C. and N., and the children of the deceased daughter. Held, that the word "heirs" meant testator's children, and that the trust fund on the death of B. must be divided among the stocks, giving to each stock in proportion to the number of children of that stock; each of the three children of

the testator being a stock, and the children of the deceased daughter being another stock. *Cook v. Hart*, 117 S. W. 357, 358, 135 Ky. 650.

The caption of a deed named the purchaser's wife and her children by him as the party of the second part. The granting clause recited that the conveyance was "to the party of the second part and heirs," and the habendum specified the "second party and her heirs." Held, that the deed being made with the evident purpose of providing for the wife and children, it should be regarded as a deed made by the purchaser, or as his will disposing of his estate for the benefit of the natural objects of his bounty; that the word "heirs" in the granting and habendum clauses mean all the wife's children by the purchaser, including after-born children; and that the wife took a life estate, and such children the remainder. *Bowe v. Richmond* (Ky.) 109 S. W. 359, 360.

The word "children" in a deed will be read as meaning "heirs," and construed as a word of limitation, and not of purchase, where it is apparent from the deed that the word "children" is used in the sense of "heirs," as where they are used interchangeably. Thus where the caption of a deed made the grantee named party of the second part. The granting clause conveyed to the party of the second part "and his children." The habendum clause read "unto the party of the second part, his heirs," etc., the grantee acquired the fee-simple title, for the word "children" was used in the sense of "heirs." *Kelly v. Parsons* (Ky.) 127 S. W. 792, 793.

The caption of a deed recited that it was entered into between the grantors, parties of the first part, and N. S. and heirs of S., parties of the second part, their heirs and assigns forever, and the habendum was to have and to hold, etc., unto the parties of the second part, their heirs and assigns forever, etc. N. S. had previously given to two children by her former husband their part of her estate and so had the deed prepared to exclude such children from participation in such land; the consideration having been paid by her. Held, that the word "heirs" was used in such deed in the sense of children, and that N. S. acquired a life estate only, remainder in fee to her children by S., then or thereafter born. *Howard v. Sebastian*, 136 S. W. 226, 227, 143 Ky. 237.

Decedent, being about to contract a second marriage and having four children by his first wife, executed a deed to certain real estate to them by name, describing them as his "heirs and all his heirs," as parties of the second part, and declaring that, in consideration of \$1 and the affection for his "heirs and for the heirs of his body," he sold unto such four children by name the property described, followed by a clause that the conveyance included the entire part of

the grantees in his real and personal property, and that they should never receive any more of his estate before or after his death. Held, that it appeared from a reading of the entire instrument that the grantor, by the use of the word "heirs," did not include children which he subsequently had by his second wife. *Mullins v. Moberly*, 140 S. W. 652, 653, 145 Ky. 477.

Testator devised land to M. "during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." Held, that the word "heirs" in such devise was not limited to the devisee's "bodily heirs," but instead meant children, descriptive of a class; and therefore the devisee did not take the fee under the rule in *Shelley's Case*. *Puckett v. Morgan*, 74 S. E. 15, 16, 158 N. C. 344.

Testatrix, dying without children, declared that, should she die without heirs, her entire property was to go to her husband, to dispose of as he wished, and by a following clause declared that, should the husband die without will after her decease, the property was to go to her brother. Held, it being conceded, that "heirs" meant "children," that the first paragraph devised to the husband a fee simple in the real estate and an absolute estate in the personal property, with the right of absolute disposition, so that any limitation over was repugnant to the fee and void. *Crutchfield v. Greer*, 74 S. E. 166, 167, 113 Va. 232.

The premises of a deed to man and wife read "unto the party of the second part and to their heirs and assigns forever," but the habendum read "to have and to hold the said property \* \* \* during the term of their natural lives, and after their death, to P. and B., and any other child or children that may be begotten" by grantee and his wife during marriage, "to them and their assigns forever." Held, that the word "heirs" in the premises was used in the sense of children, so that grantees only took a life estate with remainder over to their children. *Acker v. Pridgen*, 74 S. E. 335, 336, 158 N. C. 337.

In a will by which testator devised to his son J. certain real estate, "but should J. die leaving no heirs, then the said devised property to descend to" a brother and sisters of J., the word "heirs" must be construed to mean "children." *Bradshy v. Wallace*, 68 N. E. 1088, 1089, 202 Ill. 239.

In a deed to S., to hold in trust the land for the benefit of H. during his natural life, and, in the event of H. not leaving lawful issue, empowering the trustee to convey to the heirs of H., but, in case of lawful issue of H., then the trustee to make title to the "heirs of H." H. does not take a fee; the words "heirs of H." being simply a designatio personarum, meaning the lawful child or children of H. living at his death. *Smith v.*

*Proctor*, 51 S. E. 889, 892, 189 N. C. 314, 2 L. R. A. (N. S.) 172.

Where, from the language of the instrument and the circumstances surrounding its execution, it appears that the maker in using the word "heirs" meant "children," it will be so construed. Thus the word "heirs," in a deed to the heirs of a living person, will be construed as meaning "children"; it appearing from other language of the deed and the circumstances surrounding its execution that it was used with such meaning. *Roberson v. Wampler*, 51 S. E. 835, 836, 104 Va. 380, 1 L. R. A. (N. S.) 318.

The word "heirs" in a devise to testatrix's daughter for life and after her death to be equally divided between another daughter and a son, to them and their heirs, share and share alike, is not to be construed to mean children, so that on the death of the daughter or son their respective interests would go to their respective children and not to their respective heirs generally, because of the words "share and share alike" occurring after the word "heirs." *Fishburne v. Sigwald*, 60 S. E. 1105, 1106, 79 S. C. 551.

Where a will gives property to the testator's daughters and their "bodily heirs or the living heirs of their bodies," with a provision as to how the property shall go if any of them should "die before having or leaving any heir," the testator, in using the word "heir," meant "child," or a definite failure of issue; and, when a daughter gave birth to a child, her estate became absolute, and the limitation over was extinguished. *English v. McCreary*, 48 South. 113, 114, 157 Ala. 487.

In a will, drawn for testator by a notary public, which gave the remainder of the property to testator's wife for life, and provided that after her death it should be equally divided between her heirs, the word "heirs" could not be construed to mean "children," unless it clearly appeared from the context that it was so intended, and it could not be so construed in the present case; nothing showing that it was intended to be used in that sense, so that the remainder would go to the widow's heirs living at her death. *De Bardelaben v. Dickson*, 51 South. 986, 987, 166 Ala. 59.

Where a deed named a widow and "her heirs" as the grantors, the word "heirs" will be taken as meaning children, and the deed is sufficient as against the objection that the grantors are not named in the body of the deed. *Sloss-Sheffield S. & I. Co. v. Lollar*, 54 South. 272, 274, 170 Ala. 239.

Where a husband executed a deed, in consideration of a sum of money and love and affection, to his wife for life, and at her death, to his "heirs," the grantee being the grantor's second wife, and the stepmother of his son, who survived both of them, the

word "heirs" was not used in a technical sense, but in the sense of children as referring to the grantor's son, so that at the grantee's death the son took the property conveyed in remainder. *Boone v. Baird*, 44 South. 929, 930, 91 Miss. 420.

Where testator left his property to his wife and three children in equal proportions during their natural life, "and to the children and the heirs of their bodies" at the time of their death, and provided that, if they have no children or heirs of their bodies, it shall be again divided between his wife and children, "or such of them as shall survive, and to their heirs, share and share alike, \* \* \* and all the children of my deceased children," the words "heirs" and "bodily heirs" mean children. *Davenport v. Collins*, 48 South. 733, 735, 95 Miss. 358.

A testatrix during the lifetime of her four children executed a will, giving to a daughter corporate stock for life, and declaring that at her death the same should be "equally divided among the heirs" of the four children. Held, that the word "heirs" was equivalent to the word "children," and the stock on the death of the daughter passed to the then children of the four children of the testatrix, though one of testatrix's four children was still living. *Kalbach v. Clark*, 110 N. W. 599, 602, 133 Iowa, 215, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647.

After the marriage of a widow, her father executed a deed to her, her husband, and her heirs, and to the heirs and assigns of the "party of the second part." At the time of the conveyance the widow had two children, and thereafter another child was born to her and her second husband. Held, that the word "heirs," as used in the deed, should be construed to mean "children," and hence the deed conveyed to the widow and her second husband an estate in one-third of the land by the entirety, and vested a two-thirds interest in the widow's two children by her first marriage. *Fullagar v. Stockdale*, 101 N. W. 576, 578, 138 Mich. 363.

The word "heirs" in a will making a gift to "the heirs which my daughter \* \* \* now has and which she may hereafter have" means her children. *Spicer v. Connor*, 132 N. Y. Supp. 877, 879, 148 App. Div. 334.

Under B. & C. Comp. § 5554, providing that a testator who fails to name or provide for his child, shall be deemed to die intestate as to such child, a testator who dies leaving children, and by his will leaves all his property to his wife "to have and to hold the same during her natural life or to sell and convey the said property for the benefit of herself and her heirs," dies intestate so far as his children are concerned; the word "heirs" used in the will not being the equivalent of "children." *Neal v. Davis*, 99 Pac. 69, 71, 53 Or. 423.

A testamentary gift to a designated sister of testator, to be divided into four equal parts, one to be retained by her, and the remaining three to be given to three sisters named, or their heirs, and, in the event either shall die leaving no heirs, the share shall go to the sisters or their heirs who shall be living, is a gift to the designated sister, who alone survived the other sisters, dying without leaving children before testator's death: the word "heirs" meaning children. *Kalles v. Ewert*, 94 N. E. 105, 106, 248 Ill. 612.

The word "heirs," as used in a deed from a husband to his wife for life, with remainder to his heirs at her death, or before marriage as his widow, means children. *Shirey v. Clark*, 81 S. W. 1057, 1058, 72 Ark. 539.

Where a will provided that, if a life tenant should die before 25 years, a certain portion of his income should go to his mother, and "the rest to be divided between the heirs living and the heirs of any deceased," the word "heirs," as first employed in the first sentence, means the children of testatrix, and, as secondly employed, the children or descendants of such of her children as may be dead. *Dulaney v. Dulaney* (Ky.) 79 S. W. 195, 197.

Testator bequeathed to a trustee \$20,000, to pay the income thereof to testator's son during his life, and also \$5,000 to the same trustee to pay the income thereof to a grandson during his life, and also bequeathed to the son all the residue of the estate, including the \$5,000 bequest. A codicil provided that, after the decease of the son "and all of his lawful heirs, I give and bequeath, in equal shares, the said \$20,000 in trust" to seven named nephews and nieces, "to them and their heirs and assigns forever." Held that, by the use of the word "heirs" in the expression "after the decease of my son and all of his lawful heirs," testator meant the "children" of the son, and it was the intention of the testator that the nephews and nieces should not take anything under the bequest until after the death of the son and all of his children, though there was no express disposition of the income accruing on the fund after the death of the son, as such income would fall into the residue, which by the terms of the will belonged to the son's estate. *McAllister v. Hayes*, 79 Atl. 726, 728, 76 N. H. 108.

In a will by which testator devised all his real estate to his widow so long as she should remain such, and then provided that certain of his real estate should not be sold or incumbered, and, on the death of the widow, should be owned and used by his children as equal co-owners, "but in case of the death of any one leaving heirs, then the share of such deceased child," in equal portions, should descend to his or her heirs, and,



on the death of the children or any of them, the property should descend to their respective heirs in fee simple absolute, the word "heirs" in the clause, "in case of the death of any one leaving heirs," meant children or heirs of the body. *Winter v. Dibble*, 95 N. E. 1093, 1099, 251 Ill. 200.

A will devising the income of certain real estate to testator's daughter for life, and on her death one-half of the income to go to her issue, if any, and the balance to testator's surviving heirs, was not objectionable as creating a perpetuity; the word "heirs" being used in the sense of children, and the devise of the income, without limit, carrying the property itself. *Guesnard v. Guesnard*, 55 South. 524, 526, 173 Ala. 250.

Testator devised the income of certain real estate to his daughter for life, and provided that at her death, should she have issue, such issue should receive one-half of the income, and the other half be equally divided between testator's other heirs, as thereafter mentioned, but, should there be no issue of the daughter, then the property should revert to testator's estate, and the income be equally divided between his surviving heirs and the children of such of his heirs who had died leaving issue; that the property should not be sold, but should be kept as a source of income to his heirs. The balance of his real and personal property was given to specifically named persons. Held, that the word "heirs," as used in the will, meant children, and that the devisees under such clause took per capita, and not per stirpes. *Guesnard v. Guesnard*, 55 South. 524, 525, 173 Ala. 250.

Testatrix devised real estate to her daughter for life, and at her death to her heirs, and declared that the property should be free from any control of her husband, and should belong to the daughter and the heirs of her body, and should not be liable for any debts of the husband. Held, that the will, executed while the rule in *Shelley's Case* was in force, and while the married woman's law (Acts 1849-50, p. 63), under which a husband became the trustee of his wife's separate estate, was in force, created a fee-simple estate in the daughter; the word "heirs" or "heirs of the body" not meaning "children." *Terry v. Hood*, 55 South. 423, 424, 172 Ala. 40.

In a will by which testatrix gave to her husband "all my possessions, land, stock, farming implements, household and kitchen furniture, him all I have, his lifetime (if I leave know heirs)," with the request that, if testatrix left no heirs, he would give all to persons named, the word "heirs" was to be construed as meaning "children," and it was the intention of testatrix that the property should go to her husband for life, then to her children, should she leave any at her death,

and then over to the persons named. *Swindell v. Smaw*, 72 S. E. 1, 156 N. C. 1.

"Heirs" in the Creek Law of Descent and Distribution, § 8, set forth in Perryman's Digest of 1900, providing that the surviving spouse shall be entitled to one-half of the estate of the other spouse, if there are no heirs, and an heir's part if there should be other heirs, means children. *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 634, 20 Okl. 687.

A conveyance to the "heirs" of a living person is a conveyance to his children as tenants in common, including a child en ventre sa mere; Code, § 1328, providing that a child unborn, but in esse, shall be deemed a person capable of taking by deed. At common law, where the limitation in the deed was simply to the heirs of a living person, and nothing else appeared to indicate the special intention of the grantor as to who should take, the deed was void, because no grantor was sufficiently designated. Our statute completely reversed this principle, and now, by virtue of its wise provision, such a limitation is conclusively presumed to be intended for the children of the person named therein. The language of the statute is too plain for any possible doubt as to its true meaning. It is as follows (Code, § 1329): "Any limitation by deed, will or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless the contrary intention appear by the deed or will." *Campbell v. Everhart*, 52 S. E. 201, 203, 139 N. C. 503 (citing *Broom's Legal Maxims* [8th Ed.] p. 521, marg. p. 523). See, also, *Condor v. Secrest*, 62 S. E. 921, 923, 149 N. C. 201.

A will directed that testatrix's mother should have the entire use and control of the property during her life, and that the H. building should go to testatrix's brother, and the residue of her property, both real and personal, should "go to the heirs of my sister F." The will was drawn by an unskilled person unfamiliar with technical legal terms, and, when it was executed, sister F. was about 32 years of age, and testatrix's mother, the life tenant, was much older. Held that, in view of the improbability of sister F. dying before the life tenant so as to have "heirs" at the life tenant's death, that word would be construed as meaning "children," so that the sister's children would take a vested remainder in the residue of the property other than the H. building. *Castleberry v. Stringer* (Ala.) 57 South. 849, 850.

A deed recited that it was made between the grantors as parties of the first part and one L. and her two heirs as parties of the second part. The granting clause recited that, in consideration of love and affection, "I do hereby sell and convey" unto L. and her children certain described real property, the habendum clause reciting that it

was to have and to hold with all appurtenances thereto, and that the party of the first part covenanted with the said party of the second part to warrant the title. It was also recited that the conveyance was to the heirs of L. for their lifetime, and after their death to their children. Held that, it being the obvious intention of the grantor that the two children of L. should take some estate, the word "heirs" should be construed as "children," and they take only a life estate with remainder to their children. *Harkness v. Meade*, 147 S. W. 10, 11, 148 Ky. 565.

Where a testator gave a nominal sum to each of his five children, gave the balance to his wife for life, or during widowhood, with a gift over, on her death or remarriage, to his "surviving heirs" equally, and provided that charges against his "heirs, their husbands or wives as contracted \* \* \* by them with me," should be deducted from their share, and a daughter, whose husband was indebted to the testator, died before testator, leaving children, it was held that the words "surviving heirs" meant surviving children, and referred to such of testator's children as should be surviving at the date of their mother's death or remarriage, and that the children of the deceased daughter did not take. *Howell v. Steelman*, 74 Atl. 976, 977, 76 N. J. Eq. 423.

The granting clause of a deed was to the grantor's son H. and to his "heirs," "on the terms and conditions hereafter stated," the habendum clause to H. and his "heirs," the special warranty to H. and his "heirs," and the "terms and conditions hereafter stated" were: "The intention \* \* \* is to vest sufficient title in \* \* \* H. to the \* \* \* property so that he can, during his life, use, occupy, and enjoy it \* \* \* as completely as though he had a fee simple, and at his death his children are to have a fee-simple title. Should \* \* \* H. die without issue, then the title \* \* \* is to revert in us \* \* \* if we are living; if we are not living, then according to the descent and distribution laws \* \* \* such of our heirs are to receive and have the same title as he gets, and whoever inherits said property hereafter shall have a fee-simple title." Held, that the rule in *Shelley's Case* did not apply, so as to vest the fee in H.; it appearing from the subsequent terms and conditions referred to in the granting clause, and which are to be read as if incorporated in it, that the word "heirs" therein is used, not in its legal sense, but in the sense of "children" or "issue" of H. living at his death, who are to take by purchase, as remaindermen. *Hopkins v. Hopkins*, 122 S. W. 15, 16, 103 Tex. 15.

A deed by a father to his three sons in consideration of love and affection, and for the further consideration that his wife should control a part of the estate for her

support, should she remain his widow, and which provided that the land should be equally divided between the sons, and should not be sold to any person "during lifetime, and after our death" the same should be equally divided "between the heirs of" the three sons, and which gave the privilege to the sons of selling to each other, and that in case of sales the heirs should have no claim, etc., conveyed the land to the sons, subject to the limitation that during the lifetime of the father and his wife the sons should not convey the land to a stranger, but might sell their respective parts to each other; the word "heirs" referring to the sons; and the word "of," following the word "heirs" in the quoted phrase, being inserted by mistake. *Polley v. Adkins*, 140 S. W. 551, 552, 145 Ky. 370.

In *Laws* (Ed. 1830) p. 333, tit. 77, c. 1, § 4, which provides that an executor shall account in money for the debts due the deceased, by him received, or which by due diligence might have been collected and received; that he shall also be charged in money with the appraised value of the goods and chattels of the deceased, or, if sold under a license, with the proceeds of the sale, provided that if there be any "personal estate" specifically bequeathed or undisposed of at the request of the heirs or legatees, or preserved for their greater benefit, and not wanted for the payment of debts, the executor or administrator shall be discharged therefrom by producing and delivering it to the heirs or legatees to whom it belongs; and Rev. St. 1842, c. 159, § 6, which provides that any property may be reserved at a sale, unless needed for the payment of debts, for the benefit or on the request of heirs or legatees, and that the administrator shall be discharged by delivering the same to persons entitled thereto—the word "heirs" includes minors, so that the guardian of a minor was authorized to accept from the executor choses in action as a part of his ward's estate in lieu of cash. *Stevens v. Meserve*, 61 Atl. 420, 422, 73 N. H. 293, 111 Am. St. Rep. 612.

Testator, by the eleventh clause of his will, bequeathed certain lands to the heirs of his brother A., naming his three children, and giving to each an undivided one-third. He then, in the same clause, bequeathed to the "surviving heirs" of the brother an undivided half interest in certain live stock, provided that if either of the "above-named children" should die without issue before testator's death the share of such child should go to the survivors, and if any should die childless such share should revert to the survivors; it being testator's intention that his estate should descend to the heirs of his own blood, except the property devised to his wife. He thereafter bequeathed all the residue of his estate, one-third to C. and his heirs, and one-third, share and share alike, to the surviving heirs of the brother referred

to in the eleventh clause. Held, that the two clauses should be construed together, and that the words "surviving heirs" were used synonymously with the words "surviving children," and hence did not include the granddaughter of such brother, so as to entitle her to share under the residuary clause. *Dunshee v. Dunshee*, 96 N. E. 298, 300, 251 Ill. 405.

Testator, who left surviving him a sister and nephew and nieces, the children of a predeceased brother, devised all of his real and personal property equally between the two sons of a predeceased sister, share and share alike, without other claim to the estate as long as they or one of their lawful heirs lived, and provided that, if one should die before the other, the survivor should take his share, and that, if either devisee should have any lawful heirs, they were to have his share of the estate, and that, if both died without heirs, the property should revert. Held, that the word "heirs," construed in the light of the circumstances, was used in the will in the sense of "children," or heirs of the body, so that each of the devisees took a fee conditional, with remainder to the other in the event of his death without issue. *Du Bose v. Flemming*, 76 S. E. 277, 93 S. C. 182.

#### Collateral heirs or parents

Code Pub. Gen. Laws 1904, art. 46, providing by sections 6, 14, and 21 for the descent of real estate, declares by section 27 that if, in the descending or collateral line, any parent shall be dead, a child or children shall, by representation, be considered in the same degree as the parent would have been if living, and shall have the same share of the estate as the parent would have been entitled to if living, "provided that there be no representation admitted among collaterals after brother's and sister's children"; and article 93, § 129, provides: "After children, descendants, father, mother, brothers and sisters of the deceased, and their descendants, all collateral relations in equal degree shall take, and no representation among such collaterals shall be allowed." Testatrix directed her estate to be converted into cash and distributed among her "heirs at law and next of kin, who should be entitled thereto under the laws of Maryland." Held, in a contest between the first cousins of the deceased and the children of a deceased first cousin, that the children of the deceased first cousin were not within the class described by the will and took nothing thereunder. *Suman v. Harvey*, 79 Atl. 197, 204, 114 Md. 241.

A testator provided in his will that certain real estate devised to his four sons in equal proportions should not be sold until the youngest child arrived at the age of majority, and, "in case either one of them shall die without heirs or legal representatives

of his own, the survivors shall take his portion of the said estate equally." An infant son died after the death of the testator. Held, that the words "heirs of his own," when applied to the children of the deceased, meant lineal descendants or issue, and that the mother of the deceased child did not inherit its share of the real estate devised in the will. *Coleman v. Coleman*, 76 Pac. 439, 440, 69 Kan. 39.

In 2 Ballinger's Ann. Codes & St. § 4828, providing that, when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, etc., the term "heirs" means the widow and children of the deceased, and does not include parents and collateral heirs. *Copeland v. City of Seattle*, 74 Pac. 582, 583, 33 Wash. 415, 65 L. R. A. 333. The words "heirs" and "personal representatives," as used in this statute, include only the widow and children of the deceased person, and do not authorize an action by the mother for the wrongful death of her unmarried adult son, on whom she was dependent. *Manning v. Tacoma Ry. & Power Co.*, 75 Pac. 994, 34 Wash. 406. The Supreme Court, in construing the word "heirs" so as not to include "parents," did so upon the theory that it was limited in its scope to the persons theretofore specifically mentioned in the statute, and such decision was conclusive under the rule of stare decisis against the right of a surviving husband to maintain an action for the death of his wife. *Johnson v. Seattle Electric Co.*, 81 Pac. 705, 706, 39 Wash. 211.

Rev. Codes 1905, § 7687, provides that, in an action for wrongful death, such damages shall be given as the jury think proportionate to the injuries resulting from the death to the persons entitled to recover. Section 7688 provides that the action shall be brought by the persons named, and in the order prescribed, the surviving husband or wife, if any, the surviving children, if any, the personal representative. Section 7689 provides that the amount recovered shall not be liable for decedent's debts, but shall inure to the exclusive benefit of his heirs at law in such shares as the judge shall fix. Held, that the term "heirs at law" is not limited to the husband or wife or children of decedent, but includes his brothers and sisters, for whose benefit an action may be maintained by the personal representative. *Satterberg v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 121 N. W. 70, 71, 19 N. D. 38.

Under Rev. Codes N. D. 1905, § 5187, subsec. 2, providing that if the decedent leaves no issue, nor husband nor wife, the estate must go to the father, and, if he is dead, to the mother, and section 7686, authorizing an action for wrongful death, the recovery, under section 7689, inuring to the exclusive benefit of the heirs at law, the term "heirs at

law" includes the father of the decedent who leaves no wife or children, and an action may be maintained for his benefit by the personal representatives of the decedent. *Stangeland v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 117 N. W. 386, 387, 105 Minn. 224.

#### As creditor

See Creditor.

#### Descendants or issue

Descendant as including, see Descendant.  
Issue as including, see Issue (Descendants).

One's heirs are his surviving descendants, capable of inheriting. *Price v. Griffin*, 64 S. E. 372, 373, 150 N. C. 523, 29 L. R. A. (N. S.) 935.

Where a testator directs that if his son shall have any lawful issue at his death the estate shall vest in his heirs forever, the word "heirs" means the same as lawful issue, and is not used in its legal sense. *Harkleroad v. Bass*, 36 South. 537, 538, 84 Miss. 483.

Where a will, after a devise to two persons, provides that, in case either should die leaving no heirs, the other shall be entitled to all, and the will as a whole shows a fixed purpose to devolve the entire estate upon these two devisees to the exclusion of all other direct descendants of the testatrix, the word "heirs" in the limitation over will be construed as meaning "issue" or direct descendants of the persons named; the words "heirs" and "issue" being convertible when such a construction is necessary to carry out the paramount intent of the testatrix. *Brown v. Tuschoff*, 138 S. W. 497, 499, 235 Mo. 449. See, also, *Horton v. McCall*, 82 Atl. 472, 233 Pa. 405.

#### Devisees or legatees

Devisee as including, see Devisee.

A legatee under a universal title is not an heir. *Succession of Bossu*, 38 South. 878, 879, 115 La. 13.

The term "heirs" may be regarded as a synonym of "legatees" when the will shows that it so intended. *Kenan v. Graham*, 33 South. 699, 700, 135 Ala. 585.

The word "heir" is technically distinguishable from "legatee" or "devisee," but is sometimes used "in its more general sense, as indicating the person upon whom property devolves on the death of another"; and hence, when the intention is clear, the word may sometimes be treated as equivalent to "legatee" or devisee. *Taylor v. Perkins*, 56 Atl. 741, 742, 72 N. H. 349 (citing *Shapleigh v. Shapleigh*, 44 Atl. 107, 108, 69 N. H. 577, 579).

While the word "heir" in a will may be construed to mean "devisee" when it refers to a relationship to the testator, it could not be so construed when used in a codicil and having reference to a relationship with an-

other than the testator. *Wells v. Fuchs*, 125 S. W. 1137, 1140, 226 Mo. 97.

Where such is the intent of the will, the words "heirs" and "devisees" will be deemed to mean "legatees" when applied to gifts of personalty, and hence where gifts to certain persons were gifts of personalty or interests therein, but the gifts were given in terms "I give and devise," and the words "devise" and "devisees" were clearly used in the granting clauses of the will as intending to cover interests in personalty and the recipient of such interest, the recipients thereof will be deemed "devisees" within a provision of the will that, if any of the devisees should aid or attempt to prevent the proof of the will, all the expenses of probating it should be taken by the executor from the share of each one so attempting. *Kayhart v. Whitehead*, 76 Atl. 241, 242, 77 N. J. Eq. 12.

Civ. Code, § 1265, provides that a homestead, selected by one spouse in the separate property of the other without the consent of the latter, on the death of the owner goes to his "heirs or devisees." Code Civ. Proc. § 1474, provides that in such case the property passes on the death of the owner to his "heirs," and such section, having been amended in 1880 ten days after the amendment of section 1265 of the Civil Code, must be taken as the last expression of the legislative will, and, since the word "heirs" cannot be construed to include "devisees," as repealing by implication the part of section 1265 of the Civil Code which would permit the owner to dispose of such a homestead by devise to the exclusion of the rights of the surviving spouse or other heir at law. In *re McGee's Estate*, 97 Pac. 299, 300, 154 Cal. 204.

The statute prohibiting parties from testifying in actions by or against the "heirs" or legal representatives of a decedent does not include devisees and legatees. *Emerson v. Scott*, 87 S. W. 369, 370, 39 Tex. Civ. App. 65.

Where the sole legatee under a will was the mother of the decedent, assignments by her of money due as "heir at law" will be construed as transferring portions of the interest to which she is entitled under the will, and hence her assignee is one interested in that instrument, and as such entitled to petition for probate of the will and for the issuance of letters of administration to himself. In *re Rankin's Estate*, 127 Pac. 1034, 164 Cal. 138.

#### Distributees

The words "heirs" and "distributees," in Rev. St. 1893, § 2316, as amended by Act 1898 (22 St. at Large, p. 788), which makes heirs at law or distributees of a person the beneficiaries in an action for wrongful death where they were dependent on deceased for support, have the same meaning. To determine the heir, it is necessary only to inquire

to whom, under the law of the land, the estate would pass in case of intestacy. *Kitchin v. Southern Ry.*, 48 S. E. 4, 7, 68 S. C. 554, 1 Ann. Cas. 747.

The constitution and by-laws of a beneficial association provided that on the decease of a member in good standing the society should pay to the survivors, and that the treasurer should not pay death benefits before the proper "heirs" had been ascertained, and every member had the opportunity in his lifetime to inform the society as to his "heirs." Held, that the word "heirs" was used in a strict legal sense, and the beneficiaries were those to whom the personal property of the deceased would go in case of intestacy. *Dielmann v. Berka*, 97 N. Y. Supp. 1027, 1029, 49 Misc. Rep. 486.

The use of the word "heirs" in a will in reference to personalty, means those who take the personal estate of an intestate. In *re Schnitzler*, 114 N. Y. Supp. 934, 935, 61 Misc. Rep. 218.

The clause requiring equal division of the remainder among "the heirs of the W. family" meant that the remainder was to be given to those of testator's family who would be his heirs if he died intestate, such use of the word "heir" being a common and colloquial use, so that the widow of testator's brother cannot claim as a remainderman. In *re Womersley's Estate*, 127 Pac. 645, 646, 164 Cal. 85 (citing 4 Words and Phrases, p. 3252).

In a bequest of personalty, the word "heirs" means prima facie those who would have been entitled to it had the testator died intestate. *Jacobs v. Prescott*, 65 Atl. 761, 762, 102 Me. 63.

The word "heirs" in a will primarily is used in its legal or technical sense, and, unless the context shows a contrary intention, must be construed as meaning all those who in case of intestacy would be entitled by law to inherit on the death of the testator or ancestor named. *Flint v. Wisconsin Trust Co.*, 138 N. W. 629, 631, 151 Wis. 231.

Where a patent issues from the United States "to the heirs" of a deceased person, and there is no act of Congress specifying or designating who shall be deemed heirs, in such case resort must be had to the laws of the state where the land is situated for the purpose of determining who were the heirs of the deceased. *Powell v. Powell*, 126 Pac. 1058, 1059, 22 Idaho, 531.

When a contract or a testamentary disposition passes property to persons described as "heirs," personal property will pass to those entitled to personal estate under the statute of distribution. *Throp v. Throp*, 61 Atl. 377, 378, 69 N. J. Eq. 530 (citing *Leavitt v. Dunn*, 28 Atl. 590, 56 N. J. Law, 309, 44 Am. St. Rep. 402; *Reen v. Wagner*, 26 Atl. 467, 51 N. J. Eq. 1).

Where the by-laws of an insurance company permit insurance in favor of one's "heirs," and a policy provides for payment to the insured's "heirs," the word "heirs" must be regarded as intended to describe those persons who would take in case of intestacy. *Burns v. Burns*, 82 N. E. 1107, 1108, 190 N. E. 211.

When the word "heirs" is used in gifts of personalty, it should primarily be held to refer to those who would be entitled to take under the statute of distribution, such as children or next of kin. *Vogt v. Vogt*, 26 App. D. C. 46, 55.

Where a testator devises his estate in trust, and directs that on a final settlement the rest and residue thereof shall be divided and distributed and paid to his heirs at law in the same proportion as the same would have been paid to them if he had died without a will, the term "heirs at law" refers to the then heirs at law; that is, at the time of the authorized distribution. *Hos-tetter v. State*, 26 Ohio Cir. Ct. R. 702, 709.

"Heirs at law," as used in Kirby's Dig. §§ 6289, 6290, giving a right of action for death by wrongful act, and providing that the same shall be brought by the heirs at law of decedent where there is no personal representative and the amount recovered shall be for the benefit of the widow and next of kin, includes those receiving a distributive share of the estate and the beneficiaries of the action, and only one action may be brought for a person's death under the statute. *McBride v. Berman*, 94 S. W. 913, 79 Ark. 62.

The "surviving heirs" in a devise to a child, followed by the provision that on his death without bodily heirs the property shall go to the surviving heirs of testator, are the distributees under the statute of distribution in being at the death of the child, and until his death it cannot be ascertained who will take as surviving heirs. *Barber v. Crawford*, 67 S. E. 7, 9, 85 S. C. 54.

#### Grandchildren

In a will postponing disposition of testator's principal estate until after the death of his wife and his three children, there were clauses giving to the wife one-third of the income during her life, and distributing the remainder of the income to the children in specified shares. Then followed these clauses: "Item. Upon the death of my wife I do order that the one-third of the income hereby bequeathed to her shall be distributed among my surviving three children." "Upon the death of any of my three children, I do order the portion bequeathed to him or her to be distributed among his or her heirs." Held, that the word "heirs," as here used, included a grandchild of a deceased child of the testator. In *re Smisson*, 82 Atl. 614, 616, 79 N. J. Eq. 233.

Where by the terms of a will testator left certain property to the "heirs" of his children, vesting the control of the property in the children until their death, and made no express provisions for after-born grandchildren, only the grandchildren living at the death of testator are entitled to share in the estate. *Wyman v. Johnson*, 59 S. W. 250, 251, 68 Ark. 369.

#### Stepchildren

A stepchild of a decedent is not his child and heir at law, within the meaning of the statutes of descent (Gen. St. 1906, § 2295). *Houston v. McKinney*, 45 South. 480, 481, 54 Fla. 600.

#### Heir apparent or presumptive

No one can be an heir during the lifetime of his ancestor. *Templeman v. McFerrin* (Tex.) 113 S. W. 333, 334; *Gerard v. Beecher*, 68 Atl. 438, 441, 80 Conn. 363, 15 L. R. A. (N. S.) 900; *Westcott v. Meeker*, 122 N. W. 964, 970, 144 Iowa, 311, 29 L. R. A. (N. S.) 947.

#### Heirs living at death of testator or ancestor

A bequest or devise to "heirs," or "heirs at law," goes to those who are such when testator dies, unless different intent is manifest. *Welch v. Blanchard*, 94 N. E. 811, 208 Mass. 523.

A devise to the testator's "lawful heirs" should be construed as referring to those who are such at the testator's death, unless a different intent is plainly manifested by the will. *Hill v. Hill*, 132 N. W. 738, 739, 90 Neb. 43, 38 L. R. A. (N. S.) 198; *Harris v. Ingalls*, 68 Atl. 34, 37, 74 N. H. 339.

A devise to "heirs" or "next of kin" is construed as referring to those who answer that description at the time of the testator's death or who would have taken, by descent, had he died intestate, unless a different intention is plainly manifested by the will. *Suman v. Harvey*, 79 Atl. 197, 199, 114 Md. 241.

Where a testator devised one-half of his property to his wife for life, remainder to his heirs at law, the property vested in those who were his heirs at law at the time of his death, for not only does the language show the testator's intent to have the gift become complete upon his death, but an "heir" is he upon whom the law casts an estate upon the death of the owner. *Mitchell v. Vest* (Iowa) 136 N. W. 1054, 1056.

Where there is a devise in trust to pay the net income to A. for life, with a discretionary power in the trustees to use part of such income to pay off a mortgage incumbrance upon the land, and, after the death of A., a devise in fee simple to her "heirs at law," held, that the testator used the words "heirs at law" to designate the persons who at the time of A.'s death would be her heirs at law, and that consequently the rule in *Shelley's Case* does not apply. *Shugrue v.*

*Long*, 82 Atl. 905, 907, 82 N. J. Law, 717, 39 L. R. A. (N. S.) 257.

The term "heirs at law" of a beneficiary of a mutual benefit certificate, as used in the society's by-law providing for the distribution of the proceeds of the certificate to insure "heirs at law," mean those who answered the description at the time of the death of the insured. *Anderson v. Supreme Council Catholic Benevolent Legion*, 60 Atl. 759, 760, 69 N. J. Eq. 176.

By the express provisions of statute, when a remainder is limited to take effect on the death of any person without heirs, the word "heirs" must be construed to mean heirs living at the death of the person named as ancestor. *In re Korn's Will*, 107 N. W. 659, 662, 128 Wis. 428; *Schlereth v. Schlereth*, 66 N. E. 130, 132, 173 N. Y. 444, 93 Am. St. Rep. 616.

Sess. Acts 1815-16, p. 32, abolished estates tail, and Rev. St. 1825, p. 216, and Rev. St. 1899, § 4592, provide that in cases where by the common law or the statute law of England any person might become seised in fee tail of any lands, etc., he shall have only a life estate, and the remainder in fee simple shall pass to the person next in line, and Rev. St. 1899, § 4593, provides that where a remainder in lands shall be limited to take effect on the death of any person without heirs or without issue or on failure of issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. Testator devised lands to his two sons and to their heirs and assigns forever, and provided that the same should not be sold before the younger of the two should become of lawful age, and that, should either of them die without issue, the survivor, his heirs and assigns, should take the part bequeathed to the son so dying, and that, in the event both should die without issue, then testator's surviving heirs should take. Held that, by the use of the word "heirs" in connection with the word "issue" testator created what would have been at common law or by the statute *de donis* an estate tail, or, Rev. St. 1899, § 4593, not being applicable to an executory devise, even if the estate was a fee simple in the first instance, it was cut down to a fee tail by the clause declaring that in case of the death of both sons without leaving issue the estate was to revert to the heirs of testator, the failure of issue referred to being an indefinite failure of issue, and hence, under section 4592, the two sons took a life estate, with remainder in fee to their children. *Gannon v. Pauk*, 83 S. W. 453, 457, 183 Mo. 265.

Under a will directing the investment of a sum of money for a daughter of testator during her life, and, at her death without issue, to be paid to "my (testator's) heirs," as part of the residuary estate, and dividing

the residuary estate into five equal shares, for the benefit of each of testator's five children, the shares of the daughters being given to trustees, who were to pay the income thereof to the respective daughters during life, and, at the death of a daughter, without issue, her share was to go to "my (testator's) heirs" at law, and providing that the cestuis qui trustent should not exercise any power over their respective interests, and should take only for life or for years, as the case might be, with remainder to their or to "my (testator's) heirs," on the death, without issue, of a daughter, after the death of one of the sons without issue, one-fifth of the fund invested for her went to the daughter's executrix, since the remainders were to the persons who were testator's "heirs at law" at his death. *Rotch v. Rotch*, 53 N. E. 268, 270, 173 Mass. 125.

A will executed by H. bequeathed to testator's wife all his property during her life, and provided that "at her death what of it that is left is to go equally to my heirs at law. My object is to keep my property in the H. family." The next paragraph gave testator's son \$25 in addition to a home with testator's wife, and provided "this is in addition to his rightful share of my estate after the death of my wife." Held, that testator's son took a vested remainder, and not a remainder contingent upon his surviving testator's widow; the word "heirs" used in the first paragraph referring to testator's heirs living at the time of his death. *Campbell v. Hinton*, 150 S. W. 676, 150 Ky. 546.

Where testator left the residue of his estate in trust for the support of his daughter for life, and provided that, on her failure to make a will, the same should go to "her heirs at law," and the daughter died intestate without issue, the residuary estate passed on her death to those who were then her heirs at law, and not to those who would have been her heirs had she died when the testator did. *Coffin v. Jernegan*, 75 N. E. 958, 189 Mass. 503.

In a will directing executors to invest and keep invested a sum of money, pay the income to a nephew of testator during life, and on his death divide the trust fund among the nephew's heirs at law, the remaindermen take direct from the testator; the identity of the "heirs at law" being determined on the nephew's death, and including those who answer to that description in its strict legal meaning. *In re Fay*, 137 N. Y. Supp. 983, 984, 77 Misc. Rep. 514.

#### Heirs of the body

As used in a will giving land to testator's two sons, their heirs and assigns, forever, the word "heirs" is not used as "heirs of the body," and the sons took a fee. *Gannon v. Albright*, 81 S. W. 1162, 1163, 183 Mo. 238, 67 L. R. A. 97, 105 Am. St. Rep. 471.

The word "heirs," in a will whereby testator devised to his wife his dwelling house during widowhood, and, in the event of her marriage or death, the house should go to his son or his lawful heirs, and if he died without lawful heirs then to the children of testator's brother, must be construed to mean "heirs of the body," since there is a gift over to collaterals who would have been lawful heirs, and on the death of the son without issue, leaving a will, the children of testator's brother took the estate after the death of testator's widow. *Mayer v. Walker*, 63 Atl. 1011, 1012, 214 Pa. 440.

A devise to "heirs" on the death of a life tenant, especially in the case of a gift over upon death without heirs, may be confined to heirs of the body. *Wallace v. Diehl*, 95 N. E. 646, 647, 202 N. Y. 156, 33 L. R. A. (N. S.) 9.

"Under a deed, if the word 'heirs' is used in the granting clause, it may be cut down to mean heirs of the body of the donee, provided the words of appropriation are used in the context directly referring to the former word as if it should say 'to him and his heirs; that is, heirs of his body,' or if it should say 'to him and his heirs,' and then in a sentence closely following and referring to the gift say, 'to the aforesaid heirs of his body,' but, in the case of a will, words of direct reference are not necessary." *Gannon v. Pauk*, 83 S. W. 453, 456, 183 Mo. 265.

Though, where it appears under a will that heirs are to be ascertained as of a later date than testator's death, effect will be given the intent, ordinarily the term "heirs at law" refers to those who were or will be such at the testator or ancestor's death; and hence, where a will gave property to trustees to pay the income to a daughter for life, and provided that if she died without living descendants the remainder should "then" be distributed among testator's heirs at law, the heirs must be ascertained as of the testator's death, and not as of the daughter's—the term "heirs at law" appearing repeatedly in the will without qualification. That testator otherwise amply provided for those who were his heirs when he died does not show they were not entitled to share in the remainder. *Boston Safe Deposit & Trust Co. v. Parker*, 83 N. E. 307, 308, 197 Mass. 70.

The widow and only child of a decedent created a trust for the benefit of the decedent's brothers and sisters. The deed provided that the income of certain shares of the fund should go to each of deceased's brothers and to two of his sisters for their lives, and at the death of any beneficiary one-half of his or her share should be divided among his or her issue "then living," and in default of issue should revert to the donors or their heirs at law. The remaining ninth of the fund was devoted to the benefit

of a remaining sister of deceased for life, and at her death a part thereof was to be conveyed to a certain person "if then living, but, if then deceased, to his heirs at law." Held, that the words "heirs at law" in the clause last quoted, referred to those who were such at the time of the death of the ancestor there mentioned, and not to those surviving at the period of distribution. *Merrill v. Preston*, 72 N. E. 941, 942, 187 Mass. 197.

Testator devised all his real estate to his widow so long as she should remain such, and then provided that certain of his real estate should not be sold or incumbered, and, on the death of the widow, should be owned and used by his children as equal co-owners, "but in case of the death of any one leaving heirs, then the share of such deceased child," in equal portions, should descend to his or her heirs, and, on the death of the children or any of them, the property should descend to their respective heirs in fee simple absolute. Held, that since the word "but" following the creation of the life estate in testator's children, marked the beginning of an exception, and was used in the sense of "except," "unless," "save," "yet," "still," "however," "nevertheless," the clause relating to the death of any of the children referred to their death during the lifetime of the widow, and that, as to children surviving her, no contingency longer existed, the word "heirs," in the last clause not being limited to heirs of the body, but referring to testator's heirs generally. *Winter v. Dible*, 95 N. E. 1093, 1099, 251 Ill. 200.

Unless there is something contained in a policy of insurance expressing a contrary intention, then the words "heirs at law" of the insured must be taken in the ordinary legal sense to refer to those who are such at the time of his death. Where a policy contained the provision that the insurance should be payable to the "heirs at law" of the insured husband in case he outlived his wife who was beneficiary, on the death of the beneficiary the interest in the policy as such passed to the son as heir presumptive of the husband, and on the son's death to the "heirs at law" of the insured. *Birge v. Franklin*, 115 N. W. 278, 103 Minn. 482.

#### Husband or wife

The word "heirs" or "descendants," used in the creation of a separate estate of a married woman, will not, at her death, exclude the marital rights of the husband, except as to the children. *Wood v. Reamer*, 82 S. W. 572, 574, 118 Ky. 841.

Rev. St. 1909, § 350, providing that when a wife dies without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the property belonging to her at her death, absolutely, subject to payment of her debts, does

not make the husband the wife's "heir" with respect to any of her property, but gives him an estate in the nature of dower; the word "heirs" meaning kindred who take an interest in real estate by the law of descent. *Waddle v. Frazier*, 151 S. W. 87, 89, 245 Mo. 391.

The words "heirs at law" in a will will be given their technical meaning, unless it appears from the entire will that they are used in a different sense, such as in the popular sense excluding testator's widow. *Smith v. Winsor*, 88 N. E. 482, 485, 239 Ill. 567.

The words "an heir," in a will devising real estate to testator's widow during widowhood and at her death to her son if he should outlive the widow, and, if the son should die without "an heir," his part should go to persons named, mean a child or its descendant, and does not mean the wife of the son surviving the son. *Duzan v. Chappel*, 84 N. E. 775, 778, 41 Ind. App. 651.

The phrase, "heirs at law," as used in the following clause, "whatever may remain of my estate shall be equally divided among the heirs at law of my said wife," includes the husband of the wife who had remarried after the death of the testator. *Harris v. Rhodes*, 130 Ill. App. 233, 235.

Where a will, after giving certain legacies, provided that the remainder of the estate should be distributed among the lawful heirs of testatrix according to law, the husband of testatrix was entitled to take as an heir. In English law the word "heirs" has always meant the person succeeding to the title to real estate on the death of another—one who succeeds to the title by force of law. A common definition is, "He upon whom the law casts an estate of inheritance immediately on the death of the owner." *Turner v. Burr*, 104 N. W. 379, 380, 141 Mich. 106.

"Husband and wife, though they may be entitled under our statutes to certain interests in the estate of each other, are not properly speaking 'heirs' of each other. The rights which the statutes give them respectively they do not take as 'heirs.'" Under a statute providing that, where a decedent leaves a widow and issue, one-third of his property shall be given to the widow, but, if he leave no issue, one-half shall be given to the widow, the widow does not take as "heir" of her deceased husband. *Golder v. Golder*, 49 Atl. 1050, 1051, 95 Me. 250.

A gift to testator's son's "heirs at law" under a will executed before the taking effect of Act March 26, 1895 (Laws 1895, c. 157), establishing a widow's right by descent in her deceased husband's real estate, does not include the son's widow. *Houghton v. Hughes*, 79 Atl. 909, 911, 108 Me. 233, Ann. Cas. 1913A, 1287.

Under Pub. St. c. 125, § 1, providing for the descent of real property, a surviving hus-



band is not entitled to take an interest in land as an "heir at law" of his deceased wife. *Gardner v. Skinner*, 80 N. E. 825, 826, 195 Mass. 164.

A devise of real estate to the "heirs" of a son does not include his widow. *In re Raleigh's Estate*, 55 Atl. 1119, 1122, 206 Pa. 451.

A patent to public land in Iowa, issued to the "heirs" of a deceased entryman under Timber Culture Act June 14, 1878, c. 190, 20 Stat. 113, which provided that, on the death of the entryman, his "heirs or legal representatives" might prove compliance with the conditions of the act and receive a patent, did not confer upon the widow of the deceased entryman any title to the land as heir, since under the law of Iowa, and the construction placed upon the term "heirs" by the land department, a widow, so far as her dower interest is concerned, there being direct descendants of deceased, is not an heir. *Braun v. Mathleson*, 116 N. W. 789, 790, 139 Iowa, 409.

Where a will directed that, on the death of testator's widow, all his estate then remaining should be divided into three equal parts, one to go to his son W. or to his heirs should he have died, the word "heirs" should be construed to mean "next of kin," or those related by blood, entitled to take the personal estate of one dying intestate, and did not include W.'s widow. *Hees v. Zahn*, 107 N. Y. Supp. 951, 953, 57 Misc. Rep. 515.

The term "heirs," as used in a will by which testatrix gave all her estate to two sisters for life, with remainder to the children of the sisters and a brother, or to their heirs in case of the death of any of the children before the survivor, referred only to children, and did not include the widow of a nephew dying before the surviving sister; the word "heirs" when applied to succession of personality meaning next of kin, and, when applied to real estate, meaning persons so related to one by blood that he would take the estate in case of intestacy. *Bayley v. Lawrence*, 118 N. Y. Supp. 286, 133 App. Div. 888. See, also, *Bayley v. Beekman*, 117 N. Y. Supp. 88, 89, 62 Misc. Rep. 567.

The surviving noncitizen husband of a citizen of the Creek Nation who dies in possession of her allotment, set apart to her under Act. Cong. June 28, 1898, c. 517, 30 Stat. 495, prior to her certificate of allotment therefor, is, under the laws of descent and distribution of the Creek Nation, an "heir" of his deceased wife, and as such entitled to a "child's part" and to share and share alike therein with the children of his wife, whether they take by descent or by purchase. *Sanders v. Sanders*, 117 Pac. 338, 342, 28 Okl. 59.

By Pub. St. 1882, c. 124, § 1, a husband surviving his wife, who leaves no issue, takes her real estate in fee to the amount of

\$5,000. Testator's will required the income of his estate to be paid to his surviving children during their lives, and it was provided that upon the death of any son the income should be paid to the widow during her widowhood, and that upon the death of any daughter her share should be paid to the surviving husband, and that upon the death of any child leaving no surviving child or husband, or the death of any surviving husband, or marriage of any such widow, the shares should be paid to the issue of the deceased son or daughter, and in default of such issue to the heirs at law of the son or daughter. Held, that a surviving husband of a daughter took as his wife's "heir" up to the statutory amount; there being nothing to indicate that testator's general scheme was in all contingencies to limit his bounty to his own descendants. *Gray v. Whittemore*, 78 N. E. 422, 423, 192 Mass. 367, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246.

Under the laws of Ohio, a widow may be the heir of her deceased husband, and is included in the word "heirs" as used in a beneficial insurance certificate payable to the "heirs" of the husband. *Burns v. Burns*, 95 N. Y. Supp. 797, 800, 109 App. Div. 98.

Where decedent was survived by a widow and one child, such widow and child were his only heirs at law within Kirby's Dig. §§ 6289, 6290, providing for an action for wrongful death to be brought by the heirs at law of the deceased person, and were therefore the only necessary parties plaintiff. *St. Louis, I. M. & S. Ry. Co. v. Corman*, 122 S. W. 116, 117, 92 Ark. 102.

Ballinger's Ann. Codes & St. § 4828, provides that "the widow, or widow and her children, or child or children if no widow," of a man killed in a duel shall have a right of action against the person killing him, etc., and further provides that, "when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives" may maintain an action for damages. The Supreme Court, in construing the word "heirs" so as not to include "parents," did so upon the theory that it was limited in its scope to the persons theretofore specifically mentioned in the statute. Held, that the decision was conclusive under the rule of stare decisis against the right of a surviving husband to maintain an action for the death of his wife. *Johnson v. Seattle Electric Co.*, 81 Pac. 705, 706, 707, 39 Wash. 211.

#### Illegitimate children

The term "heir," as used in a statute making every illegitimate child an heir of the person acknowledging himself to be its father, is always appointed by the law. Its title is called into existence by the death of its ancestor, and its rights are governed by the law in force at the time of such death. *Moen v. Moen*, 92 N. W. 13, 15, 16 S. D. 210;

*Morin v. Holliday*, 77 N. E. 861, 862, 39 Ind. App. 201.

Where a child was born out of wedlock to an Indian woman, to whom Indian reservation lands were allotted, and such child survived her, he was her heir at law. *Beam v. United States*, 153 Fed. 474, 475.

#### **Legal representatives**

As legal representatives, see Legal Representatives.

As representative, see Representative.

The word "heirs" in articles of incorporation declaring that the object of the association is to provide for the families of deceased members, and that the certificate issued to a member shall entitle the "heirs or legal representative or designated beneficiary" to a specified benefit, is used in its proper sense. A distinction is clearly drawn between "heirs" and "legal representatives," and the use of the words is not mere tautology. *Walker v. Peters*, 124 S. W. 35, 36, 139 Mo. App. 681.

A will whereby testator devised his real estate to a trustee, and his heirs and assigns, for the benefit of the children of the trustee, with authority to manage it for their benefit, or at his option to convey the same to them, or to sell the same and hold the proceeds in trust, or pay the same over to the children at such times and manner as he shall deem most beneficial to them, imposes on the executors of the deceased trustee the duty of paying over the estate reduced to personality to the beneficiaries; the word "heirs" including executors. *Friedley v. Security Trust & Safe Deposit Co. (Del.)* 84 Atl. 883, 886.

#### **Natural offspring**

See Natural Offspring.

#### **Next of kin**

Next of kin, including see Next of Kin.

The terms "heirs at law," when used with respect to personal property, may properly be regarded as meaning next of kin. *Train v. Davis*, 98 N. Y. Supp. 818, 820, 49 Misc. Rep. 162 (citing *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1; *Woodward v. James*, 22 N. E. 150, 115 N. Y. 346); *In re Allison*, 102 N. Y. Supp. 887, 891, 53 Misc. Rep. 222; *Bayley v. Lawrence*, 118 N. Y. Supp. 286, 288, 133 App. Div. 888; *Bayley v. Beekman*, 117 N. Y. Supp. 88, 89, 62 Misc. Rep. 567. See, also, *Hess v. Zahn*, 107 N. Y. Supp. 951, 953, 57 Misc. Rep. 515.

The common-law distinction between "next of kin" and "heirs at law" does not exist in our statutes of descent, but heirs at law are also the next of kin. *L. T. Dickason Coal Co. v. Iddill*, 94 N. E. 411, 413, 49 Ind. App. 40.

In a will by which testator devised the residue of his estate in trust for his wife for life, remainder to the children of his sisters, the "heirs and representatives" of any such

children who died between testator's decease and the time of distribution to be entitled to such share or shares as their respective ancestors would have been entitled to receive if living, the word "heirs" must be construed to mean the same persons as "representatives," and both together should be construed to mean "next of kin." *In re Nelson's Estate*, 74 Atl. 851, 852, 9 Del. Ch. 1.

Testator gave money in trust for a nephew and niece to a trust company, the income to be paid quarterly to them during their lives, and on their deaths the principal to their respective heirs, with a provision that, if testator survived either of them, the principal of his or her portion should go to his or her heirs. The nephew died after testator, leaving a widow, but no issue. Held, that, as in a gift of personality "heirs" are synonymous with "next of kin," the widow of the nephew was entitled to share. *In re West's Estate*, 63 Atl. 407, 408, 214 Pa. 35.

The term "next of kin" at least includes those entitled to take the personal estate in case of intestacy. While it is doubtless used sometimes as synonymous with the broad signification of "heirs at law," the term "heirs at law" is often used in its popular sense of including heirs in the legal sense, those on whom the law casts title to realty possessed by the intestate as the time of his death, and next of kin as well. Treating the latter term and the former only in their legal sense, the one refers to those who take the personality of an intestate, and the other to those in whom the title to the realty possessed by the intestate vests immediately on his death. Under the statute there is very little difference between the two terms. *In re Scaife's Will*, 105 N. W. 920, 921, 128 Wis. 405.

#### **Manner and amounts taken fixed**

A devise of real estate to testatrix's nephew and "heirs" of a deceased niece equally gives an undivided half interest in the land to the nephew and an undivided half interest to the heirs of the niece per stirpes. *Farley v. Farley*, 115 S. W. 921, 922, 121 Tenn. 324.

#### **Contingent remainder created**

In a deed which granted land to H. and his wife for their lives, and during the life of the survivor of them, and at the death of such survivor, to the heirs of the body of the wife, their heirs and assigns, the words "heirs of the body" were words of purchase, and, as limited by the words "their heirs and assigns," did not indicate descendants of the life tenant who were to take in succession, but only the individuals who might be her heirs at her decease, and who themselves would become the ancestors from whom the succession would be derived, and from whom an estate in fee simple would descend, and, as it could not be ascertained who would be the heirs of the wife's body until her death, the interests of her heirs were contingent

remainders during her life. *Ætna Life Ins. Co. v. Hoppin*, 94 N. E. 669, 671, 249 Ill. 406.

Testator conveyed certain real estate in trust for the use of his daughter and her husband, and the survivor of them, for life, with power to the survivor to devise the same among the children or descendants of the daughter and her then husband, with the power to the daughter and husband or survivor, with the consent of the grantor if living, otherwise with the consent of the grantor's wife if living, otherwise with the consent of the trustee if living, otherwise with the consent of the grantor's heirs, and on their objection with the consent of the orphans' court to sell the property and invest the proceeds on like trusts declared in the deed, that the fee-simple title to the property should become vested in the children and descendants of the daughter and her husband arriving at the age of 21, and, in default of such children or descendants, in trust for the grantor for life, with power to the grantor and his wife to devise to their children or descendants, in default of which in trust for such person or persons as were the grantor's heirs at law, and for their heirs forever. The daughter and her husband survived the grantor and her mother, but died without issue, and the power reserved to the grantor and his wife was not exercised. Held that the contingent remainders created by the trust deed vested in the heirs of the grantor, not as of the date of his death, but as of the date of the death of his daughter; the word "heirs" being used as designatio personæ to ascertain the person or persons who are intended as the ultimate remaindermen, and not in any technical sense, nor as indicating a stirps or stock through which title is to be derived. The case falls within the class of those of *Clagett v. Worthington* (Md.) 3 Gill, 83; *Demill v. Reid*, 17 Atl. 1014, 71 Md. 175; and *Larmour v. Rich*, 18 Atl. 702, 71 Md. 369; *Thom v. Thom*, 61 Atl. 193, 199; 101 Md. 444.

#### **Estate of inheritance created**

The word "heirs" is indispensable to the conveyance of an estate of inheritance by deed and that no substitute is possible, unless the common law has been changed by statute. *Ivey v. Peacock*, 47 South. 481, 56 Fla. 440 (citing *Tiedeman*, Real Prop. § 37; *Tiffany*, Real Prop. § 20, 1 Wash. Real Prop. [6th Ed.] § 147).

Where the owner of a lot conveyed a nearby lot with a restriction that no building should be erected within certain limits without the consent of the grantor or her "heirs" the word "heirs" implied a heritable interest, so that the restriction was an appurtenance to the lot. *Hemsley v. Marlborough House Co.*, 61 Atl. 455, 456, 68 N. J. Eq. 596.

#### **Fee simple passed**

At common law the word "heirs" was necessary to convey a fee-simple estate, no matter how plainly the intention so to do be

expressed in other words of perpetuity. *Hall v. Hall*, 76 Atl. 705, 706, 106 Me. 389.

The ancient common-law rule was that the word "heirs" should appear, as indicating the grantee's estate, either in the premises or habendum, and generally, when appearing in the warranty clause alone, it would not enlarge into a fee a life estate conveyed in the premises or habendum. The modern rule in this state as to deeds executed prior to Acts 1879, c. 148 (Code, § 1280; Revisal 1905, § 946), providing for construction of a deed as a conveyance in fee, even without the word "heirs," was that, to carry out grantor's intent where it could be gathered from its face a deed should be construed to pass an inheritance in all cases when the word "heirs" was joined as a qualification to the name or designation of the bargainee, even in the clause of warranty, or when that covenant was confused with the premises or habendum, if by transposition, or by making a parenthesis, or in any way disregarding punctuation, such word could be made to qualify the words of conveyance in the premises, or the words "to have and to hold" in the habendum clause, even though thereby made to do double duty, but when there are no words of conveyance, or when the word "heirs" does not appear in any part, except in connection with the name of the bargainor, or with some expression such as "party of the first part," usual in the warranty or else where to designate grantor, the deed, if executed before the act of 1879, will be construed as vesting only a life estate in the bargainee, unless the instrument contains on its face conclusive intrinsic evidence that a fee was intended to pass. Following the description in a deed it continued: "The title to which I, the said I. W. W. (the grantor), of the first part, do warrant and defend against the lawful heirs of myself and any other person whatsoever, unto the said J. D. P. (the grantee), his heirs and assigns." Held that, though the word "heirs" appeared nowhere else in connection with the name of grantee, the deed conveyed a fee, and not merely a life estate. *Carolina Real Estate Co. v. Bland*, 67 S. E. 483, 485, 152 N. C. 225.

A deed prior to the statute of 1879 to convey a fee-simple estate was required to embrace the word "heirs" in connection with the grantee's name, and description in some way of his estate, and the mere use of the word in connection with the grantor's name was not sufficient. *Boggan v. Somers*, 67 S. E. 965, 966, 152 N. C. 390.

The term "heirs" is not necessary to convey an estate in fee simple. *Ruhnke v. Aubert*, 113 Pac. 38, 40, 58 Or. 6. Other words denoting the intention may be employed, such as a "devise of 'all my estate,' 'all my interest,' 'all my property,' 'my whole remainder,' 'all I am worth or own,' 'all my right,' 'all my title,' or 'all I shall be possessed of,' and many other expressions of like import, will

carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words. *Snodgrass v. Brandenburg*, 71 N. E. 137, 72 N. E. 1030, 1031, 164 Ind. 59 (quoting from 4 Kent. Comm. [13th Ed.] 535).

The word "heirs," or its equivalent, is not necessary to create an absolute estate; every conveyance properly executed being construed to convey the fee, unless a less estate is mentioned and limited in it, when the courts will not, by construction, increase such estate into a fee simple, but, disregarding technical rules, will give effect to the maker's intention as far as lawful, if such intention can be gathered from its contents, under the express provisions of Civ. Code 1895, § 3083. *Cooper v. Mitchell Inv. Co.*, 66 S. E. 1090, 1091, 133 Ga. 769, 29 L. R. A. (N. S.) 291.

The word "heirs" is no longer necessary to create a fee. The word was long ago dispensed with by statute (Rev. St. 1899, § 4590). *Ball v. Woolfolk*, 75 S. W. 410, 412, 175 Mo. 278.

The word "heirs" may be taken to mean children when used in a will when the entire will and facts attending its execution make that its natural meaning. The use of the word "heirs" to pass a fee to the devisee under the will is unnecessary, and adds nothing to the quality of the estate devised, but it may be considered in ascertaining whether the intention was to vest a life estate in the devisee or the fee, when testator's intention is doubtful. *Pratt v. Salline Valley R. Co.*, 108 S. W. 1099, 1105, 130 Mo. App. 175.

A deed conveying land to A. B. and others, trustees of a church, and their successors, in office forever, without using the word "heirs," manifested an intention to convey a fee, though the absence of the word "heirs" prevented a court of law from giving effect to it. *Visitors M. E. Church of Cape Island v. Town*, 20 Atl. 488, 489, 47 N. J. Eq. 400.

Where testator gave to a son and his heirs after him all his real estate, the son took an estate in fee simple; the word "heirs" not being used in the sense of "children." *Nesbit v. Skelding*, 62 Atl. 1062, 213 Pa. 487.

A deed recited that it was made between the grantor, named, party of the first part, and "W. and her heirs," of the second part, and that the first party conveyed unto "the said parties of the second part and assigns forever," and grantor agreed to warrant and defend "to the said parties of the second part, their administrators and assigns." The consideration was paid by grantee's husband. Held, that the deed conveyed the fee to the grantee, notwithstanding the use of the word "heirs." *Burke v. Consolidated Coal Co.*, 147 S. W. 15, 16, 148 Ky. 573.

Where the granting clause of a deed conveyed lands to M. "during her life, grantee,

and to her heirs and assigns, forever," and the habendum clause confirmed the same to M., and to her heirs and assigns, in fee simple, forever, it was declared that, if the granting clause of the deed was considered apart from the habendum, it would be difficult to hold that the word "heirs" should be considered as a word of purchase; that it was coupled with the word "assigns," and in this connection would be construed as meaning persons who would take from or through M., but that, when the words of the habendum were considered, the meaning was made clear and the deed conveyed a fee to M. and her heirs. *Meacham v. Blaess (Mich.)* 104 N. W. 579, 580, 141 Mich. 258.

#### Legacy vested

Where testator bequeathed to his wife for life the house in which he resided, at her death to be divided between his heirs per stirpes, the heirs took a vested estate in the remainder, at testator's death, and their interest was descendable in case of the death of any one of them during the continuance of the life estate, since the word "heirs" does not make the persons to take uncertain, and it is where the limitation is to the heirs of a person in existence that the remainder is contingent for uncertainty, and testator's heirs were his children and grandchildren. *Weil v. King (Ky.)* 104 S. W. 380, 382.

Testatrix, by the fifth clause of her will, bequeathed money to be invested and the interest paid to testatrix's sister for life, and on her death, to testatrix's daughter, and, on the death of the daughter, the principal to be divided between the issue of the daughter, and, if no issue, then to testatrix's next of kin. The sixth clause devised the homestead to the executors, the rent thereof to be paid to the daughter during her life, and at her death the homestead to be conveyed to the child of such daughter, or the issue of such child, and, in the event of the failure of issue, then to testatrix's heirs at law. The seventh clause bequeathed the residue of the estate in trust, to be divided into two parts, and the income of one part paid to the daughter during her life, and, on the death of such daughter, the principal to be paid to her issue, and, if she leave no issue, to testatrix's next of kin. Held, that testatrix did not intend that her daughter should, in any event, take a vested remainder in the corpus of the trusts, subject only to her own life estate; the words "heirs at law" and "next of kin" not being used in their strict and primary meaning, viz., the persons who, in case of intestacy, would at the moment of testatrix's death succeed to her property. *Salter v. Drowne*, 98 N. E. 401, 402, 205 N. Y. 204.

#### Conflict of laws

Testator having died in Massachusetts, a compromise was entered into to terminate a contest of his will, which was approved by

the court, providing that a certain fund should be set apart for the benefit of A., then a minor, not a party to the agreement, who was testator's granddaughter, and that on her death before the termination of the trust by lapse of time the fund "should be paid to her heirs at law," freed from the trust. A. thereafter moved from Massachusetts to New York, where she afterwards died. Under this agreement the persons entitled to take as "heirs at law" should be determined by the law of Massachusetts and not by the law of New York. *Brandels v. Atkins*, 90 N. E. 861, 862, 204 Mass. 471, 26 L. R. A. (N. S.) 230.

Where a policy of insurance payable to the insured's "heirs" was by its terms to be governed and construed according to the laws of Ohio providing that, when a person dies intestate and leaves no children or their legal representatives, the widow or widower shall be entitled as next of kin to all the personal property, etc., but, if the intestate leaves any children, the widow or widower shall be entitled to the first \$400 and one-third of the remainder of the personal property subject to distribution, it was held that, though in New York "heirs" when applied to successors to personal estate means next of kin, and "next of kin" does not include a widow, under the policy and laws of Ohio the widow is entitled to personal property as "next of kin," and should share in the insurance with the insured's children. *Burns v. Burns*, 82 N. E. 1107, 1108, 190 N. Y. 211.

#### Personal property

In a gift of personality to one for life and at her death to her "heirs," the word "heirs" is not a word of limitation, but indicates the class of whom ownership is vested subject to the life interest. *Pillott v. Landon*, 19 Atl. 25, 27, 46 N. J. Eq. 310.

The use of the term "heirs at law" in a bequest of personality is not conclusive that it did not mean those entitled to take real estate by descent. *Hartford Trust Co. v. Purdue*, 79 Atl. 581, 582, 84 Conn. 256.

Decedent, owning all the capital stock and bonded indebtedness of a corporation, executed a deed of trust, conveying all but two shares to trustees in trust for her children, to continue for 20 years, or until decedent's death, if she should live longer than 20 years, during which time the profits should be paid to her, and, in the event she should die before the expiration of that time, the profits should be paid to her children or to their respective heirs at law, when not otherwise provided for in the deed. She specially provided for the interest in the trust to ultimately go to one of her daughters, and then declared that in case of the death of any of the other children before the expiration of the trust their interest should vest in his or her heirs at law, but that neither the children nor their heirs, during the continuance of the trust, should be authorized to

sell their respective interests, etc. Held, that the word "heirs," or "heirs at law," was not used in such deed in its technical sense; and hence the interest of the children under the deed was not one of inheritance, which they could transfer by will. The words "heirs at law," as used in such deed, were intended only as a designation of the parties who would stand in the place of a deceased beneficiary, or one who would be entitled to inherit personal property in case of the beneficiary's death intestate; and hence, on the death of one of the children beneficiaries, leaving a widow but no children, one half of the beneficiary's interest passed to his widow and the other half to his brothers and sisters, and no part of it passed to his estate. *Burr v. Burr*, 143 S. W. 1096, 1099, 163 Mo. App. 395.

#### HEIRS AND ASSIGNS

The words "heirs and assigns," used in a will devising property to a person for her natural life, "and to her heirs and assigns forever," are technical words signifying a fee. *Kendall v. Clapp*, 39 N. E. 773, 163 Mass. 69.

The use of mere words of limitation will not prevent the lapsing of a devise on the death of the devisee before that of the testator, and the phrases in different forms, commonly used in a devise, such as "and his heirs," or "and his heirs or assigns," are words of limitation merely descriptive of the nature of the estate devised, and do not create a substituted devise. *Farnsworth v. Whiting*, 66 Atl. 831, 832, 102 Me. 296.

A patent issued by the state, which recites the issuance of land certificates and their assignment to designated persons as executors of a decedent, and which grants to such persons, "executors aforesaid," and to their "heirs and assigns," land described, passes title to them as individuals; the words "heirs and assigns" being at the time of the issuance of the patent essential to create an estate in fee, rendering it improper to disregard them and to substitute in their place the words "successors and assigns." *Sanborn v. Loud*, 113 N. W. 309, 310, 150 Mich. 154, 121 Am. St. Rep. 614 (citing *Pfeiffer v. Rheinfrank*, 37 N. Y. Supp. 1076, 2 App. Div. 574; *Kanenbley v. Volkenberg*, 75 N. Y. Supp. 8, 70 App. Div. 97; *Innerrarity v. Kennedy* [Ala.] 2 Stew. 156; *Jackson v. Roberts*, 25 S. W. 879, 95 Ky. 410; *Richardson v. McLemore*, 60 Miss. 315; *Towar v. Hale* [N. Y.] 46 Barb. 361; *Hannen v. Ewalt*, 18 Pa. 9).

As used in a deed conveying land to W., "his heirs and assigns forever," the quoted words should be regarded as equivalent to words of inheritance so as to convey the fee under Rev. St. 1899, § 4590, dispensing with the necessity of using the word "heirs" or words of inheritance in the creation of a fee-simple estate; there being no clause in the deed indicating an intention to create a

life estate and remainder. *Tygart v. Hartwell*, 102 S. W. 989, 990, 204 Mo. 200.

While the words "heirs and assigns" are not necessary in Missouri to create a devise of a fee simple, they were necessary at common law, and no more suitable terms can be chosen by a testator to emphasize his intention to give his estate absolutely. Hence under a will devising to testator's wife, her "heirs and assigns, forever," all his property with privilege of selling, and directing that at her death each of his daughters should have a certain sum, and that at the death of the wife or at any time when she might relinquish her interest in the property it should revert to testator's son, after his daughters should have received their proportion, the wife took a fee-simple estate in the land with full power to sell and convey it, and a perfect title to the testator's personal estate of every kind and character. *Jackson v. Littell*, 112 S. W. 53, 55, 213 Mo. 589, 127 Am. St. Rep. 620 (quoting and adopting *Chew v. Keller*, 13 S. W. 396, 100 Mo. loc. cit. 370; *Rubey v. Barnett*, 12 Mo. 5, 49 Am. Dec. 112; *Green v. Sutton*, 50 Mo. 186; *Tremmel v. Kleiboldt*, 75 Mo. 255; *Yocum v. Siler*, 61 S. W. 212, 160 Mo. loc. cit. 289).

In a testamentary gift in trust to pay the income to testator's daughters for life, and on the death of either to transfer the part of the estate from which she had received the income, to her children, and to their "heirs, administrators, and assigns" forever, and on the death of a daughter without leaving children her portion to go to the surviving daughters and to their children, the quoted words must be taken as words of limitation and not as words of purchase, where the latter construction will make the remainder void under the statute of perpetuities existing at the date of the will executed in 1851 and at testator's death in 1852. *Carpenter v. Perkins*, 74 Atl. 1062, 1064, 83 Conn. 11.

Under a devise of the residue of testator's estate to specified persons, their "heirs and assigns," to be equally divided between such persons, the words "heirs and assigns," in the absence of any evidence that the idea of substitution was in the mind of the testator, are not words of substitution but of limitation merely, evidencing an intention to give the property absolutely; so that, on the death of one of the legatees in the lifetime of the testator, her legacy lapsed. *Hand v. Marcy*, 28 N. J. Eq. 59, 61.

A contract by a railroad company to pay the landowner, or "his heirs or assigns," for all stock killed or injured on a farm crossing may be enforced by a son and heir of such owner, who became owner of the farm, whether the contract be construed as a covenant running with the land or not. *Livings-ton v. Chicago & N. W. Ry. Co.*, 120 N. W. 1040, 1043, 142 Iowa, 404.

## HEIRS AT LAW

See *Heirs*; *Their Heirs at Law*.

The term "heirs at law" when used in a will means those taking real property by descent, unless it appears that the testator intended a different meaning, when that will prevail. *Hartford Trust Co. v. Purdue*, 79 Atl. 581, 582, 84 Conn. 256.

## HEIRS FOREVER

A devise for life, and after devisee's decease to his lawful "heirs forever," conveys a fee under the rule in *Shelley's Case*. *Pitchford v. Limer*, 51 S. E. 789, 790, 139 N. C. 13.

In the absence of any clause in a will showing a contrary intent, a devise or bequest from a wife to her husband "to him and his heirs forever" lapses on the death of the husband in the lifetime of the testatrix; the words "heirs forever" being words of limitation and not of substitution. *McKier-nan v. Beardslee*, 73 Atl. 815, 816, 72 N. J. Eq. 283.

## HEIRS LAWFULLY BEGOTTEN

The words "heirs lawfully begotten of the body" and other similar expressions are appropriate words of limitation and must be construed as creating an estate tail which by statute is convertible into a fee simple unless from the entire will or deed it reasonably appears that they are not used in their technical sense but in the popular sense of children. *Hall v. Moore* (Ky.) 105 S. W. 414, 415 (citing *Pruitt v. Holland*, 18 S. W. 852, 92 Ky. 641; *Prescott v. Prescott's Heirs*, 10 B. Mon. [49 Ky.] 56; *Lachland's Heirs v. Downing's Ex'rs*, 11 B. Mon. [50 Ky.] 32; *Robb v. Belt*, 12 B. Mon. [51 Ky.] 643; *Brown v. Alden*, 14 B. Mon. [53 Ky.] 144; *Johnson v. Johnson*, 2 Metc. [59 Ky.] 331; *True v. Nicholls*, 2 Duv. [63 Ky.] 547; *Breck-inridge v. Denny*, 8 Bush [71 Ky.] 523). See, also, *Lawson v. Todd*, 110 S. W. 412, 413, 129 Ky. 132 (quoting and adopting definition in *Johnson v. Johnson*, 2 Metc. [59 Ky.] 331).

## HEIRS MALE

The words "male heirs" in a devise of land to a grandson of testator, during the devisee's natural life, and at his decease to the devisee's "male heirs," are words of limitation, and enlarge the estate devised to the grandson to an estate tail, under the rule in *Shelley's Case*, the clause of the statute of wills in relation to the creation and continuance of estates tail not being applicable to such a case. *Cooper v. Cooper*, 6 R. I. 261, 264.

## HEIRS OF THE BODY

See, also, *Bodily Heirs*.

Ordinarily the words "bodily heirs" and "heirs of the body," when used in a deed, will be given their technical meaning, unless there is something in the instrument itself

which shows that they were used in a contrary sense as children, or as words of purchase. *Dotson v. Kentland Coal & Coke Co.*, 150 S. W. 6, 7, 150 Ky. 60.

The word "heirs," as applied to persons who are to take in remainder, being a technical word having a definite legal signification, when unexplained and uncontrolled by the context, must be interpreted according to its technical import, as designating the person appointed by law to succeed to the realty in case of intestacy, and heirs of the body are a limited class of heirs, restricted to lineal descendants. *Aetna Life Ins. Co. v. Hoppin*, 94 N. E. 669, 672, 249 Ill. 406.

There is no distinction between the words "bodily heirs" and "heirs of the body" when used in a conveyance, and under Kirby's Dig. § 735, providing that a conveyance, which by common law would create an estate tail in lands, shall instead pass to the grantee an estate for his life only, with remainder in fee to the person to whom the estate tail would first pass according to the common law, a conveyance to the daughter of the grantor "and unto her bodily heirs and assigns forever" created a life estate in the grantee, with remainder in fee simple to her children that might survive her and the issue of such as might die during her life. *Watson v. Wolff-Goldman Realty Co.*, 128 S. W. 581, 582, 95 Ark. 18, Ann. Cas. 1912A, 540.

The words "heirs of her body," in a deed to one for life, with remainder to the "heirs of her body," will be considered as words of description and identity, and not of capacity, in view of Civ. Code, § 779, which provides that, when a remainder is limited to the heirs of the body of a person to whom a life estate in the same property is given, the persons, who on termination thereof are heirs of the body of the life tenant, will take as remaindermen, and not as mere successors of such owner. *Los Angeles County v. Winans*, 109 Pac. 650, 652, 13 Cal. App. 257.

#### As words of limitation

Ordinarily, the words "heirs," or "heirs of their body," are words of limitation, and by their own force convey the idea of a fee-simple estate. *Brumley v. Brumley* (Ky.) 89 S. W. 182, 183.

The words "heirs of the body" in a will are construed as words of limitation, unless it clearly appears that they are used to designate individuals answering the description of heirs at the death of a party, and the words will yield to a clear particular intent that the estate shall be only for life. *Suttle & Weaver Land & Improvement Co. v. Barker* (Ala.) 60 South. 157, 158.

The words "heirs" or "heirs of the body," in their primary and strict legal meaning, are words of limitation, and not of purchase, and must be so construed, unless the lan-

guage employed clearly indicates that they are intended to convey another and different meaning clearly indicated by the instrument. *Newhaus v. Brennan* (Ind. App.) 97 N. E. 938, 940, 49 Ind. App. 654. See, also, *Brown v. Brown*, 101 N. W. 81, 82, 125 Iowa, 218, 67 L. R. A. 629.

The term "heirs of the body" is to be construed as a limitation to designate heirs in succession, unless the context shows that it was intended as a description of particular persons. *Wheelock v. Simons*, 86 S. W. 830, 831, 75 Ark. 19 (quoting and adopting definition in *Myar v. Snow*, 4 S. W. 381, 49 Ark. 125).

"The words 'heirs of the body,' whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party." *Lee v. Lee*, 91 N. E. 507, 508, 45 Ind. App. 645 (quoting 4 Kent's Comm. § 229).

"Heirs of the body" have the same meaning as "bodily heirs," and both terms are words of limitation and not of purchase. *Marsh v. Griffin*, 48 S. E. 735, 736, 136 N. C. 333.

"Heirs of the body," whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party." And there is no escape from the rule in *Shelley's Case* when the word "heirs" is used in a strict legal sense as a word of limitation. And so where the statute transforms an estate tail into estates in fee, and the will devised realty to the testator's daughter for life, remainder "to the heir or heirs of her body in fee simple," it was held that, there being nothing in the will showing that the term "heirs" was not used in its strict legal sense, the devise fell within the rule in *Shelley's Case*, and the daughter took the fee. *Teal v. Richardson*, 66 N. E. 435, 436, 160 Ind. 119.

Where a freehold is limited to one for life and by the same instrument the inheritance is limited mediately or immediately to heirs of his body, the first taker takes the whole estate, either in fee simple or fee tail and the words "heirs" or "heirs of the body" are words of limitation, and not of purchase. *Snyder v. Greendale Land Co.*, 91 N. E. 819, 820, 48 Ind. App. 178.

Testatrix devised real estate to her daughter for life, and at her death to her heirs, and declared that the property should be free from any control of her husband, and should belong to the daughter and the heirs of her body, and should not be liable for any debts of the husband. Held, that the will, executed while the rule in *Shelley's Case* was in force, and while the married

woman's law (Acts 1849-50, p. 63), under which a husband became the trustee of his wife's separate estate, was in force, created a fee-simple estate in the daughter; the words "heirs" or "heirs of the body" not meaning "children." *Terry v. Hood*, 55 South. 423, 424, 172 Ala. 40.

If an estate is so given that it is to go to every person who can claim as heir of the body of the first taker, the words "heirs of his body" must be considered words of limitation, notwithstanding any restraints attempted on the power of alienation. Thus, while a deed in the granting clause conveyed to the grantee a life estate, and the habendum clause read, "to have and to hold the same, with the rights and appurtenances \* \* \* during the natural life of the grantee, his wife, if any he may have, to have no other privilege than that of living on the premises for his life and no longer, and to the 'heirs of his body' and their assigns in fee simple forever," and it then recited that the grantee or his wife should have no power to convey or place any incumbrances on the premises, it was held that, notwithstanding the provisions relative to the wife's privilege and the provision in restraint of alienation, the rule in *Shelley's Case* was applicable. *Kepler v. Larson*, 108 N. W. 1033, 1034, 131 Iowa, 438, 7 L. R. A. (N. S.) 1109.

In a devise to V. for life and to the "heirs of her body" at her death, the term "heirs of her body" is not descriptive of the persons who take the remainder, but defines and limits the estate devised to V. "Such is clearly the legal signification of these words, and, standing alone and uncontrolled by other parts of the will, it will be presumed that by their use the testatrix intended not individuals, but quantity of estate and descent." *Hastings v. Engle*, 66 Atl. 761, 762, 217 Pa. 419.

The words "heirs of her body forever," in a grant to A. and the heirs of her body forever, brings the grant within the operation of the rule in *Shelley's Case*, as the limitation by way of remainder is the same as "to his heirs or the heirs of his body" is to a class of persons to take in succession from generation to generation, in which case the limitation to the heirs entitles the ancestor to the whole estate; this for the obvious reason, assigned by Kent, in his *Commentaries* (216), that "the policy of the rule was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance and at the same time make the heirs of that person purchasers." *Hubbird v. Goin*, 137 Fed. 822, 826, 70 C. C. A. 320.

The technical words "heirs of his body," employed in a deed by a grantor to describe the persons who should take after the death of the grantee, operate, under the rule in

*Shelley's Case*, when not qualified by other language in the deed, to vest in the grantee an estate in fee simple. Thus where a deed recited that a valuable consideration was paid for the conveyance of the land described therein, and that the grantor granted and conveyed the premises to the grantee for life, "and after his death to the heirs of his body lawfully begotten," and the habendum clause provided, "To have and to hold \* \* \* unto the said [grantee] for the term of \* \* \* his natural life, \* \* \* and after his death to the heirs of his body lawfully begotten," it was held that under the rule in *Shelley's Case* the grantee acquired the fee; the words "heirs of his body" being used in their technical sense, and not being modified by any language in the deed. *Scott v. Brin*, 107 S. W. 565, 566, 48 Tex. Civ. App. 500.

#### As words of purchase

The words "heirs of the body," as used in a deed, indicate all those persons who succeed to the estate from generation to generation, and, if the words are so limited as not to include the whole line of inheritable succession, but only to designate the individuals who are, upon the death of the ancestor, to succeed to the estate, and who are themselves to constitute the source of future descent, they are words of purchase in which case the rule in *Shelley's Case* does not apply, but the estate subsequent to the life estate takes effect as a contingent remainder to the heirs of the life tenant as purchasers. *Etna Life Ins. Co. v. Hoppin*, 94 N. E. 669, 671, 249 Ill. 406.

#### Adopted child

The words "heirs of the body," in Pub. St. 1882, c. 164, § 7, declaring that an adopted child shall be deemed for the purpose of inheritance the child of the parents by adoption, as if he had been born in lawful wedlock, except that he shall be incapable of taking property expressly limited to the bodies of his adopted parents, are used in their primary and technical sense, and where testator created a trust for the benefit of his two sons, the income to be used for the support of them and their families and, in the event of their death leaving legal issue, for the support of such issue until the termination of the trust and on the death of both of the sons, to distribute one-half of the trust res to the children then living of each, an adopted child of one of the sons took the same interest she would have taken as if she were a child of his body. *In re Olney*, 63 Atl. 956, 958, 27 R. I. 495.

#### Children

The words "heirs of her body" to whom an estate is limited over manifestly mean "children" as such and not heirs generally. *Doyle v. Andis*, 102 N. W. 177, 182, 127 Iowa, 36, 69 L. R. A. 953, 4 Ann. Cas. 18.



The word "children" is ordinarily a word of purchase, and not a word of limitation, and is synonymous with "heirs of the body." *Sechler v. Eshelman*, 70 Atl. 910, 912, 222 Pa. 35.

In a devise to one "during her natural life then to the heirs of her body, if any; if no children to her sisters," the words "heirs of her body" are equivalent to the word "children," and the effect was to vest in the devisee an estate for life. *Johnson v. Smith*, 62 S. E. 958, 959, 108 Va. 725.

Where testator devised his estate in trust for his daughter and the "heirs of her body" and provided that, in case she died without children, the estate should go to certain named persons, the term "heirs of her body" was synonymous with "issue" and "children." *Watkins v. Pfeiffer* (Ky.) 92 S. W. 562, 563.

The rule that the words "heirs of the body" or "bodily heirs," when used in a will devising property to a person named and the "heirs of the body" or "bodily heirs," create an estate convertible by Ky. St. 1903, § 2345, into a fee simple, does not obtain where there is other language used in the will, from which it appears that the words are used as words of purchase and not of limitation. The circumstances surrounding the testator when the will was executed, which, with the provisions of the will itself, show that by the words "heirs of the body" he meant children. *Adair v. Adair's Trustee* (Ky.) 99 S. W. 925, 927.

The words "heirs of her body" in a will given a trustee for the benefit of the testator's daughter, said money to be invested at the daughter's request in land to be deeded to the daughter and "the heirs of her body" at her death, if she had any, clearly mean children or grandchildren. *Reeves v. Morgan* (Ky.) 100 S. W. 836, 837.

The words "heirs of her body" in a conveyance to a married woman and "heirs of her body," are not synonymous with "children," and will not be construed as words of purchase where no light is thrown by the contents of the deed upon the meaning of the words other than that furnished by the words themselves. It is well settled that such words are appropriate words of limitation and must be construed as creating an estate tail, which by statute is converted into a fee simple unless from the entire will or deed it reasonably appears that they are not used in their technical sense but in the popular sense of children. *Hall v. Moore* (Ky.) 105 S. W. 414, 415 (citing *Pruitt v. Holland*, 18 S. W. 852, 92 Ky. 641; *Prescott v. Prescott's Heirs*, 10 B. Mon. [49 Ky.] 56; *Lachland's Heirs v. Downing's Ex'rs*, 11 B. Mon. [50 Ky.] 32; *Robb v. Belt*, 12 B. Mon. [51 Ky.] 643; *Brown v. Alden*, 14 B. Mon. [53 Ky.] 144; *Johnson v. Johnson*, 2 Metc.

[59 Ky.] 331; *True v. Nicholls*, 2 Duv. [63 Ky.] 547; *Breckinridge v. Denny*, 8 Bush [71 Ky.] 523).

A trust deed in consideration of the grantor's affection for his daughters M. F. and E. M. conveyed property to their husbands, in trust for the daughters' sole use and benefit and of children now born of the body of the said E. M., and the children thereafter born of the bodies of the said M. F. and E. M., without being subject to their husbands' debts. In case of the death of M. F. without children, the deed gave her husband a life estate in one-half of the profits, which, after his death should revert to E. M. and "the heirs born of her body," and also gave a life estate to the husband of E. M. upon his wife's death, which should go on his death to his children on the body of E. M. Held, that the deed, construed as a whole, showed an intention by the grantor to provide for his daughters and their children, and the words quoted "heirs born of her body" meant the children of E. M., who took a fee upon the death of M. F.; it being permissible to construe the words "heirs of the body" to mean "children" when the context clearly shows such meaning was intended. *Rembert v. Vetoe*, 68 S. E. 659, 660, 86 S. C. 445.

A testator, in item 10 of his will, devised land unto his daughter during her natural life, and then absolutely to the heirs of her body forever, and in item 3 he devised land to his son for his natural life, and then to the heirs of his body forever; the child or children of one of his children dead to take the share of his or their parent. The other items of the will, wherein an absolute estate was not devised, were similar to item 10, save that some omitted the word "absolutely" before "heirs of her body"; while item 13 stated that it was the testator's will and intention that none of his children taking a life estate under any of the foregoing items should have power of alienation. Held that, in view of the provision last mentioned, the words "heirs of her body," used in item 10, and those same words used in the other items, must be taken as meaning children; and, such being the testator's intent, the rule in *Shelley's Case* does not apply, and the daughter took a mere life estate. *Rowe v. Moore*, 72 S. E. 468, 469, 89 S. C. 561.

Where a deed conveyed property to M. for life, remainder in fee to the children and heirs of her body, and if she should die without leaving heirs of her body living at the time of her death, then, on her death, one-third to her husband and two-thirds to the heirs of the body of her sister, held, that the phrase "heirs of the body" was used in the sense of children who were issue of the body of M., and of her sister, so that on M.'s death, leaving only an adopted child surviving, the title in fee vested in the husband

and the children who were heirs of the body of her sister. *Adams v. Merrill*, 85 N. E. 114, 118, 45 Ind. App. 315.

**As heirs**

See Heirs.

**Heirs living at death of life tenant**

In a deed which granted land to H. and his wife for their lives, and during the life of the survivor of them, and, at the death of such survivor, to the heirs of the body of the wife, their heirs and assigns, the words "heirs of the body" were words of purchase, and, as limited by the words "their heirs and assigns," did not indicate descendants of the life tenant who were to take in succession, but only the individuals who might be her heirs at her decease, and who themselves would become the ancestors from whom the succession would be derived, and from whom an estate in fee simple would descend, and, as it could not be ascertained who would be the heirs of the wife's body until her death, the interests of her heirs were contingent remainders during her life. *Etna Life Ins. Co. v. Hoppin*, 94 N. E. 669, 671, 249 Ill. 406.

**Issue**

Issue as including, see Issue (Descendants).

The words "heirs of the body" and "issue" in a will are generally equivalent, and the word "issue" is one of limitation, and not less extensive in its import than the words "heirs of the body." *Rembert v. Vetoe*, 71 S. E. 959, 965, 89 S. C. 198.

Testator gave the residue equally to his living sister and brother, who died, leaving no descendants. Subsequently he executed a codicil confirming the gift to the living sister, and giving the income of the other half of the residue to an unmarried niece, and after her death to "heirs of her body begotten." A second codicil provided, on the niece's death without issue, the homestead forming part of the half given her for life should go to an uncle's children, who should participate equally with his legal heirs in the balance. Held, that the words "heirs of her body begotten" in the first codicil meant issue, which primarily means descendants of whatever degree, rendering the gift over on the niece's death, as contained in the second codicil, void. *Perry v. Bulkley*, 72 Atl. 1014, 1017, 82 Conn. 158.

**Lineal descendants**

See Lineal Descendants.

**Estate tail created**

"The words 'heirs of the body,' 'heirs lawfully begotten of the body,' and other similar expressions, are appropriate words of limitation, and must be construed as creating an estate tail, which by statute is converted into a fee simple, unless there be something else in the deed or will from which a reason-

able inference can be drawn that the words were used in a sense different from their legal and technical signification." *Lawson v. Todd*, 110 S. W. 412, 413, 129 Ky. 132 (quoting and adopting definition in *Johnson v. Johnson*, 2 Metc. [59 Ky.] 331).

The words "heirs of the body" are words of inheritance, and where a deed creates a trust for the benefit of a wife for life with a fee to her children and heirs of her body on her death, the word "children," being coupled with the words "heirs of the body," is a word of limitation, and on the death of the husband the wife took an estate tail which by the act of 1855 (P. L. 368) was enlarged into an estate in fee simple. *Wilson v. Hellman*, 68 Atl. 674, 675, 219 Pa. 237.

The second clause of the will provided "I give to my daughter A." certain land, and the next two clauses gave other land to her other two daughters in similar language, and the sixth clause provided that the bequests made to testator's three daughters were made to them and the heirs of their body, forever, but if one or more of them should die, without heirs of their body, then the property here bequeathed should revert to and descend to testator's other heirs. Rev. St. 1899, § 4646 (Ann. St. 1906, p. 2517), provides that in devises in which the words "heirs and assigns" or "heirs and assigns, forever" are omitted, and no expressions are contained whereby it appears that the devise was intended to convey a life estate only, and no devise be made over, it shall be understood to be testator's intention to devise an absolute fee-simple estate. Held that, while under the second clause, daughter A. would take a fee simple, the sixth clause created a fee tail estate in the daughter, for which was immediately substituted a life estate by the direct provisions of section 4592 (page 2496), so that the heirs of her body alive at her death took a fee simple absolute; section 4593 (page 2497) providing that, where a remainder is limited to take effect on the death of one without heir or heirs of his body, the word "heirs," etc., shall be construed to mean heirs living at the death of the person named as ancestor. *Cox v. Jones*, 129 S. W. 495, 496, 229 Mo. 53.

The "heirs of her body begotten by me" are not words of purchase but of limitation. They have a well-settled technical meaning and import probable succession and are construed to be a limitation over to the grantor upon an indefinite failure of issue of the particular heirs to whom the estate is granted, and under the common law create an estate in special tail." A husband conveyed land to his wife "and the heirs of her body begotten by me." Held, that the words quoted created in the wife at common law an estate in special tail, which under the express provisions of Shannon's Code, § 3673, is deemed a fee-simple estate. *Speight v. Askins*, 102 S. W. 74, 118 Tenn. 749.

While the precise words, "heirs of the body," are not necessary to the creation of an estate tail, it is requisite that the heirs shall be limited to be procreated by, or begotten on, somebody certain, either by express words or by words amounting to so much. It results that a conveyance to A. and the heirs of the grantor and the heirs of the grantee, even though the grantor and the grantee are husband and wife, neither by express words nor by express implication creates an estate tail, which by virtue of the act of 1855 becomes an estate in fee simple. *Ackerman v. Ackerman*, 34 Pa. Super. Ct. 162, 166.

The words "'heirs of her body' at common law, would create an estate tail, which by statute is changed to a fee simple; there being nothing in the instrument to show that the words 'heirs of her body' are not used in their ordinary sense." Hence where a will, after giving a life estate to testator's wife, provided that the remainder should descend to R. and the "heirs of her body," and there was nothing to show that the words were not used in their ordinary sense, the term "heirs of her body" will not be construed as synonymous with children but as intending to convey a fee-simple title to R. *Young v. Amburgy* (Ky.) 87 S. W. 802.

Where a testator devises to his daughter, now the wife of another, and to her heirs lawfully from her body begotten, and assigns forever, after the decease of his wife, all his estate, such daughter takes an estate tail in the premises on the death of her mother, as the words "heirs of her body" cannot be construed as meaning nothing more than an intention to exclude her husband. *Doremus v. Zabriskie*, 15 N. J. Law, 404, 409.

C. D. devised to his five daughters, each, an undivided seventh part of his estate; "the devises to my five daughters to be to them an estate for life, and to the 'heirs of their bodies' after them, and to their heirs and assigns of such heirs forever. But in case any of my said daughters shall die without issue surviving them, then my will is, and all such real estate as is herein devised to such of my children as shall so die without issue, shall then pass to such of my children as shall survive, and then to them and their heirs and assigns forever; it being my will and intent to give an estate in fee to such of my daughters as shall die leaving issue, and an estate for life only to such of them as shall die without leaving issue to survive them." Held, that the daughters, each, took an estate tail in their respective shares, with cross-remainders to survivors, upon the death of any of them without issue. *Manchester v. Durfee*, 5 R. I. 549, 554.

Blackstone says: A deed described the grantee as a married woman and the heirs by her then husband, and the grant was to "said party of the second part, her heirs and

assigns." Held to convey a title in special tail which, under the statute, is converted into an estate in fee simple. Where lands and tenements are given to a man and the heirs of his body "on Mary, his now wife to be begotten," no issue can inherit, but such special issue as is engendered between them two and therefore is called a "special tail." *Schrecongost v. West*, 59 Atl. 269, 270, 210 Pa. 7 (citing 2 Blackstone, p. 114).

## HELD

See Duly Called and Held; Regularly Held.

Stock Corporation Law, § 54 (Laws 1892, p. 1841), provided that stockholders should be liable to creditors to an amount equal to the stock held by them until the capital stock issued and outstanding should have been fully paid. In an action to enforce the liability of a stockholder, it appeared that a stock of goods had been transferred to the corporation under an agreement whereby, in consideration therefor, it was to issue to the owner and to defendant a certain amount of stock, and that defendant had forgiven certain indebtedness owing him by the transferor of the goods on account of the issue of the stock, and that defendant had been one of the directors of the corporation, his only qualification being the ownership of the stock in question. Held, that the stock was "issued" and was "held" by the parties, though no certificate or scrip representing the same had been issued. *Flour City Nat. Bank of Rochester v. Shire*, 84 N. Y. Supp. 810, 88 App. Div. 401.

### As ownership or possession

The word "held," in Rev. St. 1899, §§ 2843, 2858, giving a lien for cutting wood and providing that persons entitled to such a lien shall not be required to identify any particular sticks but may maintain their lien against any or all of that class of property owned and "held" by the person from whom their pay is due, is used in the sense of custody or possession, so that there is no lien after the property has lawfully passed out of the debtor's possession to a third person. *Turner v. Horton*, 106 Pac. 688, 691, 692, 18 Wyo. 281.

Rev. St. 1898, § 1933, exempting from taxation property "held" by the board of education, means all property "owned" by the board and cannot be interpreted as intending only property used for school purposes. *Wey v. Salt Lake City*, 101 Pac. 381, 382, 35 Utah, 504.

## HELD BY ANY POLITICAL PARTY, ORGANIZATION, OR ASSOCIATION

The words "held by any political party, organization, or association," as used in Pol. Code 1895, § 113, providing that every political primary election held by any political

party, organization, or association for the purpose of choosing or selecting candidates for office or the election of delegates for convenience in the state shall be presided over and conducted in the manner and form prescribed by the rules of the political party, organization, or association holding such primary election, by managers selected in the manner prescribed by such rules, are not used in a restrictive sense, but are employed epithetically, not with the intention of limiting the scope of the enactment, but with the purpose of extending it to every known form of political primary election, for every primary election is necessarily held by a party or by an organization or association of some kind for the purpose of making political nominations by ballot. The expression "primary election" *ex vi termini* carries with it all the meaning that the words "held by any political party, organization, or association" denote. *Norton v. State*, 63 S. E. 662, 666, 5 Ga. App. 586.

#### HELD FOR THE USE

When testator directed that his homestead and furniture and necessary provisions "be held for the use of my wife and other members of my family" so long as they should live, the term "be held for the use" required the trustees to keep the homestead and its appurtenances in repair, and maintain the furniture by repair or renewal, and furnish necessary provisions for the use of the remaining members of the family. *Searles v. Fieles*, 83 N. E. 991, 992, 197 Mass. 343.

#### HELD IN CUSTODY

An order directing the clerk to call a special term of court for the purpose of the trial of one B., "now 'held in custody' charged with a capital offense," sufficiently alleged that he was "confined in jail" within Kirby's Dig. § 1532, declaring that the judge of any circuit court may at any time hold a special term for the trial of persons "confined in jail" by a written order to that effect transmitted to the clerk, etc. *Beard v. State*, 95 S. W. 995, 996, 79 Ark. 293, 9 Ann. Cas. 409.

#### HELD IN RESERVE

A testator directed that all his bonds and stock and real estate should be converted into cash with the exception of certain real estate, "which should be 'held in reserve' for my widow, together with all household utensils, except the piano and music which I desire to be set apart for my stepdaughter for her sole and separate use." By the expression "held in reserve," the testator meant that the property specified was not to be converted, but that his wife was to have it, and the expression must be taken as equivalent to the term "set apart," which he used with reference to the piano and music. *Birkbeck v. Wadsworth*, 70 Atl. 998, 222 Pa. 154.

#### HELD IN TRUST

The phrase "to be held in trust" in a will whereby testator gave his residuary estate to a son "to be held in trust" by his executors and managed and cared for by them for the son's benefit, until he arrived at the age of 50 years, when the trust should continue in the discretion of the executors, etc., clearly implies possession by the executors. *Higgins v. Downs*, 91 N. Y. Supp. 937, 939, 101 App. Div. 119.

#### HELD OPEN

A county judge served with an injunction order restraining him from proceeding with a certain matter stated that he "held it open" and continued it. Held, that the terms "held it open" and "holding open" did not fall within a definition of adjournment to the effect that "an adjournment is no more than a continuation of the session from one day to another as the word itself signifies." *People ex rel. Stryker v. Van Bergen*, 81 N. Y. Supp. 274, 276, 40 Misc. Rep. 139.

#### HELD TO APPEAR OR ANSWER

In Code, § 3541, prescribing that an appearance in court may be (1) by filing a memorandum to that effect with the clerk, (2) or by entering an appearance in the appearance docket or the judge's calendar or announcing it to the court, or (3) by appearing for some special purpose connected with the case, and providing that no person shall be held to appear or answer on certain designated holidays, "the phrase 'held to appear or answer' should be construed with reference to the subject-matter of the section, and, as that concerns appearance in an action in response to the notice 'to appear,' must have been intended in the same technical sense," so as not to forbid a trial on holidays. *Michel v. Boxholm Co-Operative Creamery*, 105 N. W. 323, 324, 128 Iowa, 706, 5 Ann. Cas. 918.

#### HELL

"The word 'hell' is a synonym for all that is evil and corrupt in the grossest and basest sense of those terms." The words "they make these little children as corrupt as the fountains of hell," if meaningless alone, taken in connection with a statement that plaintiff had been bribed to testify as a witness against one party and in the interest of his adversary, impute perjury and are libelous. *Atlanta News Pub. Co. v. Medlock*, 51 S. E. 756, 758, 123 Ga. 714, 3 L. R. A. (N. S.) 1139.

#### HELLER

The court may take judicial notice that a "Heller" is a modern Austrian copper coin, one two-hundredth of a crown, that its national equivalent is one two-hundredth of a florin, and its United States equivalent one-

quarter of a cent, and that it is current. *Czerney v. Haas*, 129 N. Y. Supp. 537, 541, 144 App. Div. 430.

## HELP

### HELPER

The "helper" of an operator or pressman of a printing press is sometimes called a "press feeder." *Doerr v. Daily News Pub. Co.*, 106 N. W. 1044, 97 Minn. 248.

Persons who haul ore and dump it in the furnace at a smelter are known as "helpers." *Kotera v. American Smelting, etc., Co.*, 114 N. W. 945, 946, 80 Neb. 648.

### HELPLESS

The Century Dictionary defines "helpless" to mean "incapable of acting without assistance; incapable of self-support or self-defense; feeble; dependent; as, a helpless babe; a helpless, shiftless fellow." Webster defines the word as meaning "destitute of help or strength; unable to help or defend one's self; needing help; feeble; weak; as, a helpless infant." As these definitions show a wide range of application to the word "helpless," an allegation, in an action for the ejection of a passenger, that plaintiff's husband was "almost in a helpless condition," without alleging whether he was sick or drunk or lame, or any fact on which helplessness was predicated, was subject to demurrer as not being sufficiently specific to enable defendant to prepare its defense. *Macon, D. & S. R. Co. v. Moore*, 54 S. E. 700, 703, 125 Ga. 810.

## HEMATITE IRON ORE

Not dutiable as pigments, see Pigments.

## HEN

### HEN HOUSE

"A chicken or 'hen house' is a building which is of a permanent and substantial kind and is well known in communities where poultry is raised as the building in which chickens and other poultry are housed." Indictment for burglary of a chicken or hen house need not allege that the house was specially made to keep such goods, merchandise, or other valuable things. *Lucas v. State*, 39 South. 821, 822, 144 Ala. 63, 3 L. R. A. (N. S.) 412.

## HENCEFORTH

Hereafter synonymous, see Hereafter.

## HENCHMAN

A remark of the district attorney that a witness was a "henchman" of the defendant was not objectionable, the word "henchman" being used in the sense of "friend."

*Davis v. State*, 106 S. W. 144, 145, 52 Tex. Cr. R. 149.

## HER

### HER OWN USE

See For Her Own Use.

## HERD

Driving sheep from one range to another is not "herding" them, within Rev. St. 1887, § 1210, making it unlawful for any person to herd sheep on the land of others. *Phipps v. Grover*, 75 Pac. 64, 65, 9 Idaho, 415.

## HEREAFTER

See Now or Hereafter.

The word "hereafter" has a distinct meaning in our language and pertains to something that will occur in the future. Webster defines it as a future existence or state; in time to come or some future time or state, where under the terms of an original contract 10 per cent. of the contract price was to be retained until the final completion of the work and an assignment of the contract provided that the assignee should have all the compensation "thereafter accruing" the words "thereafter accruing" reserved the 10 per cent. earned at the time of the assignment of the contract to the assignor. *Ercanbrack v. Faris*, 79 Pac. 817, 818, 10 Idaho, 584.

The word "hereafter," as used in Laws 1891, p. 12, providing that hereafter in all cities of the second class after an excise license has once been granted to any person it shall not be requisite in order to give jurisdiction to grant renewals that a new application recommended by freeholders shall be presented, indicates an intent to confer jurisdiction to renew licenses when certain enumerated occurrences shall have happened in the future, and does not apply to existing licenses granted on past recommendations. *Williams v. City of Bayonne*, 25 Atl. 407, 409, 55 N. J. Law, 60.

Under Free Coal Act Jan. 15, 1903, c. 189, § 2, 32 Stat. 773, prescribing that the provision in the tariff act of 1897 for a duty on coal "shall not hereafter be construed to authorize the imposition of any duty upon anthracite coal," the term "hereafter" was not intended to be retroactive, and did not apply to coal imported before that date. *Perkins Co. v. United States*, 180 Fed. 935, 937.

Under Act May 27, 1908, c. 205, § 2, 35 Stat. 404, amending Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138, it was prescribed that "hereafter" the parties litigant should be required to introduce all their evidence before the Board of General Appraisers, and cut off the right under said amended act, of a new trial in the Cir-

cult Court on appeal from the board. Held, that this provision applied to cases decided by the board after May 27, 1908, even though, prior to that date, they had arisen and been submitted to the board for decision. *Beer v. United States*, 181 Fed. 402, 403.

**Henceforth synonymous**

The word "hereafter," as used in a statute providing "that hereafter in all prosecutions for murder, treason, or any offense, punishable by death or confinement in the public jail and penitentiary house, the venire facias shall command the sheriff or other officer, charged with its execution, to summon 24 good and lawful men," is synonymous with the word "henceforth," and is equivalent to the phrase "from and after the passage of this act," and speaks of the time when the law shall take effect, and not of the cases to which it shall be applied. It took effect instantly and operated immediately on all cases within its scope. *Perry v. Commonwealth*, 3 Grat. (44 Va.) 632, 635.

**As relating to taking effect of statute**

The word "hereafter," as used in Code Civ. Proc. § 376, relating to limitation on justice's judgments "hereafter" docketed, relates to the time when such provision took effect. *McMahon v. Arnold*, 94 N. Y. Supp. 775, 776, 107 App. Div. 132.

*Sess. Laws 1899*, p. 235, No. 155, § 1, providing that no action shall "hereafter" be brought in any court of the state for personal injuries unless brought within three years from the occurrence on which the claim is founded, affects only such causes of action as accrued after the law took effect. *Eathaway v. Washington Milling Co.*, 103 N. W. 164, 166, 139 Mich. 708.

Section 11, Act March 22, 1907 (*Laws 1907*, p. 535), to regulate common carriers, provided for a State Railroad Commission composed of three commissioners to be elected at the following general election for two, four, and six years, one commissioner being thereafter elected at each general election for six years. Section 11 of *Laws 1910*, p. 51, provides for three commissioners, "who shall hereafter be appointed by the Governor," one to be appointed for a term beginning on the second Tuesday in January 1911, and one every two years thereafter. This act went into effect February 15, 1911, previous to which date the commissioner elected under the earlier act had taken office for the term commencing on the second Tuesday in January. Held, that the provision for the appointment of the commissioner by the Governor for that term was inoperative because impossible to carry out, the word "hereafter" referring to a time subsequent to February 15, 1911, at which time there was no vacancy, and hence the commissioner elected under the old act was entitled to the office for the six year term. *Kendall v. People*, 125 Pac. 586, 589, 53 Colo. 100.

**HEREAFTER ESTABLISHED**

Where there had been a crossing over a railroad by a road leading from an old ferry, and a contemplated crossing over the railroad was in a different place on the tracks, and was intended to accommodate more people, and was made at a highway leading from a bridge in course of construction near the exit from the bridge, it was a crossing "hereafter established," within the meaning of Act June 7, 1901 (P. L. 531), providing that all crossings "hereafter established" shall be above or below grade. *Pennsylvania R. Co. v. Bogert*, 59 Atl. 100, 102, 209 Pa. 589.

**HEREBY**

**As indicating acts in present**

Where the local authorities of a town resolved that "consent is hereby given" to a traction company to construct a railroad, such phrase imparted a present grant and conditions attached were to be construed as subsequent. *Manton v. South Shore Traction Co.*, 104 N. Y. Supp. 612, 613 (citing *Rogan v. Walker*, 1 Wis. 527; *Schulenberg v. Harriman*, 21 Wall. [88 U. S.] 44-60, 22 L. Ed. 551; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 741, 23 L. Ed. 634).

The words "hereby granted," in an act granting a right of way, import an immediate transfer of interest so that when the route is definitely fixed the title attaches from the date of act. *Okanogan County v. Cheetham*, 80 Pac. 262, 263, 37 Wash. 682, 70 L. R. A. 1027 (quoting and adopting *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578).

**HEREDITAMENT**

See Incorporeal Hereditament.

"Tenements and hereditaments" include every species of realty, as well corporeal as incorporeal. In *re Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388.

The term "hereditaments" includes "anything that may be inherited, be it corporeal or incorporeal, real, personal, or mixed. The word is almost as comprehensive as 'property.'" *Moore v. Sharpe*, 121 S. W. 341, 344, 91 Ark. 407, 23 L. R. A. (N. S.) 937 (quoting and adopting definition in *And. Law Dict.*).

The word "land" comprehends ground, soil, or earth, pastures, woods, springs, wells, lakes, ponds, and all things which have become a fixed part of the soil. The word "tenement," in its ordinary meaning, means a "house," which is the subject of tenure, and includes, not only corporeal hereditaments, which are or may be held, but also all inheritances issuing out of any of these inheritances, or concerning or annexed to or exercised within the same, though they lie not in tenure. "Tenement" is a word of

greater scope than "lands," and though, in its vulgar acceptance, is only applied to houses and other buildings, yet, in its original, proper, and legal sense, it signifies anything that may be holden, provided it be of a permanent nature, whether of a substantial and sensible, or of an unsubstantial, ideal, kind. The term "hereditaments" includes rights unconnected with land, but generally used as the widest expression for real property of all kinds, being divided into real hereditaments, which are lands and tenements, and personal hereditaments, which are rights concerning neither lands nor tenements. As so defined, neither the term "tenement" nor "hereditament" includes in law a lease of lands for years. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 494, 225 Mo. 414, 20 Ann. Cas. 1072.

## HEREDITARY

### HEREDITARY SUCCESSION

"Hereditary succession" is the title whereby a person on the death of his ancestor acquires his estate as his heir at law. *Parrish v. Mills*, 106 S. W. 882, 886, 101 Tex. 276 (quoting and adopting *Barclay v. Cameron*, 25 Tex. 233); *Hannon v. Southern Pac. R. Co.*, 107 Pac. 335, 338, 12 Cal. App. 350.

## HEREIN

Provision in a contract between a city and a railroad company, requiring the company to change street grades for the purpose of elevating its tracks, that each party to the contract should proceed to perform "the acts herein required" to be done, does not bind the city to pass an ordinance changing the street grade, such act not being mentioned in the contract. *United New Jersey R. & Canal Co. v. Lewis*, 59 Atl. 227, 228, 68 N. J. Eq. 437.

Where a deed contained the words "grant, bargain and sell," and thus included the statutory covenants raised by those words and also a single covenant of special warranty referring to the covenants "herein," such words had reference to the implied covenants and limited their operation; the deed containing no other covenants. *Miller v. Bayless*, 92 S. W. 482, 484, 194 Mo. 630.

### As relating to act

In Bankr. Act July 1, 1898, 30 Stat. 555, § 38a, cl. 4, which, with stated exceptions, authorizes referees to perform such part of the duties conferred on courts of bankruptcy as shall be prescribed by their rules or orders, "except as herein otherwise provided," the word "herein" refers to the entire act, including the general orders prescribed by authority of section 30, and the provision must be construed in connection with General Order 12, § 3 (89 Fed. vii; 18 Sup. Ct. vi), which

denies to a referee jurisdiction to grant an injunction to stay proceedings of a court or officer of the United States or of a state. *In re Berkowitz*, 143 Fed. 598, 601.

### As relating to other provisions

St. 1906, c. 291, § 10, provides that the police commissioner of the city of Boston shall appoint a trial board, composed of three captains, to hear the evidence in such complaints against members of the force as the commissioner may deem advisable to refer to the board, and that the board shall report its findings to the commissioner, who may review the same and take such action as he may deem advisable; and it is provided that, "except as otherwise provided herein," all the powers previously conferred on the board of police are conferred on the police commissioner. Under the former statute the power to hear and determine everything under a complaint against a member of the force was lodged in the board of police, and the police commissioners issued licenses for the sale of intoxicating liquor, which power by chapter 291 is conferred on a licensing board. Held, that a contention that the word "herein" meant merely in section 10, so that the requirement of a trial board prevented the commissioner from exercising the power formerly belonging to the board of police was without merit, and the commissioner may hear complaints, and, after a finding of "guilty," discharge the member, without referring the complaint to the trial board. *Welch v. O'Meara*, 81 N. E. 264, 265, 195 Mass. 541.

### HEREIN NAMED

A testatrix, after giving legacies to numerous persons, most of whom were related to her by consanguinity, and the rest as relatives of her deceased husband, directed, "any money after my debts and expenses are paid to be divided between my heirs by my family herein named," excepting N., who was one of the legatees related to her by blood. Held that the fact that the words "herein named" immediately follow the word "family" does not give to that word a meaning broad enough to embrace all the legatees named, as the words "herein named" may as well have been used to modify the whole clause "my heirs by my family" as the words "my family" alone. Therefore "my heirs by my family herein named" did not embrace those legatees who were related to the testatrix's deceased husband only, and those of the legatees named in the will, except N., take under such clause who would have been entitled to the estate had the testatrix died intestate, in the proportions in which they would take under the statute of distributions. *Jacobs v. Prescott*, 65 Atl. 761, 762, 102 Me. 63.

### HEREIN PROVIDED

See *As Herein Provided*.

Except as herein provided, see *Except*.

**HEREINAFTER APPOINTED EXECUTRIX**

Testator devised all of his real estate to his wife for life, and then gave his "wife, hereinafter appointed executrix," full power to sell and dispose of any and all of the real estate. Held, that the words, "hereinafter appointed executrix," were merely descriptive of the person and not of the capacity in which the wife was to act in making sales of the property, and therefore did not limit the power of sale to his wife while acting as executrix. *Stafford v. Washburn*, 130 N. Y. Supp. 571, 575, 145 App. Div. 784.

**HEREINBEFORE**

"Hereinbefore" has a settled meaning. Webster's definition is: 'In the preceding part of this (writing, document, speech, and the like).' The Century Dictionary and Encyclopedia defines it: 'Before in this (statement, narrative, or document); referring to something already named or described.' 4 Words and Phrases, p. 5283, gives numerous definitions by the courts, all in accordance with those of the lexicographers." *Taylor v. Insurance Co. of North America*, 105 Pac. 354, 361, 25 Okl. 92, 138 Am. St. Rep. 906.

"Hereinbefore provided," in Rev. St. c. 29, § 40, providing that no person shall by himself, clerk, servant, or agent, directly or indirectly, sell any intoxicating liquors except as hereinbefore provided, relates back to section 26 of the chapter, which provides that the selectmen of any town and the mayor and aldermen of any city may appoint some suitable person agent of the town or city to sell intoxicating liquors purchased by them according to law, to be used for medicinal, mechanical, and manufacturing purposes, and no other, and all sales of intoxicating liquors except those made by a duly appointed and qualified town or city agent are in violation of law. *State v. Intoxicating Liquors and Vessels*, 63 Atl. 666, 667, 101 Me. 161.

**HERETOFORE**

See As Heretofore.

The word "heretofore," as used in an information alleging the offense to have been committed "heretofore" on a date specified, which is the same as the date of the filing of the information, is equivalent to a direct allegation that the offense was committed anterior to the filing of the information. *Miller v. State*, 115 S. W. 578, 579, 55 Tex. Cr. R. 174; *Wilson v. State*, 15 Tex. App. 150, 155.

The word "heretofore," as used in Laws 1903, p. 9, c. 7, authorizing every city heretofore incorporated under a special charter having less than 10,000 inhabitants to be determined by the last preceding United States census, and having power to make special assessments to construct sewers, to make such assessments in a specified manner, adds nothing whatever to the limitation of the class.

The only cities under special charter were those theretofore incorporated, and no other city was permitted by the Constitution to be so incorporated thereafter. Had the word been omitted, the class would have been precisely the same. *McGarvey v. Swan*, 96 Pac. 697, 704, 17 Wyo. 120.

Const. art. 2, § 23, as amended, which provides that the right of trial by jury as heretofore enjoyed shall remain inviolate, but that a jury for the trial of criminal or civil cases, in courts not of record may consist of less than 12 men as may be prescribed by law, and that a two-thirds majority of such number prescribed by law concurring may render a verdict in all civil cases, and that, in the trial by jury of all civil cases in courts of record, three-fourths of the number of the jury concurring may render a verdict, is not limited to the rights of trial by jury given by the common law; the word "heretofore" meaning before and up to the time the Constitution was adopted, and applying to all civil cases wherein, at the time of its adoption, the right to a trial by jury existed, whether given by common law or by statute, and hence includes an insanity inquiry instituted under Rev. St. 1909, § 474, the right to jury trial in such proceeding having existed prior to the adoption of the Constitution. *State ex rel. Peper v. Holtcamp*, 138 S. W. 521, 522, 235 Mo. 232.

Where two orders extending the time for making and serving a case-made are made on the same day, one granting a 60-day extension from the date of the order, and the other 30 days from "the time heretofore granted," and an order of a prior date extending the time had been made. The word "heretofore" in such case will be construed to mean any time previous to the day of the making of the order, and will not include time in addition to that contained in another order made on the same day. *Woods v. Coleman*, 122 Pac. 234, 235, 32 Okl. 244.

A will provided that "any note or notes signed by me in favor of any person or persons and made payable by the terms thereof after my decease be recognized and treated as bequests in behalf of the payees therein respectively designated," to be paid out of the estate, and further provided "I have heretofore, and may hereafter adopt this means of designating the persons I wish to be numbered as beneficiaries under my last will." Held, that the will referred to the notes "heretofore" made as then in existence, so as to incorporate them as a part of the will; "heretofore" meaning "in time past;" "previous time;" "previously." *Keeler v. Merchants' Loan & Trust Co.*, 97 N. E. 1061, 1064, 253 Ill. 528; *In re Sexton's Estate*, 162 Ill. App. 222.

**Subject-matter of statute related to**

The words, "heretofore erected," as in the act concerning roads (Rev. p. 1010, § 79),



forbidding the pulling down or removal of any dwelling house, etc., heretofore erected and which may encroach upon any highway, refer to the time of the laying out of the roads and not to the time of the passage of the act. *State v. Troth*, 34 N. J. Law, 377, 382.

#### As theretofore

A contract for the sale of land for \$40,000, payable in four equal payments, required the purchaser to pay "\$10,000 (in addition to the sum of \$10 herein paid)," etc., and provided that all sums paid herein shall apply to the purchase price, but, if the purchaser fails to comply with the conditions herein set forth, payments "heretofore" received, are to be forfeited as liquidated damages. Held, on forfeiture after two payments, the word "heretofore" would not be construed to limit the defendant's right to the \$10 parenthetically referred to as "herein paid," but would be rejected as unnecessary or read as "theretofore," and include the \$20,000 paid. *Skookum Oil Co. v. Thomas*, 123 Pac. 363, 366, 162 Cal. 539.

### HEREUNDER

A lease for a fixed term, with the privilege of extending it for a fixed period, on the lessee so electing a specified time before the "expiration of the original term," stipulated that in the event of the total destruction of the premises the lease should terminate and the parties be freed from all liability "hereunder"; that the lessee should make improvements; that "at the expiration of the original term, \* \* \* viz., the term expiring on" a designated date, the lessor would pay to the lessee the cost of the improvement; that the lessee "at the expiration of said term" should produce the original vouchers for the money expended in the improvements, etc. The premises were totally destroyed before the expiration of the original term. Held, that the lessee could not recover the cost of the improvements made by him; the phrase "expiration of the term" meaning the termination of the original term by lapse of time, and the word "hereunder" referring to the entire lease. *Pringle v. Wilson*, 104 Pac. 316, 317, 319, 156 Cal. 313, 24 L. R. A. (N. S.) 1090.

### HERITAGE

#### HERITABLE INTEREST

A "heritable interest" is one which is attached to the ownership of land. *Hemsley v. Marlborough House Co.*, 61 Atl. 455, 456, 68 N. J. Eq. 596.

### HERNIA

There is no kinship between the words, "orchitis, 'hernia,' freezing, and sunstroke," and no sort of relationship between them

and the words "intoxicants, sleepwalking, narcotics," etc., as used in an accident policy providing that the insurance shall not cover injuries received while under the influence of, or resulting directly or indirectly from, intoxicants, sunstroke, vertigo, hernia, or any disease or bodily infirmity, and the phrase "disease or bodily infirmity" will not be limited by the preceding specific exceptions. *Carr v. Pacific Mut. Life Ins. Co.*, 75 S. W. 180, 183, 100 Mo. App. 602.

### HERPETIFORMIS

"Herpetiformis" is a skin disease. *Hynds v. Brooklyn Heights R. Co.*, 97 N. Y. Supp. 705, 706, 111 App. Div. 339.

### HERRING

Smoked herring, though salted before being smoked, are not dutiable as "herrings, pickled or salted," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 260, 30 Stat. 171, being a commodity distinct therefrom both commercially and in common speech. *Mattlage v. United States*, 139 Fed. 704.

### HERSELF

See For Herself and Children.

### HEXAMETHYLENTETRAMIN

As medicinal preparation, see Medicinal Preparation.

### HIDES

"Hides" are distinguishable from "skins" by weight. If they weigh more than 12 pounds, they are known as "hides"; if less, they are known as "skins." An importer's protest against the liquidation of his entry of hides and skins "each of which weighs under 12 pounds; looking to you for the refund of duty on these 99 skins," is a sufficient reference to the provisions in the Free List Tariff Act for skins of all kinds. *United States v. Helmrich*, 145 Fed. 36, 75 C. C. A. 261.

### HIDES OF CATTLE

The term "hides of cattle," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N. par. 437, 30 Stat. 192, is not used in a commercial sense, but according to the ordinary dictionary meaning of the words, and refers to the hides of domesticated animals of the bovine species, including those of the East India buffalo. "Cattle" are "domesticated bovine animals, as oxen, cows, bulls, and calves" or "live stock; domestic quadrupeds which serve for tillage and other labor or as food for man." In popular speech the term "cattle" is used in the United States in a restricted sense and is more specially applied to the group of so-called straightback "cattle" (cows,

oxen, steers, and bulls) as distinguished from the hump cattle of India and Africa. *United States v. Schmoll*, 154 Fed. 734, 735 (citing *Rosbach v. United States*, 116 Fed. 781; *J. H. Rosbach & Bro. v. United States*, 122 Fed. 1020, 57 C. C. A. 678; *United States v. Winter & Smillie*, 134 Fed. 841, 67 C. C. A. 437); *Schmoll v. United States*, 157 Fed. 1005, 85 C. C. A. 679.

The hide of the mud buffalo of the Straits Settlements, an animal killed in the chase, is not within the provision for "hides of cattle" in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 437, 30 Stat. 151, but is free of duty under section 2, *Free List*, par. 664, 30 Stat. 194, covering "hides not specially provided for." *United States v. Winter & Smillie*, 134 Fed. 841, 842, 67 C. C. A. 437.

## HIGH

See *As High As*.

### HIGH CARE

"High care," used in an instruction requiring the jury to believe that plaintiff used that high care which a person of ordinary prudence would have used, conveys the idea that a higher degree of care than ordinary care was imposed by law on him in that respect, if, indeed, it did not actually have that effect. *St. John v. Gulf, C. & S. F. Ry. Co. (Tex.)* 80 S. W. 235, 237.

### HIGH CRIMES AND MISDEMEANORS

*Const. U. S. art. 4, § 2*, provides for extradition of a person charged with treason, felony or other crime. *Gen. St. 1902, § 1566*, provides that, when a demand shall be made on the Governor by the executive authority of another state for the surrender of a person charged in such state with any "high crime," certain proceedings shall be had thereon, and, if the Governor shall find that the demand is conformable to law and ought to be complied with, he shall issue his warrant, etc. Held, that the words "high crime" as so used were intended to be synonymous with the word "crime" as used in the federal Constitution, and hence were sufficient to include a conspiracy, whether it was a felony or a misdemeanor. *Ross v. Crofutt*, 80 Atl. 90, 91, 84 Conn. 370, *Ann. Cas.* 1912C, 1295.

The term "high misdemeanors" includes criminal libel. *Robert v. Police Court of City and County of San Francisco*, 82 Pac. 838, 839, 148 Cal. 131.

### HIGH DEGREE OF CARE AND DILIGENCE

The term "high degree of care," when used in an instruction which gave no standard of care, and thus deprived a comparison between "ordinary care" and a "high degree of care," held not to be the legal equivalent of "reasonable care." *Van Blarcom v. Cen-*

*tral Ry. Co. of New Jersey*, 60 Atl. 182, 72 N. J. Law, 33.

Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus. This care varies with the risks to be apprehended from negligence. Where the wires carry strong and dangerous currents of electricity, and the result of negligence may be exposure to death or serious accident, a high degree of care is required. Under such circumstances, "reasonable care" and a "high degree of diligence" may be deemed to be synonymous. *Gilbert et al. v. Duluth General Electric Co.*, 100 N. W. 653, 655, 93 Minn. 99, 106 Am. St. Rep. 480.

### HIGH SCHOOL

As common school, see *Common School*.

As public school, see *Public School*.

As schoolhouse, see *Schoolhouse*.

Establish high school, see *Establish*.

*Laws 1901, p. 588, c. 96*, as amended by *Laws 1903, p. 117, c. 118, § 4*, declares that by the term "high school" as used in the act is understood a school for at least one four years' course, properly equipped and teaching such subjects as are required for admission to college, technical school, and normal school. *New Hampton Institution v. Northwood School Dist.*, 68 Atl. 538, 540, 74 N. H. 422.

### HIGH SCHOOL BOARD

*Pol. Code, § 1670, subd. 7*, provides that the board of education in the city where a high school is established shall have control of that school, and such control is to be had, not as a board of education, but as a high school board. It constitutes a board of education for all purposes of controlling primary and grammar schools, but as to high schools it is regarded as constituting the "high school board." Such a distinction is required because under *Municipal Act, § 798*, the money obtained under the general levy provided for therein is to be paid out under the order of the board of education, under *Pol. Code, § 1670, subd. 18*. The taxes derived under subdivision 14 of such section are to be credited to the high school fund and paid out only on the warrants of the high school. *Brown v. City of Visalia*, 74 Pac. 1042, 1044, 141 Cal. 372.

### HIGH SCHOOL BUILDING

As public building, see *Public Building*.

### HIGH SEAS

The term "high seas" includes waters on the seacoast and without the boundaries of low-water mark. *United States v. Newark Meadows Imp. Co.*, 173 Fed. 426, 428.

"After passing the jurisdictional limits of a state, a vessel is as much on the 'high seas' as if in the middle of the ocean." *Rose v. Himely*, 4 Cranch, 241, 288, 2 L. Ed. 608.

A collision which occurred off a foreign port, although within a marine league of the coast, was nevertheless on the "high seas" for the purposes of jurisdiction of a suit arising therefrom. *The Kaiser Wilhelm Der Grosse*, 175 Fed. 215, 217.

#### **Bay, inlet, river, etc.**

"High seas," as used in determining whether movables taken in war are "booty," which is the term used when they are taken on land, or "prize," used when taken on the high seas, includes coast waters without the boundaries of low-water mark, though within bays or roadsteads, waters on which a court of admiralty has jurisdiction. *United States v. Dewey*, 23 Sup. Ct. 415, 422, 188 U. S. 254, 47 L. Ed. 463 (citing *United States v. Ross*, 1 Gall. 624, 27 Fed. Cas. 899).

#### **Great Lakes**

Lake Michigan, which lies wholly within the territory of the United States, is not a "high sea" in the sense that it is open and uninclosed, and a free highway of adjoining nations or people. It is under the exclusive dominion of the United States and is free to the commerce of other nations not by nature but only by the grace of our government. *Bigelow v. Nickerson*, 70 Fed. 113, 117, 17 C. C. A. 1, 30 L. R. A. 336.

#### **Harbor**

"The term 'high seas' includes waters on the seacoast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute [providing for the punishment of murder committed on the high seas], high seas." *In re Ross*, 11 Sup. Ct. 897, 902, 140 U. S. 471, 35 L. Ed. 581.

The waters inclosed between the shore and the government breakwaters in Lake Erie at the port of Buffalo, without as well as within the line designated on the government chart as "Buffalo Harbor Line," constitute a "haven," and not "high seas," within the meaning of Rev. St. § 5346 and an assault with a dangerous weapon committed on a vessel belonging to the United States or citizens thereof anchored in such waters is within the state, and not the federal, jurisdiction. *Ex parte O'Hare*, 179 Fed. 662, 663, 103 C. C. A. 220.

#### **As main sea**

"Main sea" and "high sea" are synonymous. *United States v. Newark Meadows Imp. Co.*, 173 Fed. 426, 428.

### **HIGH-WATER MARK**

From evidence as to the height of water in a lake in different seasons and in different years, without the water marks on the soil or their elevation, it is impracticable to locate the high-water mark, defined as the line which the water impresses on the soil as the limit of its dominion. *Merrill v. Board of*

*Sup'rs of Cerro Gordo County*, 125 N. W. 222, 224, 146 Iowa, 325.

A city, in using a lake as a source of water supply is not entitled to flood riparian lands by raising the level by means of a dam to the highest water mark; the "high-water mark" to which Rem. & Bal. Code, § 8005, permits use, meaning the ordinary high-water mark. *Austin v. City of Bellingham*, 126 Pac. 59, 61, 69 Wash. 677 (citing 4 Words & Phrases, p. 3290).

#### **Of rivers**

Fresh rivers not subject to tide may rise and fall at certain seasons and thus have defined high and low water marks. The "low-water mark" is the point to which the river recedes at its lowest stage, while the "high-water mark" is the line which the river impresses on the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture. *State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow*, 69 S. W. 374, 377, 169 Mo. 109 (citing Gould, Waters [3d Ed.] § 45).

"The courts have attempted to define 'high-water mark' as the point below which the presence and action of the waters is so common, usual, and long continued in ordinary years as to mark upon the soil a character distinct from that of the banks with respect to vegetation as well as soil, stating that ordinary low water or low-water mark was the point at which the water receded at its lowest stage. These are more satisfactory definitions than those which leave a strip of land between the riparian owners and the water." *City of Peoria v. Central Nat. Bank*, 79 N. E. 296, 299, 224 Ill. 43, 12 L. R. A. (N. S.) 687 (citing *Farnham, Water & Water Rights*, § 67; Gould, Waters [3d Ed.] § 162; *Seaman v. Smith*, 24 Ill. 521).

By "high-water mark" is meant those points along the shore where water rises to such a height as may reasonably be anticipated, but does not include such extraordinary freshets as cannot be anticipated. *Erdman v. Watab Rapids Power Co.*, 127 N. W. 487, 489, 112 Minn. 175.

As determining the boundary between the land of a riparian owner and the public, the high-water mark of a river not affected by the tide is the point below which the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark on the soil a character distinct from that of the banks with respect to vegetation and the soil itself. The margin of the bed of a river which lies between high and low water mark is called the "beach" or "shore," which is actually a part of the bed of the river, and, when the river is at its full flow, whether caused by the tide or by the natural increase of waters by rains, floods, and the like, filling its natural bed to its high-

est reach of flow, it marks its high-water, while its lessened range of flow by summer heats shows its low-water, mark. *Sun Dial Ranch v. May Land Co.*, 119 Pac. 758, 761, 61 Or. 205.

#### In tidewaters

The term "high-water mark" with reference to tidelands is the line on the shore which is reached by the limit of the flux of the usual tide. *Taylor Sands Fishing Co. v. State Land Board*, 108 Pac. 126, 127, 56 Or. 157.

#### HIGHBALL SIGNAL

One of the uses of the "Highball signal" in railroading is to direct the engineer on a train to go past a station without stopping. *International & G. N. Ry. Co. v. Stephenson*, 54 S. W. 1086, 1087, 22 Tex. Civ. App. 220.

#### HIGHEST ABOVE BED OF RIVER

The bed of the river is that part between the banks worn by the regular flow of the water, and the expression "six feet in highest above the bed of the river" in a grant of a right to flow land by a dam of that height means six feet above the highest point of the river bed. *Haigh v. Lenfesty*, 87 N. E. 962, 963, 239 Ill. 227.

#### HIGHEST AND BEST USE

The words "highest and best," with relation to the use to which the property sought to be condemned was to be put, means "highest and best" in a financial sense. *Frelberg v. South Side Elevated R. Co.*, 77 N. E. 920, 922, 221 Ill. 508.

#### HIGHEST BIDDER

See Next Highest Bidder.

Under Pol. Code, § 3897, providing that, when the state shall become the owner of property sold for taxes, the tax collector, in reselling it, shall sell the property to the highest bidder for cash, etc., the term "highest bidder" means the one who will make the highest cash bid for all the property, and not the person who will pay all the tax for the least amount of the land. *Fox v. Wright*, 91 Pac. 1005, 1006, 152 Cal. 59; *Merchants' Trust Co. v. Wright*, 118 Pac. 517, 518, 161 Cal. 149.

Under Laws 1898, c. 182, as amended, giving cities of the second class authority to sell a franchise at public auction to the "highest bidder," the personnel of the bidder is immaterial, and the highest bid must be accepted though the bidder, being a natural person, was unable, under the law, to construct and maintain the works or road to be operated under the franchise. *Trojan Ry. Co. v. City of Troy*, 109 N. Y. Supp. 779, 781, 783, 125 App. Div. 362.

#### HIGHEST DEGREE OF CARE

The "highest degree of care" signifies nothing short of the exercise of the utmost

human skill and care. There can be no degree of care higher than the highest. *Ilgas v. St. Louis Transit Co.*, 77 S. W. 93, 94, 102 Mo. App. 529.

The terms "ordinary care," "utmost care," and "highest degree of care" are relative, and are applicable solely to the particular circumstances. *Anderson v. Great Northern Ry. Co.*, 99 Pac. 91, 95, 15 Idaho, 513.

The expression the "highest degree of care" as the formulated rule in instructing the jury is lacking in definiteness and proper limitation, and, "to give clearness and definiteness as well as proper limitation this degree of care has been described as the care 'which a very cautious, prudent and competent person would exercise under the same circumstances.'" *Houston & T. C. R. Co. v. Keeling*, 112 S. W. 808, 809, 51 Tex. Civ. App. 386 (citing *Houston & T. C. R. Co. v. Dotson*, 38 S. W. 642, 15 Tex. Civ. App. 73; *International & G. N. R. Co. v. Halloren*, 53 Tex. 46, 37 Am. Rep. 744; *Gary v. Gulf, C. & S. F. Ry. Co.*, 42 S. W. 576, 17 Tex. Civ. App. 129; *Fordyce v. Withers*, 20 S. W. 766, 1 Tex. Civ. App. 544; *International & G. N. Ry. Co. v. Welch*, 24 S. W. 390, 86 Tex. 203, 40 Am. St. Rep. 829).

The "highest degree of care" required of common carriers for the safety of their passengers is the utmost care consistent with the nature of the carrier's undertaking and with a due regard for all other matters that ought to be considered in conducting the business. *Gardner v. Boston Elevated Ry. Co.*, 90 N. E. 534, 535, 204 Mass. 213.

The term "negligently," when applied to the failure of a carrier of passengers to perform its duty to safely carry its passengers, means the failure to use the highest degree of care; and the "highest degree of care" means the utmost care exercised by prudent and skillful persons in the management and operation of trains. *Louisville & N. R. Co. v. Kemp's Adm'r*, 149 S. W. 835, 836, 149 Ky. 344.

"The expression 'highest degree of care' is synonymous with and no broader than 'the utmost care.'" Hence an instruction that it was the duty of a railroad company to exercise the highest degree of care for the safety of its passengers was proper. *Houston & T. C. R. Co. v. George (Tex.)* 60 S. W. 313, 314.

It is usual to use the word "highest" in instructions upon the degree of care required toward passengers, instead of "utmost," and the former should be used, though there may be but slight difference in their meaning. *Quinn v. Metropolitan St. Ry. Co.*, 118 S. W. 46, 48, 218 Mo. 545.

Rev. St. 1909, § 8523, provides that a person operating an automobile on a public highway shall use the highest degree of care that a very careful person would use un-

der like circumstances to prevent injury to persons on the highway. Held, that the measure of care is to be determined according to the circumstances of the particular case; the statute requiring that the driver guard against all movement of persons likely to take place in the highway which a prudent man exercising high care should anticipate as likely to occur within the rationale of human experience. *Bongner v. Ziegenhein*, 147 S. W. 182, 185, 165 Mo. App. 328.

The term "highest degree of care," as used in relation to the carrying of passengers, means the degree of care which prudent persons, engaged in the business, usually exercise under similar circumstances. *Louisville St. Ry. Co. v. Brownfield* (Ky.) 96 S. W. 912, 914.

An instruction that by the term "highest degree of care" is meant that degree of care which a person possessed of the highest degree of care and prudence, engaged in the same kind of employment, would exercise under the same circumstances, is not an accurate definition of the duty owing by a railroad company to a passenger on one of its trains. *Pecos & N. T. R. Co. v. Coffman*, 121 S. W. 218, 220; 56 Tex. Civ. App. 472.

An instruction that a carrier owed the duty to a passenger to use the "highest degree of care" for his safety did not impose too great a burden on the carrier, where the court defined "highest degree of care," as such care as a very cautious or prudent person in a like business would exercise, under the same or similar circumstances. *Pecos & N. T. Ry. Co. v. Trower* (Tex.) 130 S. W. 588, 589.

"Highest degree of care," as used to define the duty of street railway companies, is meant the degree of care usually observed by men of reasonable skill and prudence in the control and management of street cars under similar circumstances. *Louisville, H. & St. L. Ry. Co. v. Kessee* (Ky.) 103 S. W. 261, 264.

An instruction, in an action for injuries to a passenger, that defendant was bound to exercise the highest degree of care consistent with the operation of the railway and taking into consideration the existing conditions to prevent the injury, and that defendant was liable for the slightest negligence, covered all the substantial features of a refused instruction that defendant was not required to exercise the highest degree of care possible to avoid the accident, but only the highest degree reasonably practicable under the circumstances, and that by "highest degree of care" was meant that degree which would be exercised under like circumstances by careful and experienced conductors and motormen. *Jordan v. Seattle, R. & S. Ry. Co.*, 92 Pac. 284, 285, 47 Wash. 503.

It was not error for the court, after instructing that if defendant's servants start-

ed a car without having exercised the "highest degree of care" "reasonably practiced" under the circumstances and conditions existing at the time and place in question to see that all persons who were in the act of boarding the car were in places of safety, and the negligent starting of said car threw plaintiff to the pavement and injured her, defendant was liable, to instruct that by the term "highest degree of care" as used in that instruction is meant that degree of care which would be exercised under like circumstances by careful, prudent, and experienced conductors and motormen generally. *Foster v. Seattle Electric Co.*, 76 Pac. 995, 996, 35 Wash. 177.

An instruction in an action against a carrier for injury to a passenger, which, after asserting that, if defendant's motormen exercised the "highest degree of care" to avoid the accident which was reasonably practicable under the circumstances, this was enough, states that by the term "highest degree of care" is meant that degree of care which would be exercised under like circumstances by very careful, prudent, and experienced conductors and motormen generally, does not require too much by the use of the word "very." *Connell v. Seattle, R. & S. Ry. Co.*, 92 Pac. 377, 378, 47 Wash. 510.

#### HIGHEST MARKET VALUE

Civ. Code, § 3333, provides that the measure of damages for breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not, and section 3336 provides that the detriment caused by the wrongful conversion of personality is presumed to be the value of the property at the time of the conversion with interest, or, where the action has been prosecuted with reasonable diligence, its highest market value at any time between the conversion and the verdict without interest at plaintiff's option. Held, that the "highest market value" allowed by the statute meant its subsequent value in the condition it was at the time of the conversion, so that, in an action for damages for the conversion of ore by underground trespassing on plaintiff's land, plaintiff could not recover the value of the ore after the cost of milling it had been added, but only its value when mined and commingled with defendant's ore, though the conversion was intentional by defendant's agents; the circumstances not authorizing punitive damages. *Lightner Min. Co. v. Lane*, 120 Pac. 771, 777, 161 Cal. 689, Ann. Cas. 1913C, 1093.

#### HIGHEST POSSIBLE DEGREE OF CARE AND DILIGENCE

"The phrase 'highest possible degree of care and diligence' does not mean all the care and diligence the human mind can conceive of; nor such as will render transports-

tion free from any possible peril; nor such as will drive a carrier from his business." *Chicago, R. I. & P. Ry. Co. v. Brandon*, 95 Pac. 573, 576, 77 Kan. 612 (quoting *Indianapolis & St. L., etc., R. Co. v. Horst*, 98 U. S. 291, 23 L. Ed. 898).

### HIGHEST PREVIOUS INDEBTEDNESS

In an experience clause of a credit insurance bond, which provided that the insurer should be liable for an amount not exceeding the "highest previous indebtedness" for goods shipped within 12 months prior to the shipping of the first item upon which loss should occur, the phrase quoted meant the highest indebtedness which had been paid, and not merely the highest indebtedness contracted, though the experience clause was not mentioned in the application, but was included later at plaintiff's request. *Pringle Bros. v. Philadelphia Casualty Co.*, 138 N. Y. Supp. 330, 332, 153 App. Div. 180.

### HIGHLY PRUDENT PERSON

A "highly prudent person" is a very prudent, cautious, and competent person. Thus, an instruction that a carrier must exercise toward passengers such a degree of care as a highly prudent person would exercise under the same or similar circumstances did not require too high a degree of care. *Gilmore v. Houston Electric Co.*, 102 S. W. 168, 169, 46 Tex. Civ. App. 315.

### HIGH-TENSION SYSTEM

The "high-tension system" is a method of generating at the power house a large volume or current of electricity, but with a comparatively low voltage, and converting it into a small current or volume with an exceedingly high voltage, and carrying it out along the line on small wires, to be taken off at different points called "substations." At these substations the current is reconverted into the large volume again, with a pressure adjusted to the requirements of the trolley wire. The method of transmission of the current may be likened somewhat to transmitting water through pipes. *Harrison v. Detroit, Y., A. A. & J. Ry.*, 100 N. W. 451, 452, 137 Mich. 78.

### HIGHWAY

See Common Highway; Overseer of Highways; Passable Highway; Private Highway; Safe Highway; State Highway; Traveler on Highway.

Discontinuance of highway, see Discontinuance.

Expenses of highway, see Expenses.

Extension of highway, see Extension.

Location of highway, see Location.

Obstruction of highway, see Obstruction—Obstruction.

Town superintendent of highways, see Town Superintendent.

Used as highway, see Use—Used.

See, also, Public Road.

A "highway" is a public thoroughfare. *Houston v. Zahm*, 76 Pac. 641, 643, 44 Or. 610, 65 L. R. A. 799.

The word "highway" is a generic term "embracing all kinds of public ways, such as county and township roads, streets, alleys, township, and plank-roads, turnpike or gravel roads, tramways, ferries, canals, navigable rivers, including also railroads." *Strange v. Board of Com'rs of Grant County*, 91 N. E. 242, 243, 247, 173 Ind. 640.

"The word 'passageway' cannot be any broader in its signification than 'way' or 'highway,' and can have essentially no different meaning." Hence the reservation of the privilege of a passway, reading "passway" as "passageway," was merely the reservation of a way or right of passage over the ground. *Chandler v. Goodridge*, 23 Me. 78, 82.

Many courts have treated the terms "streets," "roads," and "highways," and related descriptive words, as synonymous in interpreting statutes. *Board of Revenue of Jefferson County v. State ex rel. City of Birmingham*, 54 South. 757, 759, 172 Ala. 138 (citing 7 Words and Phrases, pp. 6250-6254, 6684).

The term "public highway," in the broad, ordinary sense, includes every common way for travel by persons on foot or with vehicles rightfully used on highways, which the public have a right to use either conditionally or unconditionally. *Weirich v. State*, 121 N. W. 652, 653, 140 Wis. 98, 22 L. R. A. (N. S.) 1221, 17 Ann. Cas. 802.

The term "public highway" should be regarded as having been used in its general sense, unless there is a reason for believing it was used in its limited sense. *Weirich v. State*, 121 N. W. 652, 653, 140 Wis. 98, 22 L. R. A. (N. S.) 1221, 17 Ann. Cas. 802.

Public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or, if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for partition of real property. *Hartley v. Vermillion*, 74 Pac. 987, 990, 141 Cal. 339 (citing Pol. Code, § 2618).

In "an act to revise, amend, and codify the statutes in relation to American roads, bridges and ferries, and destruction of thistles," the word "roads" is synonymous with "highways." *City of Newton v. Board of Sup'rs of Jasper County*, 112 N. W. 167, 168, 135 Iowa, 27, 124 Am. St. Rep. 256.

The word "highway," within Rev. St. c. 52, § 86, providing that no engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour, unless the railroad maintains a flagman, a gate, or certain signals at such crossing, is not limited to ways established by county commissioners or municipal authorities, but is used in its more generic

and popular legal sense. *Moore v. Maine Cent. R. Co.*, 76 Atl. 871, 874, 106 Me. 297.

To constitute a "public highway" it must have a terminus, by which the public can enter it, and a terminus whence they can leave it. *Manigault v. S. M. Ward & Co.*, 123 Fed. 707, 713.

A way to the incumbrance of which any person may set up a defensible claim or right is not a "public highway." It follows of necessity that such a claim or right cannot ripen into title as against the public by mere lapse of time or long-continued assertion. *Lacy v. City of Oskaloosa*, 121 N. W. 542, 545, 143 Iowa, 704, 31 L. R. A. (N. S.) 853.

Under Pol Code, § 1594, declaring all section lines within the state to be "public highways" as far as practicable, a section line road becomes an established public highway, without any action or procedure on the part of the county, which no one has the right to obstruct. Pol. Code, § 1594, declaring all section lines public highways as far as practicable; does not establish a highway on a section line where it is impracticable to construct it on such line, but any situation where it is reasonably possible to construct a highway is within the operation of that section. *Lowe v. East Sioux Falls Quarry Co.*, 126 N. W. 609, 610, 25 S. D. 393.

"Public highways" are such only as come within the express provision of the statutes declaring them to be such in the common acceptance of the terms. Roads or ways are considered to be either public or private; but in the legal acceptance a way may be a road that is neither a "public highway" nor a private road or way under the statute. *Territory v. Richardson*, 76 Pac. 456, 457, 8 Ariz. 336.

#### Bridge

"A bridge is a part of the 'highway.'" *Culbertson v. Abbeville County*, 50 S. E. 33, 34, 70 S. C. 457.

Strictly speaking, there is no local ownership of public highway bridges in the absence of statutory provision therefor; they being parts of the general system of highways belonging to the state at large. *Karr v. Board of Com'rs of Putnam County*, 85 N. E. 1, 3, 170 Ind. 571.

Though the word "bridge" is used in every chapter and in almost every section of the statutes relating to highways, a distinction has always been made between bridges and other portions of the highway; the word "bridge" not being equivalent to or included in the term "highway." *City of Flemingsburg v. Fleming County*, 105 S. W. 133, 134, 127 Ky. 120.

A toll bridge is a public "highway" over which everybody has the right to pass; it being a franchise created for the use and convenience of the traveling public. In re

*People*, 128 N. Y. Supp. 29, 33, 70 Misc. Rep. 72.

"Bridges" are usually constructed across water courses or deep depressions across the roadway as a means of safe and convenient passage. While a bridge on a public road is a part of the road, it differs from the "road" strictly so called, and generally is much more expensive to construct and maintain, and often requires a greater outlay, than can be provided for from the road and bridge tax. *St. Louis, A. & T. H. R. Co. v. People*, 65 N. E. 715, 716, 200 Ill. 365.

Generally a public bridge will be regarded as a part of the common "highway" over a stream unless in the application of some statute a restricted meaning be indicated. A bridge built on a road located on the line dividing two counties from funds supplied in part by private subscriptions and the remainder by a township of one of the counties which, being a public utility, is accepted and adopted and used by the public as a part of the highway over the stream it spans, is a part of the highway, and expenses incurred in its repair are by the provisions of Laws 1874, c. 109, p. 176, to be borne jointly by the two counties. *Board of Com'rs of Cloud County v. Board of Com'rs of Mitchell County*, 90 Pac. 286, 289, 75 Kan. 750 (citing 4 Words and Phrases, p. 3295).

A "public bridge" is an essential part of a road, and the erection of a bridge is but the laying out of a "highway." Where, by the extension of the corporate limits of a city, a public bridge, owned and controlled by a county, comes to be within such city, it becomes the duty of the city to keep the bridge in repair. *Cavender v. City of Charleston*, 59 S. E. 732, 734, 62 W. Va. 654 (quoting and adopting definition in Elliott, Streets, § 27).

Traction Act March 14, 1893, § 1, empowering street railway corporations to construct their lines over highways, etc., authorizes the construction of such lines over bridges, public bridges and their approaches being "highways," and the rebuilding as necessary any part of the roads over such highways and bridges, and hence the act necessarily limited the sole control over bridges previously existing in the board of chosen freeholders under 1 Gen. St. p. 305, § 1, and page 410, § 4. *Public Service Ry. Co. v. Board of Chosen Freeholders of Hudson County*, 78 Atl. 235, 238, 78 N. J. Eq. 20.

#### Common and equal right to use

"A 'highway,' according to the common law, is a place in which all the people have a right to pass. A common street and public highway are the same, and any way which is common to all the people may be called a 'highway.'" *Skinner v. Town of Weathersfield*, 63 A. 142, 143, 78 Vt. 410 (quoting *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560).

The fact that an ancient highway is rarely used except by a few persons to whom it affords an egress and ingress to their lands does not make it the less a "public highway." *Small v. Binford*, 83 N. E. 507, 510, 41 Ind. App. 440.

"Every public thoroughfare is a 'highway,' and a way open to all the people is a highway, whether it is, strictly speaking, public or private. Roads generally used by the citizens of a locality, but open to the general public, are public roads, although they may afford facilities for travel to only such persons as reside in the neighborhood, and may not be useful to the general public. \* \* \* The character of the road does not depend upon its length, nor upon the places to which it leads, nor is its character determined by the number of persons who actually travel upon it." *Dunn & Lallande Bros. v. Gunn*, 42 South. 686, 690, 149 Ala. 583 (citing *Elliott, Roads & Streets*, §§ 1, 3, 11).

"Whatever may be the dimensions of a way, if it be opened to the free use of the public, it is a 'highway'; nor is its character determined by the number of persons who actually use it for passage. The right of the public to use the way, and not the size of the way or the number of persons who choose to exercise that right, determines its character. An alley of small dimensions, actually used by only a limited number of persons, but which the public have a general right to use, may be regarded as a public way. It is to be understood, of course, that the way cannot be deemed a public one so as to charge the local authorities with the duty of maintaining it, unless it has been legally established or accepted; but, if it is so established or accepted, it is to be considered one of the public ways, whatever may be its size or situation, provided it is suitable for any kind of travel by the public." *Tise v. Whitaker-Harvey Co.*, 57 S. E. 210, 211, 144 N. C. 507 (quoting and adopting the definition in *Elliott, Roads & Streets*, § 24).

"A 'highway' is a public way open and free to any one who has occasion to pass along it on foot, or with any kind of vehicle." It is the generic name for all kinds of public ways, including among others, roads, streets, and alleys. No matter whether obtained by prescription or dedication, or under the right of eminent domain, it is a highway if there is a general right to use it for travel. *Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co.*, 54 S. E. 736, 746, 125 Ga. 529.

"The term 'highway' in its popular sense is a road or way open to the use of the public; a main road or thoroughfare. A way open to all people is a 'highway.' Though every public thoroughfare is a highway, it is not essential that every 'highway' should

be a thoroughfare. A road which leads only to the residence of a single individual may be a 'highway.' Every thoroughfare which is used by the public and which in the language of English books is common to all the King's subjects is a 'highway.' They are created by legislative authority, by dedication, or by prescription. The construction of the term 'highway' when used in a statute depends upon the legislative intent, and no fixed rule in regard to its meaning can be given." *Southern Ry. Co. v. Combs*, 53 S. E. 508, 124 Ga. 1004 (citing *Webster's International Dict.*; *Elliott, Roads & Streets* [2d Ed.] § 1 et seq.).

The term "public highway" means more than the right of way over which a public highway may be established. It is a passage or road which every citizen has a right to use. The expression "public highway," used in *Laws Dak. T. 1870-71*, p. 519, c. 33, declaring that "all section lines shall be and are hereby declared public highways as far as practicable," was evidently intended to make every section line in the then territory and now state a "highway" over which the people of the state would have an easement and right of way, subject to the qualifications therein mentioned for the purpose of passing from one section of the state to another. Declaring section lines "public highways" means that they are roads which every citizen has a right to use. *Lawrence v. Ewert*, 114 N. W. 709, 710, 21 S. D. 580.

#### Control and repair by public

A "public highway" is one under the control of and kept by the public, and must have been established either by regular proceeding for that purpose or general use by the public for 20 years or dedicated by the owner of the soil. *Bellview Cemetery Co. v. McEvers*, 57 South. 375, 376, 174 Ala. 457.

A "highway," originally laid out as a public highway, retains its character as a public highway, though placed under the control of park commissioners, as authorized by St. 1893, p. 934, c. 300, and it is unlawful for one to operate his automobile on such highway without having the register number displayed thereon, as required by the State Highway Commission in its certificate of registration. *Commonwealth v. Butler*, 90 N. E. 360, 204 Mass. 11.

#### As created by user or dedication

It is the law of this state that any road or highway which has been continuously, openly, notoriously, and adversely used as a public road or highway by the general public under a claim of right for 10 years, where the same has been worked and kept up at the expense of the public, is a lawful road or "highway." *Portland & S. R. Co. v. Clarke County*, 93 Pac. 1083, 1084, 48 Wash. 509.

Proof that a highway has been used for general public travel for more than 20 years,



and that it has been kept in repair by the public authorities, warrants the conclusion that it is a public highway by user under Pub. St. 1901, c. 67, § 1, declaring that "highways" are such as have been used for public travel for 20 years. *Harriman v. Moore & Co.*, 67 Atl. 225, 227, 74 N. H. 277 (citing *Stevens v. Nashau*, 46 N. H. 192; *In re Camp-ton*, 41 N. H. 197, 198; *Willey v. Portsmouth*, 35 N. H. 303).

To establish a highway by user, the general public must have traveled a definite path without substantial change uninterruptedly for 10 consecutive years under an adverse claim of right. *Smith v. Nofsinger*, 126 N. W. 659, 661, 86 Neb. 834.

Rev. Code 1852, as amended 1893, p. 491, c. 60, § 1, declares that all public roads previously laid out as such, or made by lawful authority, or which have been used as such and maintained at the public charge for 20 years, are public highways. Held, that such section was descriptive of public highways existing at the time of its enactment, and did not apply to others subsequently laid out by public authority or private dedication. *State v. Southard* (Del.) 66 Atl. 372, 373, 6 Pennewill, 247.

The character of the use necessary to establish a "highway" by user has been often before the court. The use to be sufficient for that purpose must have actual uninterrupted, continuant use by the general public under a claim of right for a period of ten years. It must be adverse to the owner of the property, and while such owner is without disability in law to assert and enforce his rights, that use, by license or commission of the owner or while he is under disability, is not such a use as will create a public easement. *Peterson v. Waske*, 88 Pac. 206, 45 Wash. 307 (citing *Shell v. Poulson*, 63 Pac. 204, 23 Wash. 535; *Megrath v. Nickerson*, 64 Pac. 163, 24 Wash. 235; *Yakima County v. Conrad*, 66 Pac. 411, 26 Wash. 155; *Wasmund v. Harm*, 78 Pac. 777, 36 Wash. 170; *Seattle v. Smithers*, 79 Pac. 615, 37 Wash. 119).

To constitute a "highway" under *Ballinger's Ann. Codes & St.* § 3846, providing that all highways that have been used as such for not less than seven years, and have been worked and kept up at the expense of the public, shall be public highways, the highway must have been worked and kept up at public expense. *State v. City of Seattle*, 107 Pac. 827, 831, 57 Wash. 602, 27 L. R. A. (N. S.) 1188.

It must be assumed that a road generally used by the public for 25 or 30 years is a public highway, and that it would be unlawful to obstruct it, even though there is nothing to show that it is what might be termed, in the meaning of the statute, "a county road," worked and maintained by the public authorities. *Smith v. Illinois Cent. R. Co.* (Ky.) 105 S. W. 96.

Acts 1902 (23 St. at Large, p. 998), declaring that roads laid out under statute or order of court or of commissioners shall be included under the definition of "highways," does not limit the jurisdiction of highway officers to such roads, but such jurisdiction extends to highways acquired by prescription. *Township Com'rs of St. Andrews Parish v. Charleston Min. & Mfg. Co.*, 57 S. E. 201, 202, 76 S. C. 382.

A road that has been used by the public uninterruptedly for 20 years, with the knowledge and consent of the owner of the soil, becomes a public "highway." *Bidinger v. Bishop*, 76 Ind. 244, 254.

Proof that a road was commonly and largely used by the general public for a number of years, without more, will not support an allegation that it was a "public" highway or a "public" road. *Johnson v. State*, 58 S. E. 265, 267, 1 Ga. App. 195.

Under Laws 1871-72, p. 675, § 1, Laws 1883, p. 137, and *Starr & C. Ann. St.* 1896, c. 121, § 1, providing that all roads used by the public as a highway for the period prescribed therein, varying in the different acts cited, are public highways, the intention of the former owner is immaterial in determining whether a road exists by prescription. *Village of Peotone v. Illinois Cent. R. Co.*, 79 N. E. 678, 681, 224 Ill. 101.

A certain way was a short cut-off between two roads. There was evidence justifying a finding that, though never laid out as a way, under the statute, it had been open, and commonly used by the public for travel for at least 40 years, and that the public had gained a prescriptive right of travel thereover. A railroad company, when it built its road, took a deed of the premises providing that the company would maintain a train crossing over the track at such place, and it appeared that the successor of such railroad company had kept the crossing open, planked, and at times it stretched a rope across the way while fast trains were passing, and maintained a sign at the crossing on which were the words "Railroad Crossing," which, as well as being a warning, was an invitation to the public to use the crossing. Held, that the crossing was a "highway" within Rev. St. c. 52, § 80, providing that no engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour, unless the company maintains a flagman, gate, or certain signals there. *Moore v. Maine Cent. R. Co.*, 76 Atl. 871, 873, 106 Me. 297.

Dedication of land for a highway must be accepted by public authorities or by user to create a "highway" and vest in the public a right of passage thereon, and mere travel by the public without action by the public authorities in repairing or maintaining the highway is insufficient. *Smith v. Smythe*, 90

N. E. 1121, 1122, 197 N. Y. 457, 35 L. R. A. (N. S.) 524.

The word "highways," as used in Rev. St. § 2477, granting a right of way for highways over public lands, should be construed in accordance with recognized local laws, customs, and usages, so that a highway dedicated thereby is not limited to the beaten track, but is 60 feet wide, as provided for the establishment of ordinary highways by Rev. Code, § 1339. *City of Butte v. Mikosowitz*, 102 Pac. 593, 594, 39 Mont. 350.

A "highway" acquired by prescription is a "public highway" within the statute against shooting a pistol at random on a "public highway," and it is not required that the highway shall be established by an order of the county court. *Commonwealth v. Terry* (Ky.) 86 S. W. 519, 520.

#### As an easement

A "highway," though common to all people, is said to be nothing but an easement in the lands over which it passes. The public have no other right in it than the right of passage with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road and its bridges. The owner of the soil still retains his exclusive right in all the mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way. These rules must be taken with some limitation as to the streets of a city or large village. There are certain uses, such as the construction of sewers and the laying of gas and water pipes, to which the latter are generally applied. These uses, which are called "urban servitudes," are the necessary incidents of streets in large cities, and are paramount to the rights of the owner of the fee. *Sweet v. Perkins*, 101 N. Y. Supp. 163, 165, 115 App. Div. 784 (citing *Thomp. Highw. pp. 25, 26*).

#### Ferry as part of highway

See *Ferry*.

#### Gravel and macadamized road

Acts 1905, p. 521, c. 167, entitled "An act concerning highways," which was intended to be a compilation, revision, and codification of statutes relating to "highways," in which all the different systems of improving highways in force prior to 1905 were substantially reenacted, repealed by implication Acts 1903, p. 255, c. 145, entitled "An act concerning gravel and macadamized roads." *Findling v. Foster* (Ind.) 81 N. E. 480.

#### As highway properly laid out

The term public road or "highway," as used in Civ. Code 1895, § 2222, requiring railroad companies to blow locomotive whistles and to reduce the speed of trains after reaching a point 400 yards from a public road

crossing, is not confined to a road laid out and established by county authorities by regular proceedings, but includes as well "highways" which came into existence by legislative action, by proceedings of the county authorities, by dedication, or by prescription. *McCoy v. Central of Georgia Ry. Co.*, 62 S. E. 297, 298, 131 Ga. 378.

"Highways," as expressly defined by Pub. St. 1901, c. 67, § 1, "are only such as are laid out in the mode prescribed therefor by statute or as have been used as such for public travel thereon other than travel to and from a toll bridge or ferry for 20 years." *O'Neill v. Town of Walpole*, 66 Atl. 119, 120, 74 N. H. 197.

#### Impassable or unopened road

Merely platting a body of land into lots and streets, without more, is insufficient to lay off and open such streets, since the survey serves only to define the location of the streets, and the portions of land on such plat intended for public use become streets when they are put into condition for travel and the public is invited to use them. Until the street is so open for public travel, the land does not partake of the character of a "highway." *Robins v. McGehee*, 56 S. E. 461, 463, 127 Ga. 431.

When land is taken for highway purposes it does not become a "highway," within the meaning of the statute relating to the change of grade in the highway, until it has been made into one by working it to some grade and otherwise completing it for travel. *Gorham v. City of New Haven*, 58 Atl. 1, 2, 76 Conn. 700.

The term "highway," as used in Code, § 919, providing that any part of a plat may be vacated, provided it does not abridge or destroy any right of any proprietor therein, and declaring that nothing contained in the statute shall authorize the closing or obstruction of the highways, means a traveled street, as distinguished from the mere space laid out between lots and blocks, which may sometimes become such. It cannot be construed to mean a country road, for the plat contemplated is that filed within corporate limits, where a road is always a street. All streets are highways, but all highways are not streets. *Chrisman v. Omaha & C. B. Ry. & Bridge Co.*, 100 N. W. 63, 65, 125 Iowa, 133.

Under P. S. 3824, requiring the filing of a certificate in the town clerk's office of the completion and opening of a highway, and providing that the day on which it is recorded shall be deemed the time of the opening of the highway, a road does not become a public highway until such certificate is filed, unless it is recognized as such by some unequivocal act of the town. *Bacon v. Boston & M. R. R.*, 76 Atl. 128, 131, 83 Vt. 421.

#### As incumbrance

See *Incumbrance*.

**As internal improvement**

See Internal Improvement.

**Nature of use**

The term "public highway," in a limited sense, means a way for general travel which is wholly public. *Weirich v. State*, 121 N. W. 652, 654, 140 Wis. 98, 22 L. R. A. (N. S.) 1221, 17 Ann. Cas. 802.

A "public highway" is primarily for public passage. *Central of Georgia Ry. Co. v. Motz*, 61 S. E. 1, 3, 130 Ga. 414.

A "highway" is a public way for the use of the public in general for passage and traffic in general without distinction. The restrictions on its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods, and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. Thus it was not per se an improper use of a highway to operate a traction engine with trailers thereon. *McCarter v. Ludlum Steel & Spring Co.* (N. J.) 63 Atl. 761, 766.

"In the most primitive state of society the conception of a 'highway' was merely a footpath. In a slightly more advanced state it included the idea of a way for pack animals. \* \* \* And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those in use." *Kirby v. Citizen's Telephone Co.*, 97 N. W. 3, 6, 17 S. D. 362, 2 Ann. Cas. 152 (quoting statement in *Cater v. Northwestern Tel. Exch. Co.*, 63 N. W. 111, 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543).

"Public 'highways' are arteries of communication and of intertraffic in the commodities of the country. The means to accom-

plish these purposes change with the advance of civilization." As against the state, a natural gas company incorporated under the laws of Kansas, for the purpose of transporting and distributing natural gas for fuel, light, and power, may bury its pipe line in the public highway, where such use does not inconvenience, endanger, or obstruct public travel. *State v. Kansas Natural Gas, Oil, Pipe Line & Improvement Co.*, 80 Pac. 962, 963, 71 Kan. 508, 114 Am. St. Rep. 507.

**Neighborhood road**

Revisal 1905, § 2567, subd. 5, requires railroads to keep highway crossings in such condition as not unnecessarily to impair their usefulness. Section 2569 requires railroads in crossing established roads or ways to so construct its works as not to impede the passage of persons or property along the same. Held, that a neighborhood road used as a mill and church road, and for the purpose of reaching a county seat, was within the terms "highways, established roads and ways," and hence, though not a public highway, it was the duty of a railroad company to keep a crossing upon the same in a safe condition. *Goforth v. Southern Ry. Co.*, 57 S. E. 209, 144 N. C. 569.

**Private way**

A "highway" is a public way and not a private way. *Culbertson v. Abbeville County*, 50 S. E. 33, 34, 70 S. C. 457.

Const. art. 272, declares that all highways are "public highways" from which it follows that, though intended primarily for the purposes of the corporations by which they are built, the public have certain rights with respect to their use. *McClanahan v. Vicksburg, S. & P. R. Co.*, 35 South. 902, 904, 111 La. 781.

Under Comp. Laws 1897, § 4038, requiring service of notice of application for laying out a public highway, where an application prayed establishment of a public highway, the omission of the word "public" before the word "highway" in the notice was not fatal, where it was personally served, and there was no claim that landowners served did not know the object of the application, especially as the notice could apply to no other than a public highway; "highways" being public, as contradistinguished from private, ways. *Gorham v. Johnson*, 122 N. W. 181, 182, 157 Mich. 433.

"A 'public highway,' as contradistinguished from a private highway, is one under the control and kept by the public; dedicated for that purpose by the owner; used by the public for 20 years; or, established in a regular proceeding for that purpose." *Dunn & Lallande Bros. v. Gunn*, 42 South. 636, 690, 149 Ala. 583 (citing *Lewman v. Andrews*, 29 South. 692, 129 Ala. 174).

As expressly defined by Rev. St. Idaho 1887, § 850, "highways" are "roads, streets,

alleys, and bridges laid out or erected by the public, or if laid out or erected by others dedicated or abandoned to the public." Under section 851, as amended by Sess. Laws 1893, p. 12, all roads used as highways for a period of five years, if worked and kept up at public expense, are "highways" by prescription, but a road constructed by private persons as a local road, and kept in repair by such persons, across which a gate is maintained, is not a public "highway." *Palmer v. Northern Pac. Ry. Co.*, 83 Pac. 947, 949, 11 Idaho, 583.

Though a road is, in a large sense, a private way, where it provides at public expense a free and open highway by which the general public can go to and from a particular person's premises, as business or pleasure may require, it has all the legal characteristics of a "public highway." *Board of Com'rs of Johnson County v. Minnear*, 83 Pac. 828, 829, 72 Kan. 326.

As used in Railroad Law (Laws 1897, c. 754) § 62, providing that the authorities of any village, town, or city within which a street, avenue, or highway crosses, or is crossed by a railroad at grade, may petition the public service commission for discontinuance of the grade crossing and the separation of travel, etc., the words "street, avenue, or highway" import ways of a public character only, and that proceedings are authorized for the discontinuance of grade crossings only where a public street, avenue, or highway crosses a steam surface railroad at grade, and the railroad commissioners have no authority to charge a village with a part of the expense of eliminating crossings over streets or ways which were exclusively private. In re *New York Cent. & H. R. R. Co.*, 93 N. E. 515, 200 N. Y. 121.

#### Railroad

A railroad is a "public highway," conducted and operated for the public's benefit. *Heilbron v. St. Louis & Southwestern Ry. Co. of Texas*, 113 S. W. 610, 613, 52 Tex. Civ. App. 575.

A railroad is in many essential respects a public "highway," and the rules of law applicable to one are generally applicable to the other. *Whalen v. Baltimore & O. R. Co.*, 69 Atl. 390, 393, 108 Md. 11, 17 L. R. A. (N. S.) 130, 129 Am. St. Rep. 423.

The word "highways" in Const. art. 4, § 23, prohibiting the Legislature from passing any special or local law for laying, opening, working, or supervising highways, means ordinary roads, and not railroads. *Sears v. Steel*, 107 Pac. 3, 9, 55 Or. 544.

A railroad has the character of a "public highway," and the railroad corporation exercises the power of eminent domain for the public use, although the ownership of the property is in the company and not the public, and the public has no share in the profits

of the business. *Rothschild & Co. v. City of Chicago*, 81 N. E. 407, 410, 227 Ill. 205.

The right of way of a railroad is not a "public highway," within the rule of construction of deeds to lands bounded by a public highway, in such sense as to make a deed calling for a right of way as a boundary convey the owner's interest in the land between the boundary of the right of way and the railroad track. *Couch v. Texas & P. R. Co.*, 90 S. W. 860, 861, 99 Tex. 464.

The right of way of a railroad company is not a "public highway" within the constitutional provision exempting public highways from taxation, so that it would not be exempted on that ground from special assessments for street improvements. *Gilsonite Const. Co. v. St. Louis, I. M. & S. Ry. Co.*, 144 S. W. 1086, 1087, 240 Mo. 650.

A "railroad" is, in a sense, a "public highway," and the construction of a railroad over a strip of land by the consent of the owner of the same, or after condemnation proceedings, as the case may be, is the dedication of the same to a public use, and the operation of the same is in the interest of the public, and cannot be interrupted by an action to recover possession of any part thereof in the interest of a private party. *Southern California Ry. Co. v. Slauson*, 71 Pac. 352, 354, 138 Cal. 342, 94 Am. St. Rep. 58.

Railways are not "highways" within the meaning of a provision in the charter of a telegraph company giving it the right to occupy with its telegraph lines any of the roads, highways, streets, and waters within the state. *Pennsylvania R. Co. v. Western Union Tel. Co.*, 123 Fed. 33, 59 C. C. A. 113; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 25 Sup. Ct. 150, 151, 195 U. S. 594, 49 L. Ed. 332.

Railway rights of way are not made public property by charter provisions declaring the railways "public highways," so as to subject such rights of way to occupation by telegraph companies without the consent of the railway company, under Act July 24, 1866, c. 230, 14 Stat. 221, giving telegraph companies the right to construct, maintain, and operate telegraph lines through and over the public domain, and "over and along any of the military or post roads of the United States." *Pennsylvania R. Co. v. Western Union Tel. Co.*, 123 Fed. 33, 59 C. C. A. 113; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 25 Sup. Ct. 133-142, 195 U. S. 540, 49 L. Ed. 312, 1 Ann. Cas. 517.

The right of way of a railway company is not exempt from local assessment for benefits upon the ground that by the Constitution and statutes railways are declared to be "public highways." The declaration in the Constitution that railways are "public highways" was not intended to throw them open as thoroughfares for pedestrians. Its

object was to lay a foundation for legislative regulation or railways, but not to change the nature of the railroad property, or to divert it from the general purpose for which it was designed. Such declaration is in no sense a warrant to use the cars of the railway company without the payment of a reasonable compensation. *Heman Const. Co. v. Wabash R. Co.*, 104 S. W. 67, 72, 206 Mo. 172, 12 L. R. A. (N. S.) 112, 121 Am. St. Rep. 649, 12 Ann. Cas. 630.

"Street railways are, in a certain sense, 'highways,' but not in the strict sense are they public ways; for their owners have private rights of property in the franchise, and they are operated for the private benefit of their stockholders. The public benefits from street railways are only incidental." *Briden v. New York, N. H. & H. R. Co.*, 65 Atl. 315, 317, 27 R. I. 569.

**As public place**

See Public Place.

**As public use**

See Public Use (In Eminent Domain).

**Railroad platform**

A platform at a station, used by the public going to and from trains, and used by the public without objection in traveling from one street to another, and to other parts of the depot grounds, is a public highway, within an accident policy insuring against injury, while walking on a public highway, by actual contact with a moving conveyance. *Rudd v. Great Eastern Casualty & Indemnity Co.*, 131 N. W. 633, 114 Minn. 512, 34 L. R. A. (N. S.) 1205, Ann. Cas. 1912C, 606.

**Street, alley, or town way**

A "street" is a highway, but a "highway" is not necessarily a street; a street being a public highway in an incorporated town or city. *Strange v. Board of Com'rs of Grant County*, 91 N. E. 242, 247, 173 Ind. 640.

A public street in a city is a "public highway," and its uses belong to the public generally, and it cannot be said that such uses are limited to the municipality or to its citizenship alone. *Alabama Western R. Co. v. State ex rel. Attorney General*, 46 South. 468, 155 Ala. 491, 19 L. R. A. (N. S.) 1173, 16 Ann. Cas. 485.

In Civ. Code Cal. § 536, which as re-enacted March 20, 1905, grants to both telegraph and telephone companies the right to construct their lines "along and upon any public road or highway," the word "highway" includes a street. *Sunset Telephone & Telegraph Co. v. City of Pomona*, 164 Fed. 561, 573.

Many courts have treated the terms "streets" and "highways" as synonymous in interpreting statutes. *Board of Revenue of Jefferson County v. State ex rel. City of Birmingham*, 54 South. 757, 759, 172 Ala. 138 (citing 7 Words and Phrases, pp. 6250-6254, 6684 et seq.); *State ex rel. City of Tusca-*

*loosa v. Court of County Com'rs of Tuscaloosa County*, 54 South. 763, 173 Ala. 724.

In 2 Starr & C. Ann. St. 1896, p. 1551, c. 42, § 40, providing that if, in the construction of the work of any drainage district, any public highway or railroad, or any part of the same, will be benefited, the commissioners may assess to such "public road" or railroad such sum as will be just in proportion to the benefits received, the words "public highways" were intended to mean "public roads," not the streets or alleys of a city or village. *Drainage Com'rs of Dist. No. 1 v. Village of Cerro Gordo*, 75 N. E. 516, 518, 217 Ill. 488.

In view of the use of the word "road" throughout the Code of 1897, where the word "highway" previously appeared in the statute, and of Code, § 48, par. 5, providing that the word "highway" and "road" may be held equivalent to "county highway," "county road," "common road," "state road," the word "roads," as used in Code section 2158, authorizing the construction of telephone lines along the public roads of the state and the erection of the necessary fixtures therefor, is equivalent to the word "highways," as used in a similar provision of Code 1873, § 1324, as amended by Acts 19th Gen. Assem. c. 104, and includes the streets and alleys of a city or town. *East Boyer Telephone Co. v. Incorporated Town of Vail (Iowa)* 129 N. W. 298, 299.

"The term 'highways' embraces city streets within the meaning of the statutes conferring upon telegraph and telephone companies the right to occupy the public highways of the state, unless a different intent is clearly indicated." Code Ala. 1896, § 2490, providing that the right of way is granted to any person or corporation having the right to construct telegraph and telephone lines within this state to construct them along the margin of public highways, confers upon a telephone company the right to construct its lines in the streets of a city, which are "highways" within the meaning of the statute. *Southern Bell Telephone & Telegraph Co. v. City of Mobile*, 162 Fed. 523, 528.

As used in the state Constitution forbidding grant of right to construct a street railroad within any city, town, or village or upon "public highways" without the consent of local authorities having control of the street or highway, the words "public highways" are clearly used to describe some public thoroughfare different from a street in a city, town, or village, and cannot be construed to mean streets; nor can they be held, with any degree of reason or force, to apply to streets in an unincorporated town or village as contradistinguished from the streets in an incorporated city, town, or village. If the desire had been to confine the power to grant authority to erect and operate street railways to the streets of cities, towns, or villages, the words "public highways," being

superfluous and confusing, would never have been used. *Galveston, H. & S. A. R. Co. v. Houston Electric Co.*, 122 S. W. 287, 289, 57 Tex. Civ. App. 170.

"The term 'highway' is generic, comprehending in its broadest sense every public way, from an alley to a railroad or a navigable river." The Legislature, in *Burns' Ann. St. 1901*, § 7283d, prohibiting the sale of intoxicating liquors by virtue of a license in any room, unless it is arranged with a window or glass door, so that the whole of it may be in view from the street or highway, did not use the word "highway" in an unrestricted sense, and a paved alley 16 feet wide passing through the middle of a block is not a highway. *State v. Harrison*, 70 N. E. 877, 878, 162 Ind. 542.

The term "highway" is a generic term and includes streets, alleys, and other public ways. The word "highways" in the title of *Acts Ind. 1907*, p. 249 (*Burns' St. 1908*, § 8962), entitled an act concerning actions against cities and towns on account of injuries from defective "highways" and bridges, is sufficiently broad to include in the body of the act provisions for actions for damages for injuries from any defect in any street, alley, highway, or bridge, and the act is not violative of *Const. art. 4*, § 19, providing that the subject of every act shall be expressed in its title. *Gribben v. City of Franklin*, 94 N. E. 757, 758, 175 Ind. 500.

*Code*, § 422, subd. 16, empowers the board of supervisors to discontinue any state or territorial highway, and subdivision 17 empowers them to establish or discontinue any county highway through or within the county. Section 751 empowers cities and towns to establish or vacate streets and alleys. Section 48, subd. 5, provides that the words "highway" and "road" include public bridges, and may be held equivalent to the words "county road," "county way," "common road," and "state road." Section 1507 provides that all public streets of villages are a part of the road. Held that, where a plat was made of land dividing it into lots, streets, and alleys prior to the incorporation of a town embracing the land platted, the streets and alleys became county roads subject to the jurisdiction of the board of supervisors, and though after the incorporation of the town the control may have passed to the city council, yet the incorporation of the town having been vacated, the control of the streets and alleys reverted to the board of supervisors. *Chrisman v. Brandes*, 112 N. W. 833, 835, 137 Iowa, 433.

*Act June 16, 1836*, providing that streets, lanes, and alleys in the city of Pittsburgh laid out by private persons shall be deemed public highways, does not apply to lands laid out as lots situated in a township and subsequently brought within the city limits. *O'Donnell v. City of Pittsburgh*, 83 Atl. 314, 318, 234 Pa. 401.

*Pol. Code*, § 2600, and *Laws 1903*, p. 66, c. 44, amending *Pol. Code*, pt. 3, tit. 6, art. 1, c. 2, provide that all streets are "public highways," so that *Civ. Code*, § 1000, authorizing telephone corporations to construct their lines along any of the roads by the erection of necessary fixtures, etc., authorizes their construction along the streets of a city. *State ex rel. Rocky Mountain Bell Tel. Co. v. City of Red Lodge*, 76 Pac. 758, 759, 760, 30 Mont. 338.

*Civ. Code Prac.* § 129, provides that no variance is material which does not mislead a party to his prejudice, and that a party claiming to be so misled must show such fact, when the court may order the pleading amended, and section 130 declares that, if such variance be not material, the court may direct the fact to be found according to the evidence and order an immediate amendment. Held that, where plaintiff alleged the maintenance of a nuisance by defendant in a highway of G. county, evidence that the place was a public street in a village, in the absence of a claim of surprise, did not constitute a material variance, a public street being a "public highway" of the county in a broad sense. *Illinois Cent. R. Co. v. Smith*, 118 S. W. 933, 935, 133 Ky. 782.

#### Trees as part of

Under a franchise authorizing a gas company to lay gas mains, etc., and requiring streets, highways, etc., to be left in as good condition as before the laying of the mains, etc., the term "highways" included any trees that might have been planted on them for shade or ornament. *Robbins v. Hartford City Gaslight Co.*, 74 Atl. 113, 114, 82 Conn. 394.

#### Turnpike and toll road

In a general sense, the term "public highway" includes "toll roads"; in a limited sense, it does not. *Weirich v. State*, 121 N. W. 652, 653, 140 Wis. 98, 22 L. R. A. (N. S.) 1221, 17 Ann. Cas. 802.

For most purposes, a "turnpike" is regarded as a highway, and it may be said to be generally so regarded when the term "highway" is used in a statute, unless the words and purposes of the act display a different legislative intent. *Atlantic & S. Ry. Co. v. State Board of Assessors of New Jersey*, 77 Atl. 609, 610, 80 N. J. Law, 83.

A turnpike road is a "highway," and a portion thereof within the limits of Baltimore is a "highway of Baltimore city" within *Code Pub. Gen. Laws 1904*, art. 23, § 366, and *Baltimore City Charter (Laws 1898*, pp. 244, 272-274, 290, c. 123) §§ 6, 8, 10, 11, and 37, relating to the use of highways in such city by electric light and power companies, and the granting of franchises for that purpose. *Patapsco Electric Co. v. City of Baltimore*, 72 Atl. 1039, 1041, 110 Md. 306.

**Waterway**

"All streams in the state of sufficient capacity in their natural condition to float boats, rafts, or logs are deemed public highways, and as such are subject to the use of the public." *Smart v. Aroostook Lumber Co.*, 68 Atl. 527, 531, 103 Me. 37, 14 L. R. A. (N. S.) 1083 (quoting and adopting definition in *Veazie v. Dwinel*, 50 Me. 484).

All navigable streams within the state are "highways" to the extent and for the purpose of their navigability, and the state may enter upon and improve the beds of such streams. *Mashburn v. St. Joe Improvement Co.*, 113 Pac. 92, 94, 19 Idaho, 30, 35 L. R. A. (N. S.) 824.

A navigable stream is not a "highway" in the sense that that word is used in the provision of Const. S. C. art. 3, § 34, forbidding the enactment of local or special laws "to lay out, open, alter, or work roads or highways," the word "highway" being used in its ordinary sense and equivalent to a public road. *Manigault v. S. M. Ward & Co.*, 123 Fed. 707; *Manigault v. Springs*, 26 Sup. Ct. 127, 133, 199 U. S. 473, 50 L. Ed. 274.

A navigable river is, of common right, a "public highway." *Chicago, R. I. & P. R. Co. v. Williams*, 148 Fed. 442, 447 (quoting *Boston & M. R. R. v. Lowell & L. R. Co.*, 124 Mass. 368; *Commonwealth v. Coombs*, 2 Mass. 489).

"A navigable river is a 'public highway.' Our canals, open and free to all for navigation upon payment of the toll fixed by law as our turnpikes are for travel upon like terms, are, I think, in every sense public highways." *German Alliance Ins. Co. v. Home Water Supply Co.*, 174 Fed. 764, 768, 99 C. C. A. 258 (quoting and distinguishing *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713).

Const. art. 3, § 19, forbidding the passage of any special or local law authorizing the laying out, opening, altering, maintaining, or vacating roads, highways, streets, alleys, etc., does not use the word "highways" in a sense which would include navigable rivers, but rather as expressed in Rev. Codes, § 874, in force when the Constitution was adopted, providing that highways are roads, streets, or alleys and bridges, laid out or erected by, or dedicated or abandoned to, the public; and hence Laws 1911, p. 343, authorizing the construction of dams in the North fork of the Clearwater river, is not a violation of the constitutional provision. *Grice v. Clearwater Timber Co.*, 117 Pac. 112, 113, 20 Idaho, 70.

A natural and navigable stream is a "highway," and to cut off the supply of water flowing therein is as effectual an obstruction of the highway as it would be to build a barrier across the same or to plow up or obstruct a public road. *Hutchinson v. Watson*

*Slough Ditch Co.*, 101 Pac. 1059, 1063, 16 Idaho, 484, 133 Am. St. Rep. 125.

A river, in fact nonnavigable, which is declared by Laws 1844-45, p. 299, a public "highway," is not thereby made a navigable river within Rev. St. 1899, § 8278, as amended by Laws 1903, p. 234, § 1, and reenacted by Laws 1905, p. 180 (Ann. St. 1906, p. 3917), authorizing the improvement of a nonnavigable stream for the drainage of lands, for a "public highway" is a way open to all persons, and all streams which are actually capable of flowing and of permitting the passage of ordinary boats are navigable. Mr. Webster defines the word "highway" as a "public road; a way open to all passengers. Syn.—Way; road; path; course." *State ex rel. Applegate v. Taylor*, 123 S. W. 892, 918, 224 Mo. 393.

Rev. St. U. S. § 2476, makes all navigable rivers within the territory occupied by public lands "public highways." *Johnson v. Johnson*, 95 Pac. 499, 506, 14 Idaho, 561, 24 L. R. A. (N. S.) 1240.

A stream to be a "public highway" for floatage must be capable in its natural condition and at the ordinary winter stages of water of valuable public use, and, if not, it is private property. Ordinary stages of water or natural conditions, within this rule, do not mean a continuous state of floatage or an average volume of water, but has reference to the natural flow of the water, and is applied to the stream in its natural condition without the application of artificial means, and is used in contradistinction to extraordinary or unusual floods. That which occurs with reasonable certainty, periodically, can hardly be said to be unusual, and much less is it extraordinary, and may be properly characterized as ordinary. Therefore a stream that is capable of floating logs unaided by artificial means during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value is a "public highway" for that purpose; but a stream which is not such a way cannot be made one by the use of dams or other artificial means without first acquiring the rights of riparian proprietors. *Kamm v. Normand*, 91 Pac. 448, 450, 50 Or. 9, 11 L. R. A. (N. S.) 290, 126 Am. St. Rep. 698 (citing 1 Farnham, Waters, § 139).

The Willamette river, being navigable, is a public highway, and title to the bed and banks is in the state, for the benefit of the public. *State v. Portland General Electric Co.*, 98 Pac. 160, 161, 52 Or. 502.

Acts Md. 1908, c. 148, confers power on the city of Baltimore to provide for the improvement of the P. river, to remove therefrom anything detrimental to navigation, and to regulate the erection and maintenance of bulkheads, etc., therein. The act also authorized the city to provide for the ap-

pointment of officers necessary to execute such powers, and to impose fines and penalties for breach of any ordinance in conformity with the act. Pursuant thereto, an ordinance was adopted directing the harbor board to require all defective wharves or bulkheads to be rebuilt or repaired within a reasonable time, to be prescribed by notice, and imposed a fine of \$10 a day on any owner failing to comply therewith. Held, that navigable water within the corporate limits of a city and over which the city is given control is not a "highway" in the same sense as a city street, and that the city's mere omission to perform its duty imposed by such act to inspect a bulkhead in the P. river, which was dangerous to navigation, did not render the city liable for injuries to libellant's launch caused by grounding on certain of the submerged piles belonging to the bulkhead, nor for injury to and death of passengers on the launch caused by the same accident. *State of Maryland v. Miller*, 180 Fed. 796, 810.

The word "highways," in Const. art. 4, § 23, prohibiting special or local laws for laying, opening, working, or supervising highways, means ordinary roads and not canals. *Sears v. Steel*, 107 Pac. 3, 9, 55 Or. 544.

Laws 1899, p. 958, § 469, authorized a canal company to lease, sell, or discontinue its canal. The canal company conveyed the entire canal and its appurtenances to a steamboat company, with all the franchises of the grantor in connection with the ownership and operation of the canal. The steamboat company operated the canal for about three years, charging the tolls authorized by law, when it conveyed the east 12 miles of the canal to a manufacturing company, reserving to itself and its successor and a certain person named the right at all times when the canal was operated to use it for boats, light or loaded, without charges. The entire canal except such 12 miles was abandoned, but the grantee continued to use the 12 miles for itself and such persons as it saw fit to permit. Such 12 miles were a "public highway," and must be regarded, for the purpose of transportation, a public highway, to be operated under the restrictions placed on the original canal company by the act under which it was organized. *New York Cement Co. v. Consolidated Rosendale Cement Co.*, 70 N. E. 451, 453, 178 N. Y. 167.

#### **Wharf**

See Wharf.

#### **HIGHWAY AGENT**

Under Laws 1893, p. 25, c. 29, § 3, a "highway agent" is a person under the direction of the selectmen, and having charge of the construction and repair of all highways and bridges within the town, with authority to employ the necessary men and teams and purchase timber plank and other

material for the construction and repair of highways and bridges. *O'Brien v. Town of Derry*, 60 Atl. 843, 844, 73 N. H. 198.

#### **HIGHWAY OFFICER**

As state officer, see State Officer.

#### **HIGHWAY PROCEEDING**

As special proceeding, see Special Proceeding.

#### **HILARIOUS**

If the word "hilarious," as used by a doctor in testifying that he had seen a certain man when he was drinking and that he became hilarious, does not have a barroom meaning that differs from its ordinary English meaning, as defined in the lexicons, it does not imply that such person was in a drunken condition. In *re Crocheron's Estate*, 101 Pac. 741, 747, 16 Idaho, 441, 33 L. R. A. (N. S.) 868.

#### **HILL**

See Foot of Hill.

#### **HIM**

See Doing Him.

A power of attorney to confess judgment, contained in a lease made to a man and his wife, which appointed an attorney for "him" to enter "his" appearance, etc., is nevertheless to be construed as a joint power, and the word "him" read as "them," and the word "his" as "their." *Barron v. Kimball*, 124 Ill. App. 268, 271.

#### **HINDER**

##### **Delay and defraud synonymous**

"Defraud," "hinder," and "delay," as used in Code 1906, § 3099, are not synonymous, and a purpose to hinder and delay a creditor is therefore fraudulent within that section, although the debtor may honestly intend that all his debts shall ultimately be paid. *Halfpenny & Hamilton v. Tate & McDevitt*, 64 S. E. 28, 29, 65 W. Va. 296 (citing *Edgell v. Smith*, 40 S. E. 404, 50 W. Va. 349, 356).

#### **HINDER AND DELAY**

"By 'hindering and delaying' certain creditors in the collection of their debts is meant the doing of an illegal act which causes or presents an obstacle in the collection of the debt by a creditor. The act done by the debtor may not defraud the creditor in fact, and yet be fraudulent in law, because it hinders and delays creditors in the collection of their debts. Thus, for instance, a debtor may have property more than sufficient to pay all his debts, yet, if he puts his property out of his hands so that it cannot be reached by the ordinary process of law,



it is 'hinderling and delaying' in the eyes of the law, and a legal fraud. Such hinderling and delaying of creditors in the collection of their debts the law denounces and treats as a fraud." *Frank v. Minsterketter* (Ky.) 99 S. W. 219, 220 (quoting *Kellog v. Richardson*, 19 Fed. 70).

### HINDER, DELAY, AND DEFRAUD

A conveyance made to hinder and delay creditors is a conveyance "to hinder, delay, and defraud" such creditors within the meaning of Attachment Act, § 1. *Adams v. Pease*, 113 Ill. App. 356, 360.

Where two defendants in a slander suit mortgaged their land to their sisters, sold their personalty, and withdrew their bank accounts, the result of such acts was to "hinder, delay, and defraud" the plaintiff in the collection of his judgment against them. *McCauley v. Shockey*, 66 Atl. 625, 626, 105 Md. 641.

"This expression is familiar to the law of fraudulent conveyances, and was used at the common law and in the statute of Elizabeth, and has always been held to require, in order to validate a conveyance, that there shall be actual fraud; and it makes no difference that the conveyance was made for a valuable consideration if made for the purpose of hindering, delaying, or defrauding creditors, and this meaning is that which Congress intended in using the same in Bankr. Act, § 67e, so that a conveyance is not invalid under such subdivision unless actually fraudulent." *Coder v. Arts*, 29 Sup. Ct. 436, 443, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

### HINDRANCE

See Unavoidable Hindrance

### HIRE

See Bailee for Hire; Contract of Hiring; Depositary for Hire; Let for Hire; Using for Hire.

The word "hire" is associated with the act of employment rather than reward for services, and in the latter connection is more on the plane of wages than of salary, though in a sense it comprehends both, and is also applied to engaging the use of property. One "hires" a coachman, a gardener, or a cook, or a carriage, and may be said to hire a superintendent, a bookkeeper, or a clerk, though it seems better in such instances to say engage or employ. The term is improperly applied to the securing of professional services—e. g., a lawyer's or a doctor's. *First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. 245, 248.

Though the primary meaning of the verb "to hire" is to procure the temporary use of an article for compensation, its secondary meaning is to grant such use. An ordinance forbidding any person to hire, or offer for

hire, rolling chairs on a public way, used the verb "to hire" in its secondary sense, meaning to grant the temporary use for compensation. *Harris v. Atlantic City*, 62 Atl. 993, 996, 73 N. J. Law, 251.

The compensation received by a man who owned a team, wagons, and a plow, with which he worked by the day for different employers as he could obtain work, earning usually from nine to fifteen dollars per week, and working alone when he could not find work for his team, must fall within the meaning of either "wages" or "hire," as used in Bankr. Act July 1, 1893, c. 541, § 1, cl. 27, 30 Stat. 545, defining a "wage-earner" to be one who works for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 per year. *In re Yoder*, 127 Fed. 894, 895.

The use of the term "hire," like the word "charter," is not inconsistent with the idea of a covenant or agreement only for freighting accommodations. *Grimberg v. Columbia Packers' Ass'n*, 83 Pac. 194, 197, 47 Or. 257, 114 Am. St. Rep. 927, 8 Ann. Cas. 491.

"Hiring" is expressly defined by Rev. Code Minn. 1905, § 5516, to be "a contract by which one gives to another temporary possession and use of property other than money for reward and the latter agrees to return the same to the former at a future time." *Schlusser v. Great Northern R. Co.*, 127 N. W. 502, 503, 20 N. D. 406.

Where a liquor dealer sold liquor for delivery in a no-license town, and employed a servant, who was required, among other things, to deliver the liquor by a team owned by the seller, the wages paid to the servant for all of his services did not constitute "hire or reward" for the carriage of liquors, merely because such services might incidentally include the duty of delivering the liquor to the purchasers, within a statute prohibiting any person or corporation, with certain exceptions, from transporting liquors for hire or reward into a city or town in which certain licenses are not granted. *Commonwealth v. Radocchia*, 91 N. E. 856, 205 Mass. 455.

### Employment distinguished

See Employment.

### Salary distinguished

The term "hire" has application to the more menial, manual, or mechanical employments, and commonly implies employment for short periods, as a day or a week; while the word "salary" has reference to the more mental forms of employment and implies greater permanence of employment and payment at long intervals. *State v. Duncan*, 1 Tenn. Ch. App. 334, 339.

### HIRE OF TEAMS

As materials, see Materials.

**HIRED OUT**

A statute providing that no child under the age of 14 years shall be "hired out" in any factory, etc., prohibits both the employment as well as the hiring out of a minor under such age, and therefore renders an employer knowingly employing or keeping in his employ a minor within the prohibited age guilty of a violation of the statute, making the employment itself illegal. *Kirkham v. Wheller-Osgood Co.*, 81 Pac. 869, 870, 39 Wash. 415, 4 Ann. Cas. 532.

**HIRING AT WILL**

An employment without term, at a stated sum per week, is a "hiring at will," terminable by either party without notice. *Warden v. Hinds*, 163 Fed. 201, 203, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529.

Where a contract of hiring is general or indefinite in its terms, it is prima facie a "hiring at will," and the burden rests upon the servant to prove that the hiring is for a definite term. *Frank v. Manhattan Maternity & Dispensary*, 107 N. Y. Supp. 404, 405.

A hiring at so much a year, no time being specified, is an indefinite hiring, and such a hiring is a "hiring at will," and may be terminated at any time by either party. *Summers v. Phenix Ins. Co.*, 98 N. Y. Supp. 226, 228, 50 Misc. Rep. 181.

**HIS**

See, also, *He*.

In a will providing that, in case of the death of testator's two sons, "or either of them, without issue living at the time of 'his' decease, then the share of the one so dying without issue shall be divided equally between my grandchildren," the pronoun "his" refers to testator's sons and not to testator. *Stokes v. Weston*, 24 N. Y. Supp. 26, 27, 69 Hun, 608.

The word "his," as used in Ky. St. § 4208, providing that any tavern keeper, merchant, distiller, or druggist who shall violate any provision of this article, shall forfeit his license, includes a partnership and a corporation as well as an individual. *Lewis & Potter v. Commonwealth*, 121 S. W. 643, 644, 134 Ky. 837.

**As her**

Rev. St. 1895, art. 3499, provides that any minor over 19 years of age may proceed before the district court of the county of his residence to have his disabilities as a minor removed. Article 3500 provides that if it shall appear that the grounds are sufficient, and that it is advisable for the minor to have his disabilities removed, a decree therefor may be entered. Article 3501 provides that after the removal of disabilities the minor shall be deemed of full age, except that he cannot vote until he reaches the full age. Held, in view of article 3268, cl.

8, 6, providing that in construing civil statutes the masculine gender shall include the feminine and neuter, and that in all interpretations the court shall look for the intention of the Legislature, keeping in view the old law, the evil and the remedy, and of Final Title, § 3, providing that the rule that the revised statutes, though in derogation of the common law, shall be liberally construed, the use of the words "he" and "his" were not intended to exclude the female minor, and she can have her disabilities removed thereunder. *Texas Cent. R. Co. v. Wheeler*, 118 S. W. 83, 86, 52 Tex. Civ. App. 603.

**As their**

Ky. St. 1903, § 457, provides that a word importing the singular number only may extend and apply to several persons or things as well as to one person or thing, and vice versa. Section 3514 provides that a police judge of a city of the fourth class shall be clerk of his own court, but may appoint a deputy clerk, and section 3515 declares that the council shall, by ordinance, fix the compensation of the police judge "for his services." Held, that the words "his services" might properly be construed to import "their services" and to authorize the council to make an allowance both to the judge and to the deputy clerk when appointed. *Greenleaf v. Woods*, 96 S. W. 458, 459, 123 Ky. 306.

A power of attorney to confess judgment, contained in a lease made to a man and his wife, which appointed an attorney for "him" to enter "his" appearance, etc., is nevertheless to be construed as a joint power, and the word "him" read as "them," and the word "his" as "their." *Barron v. Kimball*, 124 Ill. App. 268, 271.

**His own**

See *Not His Own*.

The expression "his own," in a policy of fire insurance covering the product of a glass manufacturer's plant, "his own, or held by him in trust," refers to that absolutely belonging to insured. *Burke v. Continental Ins. Co. of City of New York*, 91 N. Y. Supp. 402, 403, 100 App. Div. 108.

Negligence of the attorney of defendant, whereby default judgment was rendered, is not neglect of defendant within Rev. St. 1895, art. 345, requiring his affidavit for removal of the case by certiorari from the justice's court to the county court, on the ground of injustice done him by the final determination, to show that such injustice was not caused by "his own" inexcusable neglect. *Lucas v. Harrison (Tex.)* 139 S. W. 659.

**His own official misconduct**

If a tax collector, in addition to posting advertisements of default in paying taxes in two or more public places, as required by Pub. St. 1901, c. 60, § 14, maliciously published similar notices in the papers, for the purpose of injuring the taxpayer, and not be-

lieving that such additional notices were necessary to a successful tax sale, he would be liable for damages caused thereby, though the taxes were in fact delinquent, and is not relieved from liability by section 16, providing that he shall not be liable for any cause except his own official misconduct; his malicious act being "his own official misconduct" within the statute. *Hutchins v. Page*, 72 Atl. 689, 690, 75 N. H. 215, 31 L. R. A. (N. S.) 132.

#### **His own right**

See Holder in His Own Right.

#### **His own use and benefit**

The phrase "his own use and benefit and for the use or benefit of no other person," as used in Pol. Code, § 3495, providing that an applicant for the purchase of school lands must state in his affidavit that he desires to purchase the same for his own use and benefit, and for the use and benefit of no other person, and that he shall have made no contract or agreement to sell the same, does not mean that the applicant must go into possession and occupy the land and personally devote it to the uses of which it is capable. It simply means that, when one makes application to purchase, he does so with the intention and purpose of deriving whatever profit or advantage may accrue through such purchase for himself alone, as contradistinguished from a purchase for the profit and advantage of some other person. As an element entering into that benefit, he may properly have in contemplation a sale of the land at a profit, some time after he has obtained the certificate of purchase, and when the law expressly authorizes such a sale. *Henshall v. Marsh*, 90 Pac. 693, 695, 151 Cal. 289.

#### **His term of office**

The phrase "his term of office." in Const. art. 4, § 26, creating legislative disability to change the compensation of public officers under certain circumstances, is ambiguous, and the question of whether it is synonymous with his incumbency of office under a particular election or appointment, or is synonymous with the full term of office created by Const. art. 7, is not so free from doubt as not to be open to solution by judicial construction. *State ex rel. Bashford v. Frear*, 120 N. W. 217, 219, 223, 138 Wis. 536, 16 Ann. Cas. 1019.

## **HISTORY**

"History" consists largely, if not wholly, of the records, narratives, and statements of others, purely hearsay, and if the history of a stream be such as that therefrom floods of a given height may reasonably be anticipated by a party, such as a carrier, then such floods must be provided against. *Atchison, T. & S. F. R. Co. v. Madden, Sykes & Co.*, 103 S. W. 1193, 1195. 46 Tex. Civ. App. 597.

The separation of the Methodist Episcopal Churches, the one north and the other

south of a common boundary line, has been the subject of much discussion, in which the whole community was more or less interested and was an event that connected itself with, and formed a part of the "history" of the country, of which courts will take judicial notice. *Malone v. La Croix*, 41 South. 724, 725, 143 Ala. 657 (citing *Humphrey v. Burnside*, 4 Bush [87 Ky.] 215; *Hart v. Bodley*, Hardin [3 Ky.] 98; *Creighton v. Bilbo*, 1 T. B. Mon. [17 Ky.] 138).

## **HITCHED**

See Not Hitched.

## **HOG**

Proof that defendant received the carcass of a hog, which had been killed by another before defendant received it, constituted a fatal variance from an indictment charging defendant with receiving "one hog, the property of R.," since the term "hog," in the absence of an allegation to the contrary, would be presumed to mean a live animal. *Hutchinson v. State*, 83 S. W. 331, 332, 72 Ark. 640.

It is error to refuse to charge the theft of a dead hog does not constitute hog stealing. *Paulk v. State*, 63 S. E. 659, 661, 5 Ga. App. 567.

Where the evidence showed that accused did not kill the hog which he was charged with stealing, nor suggest that it be killed, and the intent to steal, if any, had been formed after the hog had been killed, he was not guilty of hog stealing, but the theft of the carcass was simple larceny. *Moses v. State*, 69 S. E. 575, 576, 8 Ga. App. 446.

#### **As cattle**

See Cattle.

## **HOIST**

As appliance, see Appliance.

Labor Law (Consol. Laws 1909, c. 31) § 18, provides that a person employing or directing another to perform labor in the repairing of a house, building, or "structure" shall not furnish, erect, or cause to be furnished or erected, for such labor, scaffolding, "hoists," stays, or other mechanical contrivances which are unsafe, and which are not such as to give proper protection to a person so employed or engaged. Held that, where a car repairer was injured by the breaking of the handle of a ratchet jack with which the body of a freight car had been hoisted to permit repairs on the trucks, as the body was being lowered, the jack, while not a "hoist" within the statute, is nevertheless a "mechanical contrivance" furnished by the railroad company for plaintiff's use, and the car was a "structure" as to which the jack was being used; and hence the defective jack was within the statute. *Corbett v. New York*

Cent. & H. R. R. Co., 135 N. Y. Supp. 137, 139, 151 App. Div. 159.

### HOISTING APPARATUS

A gin pole, to which was attached a block and fall used to haul beams to the third floor of a new building, the walls and girders of which had not yet been constructed, was not a "hoisting apparatus," within Laws 1897, p. 468, c. 415, § 20, as amended by Laws 1899, p. 351, c. 192, providing that, if hoisting apparatus is used within buildings in process of construction, the contractors and owners shall cause the shafts and openings in each fall to be inclosed by a barrier. *McNeill v. Bottsford-Dickinson Co.*, 112 N. Y. Supp. 867, 869, 128 App. Div. 544.

### HOLD

See Take and Hold; To Have and to Hold.

"To hold," when used in the habendum clause of a deed, includes the twofold idea of actual possession of the thing and being invested with legal title." In *re Crofoot's Will*, 137 N. Y. Supp. 430, 431 (quoting 4 Words and Phrases, p. 3317).

The word "hold," as it relates to real property, is to enjoy and possess. The word "hold," as used in a statute providing that aliens may hold real estate, relates to any kind of title, as by descent or purchase or otherwise. *Cooke v. Doron*, 64 Atl. 595, 597, 215 Pa. 393, 7 L. R. A. (N. S.) 659, 7 Ann. Cas. 502.

The meaning of the word "hold" as applied to real estate is somewhat different from the mode of acquisition. It has to do with the duration or tenure of the estate. *Lehman v. State ex rel. Miller*, 88 N. E. 365, 368, 45 Ind. App. 330.

A will giving all of testator's property to his widow, "to hold and use as she may see fit and proper," gave her absolute title, and not a mere life estate. In *re Crofoot's Will*, 137 N. Y. Supp. 430, 431.

Testator devised the residue of his estate to his wife "to hold and to have to her and her heirs and assigns forever," but, if she married again, then one-half of the estate should be sold and divided among named legatees. The will also provided that in case of the death of testator's wife, still remaining his widow, the residue of the estate then remaining should be divided among such legatees. Held, that the widow took her husband's estate in fee under the rule in *Shelley's Case*, and that on her death the property passed to her heir. *Rissman v. Wierth*, 77 N. E. 108, 109, 220 Ill. 181, 110 Am. St. Rep. 243.

### HOLD COURT

See May Hold Court.

### HOLD HARMLESS

A receipt to an administrator, containing an agreement to "hold him harmless" in case the estate which he represents does not pay enough on settlement to cover the amount received, is held equivalent to an agreement to return the amount in case the claim should be rejected. *Gorman v. Nairne*, 12 Ala. 338, 339.

### HOLD OVER

See Unlawfully Hold Over.

### HOLD UP

The expression "hold up," in its ordinary significance means a forcible detention of the person held with intent to commit robbery, and the necessary force is implied to carry the purpose into effect, even to the killing of the person held up, if necessary to the perpetration of the robbery or the escape of the robber, and deliberation and premeditation are necessary elements, and malice will be implied. *State v. Anderson*, 101 Pac. 198, 200, 53 Or. 479.

### HOLDER

See Bona Fide Holder; Certificate Holder; Landholder; Lienholder; Property Holder; Registered Holder; Shareholder.

A "holder" of a bill or note, as the term is used in the law of negotiable instruments, means the payee or indorsee of a bill or note who is in possession of it, or the bearer who has acquired title by indorsement, as provided by Revisal 1905, § 2340. *Steinhilper v. Basnlight*, 69 S. E. 220, 221, 153 N. C. 293.

The term "holder," as applied to a note, is properly applied to a person having possession of the paper and making the demand whether in his own right or as agent of another. *Welch v. Kinney*, 80 Pac. 648, 649, 46 Or. 406 (quoting and adopting *Bowling v. Harrison*, 6 How. 248, 12 L. Ed. 425).

"Holder" means the payee or indorsee of the bill or one who is in possession of it or the bearer thereof." Where an indorsee upon payment of a portion of the face of a note voluntarily surrendered it to the maker, the maker became (though he promised at the time to pay the balance) the holder within Negotiable Instrument Law, § 200, subd. 5 (Laws 1897, p. 744, c. 612), providing that a negotiable instrument is discharged when the principal maker becomes the holder in his own right at or after maturity. *Schwartzman v. Post*, 84 N. Y. Supp. 922, 923 (quoting definition in Negotiable Instrument Law [Laws 1897, p. 720, c. 612, § 2]).

Where notes payable to the order of the payee were not indorsed, or transferred by writing or parol to any one, the naked possession of the notes and the mortgage securing them, by a bank, of which the payee and mortgagee was cashier, did not prove title in

the bank; Sanborn's St. Supp. 1906, §§ 1675, 1676—21, defining the holder of a note payable to order as the payee or indorsee in possession. *Swanby v. Northern State Bank*, 137 N. W. 763, 764, 150 Wis. 572.

Payment by a bank, of a check drawn on it, does not make the bank a holder within Negotiable Instrument Law, providing that an instrument is negotiated when it is transferred, so as to constitute the transferee a holder thereof. *Aurora State Bank v. Hayes-Eames Elevator Co.*, 129 N. W. 279, 281, 88 Neb. 187; *National Bank of Commerce of Lincoln v. Farmers' & Merchants' Bank*, 128 N. W. 522, 523, 87 Neb. 841.

Under section 51 of the negotiable instruments act, giving the holder of a negotiable instrument the right to sue upon it in his own name, and section 190 of the act, defining the word "holder," as used in the act, to mean the bearer, or the payee or indorsee of a bill or note who is in possession of it, read in connection with section 49, providing that the title to a note payable to the holder's order may be transferred without indorsement, and section 59, providing that every holder is deemed to be a holder in due course, unless excepted by the same section, an action on a promissory note may be maintained by the holder in possession. *Callahan v. Louisville Dry Goods Co.*, 131 S. W. 995, 996, 140 Ky. 712.

Under Negotiable Instruments Act, April 4, 1902, § 51, providing that the holder of a negotiable instrument may sue thereon in his own name, and section 191, defining a holder as the payee or indorsee of a bill or note in possession thereof or its bearer, the payee or indorsee, of a note in possession thereof, though not the beneficial owner, may sue thereon in his own name by consent of the owner and for such purpose strike out his own and subsequent indorsements. *R. M. Owen & Co. v. Storms & Co.*, 72 Atl. 441, 442, 78 N. J. Law. 154.

Under Negotiable Instruments Law (Consol. Laws 1909, c. 38) §§ 2, 324, defining a holder as the payee or indorsee of a bill or note in possession, and declaring that, where the holder of a check procures it to be accepted or certified, the drawer is discharged from liability, and independent thereof, a bank giving a customer credit on the deposit of a check drawn by him on another bank and obtaining a certification from the other bank may not, on the check being returned unpaid, hold the depositor liable thereon, the bank receiving the check as a deposit with a deposit slip and a delivery of the passbook containing a credit entry, and a credit on the bank's books. *Lyons v. Union Exch. Nat. Bank of New York*, 135 N. Y. Supp. 121, 124, 150 App. Div. 493.

Rev. St. 1909, § 10,026, provides that, to constitute notice of an infirmity in an instrument or defect in the title of the person ne-

gotiating it, such person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. Held, that the holder within such section, and in the rule that constructive notice is insufficient to impair the title of a bona fide holder for value, is limited to an indorsee, and has no application to the payee as the original holder of the instrument. *St. Charles Savings Bank v. Edwards*, 147 S. W. 978, 980, 243 Mo. 553.

A municipal improvement certificate wherein the city issuing it agrees to pay a named person or the "holder" thereof, providing that it should be receivable in payment of assessments, that it should be transferable by indorsement, is transferable only by indorsement; the word "holder" meaning a holder in one of the modes provided for in the certificate, viz., either by receiving it under the original issue or by endorsement. *Winfield v. Mayor, etc., of City of Hudson*, 28 N. J. Law, 255, 263.

"Byles on Bills says that 'holder' is a general word applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it." A judgment taken under a warrant of attorney annexed to a note, authorizing confession of judgment "in favor of the 'holder,'" is not protected by the federal Constitution and laws, when sued on in another state, from collateral attack upon the ground that the party in whose behalf it was rendered was not in fact the 'holder,' because not the real owner of the note. Due process of law is wanting in proceedings by which judgment is taken in a state court under a warrant of attorney annexed to a note, authorizing confession of judgment "in favor of the 'holder,'" if the party in whose favor the judgment was rendered has ceased, before the commencement of the suit, to own the note, or to be entitled to receive the proceeds to its own use, since such judgment is, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. *National Exchange Bank of Tiffin, O., v. Wiley*, 25 Sup. Ct. 70, 74, 195 U. S. 257, 49 L. Ed. 184.

Revisal 1905, § 2198, declares that when the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had, and the transferee acquires in addition the right to have the indorsement of the transferor, but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. Section 2208 provides that every holder is deemed prima facie a holder in due course, etc., and section 2340 declares that a "holder" is the payee

or indorsee of a bill or note who is in possession of it, or the bearer thereof, and defines "bearer" as the person in possession of a bill or note payable to bearer. Held, that the holder of a draft payable to order, in the absence of proof of indorsement by the payee, was not a bona fide purchaser for value without notice. *Mayers v. McRimmon*, 53 S. E. 447, 448, 140 N. C. 640, 111 Am. St. Rep. 879.

Where a note gave the "holder or holders" a right to enforce payment, and in another portion of the instrument provided that the "holder or holders" might exercise the power to sell the collateral and apply the proceeds to the payment of the note, the phrase "holder or holders" is broad enough to include any person holding the note under the order of the payee. *Richardson v. Winisimmet Nat. Bank*, 75 N. E. 97, 98, 189 Mass. 25.

#### Agent

Negotiable Instrument Law provides (section 30) that an instrument payable to order is negotiated by indorsement of the holder completed by delivery. Held, that the "holder" of a note before transfer was the payee, and not one who claimed to have possession of it as its agent, and attempted to transfer it by indorsement as agent of, or attorney in fact for, the payee, and not by his personal indorsement. *Scotland County Nat. Bank v. Hohn*, 125 S. W. 539, 541, 146 Mo. App. 699.

Under Rev. Codes, § 3508, authorizing the holder of a negotiable instrument to sue in his own name, the holder of a negotiable instrument, though for the purpose of collection only, may sue thereon in his own name. *Craig v. Palo Alto Stock Farm*, 102 Pac. 393, 394, 16 Idaho, 701.

#### Owner

Under New Jersey Negotiable Instrument Law (Act April 4, 1902, P. L. p. 614) § 191, defining a "holder" as the payee or indorsee of a bill or note who is in possession thereof, or the bearer thereof, the "holder" is not necessarily the owner thereof. *R. M. Owen & Co. v. Storms & Co.*, 72 Atl. 441, 442, 78 N. J. Law, 154.

### HOLDER FOR VALUE

See *Innocent Holder for Value*.

See, also, *Bona Fide Holder*.

A holder who takes commercial paper by way of security for pre-existing indebtedness is a "holder for value." *Voss v. Chamberlain*, 117 N. W. 269, 271, 139 Iowa, 569, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331.

One who takes negotiable paper in payment of an antecedent debt before maturity and without notice, actual or otherwise, of any defect, receives it "in due course of business," and becomes, within the meaning of commercial law, "a holder for value." *Hamiter v. Brown*, 113 S. W. 1014, 88 Ark. 97 (cit-

ing *Tabor v. Merchants' Nat. Bank*, 3 S. W. 805, 48 Ark. 454, 3 Am. St. Rep. 241).

A mortgagee whose mortgage is given merely to secure antecedent debts is not a "holder for value" within the meaning of clause "e," in section 70 of Bankr. Act. July 1, 1898, c. 541, 30 Stat. 566. *Empire State Trust Co. v. Trustees of William F. Fisher & Co.*, 60 Atl. 940, 941, 67 N. J. Eq. 602, 3 Ann. Cas. 393.

An indorsee of an overdue negotiable promissory note taken as collateral security for a loan, made at the time, is a "holder for value," and is not affected by any equities between the maker and the payee of which he had no notice. *Monett State Bank v. Eubanks*, 101 S. W. 687, 124 Mo. App. 499 (citing *Logan v. Smith*, 62 Mo. 455; *Deere v. Marsden*, 88 Mo. 512; *Merchants' Nat. Bank v. Abernathy*, 32 Mo. App. 211).

"One who takes commercial paper in extinguishment of a debt, surrendering the note of his debtor and the collateral, whether before or after the note becomes due, is a 'holder for value.'" *Ward v. City Trust Co.*, 102 N. Y. Supp. 50, 52, 117 App. Div. 130.

Where a debtor gives a bank a note on which he is a second indorser, and the bank on receipt of the note extends time to the debtor, and applies the proceeds of the note as a credit to the debtor, and relinquishes bills of lading pledged as collateral, the bank is a "holder for value," if without notice of any infirmity in the instrument, or any right of set-off in connection therewith. *Allen-town Nat. Bank v. Clay Product Supply Co.*, 66 Atl. 252, 253, 217 Pa. 128.

A payee of a note, who on receiving it paid a specified sum to banks, which the maker owed, is a "holder for value" within Negotiable Instruments Law, § 26. *Hermann's Ex'r v. Gregory*, 115 S. W. 809, 811, 131 Ky. 819.

Under section 51 of the Negotiable Instruments Law of New York (Laws 1897, p. 727, c. 612), which provides that "value is any consideration sufficient to support a simple contract," and that "an antecedent or pre-existing debt constitutes value," an indorsee of an accommodation note, which took the same from another indorsee before maturity, in good faith, and without notice of any defense, as collateral security for an antecedent debt of the immediate indorser, is a "holder for value," or occupies the position of a "holder for value," and may enforce the note against the maker, although it surrendered no right in respect to the original debt, and although the note was invalid and illegal in its inception. In *re Hopper-Morgan Co.*, 154 Fed. 249, 254.

Under Michigan Negotiable Instruments Law, § 27, providing that value is any consideration sufficient to support a simple contract, and an antecedent or pre-existing debt

constitutes value and is deemed such, whether the instrument is payable on demand or at a future time, a person to whom a note has been pledged as collateral is a "holder for value" to the extent of the amount due him. *Graham v. Smith* 118 N. W. 726, 727, 155 Mich. 65 (citing *Payne v. Zell*, 36 S. E. 379, 98 Va. 294; *Mersick v. Alderman*, 60 Atl. 109, 77 Conn. 634, 2 Ann. Cas. 254; *Brooks v. Sullivan*, 39 S. E. 822, 129 N. C. 190).

Where a note to a bank, made by S. and indorsed by W. for the accommodation of C., was used by C. to take up his note, to the bank, indorsed by W., the bank is a holder thereof for value, within Rev. Laws, c. 73, § 46, declaring an accommodation party to a note liable thereon to a "holder for value," notwithstanding such holder, at the time of taking it, knew him to be only an accommodation party. *Neal v. Scherber*, 93 N. E. 628, 629, 207 Mass. 323.

Under Negotiable Instruments Act, §§ 25-27, providing that value is any consideration sufficient to support a contract, and that where value has been given for an instrument the holder is one for value, and where the holder has a lien on the instrument, he is a holder for value to the extent of the lien, a third person receiving from the payee a note as collateral security to save him against loss as surety for the payee is a "holder for value," and the maker of the note is liable only to the amount the third person must pay as surety. *Jett v. Standafer*, 137 S. W. 513, 514, 143 Ky. 787.

Under Rev. Laws, c. 73, § 41, providing that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon is deemed a party thereto for value, and section 42, providing that "value" is any consideration sufficient to support a simple contract, and that an antecedent or pre-existing debt constitutes value, and section 43, providing that, where value has at any time been given for the instrument, the holder is deemed a "holder for value" in respect to all parties who became such prior to that time, where defendant signed the note in suit and gave it to O. to enable him to take up a forged note indorsed to plaintiff by O., plaintiff could recover against defendant, for O. was liable as indorser of the forged note, whether he knew it was forged or not, and plaintiff had a right to accept defendant's note in settlement of O.'s liability. *Jennings v. Law*, 85 N. E. 157, 158, 199 Mass. 124.

Indorsee of a check received in payment of a past loan is a "holder for value," though valuable consideration, when applied to chattels, means something more than discharge of a debt, reviving when consideration for its discharge fails, and means parting with some value that cannot be actually restored by operation of law, leaving purchaser in a

changed condition. *Albert v. Hoffman*, 117 N. Y. Supp. 1043, 1044, 64 Misc. Rep. 87.

An indorsee of a negotiable note taken as collateral security for a pre-existing debt, there being no extension of time of payment or other new consideration except such as may be deemed to arise from the acceptance of the paper, is a "holder for value" and in due course of business, and, in the absence of any circumstances charging him with notice, is protected against a claim of payment made to the original payee. *Birket v. Elward*, 74 Pac. 1100, 1101, 68 Kan. 295, 64 L. R. A. 568, 104 Am. St. Rep. 405, 1 Ann. Cas. 272.

Under Acts 1899, p. 146, c. 94, § 25, providing that "value" is any consideration sufficient to support a simple contract, a bank discounting a note and obtaining credit in favor of the indorser in a solvent bank for the amount of the discounted paper is a holder for value. *Elgin City Banking Co. v. Hall*, 108 S. W. 1068, 1072, 119 Tenn. 548.

Where a bank discounted a note for the payee, who was indebted to the bank on a note due at that time and charged to the payee's account, and the account was made good by the application of the proceeds of the discount, the bank was a holder for value under Negotiable Instruments Law, Laws 1897, p. 727, c. 612, § 54. *Wallabout Bank v. Peyton*, 108 N. Y. Supp. 42, 44, 123 App. Div. 727 (citing *Joyce*, *Defenses Com. Paper*, § 243; *Mechanics' Bank v. Chardavoyne*, 55 Atl. 1080, 69 N. J. Law, 258, 101 Am. St. Rep. 701).

Under Negotiable Instrument Law (Comp. Laws 1907, § 1577), which provides that an antecedent or pre-existing debt may constitute value, whether the instrument is payable at demand or at a future time, section 1578, which provides that, where value has at any time been given for the instrument, the holder is deemed a holder for value as to all parties who became such prior to that time, and section 1579, which provides that, where the holder has a lien on the instrument, he is deemed a holder for value to the extent of his lien, an indorsee of negotiable paper who received it before maturity as collateral for a pre-existing debt, without any further consideration, and without notice of equities or infirmities, is a holder for value, and will be protected against payments made to the original payee before maturity, and before the note was indorsed and delivered. *Felt v. Bush* (Utah) 126 Pac. 688, 689.

Where the indorser of a dishonored note delivered to the holder bank as collateral a demand note by himself and wife, in consideration of the bank's promise to forbear suing the indorser on the note, taking the demand note as collateral for the pre-existing debt made the bank a "holder for value" of the note as against the wife, an accommodation maker, under Rev. Laws 1902, c. 73, § 42, pro-

viding that a pre-existing debt constitutes "value," whether the instrument is payable on demand or at a future time, notwithstanding the demand note was payable to the bank. *Lowell v. Bickford*, 88 N. E. 1, 2, 201 Mass. 543.

Where the holder of a note for \$2,000 surrendered it after a payment of \$500 and accepted a new note for \$1,500, executed by the makers and indorsed by a corporation, the holder of the new note was a "holder for value," within Negotiable Instruments Law (Laws 1897, p. 727, c. 612), § 52. *Van Norden Trust Co. v. L. Rosenberg*, 114 N. Y. Supp. 1025, 1029, 62 Misc. Rep. 285.

#### Holder in due course distinguished

The Negotiable Instruments Law (Samborn's St. Supp. 1906, §§ 1675, 1684) seems to distinguish between a "holder for value" and a "holder in due course." Section 1675 defines holder to mean the payee or indorsee of a bill or note who is in possession of it or the bearer thereof and defines value to mean valuable consideration. On the other hand, a holder in due course is defined in section 1676 to be one who has taken the instrument under the following considerations: (1) That it is complete and regular upon its face; (2) that he became the holder before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; (5) that he took it in the usual course of business. *Marling v. Jones*, 119 N. W. 931, 933, 138 Wis. 82, 131 Am. St. Rep. 996.

#### HOLDER IN DUE COURSE

See, also, *Bona Fide Holder*.

A "holder in due course," as defined by the Negotiable Instruments Law, is one who has taken the instrument under the following conditions: First, that the instrument is complete and regular on its face; second, that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; third, that he took it in good faith and for value; and, fourth, that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. *Winter v. Nobs*, 112 Pac. 525, 526, 19 Idaho, 18, Ann. Cas. 1912C, 302; *Cedar Rapids Nat. Bank v. Myhre Bros.*, 107 Pac. 518, 519, 57 Wash. 596; *Park v. Johnson*, 119 Pac. 52, 54, 20 Idaho, 548 (quoting and applying Rev. Codes, § 3509); *Iowa Nat. Bank v. Carter*, 123 N. W. 237, 240, 144 Iowa, 715 (quoting and applying the definition in Code Supp. 1907, § 3060a52); *Wilkins v. Usher*, 97 S. W. 37, 38, 123 Ky. 696; *Elgin City Banking Co. v. Hall*, 108 S. W. 1063, 1071, 119 Tenn. 548; *Weiss v. Rieser*, 114 N. Y. Supp. 983,

986, 62 Misc. Rep. 292; *American Nat. Bank v. Fountain*, 62 S. E. 738, 739, 148 N. C. 590.

Negotiable Instruments Act 1902, § 52, declares that a "holder in due course" is a holder who has taken the instrument under the following conditions: That it is complete and regular upon its face; that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such were the fact; that he took it in good faith and for value; that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Municipal bonds, complete and regular upon their face, were deposited with a bank as collateral to a loan made to the depositor, before maturity and for value, and the bank had no knowledge until long after they came into its possession that the depositor was not in legal possession and authorized to dispose of them. Held, that the bank was the "holder in due course" of the bonds. *Borough of Montvale v. People's Bank*, 67 Atl. 67, 68, 74 N. J. Law, 464.

Negotiable Instruments Act, art. 13, § 48, defines an accommodation party as one who has signed without recovering value to lend his name to another, and provides that he is liable to a holder for value, though the holder knew him to be only an accommodation party. Section 78 declares that every holder is deemed prima facie a holder in due course. Section 71, defining a "holder in due course," requires the instrument to be regular on its face, to have been taken in good faith, for value, before it was overdue, and without notice of previous dishonor, or of infirmity in the instrument or defect in title. Section 75 provides that to constitute notice of an infirmity in the instrument or defect in title, one must have actual knowledge thereof, or of such facts that his taking the instrument amounts to bad faith. Section 76 provides that a holder in due course holds free from defects in title of prior parties, and from defenses available among prior parties. Held, in an action on an accommodation check by an indorsee against the maker after he stopped payment, where the maker had been giving similar checks, and had never stopped payment before, and the indorsee had no communication with the maker before the stopping of payment, and there was no evidence of fraud of the payee, or defect in his title, it was proper to instruct that there was no evidence that the indorsee had actual knowledge of any infirmity or knowledge of such facts that its taking the check amounted to bad faith. *Weant v. Southern Trust & Deposit Co.*, 77 Atl. 289, 293, 112 Md. 463.

Under Negotiable Instruments Law, § 55, defining a "holder in due course" as one who has taken the instrument in good faith and for value, and without notice of any infir-



mity in the instrument or defect in the title of the person negotiating it, one who acquires a note from a payee whose title is shown to have been defective, and who therefore, by section 59, has the burden of proving that he acquired title in due course, must show that he took the note, not only for value, but also in good faith, by showing the facts constituting good faith, and that at the time the note was negotiated to him he had no notice of the defect in the payee's title. *Keene v. Behan*, 82 Pac. 884, 886, 40 Wash. 505.

In view of the Negotiable Instrument Statute (section 1676—22), it was held that a "holder in due course" is one who takes commercial paper when (a) it is complete and regular upon its face; (b) who became the holder of the paper before it was overdue and without notice that it had been previously dishonored, if such was the fact; (c) and took it in good faith and for value; (d) and at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; and (e) he took it in the usual course of business. So the transferee of commercial paper is not a "holder in due course," unless he has paid the full amount agreed to be paid therefor without notice of any infirmity in the instrument or in the title of the transferor, except to the amount thereof so paid. *Hodge v. Smith*, 110 N. W. 192, 195, 130 Wis. 326.

The Negotiable Instruments Act (Acts 29th Gen. Assen. p. 81, c. 130) provides that where an instrument is signed by a party in blank and delivered to another to be filled in and delivered to the payee, in order that it may be enforced, when completed, against the persons who became parties thereto prior to its completion, it must be filled in strictly in accordance with the authority given, unless, after completion, it is negotiated to a holder in due course, who may enforce it as if filled in strictly in accordance with the authority given. Section 3060a52 defines a holder in due course as one who has taken the instrument complete and regular, before maturity, without notice that at the time it was negotiated to him there was any defect in the title of the person negotiating it. Held, that where defendants signed a note in blank and delivered it to P., who filled in the blanks, making it payable to plaintiff, and delivered it to him, plaintiff was not a "holder in due course," and hence, where the note was not filled in by P. in accordance with his agreement with defendants, it was not enforceable by plaintiff against him. *Vander Ploeg v. Van Zuuk*, 112 N. W. 807, 808, 135 Iowa, 350, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275.

Under the Negotiable Instruments Act, which constitutes an antecedent or pre-existing debt a valuable consideration, and defin-

ing a "holder in due course," a bank taking notes as collateral security for a pre-existing indebtedness was a holder for value and in due course. *State Bank of Halstad v. Bilstad* (Iowa) 136 N. W. 204, 207.

Under Negotiable Instruments Act (Laws 1905, p. 250) § 59, providing that when it is shown that the title of any person who has negotiated an instrument was defective, the burden is on the holder to prove that he or some person under whom he claims was a holder in due course, and section 52, defining a "holder in due course" as one who took the instrument when it was complete and regular on its face, and before it was due, without notice of dishonor or infirmity or defect in the title of the person negotiating it, and in good faith and for value, in a suit on notes by the assignee where defendant showed that they were procured by fraud and were without consideration, the burden was on plaintiff to show that it was a holder in due course. *Bank of Ozark v. Hanks*, 125 S. W. 221, 223, 142 Mo. App. 110.

Negotiable Instruments Act, § 59, provides that, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title in due course. Section 52 defines a "holder in due course" to be one who has taken the instrument under the following conditions: That it is complete and regular on its face; that he became the holder of it before it was overdue, and without notice of dishonor, in good faith, and for value; and that he had no notice of any infirmity in the instrument or defect in the title of his indorser. Held, that where, in an action on bills of exchange, defendant showed that his acceptances thereof were without consideration, plaintiff indorsee had the burden of proving that it took the bills in good faith and for value and without any notice of infirmity in the instruments or defect in the title of the indorser. *Johnson County Sav. Bank v. Mills*, 127 S. W. 425, 426, 143 Mo. App. 265.

A bank taking indorsed notes as collateral security, without notice of the indorser's ownership, becomes a "holder in due course" within Negotiable Instruments Law, § 52, subsec. 4. *American Nat. Bank v. J. S. Minor & Son*, 135 S. W. 278, 279, 142 Ky. 792.

Under the Negotiable Instruments Law (Rev. St. 1909, §§ 10,022, 10,025, 10,029), providing that a "holder in due course" is one who takes an instrument before maturity in good faith and without notice of infirmities, that the title of a person negotiating an instrument is defective if he obtains it by fraud, duress, force, or for an illegal consideration, and that when it is shown that the title of any person who has negotiated an instrument is defective, the burden is on him to prove that he, or the person from whom he

claims, acquired the title in due course, the burden of proving that he is an innocent purchaser for value devolves upon the holder of a note, where the maker has made a prima facie showing that the note was without consideration. *Birch Tree State Bank v. Dowler*, 145 S. W. 843, 844, 163 Mo. App. 65.

A bank, discounting a note with knowledge that it is void for usury, is not a "holder in due course," within Negotiable Instruments Law (Laws 1897, p. 732, c. 612) § 91, defining a holder in due course as one having no notice of any infirmity in the instrument and defect in the title of the person negotiating it; and it cannot recover thereon, notwithstanding Banking Law, Laws 1892, p. 1869, c. 689, § 55, fixing the rate of interest which a bank may lawfully charge and setting forth the penalties recoverable on a bank knowingly taking an unlawful rate of interest, not including a forfeiture of the entire debt, which applies only to notes on which a bank knowingly charges usury, and not to notes absolutely void for usury at their inception. *Schlesinger v. Lehmaier*, 99 N. Y. Supp. 389, 390, 50 Misc. Rep. 610.

A check was given contractors to pay off their men, on the supposition that the architect's certificate had been obtained. On discovery that the certificate had in fact been refused, payment on the check was stopped. On the evening of the same day the payees negotiated the check to plaintiffs who had previously cashed checks for the payees but had no definite knowledge as to their financial responsibility. The payees did not pay off their men and abandoned the work. Held, that the plaintiffs were "holders in due course," within the meaning of sections 91, 95, 96, of the Negotiable Instruments Law (Laws 1897, p. 732, c. 612). *Slegmeister v. Lisenard Realty Co.*, 107 N. Y. Supp. 158, 159.

Defendant gave a check to a person by mistake. The check was delivered to plaintiff as a loan without consideration. Held, that plaintiff was not a holder of the check in due course; Negotiable Instruments Law (Laws 1897, p. 732, c. 612) § 91, subd. 3, providing that to constitute one a "holder in due course" he must have taken the instrument in good faith and for value. *Rosenthal v. Parsont*, 110 N. Y. Supp. 223, 224.

Under Negotiable Instruments Law (Laws 1897, p. 727, c. 612) § 54, making absence of consideration a defense as against one not a holder in due course, and section 97, subjecting a note in the hands of one other than a holder in due course to the same defenses as if nonnegotiable, and section 91, defining a "holder in due course" to be one who has taken before maturity in good faith for value without notice of any defense, an answer in an action on a check, alleging that the check was an accommodation check, given without consideration, and taken by the

first indorsee from the payee with knowledge of that fact, that such indorsee obtained the check from the payee without consideration and by extortion, and indorsed the same to another without consideration, who presented it for payment, which was refused, and who then indorsed it to plaintiff without consideration, and that plaintiff took it with knowledge of all the facts connected with its making and successive transfers and dishonors, states a good defense. *Weiss v. Rieser*, 114 N. Y. Supp. 983, 986, 62 Misc. Rep. 292.

Under Negotiable Instruments Law (Laws 1897, p. 731, c. 612), § 79, providing that the transfer of an instrument payable to order for value without indorsement obtains only the transferor's title, an assignment of a note payable to order, without indorsement, does not make the assignee a "holder in due course," as defined by Negotiable Instruments Law, §§ 2, 60, 61, 91 and 98. *Manufacturers' Commercial Co. v. Blitz*, 115 N. Y. Supp. 402, 404, 131 App. Div. 17.

Under Revisal 1905, § 2201, defining a "holder in due course" as one who takes a negotiable instrument, complete and regular on its face, before it is overdue and without notice of dishonor, in good faith and for value, and who at the time of transfer had no notice of any infirmity in it or defect in the title of the person negotiating it, and section 2208 thereof, providing that every holder is deemed prima facie a holder in due course, but, when it is shown that the title of any one negotiating the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as a holder in due course, etc., where fraud in procuring the note has been established, or there is a defect in the title of one negotiating it, the burden is on one suing thereon to show that he or one under whom he claims was a holder in due course, as defined by section 2201. *American Nat. Bank v. Fountain*, 62 S. E. 738, 739, 148 N. C. 590.

Under Revisal 1905, § 2202, providing that, where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a "holder in due course," where a cashier's check was issued May 18, 1904, and indorsed May 23, 1906, the time was not unreasonable under the statute. *Singer Mfg. Co. v. Summers*, 55 S. E. 522, 524, 143 N. C. 102.

Where a bill is filed for the foreclosure of a mortgage, which was given to secure the payment of a note, which note provides for the payment of the interest quarter-annually, and the mortgage contains a provision to the effect that, upon default in the payment of any installment of interest, the whole amount of such note shall thereby become due and payable, and there is a positive allegation in the bill that, at the time of the purchase of the note by the complainant bank, which

was prior to the maturity of the principal of the note, it had no knowledge that there had been any default in the payment of interest, or that there was any defense on the part of the mortgagor against the note and mortgage, the fact that no payments of interest were indorsed on note or accompanying mortgage did not make the note dishonored, and the complainant must be deemed a "holder in due course" of such note, under the provisions of section 2985 of the General Statutes of 1906, and its action in taking such note under such circumstances did not amount to bad faith, which is required by section 2989 of such General Statutes, wherefore a demurrer interposed to the bill upon such grounds is properly overruled. *Taylor v. American Nat. Bank of Pensacola*, 57 South. 678, 684, 63 Fla. 631.

The term "holder in due course" refers to due course of trade, and trade rests on an exchange of valuation. Under the law merchant a bona fide holder in due course of a negotiable instrument payable to bearer was one who gave valuable consideration for it before maturity and without notice of any infirmity in his grantor's title, and obtained it in due course of trade. *Parsons v. Utica Cement Co.*, 73 Atl. 785, 788, 82 Conn. 333, 135 Am. St. Rep. 278 (citing *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308).

To sustain the burden of showing that one was the "holder in due course" of certain bonds, it is necessary to show that such one took the bonds in good faith and for value, and without any notice of any defect in the title. *Parsons v. Utica Cement Mfg. Co.*, 66 Atl. 1024, 1025, 80 Conn. 58.

Every holder of a promissory note is deemed prima facie to be a "holder in due course"; that is, it is presumed that he took the note in good faith and for value, without notice of any infirmity in the instrument or defect in the title of the person negotiating it. *Louis De Jonge & Co. v. Woodport Hotel & Land Co.*, 72 Atl. 439, 440, 77 N. J. Law, 233.

Under B. & C. Comp. § 4454, providing that one is a "holder in due course" of a negotiable instrument who has taken the instrument under the following conditions: "That it is complete and regular on its face," etc.—the fact that at the time a check was transferred the payee stated that the drawer had asked him to wait two or three days for presentation of the check did not charge the indorsee with notice of any infirmity in the contract, such a request not being binding on the payee, and not varying the terms of the writing; and under section 4455, providing that, where an instrument, payable on demand, is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course, a check issued on a certain date and bearing that date, and negotiated at noon of the following day, was not overdue, so as to carry to the indorsee

notice of its illegality or previous dishonor. *Matlock v. Scheuerman*, 93 Pac. 823, 826, 51 Or. 49, 17 L. R. A. (N. S.) 747.

A materialman sold materials to a contractor for several jobs and kept separate accounts for each job. He received from the contractor checks drawn by an owner payable to the contractor "on contract." Held, that the materialman was put on notice and was not a holder in due course, within Rem. & Bal. Code, § 3443, defining a "holder in due course" as one taking an instrument complete and regular on its face, and he could not, without notice to the owner, divert the proceeds of the checks, and charge him with a lien for the amount diverted. *Hughes & Co. v. Flint*, 112 Pac. 633, 634, 61 Wash. 460.

A "holder in due course," as defined by Rem. & Bal. Code, § 3443, subd. 3, is a holder who takes an instrument in good faith and for value. *Scandinavian American Bank v. Johnston*, 115 Pac. 102, 105, 63 Wash. 187.

Under L. O. L. § 5885, which declares that a "holder in due course" is a holder who has taken the instrument under condition that it is complete and regular upon its face, that he became the holder of it before it was overdue, and without notice of its previous dishonor, if such was the fact, that he took it in good faith and for value, and that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it, a bank, which accepts and pays a check bearing the forged name of its depositor, on presentation by another bank, a holder in due course, does not itself become a holder in due course, since the check when so paid, had run its course and was no longer a check, but only a canceled voucher. *First Nat. Bank of Cottage Grove v. Bank of Cottage Grove*, 117 Pac. 293, 295, 59 Or. 388.

Under the express provision of L. O. L. § 5885, defining a "holder in due course," one who does not take a note in good faith, or for value, is not such a holder, and, as provided by L. O. L. § 5891, a note in the hands of such holder is subject to the same defenses as if it were nonnegotiable. *Hull v. Angus*, 118 Pac. 284, 286, 60 Or. 95.

As between the maker and indorsee of a note, the latter is deemed the "holder in due course" if it came into his hands for value in the ordinary course of business within a reasonable time after its date. Rev. Codes, § 5900, provides that a holder in due course is one who has taken the instrument complete and regular on its face, before it became due, and without notice that it had been previously dishonored, in good faith and for value, and without notice of any infirmity therein or defect in the title of the person negotiating it. Held, that where a note payable on demand was transferred to plaintiff at a time when payments indorsed

thereon showed that the principal sum had been nearly paid in full, and that the maker and payee had regarded the obligation as matured long prior to its transfer, and plaintiff knew at the time he accepted it that there was a dispute between the maker and payee as to the amount due thereon, plaintiff was not a "holder in due course." *Brophy Grocery Co. v. Wilsoh*, 124 Pac. 510, 512, 45 Mont. 489.

Where the holder of a check drawn on another bank deposited it to his account, and the bank of deposit credited it, and the depositor's account remained sufficient to pay the check in case of dishonor, the bank was not a holder of the check in "due course of business," within Laws 1897, p. 732, c. 612, § 91, so as to exclude defenses which the drawer of the check might have against the payee. *Citizens' State Bank v. Cowles*, 73 N. E. 33, 180 N. Y. 346, 105 Am. St. Rep. 765.

Where, after a note was indorsed and delivered by the indorser to the maker, and the latter altered it and delivered it to the payee, who took it without notice of the alteration, the indorser was liable to the payee under Rev. Laws, c. 73, §§ 69, 141 defining a holder in due course, and declaring that, when an instrument has been materially altered and is in the hands of a "holder in due course," not a party to the alteration, he may enforce payment according to its original tenor. *Thorpe v. White*, 74 N. E. 592, 188 Mass. 333.

An indorsee of a check for value and in good faith, before it was overdue and without notice of any infirmity or that payment had been stopped, was a "holder in due course," with all the rights appertaining thereto, under Rev. Laws, c. 73, § 69. *Buzzell v. Tobin*, 86 N. E. 923, 201 Mass. 1.

One who acquires title to negotiable paper, not only without consideration, but by an act which constitutes a fraud on the makers, is not a "holder in due course." *Keegan v. Rock*, 102 N. W. 805, 807, 128 Iowa, 39.

That a holder of a negotiable instrument may be a "holder in due course," he must take it in the usual course of business. *Kipp v. Smith*, 118 N. W. 848, 850, 137 Wis. 234.

Where there was no fraud in the inception of a note, and the holder had no knowledge, actual or constructive, of alleged fraud which induced the payee to indorse and transfer it, but received it in good faith, the holder was a "holder in due course" if he was a holder for value. *Graham v. Smith*, 118 N. W. 726, 727, 155 Mich. 65.

To constitute a "holder in due course" of a negotiable instrument payable to order, it is always required that the same shall be indorsed. Other requirements may, under given conditions be dispensed with, but indorsement of such an instrument is essential.

Thus it is provided in Revisal 1905, § 2198, that "where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein and the transferee acquires in addition the right to have the indorsement of the transferor, but for the purpose of determining whether the transferee is a holder in due course, a negotiation takes effect as of the time when the indorsement is actually made." Under this definition the holder of a draft payable to order is not a bona fide purchaser for value without notice, in the absence of proof of indorsement. *Mayers v. McRimmon*, 53 S. E. 447, 448, 140 N. C. 640, 111 Am. St. Rep. 879.

Acts 1897-98, pp. 896, 910, c. 866, § 124 (Code Va. 1904, p. 1455, § 2841a), provides, in subsection 52, that a holder in due course is one who takes the instrument when it is complete and regular on its face, before maturity, for value, without notice of any infirmity; and subsection 53 expressly provides that the holder of an instrument payable on demand negotiated a reasonable length of time after maturity should not be regarded as a holder in due course. As only one class is excepted from the class of bona fide holders under subsection 53, a trustee under a deed of trust for creditors is a "holder in due course." *Trustees of American Bank of Orange v. McComb*, 54 S. E. 14, 15, 105 Va. 473.

Where a bank in the usual course of business took a check in good faith and without notice of any infirmity in it, paying the holder part of the proceeds and depositing the remainder to his credit, the bank was a "holder in due course" under St. 1909, § 3720b, subsecs. 51, 52. *Choteau Trust & Banking Co. v. Smith*, 118 S. W. 279, 280, 133 Ky. 418.

The purchaser of a draft complete and regular on its face was a "holder in due course," where the purchase was made before maturity of the draft, without notice that it had previously been dishonored, or that there was any infirmity in the instrument, or defect in the title of the person negotiating it, and where it was taken in good faith and for value. *Bothwell v. Corum*, 123 S. W. 291, 292, 135 Ky. 766.

Facts and circumstances as disclosed by the record in this case examined, considered, and held sufficient to put the receiver of an insolvent bank upon notice as to the fraud practiced in the inception and execution of a promissory note, and that such receiver is not a "holder in due course," within the meaning and purview of the statute. *Brown v. Miller*, 125 Pac. 981, 985, 22 Idaho, 307.

#### Holder for value distinguished

See Holder for Value.

**HOLDER IN HIS OWN RIGHT**

Where defendant, the maker of a note, on the day it fell due, requested plaintiff, the second indorser, to take it up at the bank, and that defendant would pay plaintiff in a few days, and defendant thereafter in some manner acquired possession of the note without having paid it, he was not a "holder in his own right," within Negotiable Instruments Law (Laws 1897, p. 743, c. 612) § 200, providing that a negotiable instrument is discharged when the principal debtor becomes the holder at or after maturity in his own right, and was liable thereon. *Korkemas v. Macksood*, 116 N. Y. Supp. 85, 87, 131 App. Div. 728.

**HOLDERS OF CONTRACTS**

See Contract Holders.

**HOLDING**

"Holding" describes and implies an act, event, and circumstance. *Wells, Fargo & Co. v. McCarthy*, 90 Pat. 203, 206, 5 Cal. App. 301.

**HOLDING COMPANY**

As common carrier, see Common Carrier.

**HOLDING COURT**

Acts 1888-89, p. 64, is not violative of Const. 1875, art. 3, § 19, providing that no bill shall be so altered or amended on its passage through either house as to change its original purpose; the change having been only from a bill to fix the time of "opening courts" to one to fix the time of "holding courts," and the terms as used in the connection being synonymous. *Letcher v. State*, 48 South. 805, 806, 159 Ala. 59, 17 Ann. Cas. 716.

**HOLDING ELECTION**

The word "holding" in the Australian ballot law, regulating the manner of "holding elections," has the same signification as when used in the term "holding court," or "holding a meeting." *Getty v. Holcomb*, 99 Pac. 218, 219, 79 Kan. 224.

**HOLDING OPEN**

A county judge, served with an injunction order restraining him from proceeding with a certain matter, stated that he "held it open" and continued it. Held, that the terms "held it open" and "holding open" did not fall within a definition of adjournment, to the effect that "an adjournment is no more than a continuation of the session from one day to another, as the word itself signifies." *People ex rel. Stryker v. Van Bergen*, 81 N. Y. Supp. 274, 276, 40 Misc. Rep. 139.

**HOLDING STOCK AS TRUSTEE**

See Person Holding Stock as Trustee.

**HOLDING WATER**

See Land for Holding Water.

**HOLE**

See Lamp Hole; Pop Holes; Tapping Hole.

**HOLING**

See Gopher Holling.

**HOLIDAY**

See Legal Holiday.

"The word 'holiday' means, first, a consecrated day, a general festival; and, second, a day on which the ordinary occupations are suspended, a day of exemption or cessation from work, a day of festivity, recreation, or amusement." *State v. Shelton*, 77 N. E. 1052-1054, 38 Ind. App. 80.

The word "holiday," within the rule that "continuously," as used in a bill of lading, entitling a ship to discharge continuously, means continuously during working days, which excludes Sundays and holidays usually observed, means a holiday created by general acceptance and observance, to which dignity it may arrive without the aid of statute law. *Tweedie Trading Co. v. Pitch Pine Lumber Co.*, 156 Fed. 88, 89.

A charter party excepted "holidays" from the lay days for loading. *B. & C. Comp. Or. § 3918*, makes certain days legal holidays, "and every day appointed by the President of the United States or by the Governor of this state as a day of public fasting, thanksgiving or holiday." Held, that the provision included only such holidays as were customarily observed by a cessation of work but a series of days designated by the Governor as legal holidays on account of a financial panic were not within the exception. *Schwaner v. Kerr*, 170 Fed. 92, 99; *Kerr v. Schwaner*, 177 Fed. 659, 663, 101 C. C. A. 285.

A bill of lading provided that a carrier should not be liable for damages by fire occurring after 48 hours, exclusive of legal holidays, after notice of the arrival of the shipment; and notice was given Friday, July 1st, at 3 p. m., next before the destruction of a shipment by fire July 5th, at 1 a. m. Held, that the carrier was liable, there not having been 48 hours' notice under the bill of lading; the word "holidays" therein including Sundays, as well as the Fourth of July. *Hussa Brewing Co. v. Chicago & N. W. Ry. Co.*, 139 N. W. 415, 416, 151 Wis. 666.

**HOLLOW**

As water course, see Water Course.

**HOLOGRAPHIC WILL**

Under Civ. Code Cal. § 1277, providing that a "holographic will" is one that is "entirely written, dated and signed by the hand of the testator himself," and that it "may be made in or out of this state and need not be

witnessed," as construed by the Supreme Court of the state, such a will dated simply, "Oct. 1st, 1896," is sufficiently dated, although it does not state the place of its execution. *Stead v. Curtis*, 191 Fed. 529, 537, 112 C. C. A. 463.

A "holographic will" is one that is entirely written, dated, and signed by the hand of the testator himself. In *re Fay's Estate*, 78 Pac. 340, 341, 145 Cal. 82, 104 Am. St. Rep. 17 (quoting Civ. Code. § 1277).

## HOME

See *At Home*.

The words "home or place of business," as used in Act Aug. 12, 1910 (Acts 1910, p. 134), prohibiting one without a license from carrying a pistol outside of his home or place of business, are broad enough to include any portion of a farm or plantation where one employs his time and makes his living, though technically the word "home" may mean the house wherein one resides. *Coker v. State*, 76 S. E. 103, 104, 12 Ga. App. 425.

### Domicile distinguished

The word "domicile" is nearly synonymous with "home." *Ex parte Petterson*, 166 Fed. 536, 545.

"The word 'home' is undoubtedly the fundamental idea of domicile, though calling a place 'home' as a matter of fact may not be and often is not entitled to much weight." The word "home" is very frequently used with reference to a place other than the legal and permanent domicile. *Pickering v. Winch*, 87 Pac. 763, 765, 769, 48 Or. 500, 9 L. R. A. (N. S.) 1159 (quoting and adopting definition in *Jacobs*, Domicile, § 72).

### Maintenance and support included

A mortgagor's covenant to furnish a "home" upon the premises for a named person will be construed, according to a practical construction given by the parties, as requiring the grantee to furnish board and lodging; the beneficiary contributing such service as she can, and bearing the expense of her own clothing and doctor bills. *Day v. Towns*, 81 Atl. 405, 406, 76 N. H. 200.

A provision that beneficiaries should be provided with a "home" while they lived included everything necessary to maintain the home, such as paying of taxes and keeping it in proper repair, but not the purchasing of supplies. *Long v. Mayes*, 48 South. 523, 530, 94 Miss. 735.

"A provision in a will for a 'home' for certain persons is very uncertain in meaning. It may mean simply a place of abode, or it may mean coupled with support, or an abode with actual necessities of life. \* \* \* The intention of the testator depends much on the situation of the parties, their ages, and all the existing circumstances. From the language used it is our opinion that the grantor

intended simply to provide a place of abode for his children, provided that the property should be a home for the mother and children if she remained single, and if she should marry the place was to become the sole property of the children, but not to be divided among them until the youngest child became of age. In addition to this, it is provided that the place is still to be a home for the children if they can be kept together. This provision also evidences an intention that 'home' was to be used in the sense of 'abode,' merely because the grantor would hardly have made a support dependent upon the children being kept together." *Stiles v. Cummings*, 50 S. E. 484, 486, 122 Ga. 635.

### As residence

See, also, *Residence*.

The words "residence" and "home" are not, as ordinarily used, synonymous; but when used, as in this case, with reference to a corporation and its general office, the word "home" is the equivalent of "residence." The affidavit herein for the change of the place of trial was sufficient. The change of the place of trial was not waived. *State v. District Court of Clay County (Minn.)* 139 N. W. 135, 137.

### As public charity

See *Public Charity*; *Purely Public Charity*.

## HOME FOR THE FRIENDLESS

See *State Public School for Dependent Children*.

## HOME PLACE

Pub. St. 1901, c. 138, § 1, provides that every person is entitled to \$500 worth of his homestead as a homestead right. Held that, where a married woman and her husband own land in undivided halves and occupy it as their home, the wife is entitled to an exemption or homestead right to the extent of \$500 in her half interest as against an execution levied against her, under section 3, making such homestead right exempt from levy or sale on execution; her undivided half of the premises being her "home place" or homestead. *McLaughlin v. Collins*, 78 Atl. 623, 624, 75 N. H. 557.

Testator owned two adjoining tracts aggregating about 150 acres, which were cultivated together as one tract, one of the tracts consisting of 54 acres, which he called the "home place," and the other tract of 96 acres, which adjoined it, he called the "W." place, one lying south of the other, and, if the will is construed as devising both tracts, the dividing line between them would give the northern side to one son, and the southern tract to the other. The will devised all of testator's realty and personalty to his wife for life, and provided that, "after me and my wife is gone, I want my son J. to have the northern side of the dividing line

of the home tract of land, and my son W. to have the south side of the said dividing line of said tract of land," and he further provided that the personalty should be "equally divided among my other heirs." Testator gave all of his children something, giving those excluded from a share in his land the whole of his personalty. Held, that the will devised the "W. place" as well as that ordinarily called the "home place" under the designation, "the home tract of land," so that there was no intestacy as to the W. tract. *Austin v. Austin*, 76 S. E. 272, 160 N. C. 367.

### HOME PORT

Under the United States statutes requiring the name of the "home port" of a vessel to be painted on her stern, and defining the word "port" to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside, a corporation having its principal place of business in Chicago, and offices in Paducah, sufficiently complies with such statutory requirements by painting on the stern of a vessel belonging to it the words "of Paducah, Kentucky." *Commonwealth ex rel. Lucas v. Ayer & Lord Tie Co.*, 77 S. W. 686, 688, 117 Ky. 161.

Under the shipping laws, every vessel has what is called her "home port," to which she belongs, and which constitutes her legal abiding place or residence, regardless of her actual absence therefrom. *U. S. Comp. St.* 1901, p. 2808, provides that "every vessel, except as hereinafter provided, shall be registered by the collector of the collection district which includes the port to which such vessel shall belong at the time of her registry, which port shall be deemed to be that at or nearest to which the owner if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides." The home port of a vessel engaged in commerce on the high seas was therefore San Francisco, where the managing owner of the vessel resided there, although she had been temporarily registered in Washington, had received no permanent registration at San Francisco, and had never been in the waters of California, and though some of her owners resided without the state, and hence she was taxable in the city and county of San Francisco. *Olson v. City and County of San Francisco*, 82 Pac. 850, 851, 148 Cal. 80, 2 L. R. A. (N. S.) 197, 113 Am. St. Rep. 191, 7 Ann. Cas. 443.

### HOME RULE

The principle of "home rule," or the right of self-government as to local affairs, existed before we had a Constitution. Even prior to Magna Charta, some cities, boroughs, and towns had various customs and liberties, which had been granted by the crown, or

had subsisted through long user, and among them was the right to elect certain local officers from their own citizens, and, with some restrictions, to manage their own purely local affairs. The supreme taxing power of the Legislature should not be crippled by the home rule provision of Const. art. 10, § 2, so as to take from the Legislature the right to create a new system of taxation, and bring in property of a new character, hitherto untaxed, with some other property incidental thereto, and worthless without it. *People ex rel. Coney Island & B. R. Co. v. State Board of Tax Com'rs*, 67 N. E. 69, 77, 174 N. Y. 417.

"Home rule" means that, as to the affairs of a municipality, which affects the relations of the citizens with their local government, they shall be freed from state interference, regulation, and control, that the system of public improvements, the building of streets or alleys the appointment of officers, the designation of their duties, and how they shall be performed, and all other matters purely of local interest, advantage, and convenience shall be left to the people thereof for their own determination. *People ex rel. Attorney General v. Johnson*, 86 Pac. 233, 238, 34 Colo. 143.

### HOMESTEAD

See *Business Homestead*; *Constitutional Homestead*; *Improvement (of Homestead)*; *Pony Homestead*; *Probate Homestead*; *Rural Homestead*; *Urban Homestead*.

*Declaration of homestead as conveyance*, see *Conveyance*.

*Transfer*, see *Transfer of Homestead*.

See, also, *Home Place*.

"Homestead" means the place of the house or home place; a home and the ground immediately connected with it; the seat of the family, owned and occupied by any resident of the state. *In re Owings*, 140 Fed. 739, 741 (citing *Bouv. Law Dict.*; *Webst. Dict.*).

The term "homestead" means that tract of land which, being within the statutory limitations as to quantity and value, is occupied and claimed as a homestead. *White v. Spencer*, 117 S. W. 20, 25, 217 Mo. 242, 129 Am. St. Rep. 547, 16 Ann. Cas. 598.

Our statute uses the term "homestead" in its commonly accepted meaning—the house and land where the family dwells. *Melsner v. Hill*, 138 N. W. 583, 584, 92 Neb. 435.

A "homestead" is a parcel of land on which a family resides and which is to them a home. *Elliott v. Thomas*, 143 S. W. 563, 564, 161 Mo. App. 441.

"A 'homestead' is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two

acts of selection and residence in compliance with the terms of the law conferring it. When these things exist bona fide, the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition." *Palmer v. Sawyer*, 103 N. W. 1088, 1090, 74 Neb. 108, 12 Ann. Cas. 715 (quoting and adopting definition in *Galligher v. Smiley*, 44 N. W. 187, 28 Neb. 189, 26 Am. St. Rep. 319). In view of the foregoing definition, neither the husband nor the wife can abandon the family homestead, and thereafter sell and convey the same to another, to the exclusion of the homestead right of an insane spouse. *Weatherington v. Smith*, 112 N. W. 566, 77 Neb. 369.

"A 'homestead' may be claimed in land of which a party is in possession under a contract to purchase, or under any equitable title, as well as if it were a legal title." *Keith v. Albrecht*, 94 N. W. 677, 678, 89 Minn. 247, 99 Am. St. Rep. 566 (citing *Wilder v. Haughey*, 21 Minn. 101; *Kaser v. Haas*, 7 N. W. 824, 27 Minn. 406; In re *Emerson's Homestead*, 60 N. W. 23, 58 Minn. 450).

Const. art. 16, § 51, providing that a "homestead" in a city, town, or village shall consist of a lot or lots not to exceed in value \$5,000 at the time of their designation as the homestead, without reference to the value of any improvements thereon, provided the same be used for the purposes of a home or as a place to exercise the calling or business of the head of the family, exempts to the head of the family but one homestead. *Harrington v. Mayo* (Tex.) 130 S. W. 650, 652.

"The joint occupancy by husband and wife of a home, the title to which is in the wife, confers upon the wife a 'homestead' in the property, within the constitutional provision." *Pullen v. Simpson*, 86 S. W. 801, 802, 74 Ark. 592 (citing *Thompson v. King*, 14 S. W. 925, 54 Ark. 11; *Wilmoth v. Gossett*, 76 S. W. 1073, 71 Ark. 594).

#### As designation of amount of land

A "homestead" is defined as follows: "A homestead not exceeding in value \$2,000 consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land, not exceeding two lots within any incorporated city or village, shall be exempt from execution or forced sales." Comp. St. 1901, c. 36. The first limitation imposed is that the homestead shall not exceed \$2,000 in value; the next that it shall not exceed 160 acres of land not in any incorporated city or village, or, in lieu thereof, not exceeding two lots within such city or village. *Tyson v. Tyson*, 98 N. W. 1076, 1078, 71 Neb. 438.

Const. art. 19, § 1, Homesteads, mentions a homestead as provided by law, and Laws 1869, c. 21, the only provision on the subject, provides by section 1 that every head of a family shall be entitled to a homestead not exceeding \$1,500 in value. Section 4 provides that the homestead, if a farm, may not exceed 160 acres. Section 5, as amended by Laws 1886, c. 83, providing that every owner of a homestead may dispose of it, provided that the sale shall be void unless participated in by the wife, places a restriction as to disposition only upon the homestead as limited in quantity. Section 6 provides that, when any creditor shall be of the opinion that a homestead is of greater value than \$1,500, he may proceed as in ordinary cases, and, if it sell for more than \$1,500, the excess shall be applied to his claim. Held, in view of that section and of the probate law, which provides for the disposition of a decedent's homestead which is of a value greater than \$1,500, that a homesteader does not have a "homestead" in the whole 160 acres of land, where it is of greater value than \$1,500. *Jones v. Losekamp*, 114 Pac. 673, 675, 19 Wyo. 83.

#### Actual occupancy, residence, and possession

The essential feature of the homestead act is that the premises must be "used and kept" as such, and when they are not so "used or kept" they cease to be "homestead," whether another has been acquired or not. *Cushman v. Davis*, 64 Atl. 456, 458, 79 Vt. 111.

The "homestead" intended by the Constitution to be exempted is a place of actual residence of the party and his family; and, though a temporary absence will not deprive a homestead claimant of his right, yet a permanent abandonment of the homestead as a place of permanent abode strips it of its homestead character. *Matthews v. Jeacle*, 55 South. 865, 867, 61 Fla. 686.

A debtor in failing circumstances, being the head of a family, concluded to surrender to his creditors the property he had occupied as a homestead, and to move to and make his home upon another tract of land which he owned, and which was so leased that he had a right to take possession of it at any time. He made such removal after delaying it between four and five months in order to assist his creditors in realizing upon his property, having made a general assignment. Before he moved, and before he had done any act in pursuance of his purpose to move, a judgment was rendered against him by a justice of the peace, and a transcript of it was filed in the district court. Held, that the property in question was not exempt from sale upon an execution issued on such judgment. *Wm. H. Bush & Co. v. Adams*, 84 Pac. 122, 72 Kan. 556.



**Dwelling house necessary**

A "homestead" necessarily includes the idea of a house for a residence. It may be a mansion, a cabin, or a tent; either being sufficient to bring the land under the protection of the homestead law. *Flowers v. United States Fidelity & Guaranty Co.*, 117 S. W. 547, 548, 89 Ark. 506.

A "homestead" is the place of a home or house; that part of a man's landed property which is about and contiguous to his dwelling house. A homestead necessarily includes the idea of a house for a residence or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either, it is under the protection of the law; but there must be a home residence before it and the land on which it is situated can be claimed as a "homestead." *Merrell v. Harris*, 46 S. W. 538, 541, 65 Ark. 355, 359, 41 L. R. A. 714, 67 Am. St. Rep. 929 (dissenting opinion citing *Williams v. Dorris*, 31 Ark. 466).

As stated in *Williams v. Dorris*, 31 Ark. 466, "a 'homestead' necessarily includes the idea of a house for a residence or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either, it is under the protection of the law; but there must be a home residence before it, and the land on which it is situated, can be claimed as a homestead." Where a house was being erected on land with the intention to occupy it as a home, and the owner lived near by, and a stable and crib were furnished, and corn was hauled to the crib, and turnips were planted on a clearing, but the owner died without ever having actually occupied the house as a residence, this was insufficient to constitute it a homestead. *Shell v. Young*, 95 S. W. 798, 799, 78 Ark. 479 (citing *Gill v. Gill*, 65 S. W. 112, 69 Ark. 596, 55 L. R. A. 191, 86 Am. St. Rep. 213; *Tillar v. Bass*, 21 S. W. 34, 57 Ark. 179; *Gibbs v. Adams*, 89 S. W. 1008, 76 Ark. 575).

Under *Ballinger's Ann. Codes & St. Wash.*, § 5214, declaring that a "homestead" consists of a dwelling house in which the claimant resides, and the land on which the homestead is situated, the particular kind of a dwelling house is not material, but the premises must be actually intended to be used for a home. In *re Thompson*, 140 Fed. 257, 260.

**As dwelling and adjoining land**

"The 'homestead' referred to in the Constitution means the real property in or upon which the home is located and which is devoted to a use appropriate and usual to a home place. It may be a small lot and building in town or a section or more of farm land with its buildings, and it includes a palace as well as a hovel." *Calmer v. Calmer*, 106 N. W. 684, 686, 15 N. D. 120.

Under Civ. Code, §§ 1237, 1260, providing for a "homestead" not exceeding \$5,000 in

value, to consist of the dwelling house and land on which it is situated, selected as provided by statute, there is no limit to a homestead except as to value, and a tract containing 524 acres of contiguous land is, if properly selected and of less value than \$5,000, exempt, though part of it was acquired by pre-exemption and part as a desert claim, and though it was unfenced. Under the statute, water rights, ditches, etc., used appurtenant to the homestead, are a part of it and exempt. *Payne v. Cummings*, 80 Pac. 620, 621, 146 Cal. 426, 106 Am. St. Rep. 47.

A 40-acre tract of land, on which is situated a mill and gin used in the support of the owner's family, and which is contiguous to a 160-acre tract comprising the owner's farm and home residence, is, as against creditors, part of the "homestead." *Carroll v. Jeffries*, 87 S. W. 1050, 39 Tex. Civ. App. 126.

**As the exemption right**

See, also, *Homestead Exemption*.

The "homestead right" or privilege granted by statute, before it has ripened into a life estate by the death of the spouse holding the legal title, is a quality of exemption and freedom of the property embraced in the homestead from execution and forced sale, incumbrance, or alienation without the consent of both husband and wife. The right of homestead is a personal privilege, which may be waived or lost unless asserted in due time on all proper occasions. The statute providing for the selection and exemption of a homestead withdraws the land thus selected from forced sale, and prevents alienation without the consent of both spouses. But the statute treats the subject as one of exemption, rather than creation of any new estate in the property in the spouse not holding the legal title. *Campbell v. Moran*, 99 N. W. 498, 499, 71 Neb. 615.

A "homestead," as usually used in the statute, is established to secure a home free from the debts of the head of the family, and is inalienable by him, and is for the benefit of the family. The "homestead" of a Chickasaw Indian differs in no particular from the surplus or other half of his land, except in the length of time during which it is made inalienable. *Hayes v. Barringer*, 104 S. W. 937, 940, 7 Ind. T. 697.

**As an estate**

A "homestead interest" is not an estate in land. It has been sometimes spoken of in loose and inaccurate speech as an "estate," but only to characterize it as a right secured by law. It is an exemption of land under stated conditions. If the conditions do not exist, or, having once existed, are at an end, the exemption ceases. A wife occupying with her husband a homestead, the legal title to which is in him, is not an owner of the land within the meaning of Gen. St. 1901, p. 6019, relating to notice of proceedings in the estab-

ishment of a highway. *Mathewson v. Skinner*, 71 Pac. 580, 581, 66 Kan. 309 (quoting and adopting *Ellinger v. Thomas*, 67 Pac. 529, 64 Kan. 180).

A homestead being purely statutory, there is no greater right or estate therein than the statute creates. The term "homestead," as used in the exemption statute (B. & C. Comp. § 226), is not the designation of a particular estate implying prohibitions and limitations not incident to ordinary titles, but only means "the home place" or "the house and adjoining grounds" where the head of the family dwells. *Mansfield v. Hill*, 108 Pac. 1007, 1008, 56 Or. 400.

A "homestead" is not an estate in land, but a mere personal right of the parties in whose favor it exists, and it may exist only upon the conditions defined by the Constitution and laws, which require that there must be a family in order to constitute a homestead within the statute, and the family must exist by authority of law, and not in violation thereof. *Middleton v. Johnston* (Tex.) 110 S. W. 789, 791.

Under St. 1898, § 2983, as amended, providing that a homestead exemption shall extend to land not exceeding a specified amount in value, and to any estate less than a fee held by any person by lease, contract, or otherwise, and that the word "homestead" used in the statutes shall be defined to be the estate or interest in land as set forth in section 1 of this act, a grantee in a deed which reserves to the grantor, his mother, the use and occupancy for life, has no present right of occupancy during the grantor's life sufficient to carry with it the privileges of homestead rights during the life of the grantor, though permitted to live with her on the premises. *Reeves & Co. v. Saxton*, 129 N. W. 784, 145 Wis. 10.

#### **As freehold**

See Freehold.

#### **Intent as governing**

An intention to devote, and an actual devotion, to the use of a home are prerequisites to an estate of homestead. The "homestead" must be "a home place." *Styles v. Theo. P. Scotland & Co.*, 134 N. W. 708, 710, 22 N. D. 469.

Land constitutes a "homestead" where it is purchased with the definite intention of making it a homestead, and immediately after the purchaser and his family go into possession and continue to occupy it as their homestead. *Stowell v. Kerr*, 83 Pac. 827, 828, 72 Kan. 330.

#### **Land never actually occupied**

The purchase of a farm on which is situated a habitable residence, with intent at the time to make it the purchaser's "homestead" in the future at such time as he might be able to improve it to his liking, will not constitute the farm the "homestead" of the

family from the date of the purchase. "The rule seems to be that there must be something more than mere intention to constitute property the homestead of the family. If, at the time the question arises, the property is not actually occupied for homestead purposes, there should at least exist the intention to make it a homestead, accompanied with some act or acts of preparation looking to its actual occupancy for such purpose. Mere intention, under such circumstances, will not be sufficient. \* \* \* In order that property may be exempted as the homestead, it is required that the same shall be used for the purposes of a home." *Johnson v. Burton*, 87 S. W. 181, 182, 39 Tex. Civ. App. 249.

#### **Terminated by lease**

Property is not deprived of its character as a "homestead," under a statute exempting to every housekeeper or head of a family a dwelling house and appurtenances, and the land used in connection therewith, not exceeding a certain specified amount in value, by reason of the fact that the house was constructed into two separate living apartments, one of which was rented. *Adams v. Adams*, 82 S. W. 66, 67, 183 Mo. 396.

Where a lot (or part of a lot) with a house thereon, situated in an incorporated city, is rented for a money rent to a tenant, who is not a servant or an employé of the owner, with the intention that such house and lot shall become the home and residence of such tenant and his family, and they actually do become the home and residence of such tenant and his family, such house and lot cannot be considered as a part of the "homestead" and residence of the owner, so as to be exempt from legal process, although such lot may adjoin the homestead of the owner. *Ashton v. Ingle*, 20 Kan. 670, 671, 678, 27 Am. Rep. 197.

Business property is not a part of the "homestead" of a widow; it not being used as a place of business by her, and not having been so used since the death of her husband, but having been rented continuously since then. *Morris v. Morris*, 99 S. W. 872, 875, 45 Tex. Civ. App. 60.

#### **Leasehold**

A leasehold interest which may be sold on execution may constitute a "homestead." *White v. Danforth*, 98 N. W. 136, 137, 122 Iowa, 403.

#### **More than one house**

Under Civ. Code, § 1237, providing that the "homestead" consists of the dwelling house in which the claimant resides and the land on which it is situated, the homestead does not include such other land as has resting thereon, as a part thereof, a building or buildings devoted to other purposes than those of a family home. In *re Levy's Estate*, 75 Pac. 301, 303, 141 Cal. 646, 99 Am. St. Rep. 92.

Where four lots, all in one tract and purchased at one time for a home, contain two houses separated by a partition fence, but the value of the entire property was less than \$1,000, such entire tract may constitute a "homestead," although the claimant was not actually residing on the property. In *re Murphy's Estate*, 90 Pac. 916, 917, 46 Wash. 574.

#### Noncontiguous land

Land owned by a debtor and controlled and used by him as a part of his homestead, though two miles from his residence, which is in a village, may be found to be part of his "homestead," within the statute exempting a "homestead" of not more than \$1,000 in value. *Gaar, Scott & Co. v. Reesor* (Ky.) 91 S. W. 717, 719.

A "homestead" must be wholly urban or rural, so that one residing on a lot in a town cannot claim exempt as part thereof a disconnected tract outside the town. *Parker v. W. L. Moody & Co.*, 96 S. W. 650, 651, 43 Tex. Civ. App. 492.

Under Const. art. 16, § 51, providing that the homestead shall consist of lots used for a home or as a place for the business of the head of a family, the "homestead" embraces the family residence and the place of business of the head of the family, and the lots constituting the homestead may be connected or disconnected, provided they are used for the purposes of a home, and one or more lots may be devoted to the business of the head of the family; but the portion devoted to the business must constitute one place, at which the business is transacted. *Rock Island Plow Co. v. Alten*, 116 S. W. 1144, 1145, 102 Tex. 366.

Where the head of a family owns and resides on lots in an addition to a city beyond the corporate limits, other land owned by him, situated several miles distant, but used in connection with the lots for the purposes of a home, is not deprived of its "homestead" character by the mere fact of the family residence being on the lots forming part of the addition to the city, in the absence of evidence that it was so surrounded with other residences as to have become a part of a town or village, so as to have lost its "homestead" character. *Jolly v. Diehl*, 86 S. W. 965, 966, 38 Tex. Civ. App. 549.

Plaintiff's husband owned a half interest in a lot containing 12 acres separated from his residence by two streets, 10 and 30 varas wide, respectively, with a narrow block between them, which was fenced in 1892, and since continuously used by him as a pasture, and, with the exception of two years, for raising garden vegetables, though at times he also raised some cotton thereon. One year the land was rented for cash, and one year on shares, to one who planted crops as directed, consisting of garden vegetables, etc., and some cotton. Part of the time cattle

bought to sell were pastured with the regular domestic animals. Held, that the property was used "for the purposes of the home," within the meaning and intent of the Constitution and laws, and that the property was a part of the "homestead" of plaintiff and her husband. *Lacour v. L. W. Levy & Co.*, 108 S. W. 190, 191, 49 Tex. Civ. App. 163.

#### Outbuildings and contiguous lands

"The statute defines the word 'homestead' as 'a dwelling house and appurtenances, and the land used in connection therewith.' In Webster's Dictionary it is defined as 'a person's dwelling place, with that part of his landed property which is about and contiguous to it.' But contiguity does not seem to enter into our statutory definition." *Perkins v. Quigley*, 62 Mo. 498, 503.

Under the act exempting a dwelling house in which the claimant lives, and its appurtenances, and the land on which it is situated, not exceeding 160 acres, a homestead may be composed of contiguous parts of different governmental subdivisions, and, where the buildings are situated upon only one of such subdivisions, that only does not necessarily constitute the "homestead." *Tindall v. Peterson*, 98 N. W. 688, 689, 71 Neb. 160, 8 Ann. Cas. 721.

The word "residence," like the word "homestead," is not confined merely to the dwelling house, but it may also include everything connected therewith used to make the home more comfortable and enjoyable. But the words "homestead" and "residence" cannot be intended to include some other and independent family's home and residence. One pleading that a tract of land was occupied at a certain time by himself as a homestead was estopped to assert that such tract was at the same time the homestead of another. *Linn v. Ziegler*, 75 Pac. 489, 490, 68 Kan. 528.

Two separate 10-acre parcels of land, touching only at the corners, between which is a regular roadway, may constitute a "homestead," though the residence and appurtenances are all located on one tract. *Brixius v. Reimringer*, 112 N. W. 273, 101 Minn. 347, 118 Am. St. Rep. 629.

When the "homestead" of a landowner is alluded to in common speech, it is never understood to be limited to the dwelling house or other houses within the curtilage, but embraces the tract of land on which is located the dwelling and tributary improvements. *Hancock v. King*, 66 S. E. 949, 950, 133 Ga. 734.

#### Partial use for business

A "homestead," if one exists, should be preserved, and there can be no sale of any portion of the building, if the result thereof will be to unreasonably interfere with the use and occupation of such homestead. Each case presented must be determined in great

part on the particular facts involved therein. Where a two-story building is subject to convenient use as a residence by the owner, she should not be deprived of her homestead right of any part because she is using for her ordinary business the front windows and a portion of the room on the lower floor. *Edmonds v. Davis*, 98 N. W. 375, 376, 122 Iowa, 561.

#### Residence of family

Where a widow owns in fee a lot less than a half acre in size in an incorporated city, and resides thereon, making it her home and place of actual residence for many years prior to her death, and dies there, and such widow has several children, all of them over 21 years of age, but none of them reside with her except two unmarried daughters, who resided with their mother continuously up to the time of her death, making her home their home, and they having no other home or dwelling place but their mother's, both of such daughters being of age, and both of them, by sewing, earning enough to supply all of their wants except their food, which they ate at their mother's table, both of them continuously remaining under the protection of their mother's roof-tree and family fireside, one of them for several years prior to her mother's death acting as her nurse—the mother being in feeble health—and attending to her personal wants generally, while the other daughter attended exclusively to the duties of housekeeper and to her mother's outside business affairs, under these circumstances it was held that such widow was the head of a family, and that such lot upon which she resided and died was her "homestead." *Caro v. Caro*, 34 South. 309, 310, 45 Fla. 203.

The "homestead" of a man residing thereon with his adult daughter, who had abandoned her vocation as a schoolteacher in order to live with him and keep house for him, was exempt from judicial sale as the "homestead of the family," in the absence of any showing that the father was under any obligation to pay for the daughter's services. *Fox v. Waterloo Nat. Bank*, 102 N. W. 424, 425, 126 Iowa, 481.

"The homestead of a wife continues after her death for the benefit of the surviving husband. It exists so long as he continues to occupy the land, although he has neither family nor children living with him." Where a single woman contracted debts at a time when she was not living on property which she had inherited, and which she did not at the time claim as a "homestead," but she afterwards married, and she and her husband lived on rented property adjoining her land, which they cultivated and used for pasture, the land so used was exempt to her husband as a "homestead" after her death. *Holder's Adm'r v. Holder*, 87 S. W. 1100, 120 Ky. 802.

#### HOMESTEAD CLAIM

A "homestead filing" is a "homestead claim," and a "pre-emption filing" is a "pre-emption claim," within the meaning of acts granting rights in public lands. Hence a grant of public lands to aid in the construction of a railroad, which excepts therefrom such lands within the place limits as shall be found to have been "granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of," did not attach to lands which were within the primary limits of the grant as fixed by the definite location of the line of road, but upon which at the time the map of definite location became effective, there were homestead and pre-emption claims filed in the proper land office, and remaining of record and uncanceled. *Oregon & C. R. Co. v. United States*, 148 Fed. 603, 605, 606, 78 C. C. A. 375 (citing *Northern Pac. R. Co. v. De Lacey*, 19 Sup. Ct. 791, 174 U. S. 634, 43 L. Ed. 1111; *Northern Pac. R. Co. v. Sanders*, 17 Sup. Ct. 671, 166 U. S. 620, 41 L. Ed. 1139; *Whitney v. Taylor*, 15 Sup. Ct. 796, 158 U. S. 85, 39 L. Ed. 906; *Kansas Pac. R. Co. v. Dunmeyer*, 5 Sup. Ct. 566, 113 U. S. 629, 28 L. Ed. 1122; *Doolan v. Carr*, 8 Sup. Ct. 1228, 125 U. S. 618, 31 L. Ed. 844; *Monroe Cattle Co. v. Becker*, 13 Sup. Ct. 217, 147 U. S. 47, 37 L. Ed. 72; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Bardon v. Northern Pac. R. Co.*, 12 Sup. Ct. 856, 145 U. S. 535, 36 L. Ed. 806; *United States v. Southern Pac. R. Co.*, 13 Sup. Ct. 152, 146 U. S. 570, 36 L. Ed. 1091).

By Act March 2, 1889, 25 Stat. 1008, forfeiting certain unearned land in the State of Michigan, prior sales or disposition of any such lands by the land department under color of the public land laws were confirmed, with a proviso that nothing therein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed. "While the term 'homestead claim' is sometimes used to denote a more familiar application at the local land office, obviously this is not the purport of the term as used in this section, for it is defined by the succeeding words, 'arising or asserted by actual occupation of the land.' This obviously includes cases in which the party is on the 1st day of May, 1888, in the actual occupation of land with a view of making a homestead on it under the laws of the United States." *Edwards v. Begole*, 121 Fed. 1, 7, 57 C. C. A. 245 (quoting and adopting definition in *Lake Superior Ship Canal, Railway & Iron Co. v. Cunningham*, 15 Sup. Ct. 103, 155 U. S. 354, 39 L. Ed. 183).

**HOMESTEAD EXEMPTION**

Rev. Codes 1890, § 3605, providing for homestead and that the house in which the homestead claimant resides and the land on which it is situated shall be exempt from judgment lien and execution, is not a definition of the term "homestead," but a definition and limitation of the "homestead exemption." *Calmer v. Calmer*, 106 N. W. 684, 685, 15 N. D. 120.

**HOMESTEAD FILING**

As homestead claim, see Homestead Claim.

**HOMESTEAD LOAN ASSOCIATION**

A "homestead loan association" is a sort of expedient resorted to for the more convenient prosecution and control of the peculiar copartnership business for which it was organized. *Broch v. French*, 116 Ill. App. 15, 18.

**HOMESTEAD PURPOSES**

See Homestead.

**HOMESTEAD RIGHT**

As real estate, see Real Property.

A "homestead right" is an interest in land. Where a testator gave to his daughter and two sons, each, a one-third interest in buildings, and devised to his daughter the portion of the tract owned by him upon which the buildings stood, and to one of the sons the middle portion of the tract and one acre near the buildings, and to the other son the remaining portion of the tract and one acre near the buildings, there is no connection between the interest of the latter son in the remaining portion of the tract and his interest in the buildings and the acre near it, which will support a homestead claim by him in the remaining portion of the tract. *Barbo v. Jeru*, 119 N. W. 580, 583, 155 Mich. 353 (citing *Michigan Mut. Life Ins. Co. v. Cronk*, 52 N. W. 1035, 93 Mich. 49).

"A 'homestead right' is not an estate in land, but the privilege of exemption from execution of such an estate as the holder has; and hence the nature or quantum of a debtor's estate in his homestead is immaterial in determining whether it shall be exempt. *Turner v. Browning's Adm'r*, 107 S. W. 318, 319, 128 Ky. 79 (citing *Pryor v. Stone*, 70 Am. Dec. 344, note).

Under Rev. St. 1899, § 3616, providing that the homestead of every householder consisting of a dwelling house, etc., shall be exempt from attachment and execution, and section 3617, making the excess of the value allowed as a homestead subject to execution, the "homestead right" during the life of the owners of the fee may, by way of analogy, be defined as a privilege, an exemption from levy and sale under execution.

*Brewington v. Brewington*, 109 S. W. 723, 725, 211 Mo. 48.

Pub. St. 1901, c. 138, § 1, provides that every person is entitled to \$500 worth of his homestead as a homestead right. Held that, where a married woman and her husband own land in undivided halves and occupy it as their home, the wife is entitled to an exemption or "homestead right" to the extent of \$500 in her half interest as against an execution levied against her, under section 3, making such homestead right exempt from levy or sale on execution, her undivided half of the premises being her "home place" or homestead. *McLaughlin v. Collins*, 78 Atl. 623, 624, 75 N. H. 557.

**HOMICIDE**

See Constructive Homicide; Excusable Homicide; Felonious Homicide; Infanticide; Justifiable Homicide; Negligent Homicide; Voluntary Homicide. See, also, Intent to Kill; Involuntary Manslaughter; Murder.

"Homicide" is the killing of one human being by another. *State v. Wiggins* (Del.) 76 Atl. 632, 634, 7 Pennewill, 127; *State v. Underhill* (Del.) 69 Atl. 880, 882, 6 Pennewill, 491; *State v. Reese* (Del.) 79 Atl. 217, 220, 2 Boyce, 434; *State v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164; *Jones v. State*, 60 S. E. 840, 844, 130 Ga. 274; *State v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24; *State v. Johns* (Del.) 65 Atl. 764, 766, 6 Pennewill, 174; *Kent v. State*, 126 Pac. 1040, 1042, 8 Okl. Cr. 188.

"Homicide" is the killing of one human being by the act or culpable omission of another, and a person, to be subject of homicide, must be in existence by actual birth, having been completely expelled from the body of the mother, and must thereafter have been alive before the infliction of the injury. *Cordes v. State*, 112 S. W. 943, 947, 54 Tex. Cr. R. 204.

"Homicide" is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another. The destruction of life must be complete by such act or agency; but although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death without its appearing that there has been any gross neglect or improper treatment by some other person other than defendant, such as the physician, nurse, or other attendants, it would be "homicide." *Stovall v. State*, 108 S. W. 699, 701, 53 Tex. Cr. R. 30.

To convict for any degree of culpable "homicide," it must be shown that decedent has been killed. *Lott v. State*, 131 S. W. 553, 555, 60 Tex. Cr. R. 162.

To convict for any degree of culpable "homicide," it must be shown that the kill-

ing was criminally caused by accused's act or agency. *Lott v. State*, 131 S. W. 553, 555, 60 Tex. Cr. R. 162.

Where the state's evidence was to the effect that the defendant shot and killed deceased on his refusal to obey an order not to approach defendant, while the defendant testified that as he was about to shoot at a tree a bystander pulled the gun to one side, whereupon it was accidentally discharged and killed deceased, this evidence does not raise the issue of negligent "homicide." *Jones v. State (Tex.)* 95 S. W. 539.

The term "homicide," as used in Code, § 5314, providing that an attorney appointed by the court to defend a person indicted for homicide, or any offense the punishment of which may be life imprisonment, shall receive certain pay from the county for his services, is used distinctively, is generic in character, and needs no interpretation. It does not refer to its punishment, and an attorney is entitled to such pay for defending one indicted for homicide, though a prior trial had amounted to an acquittal of all degrees of homicide, except manslaughter, which is not punishable by life imprisonment. *Tomlinson v. Monroe County*, 112 N. W. 100, 101, 134 Iowa, 608.

#### As crime

See Crime.

#### Grades

"Homicide" is the killing of any human creature, and is of three kinds—justifiable, excusable, and felonious. *State v. Brinte (Del.)* 58 Atl. 258, 262, 4 Pennewill, 551; *State v. Blackburn (Del.)* 75 Atl. 536, 538, 7 Pennewill, 479; *State v. Watson (Del.)* 82 Atl. 1086, 1087.

The killing of a human being by another under any circumstances constitutes a "homicide," as an etymological analysis of the word itself will plainly show; but whether a homicide is murder or any other like crime depends necessarily on the circumstances under which it is committed. *People v. Mar Gin Sule*, 103 Pac. 951, 958, 11 Cal. App. 42.

"Homicide" is murder, unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury. If A. assaults B., giving him a severe blow, or otherwise making the provocation great, and B. strikes him with a deadly weapon, and death ensues, the law, in deference to human passion says this is 'manslaughter.' \* \* \* If the 'provocation be slight, and it can be collected from the weapon used or any other circumstances that the prisoner intended to kill or do great bodily harm, and death follows, it is murder.'" *State v. White*, 51 S. E. 44, 48, 138 N. C. 704 (quoting and adopting definition in *State v. Smith*, 77 N. C. 488).

"Homicide" is manslaughter in the first degree, when committed, without a design

to effect death, in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon. Where a homicide was committed with a dangerous weapon with a design to effect death, and after a lapse of time sufficient for passion to subside, the crime was "murder," and not "manslaughter." *State v. Towers*, 118 N. W. 361, 362, 106 Minn. 105.

Under Pen. Code, § 179, defining "homicide" as the killing of one human being by the act, procurement, or omission of "another," and section 180, providing that homicide is either murder or manslaughter, and section 193, subd. 3, making a homicide manslaughter in the second degree when due to the act, procurement, or culpable negligence of any "person" which does not constitute murder or manslaughter in the first degree, a corporation may not be indicted for manslaughter, since the word "another" means another human being, and since the word "person" does not include a corporation. *People v. Rochester Ry. & Light Co.*, 88 N. E. 22, 24, 195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837.

#### As murder

The word "homicide," as used in Code, § 5314, providing that an attorney appointed by the court to defend a person indicted for homicide, or any other offense the punishment of which may be life imprisonment, shall receive certain pay from the county for his services, is not equivalent to "murder"; and the attorney is entitled to pay for defending one indicted for homicide, although a prior trial has amounted to an acquittal of all degrees of homicide except manslaughter, which is not punishable by life imprisonment. *Tomlinson v. Monroe County*, 112 N. W. 100, 101, 134 Iowa, 608.

#### HOMICIDE BY MISADVENTURE

"Homicide by misadventure" is the accidental killing of another, where the slayer is doing a lawful act unaccompanied by any criminally careless or reckless conduct. *State v. Watson (Del.)* 82 Atl. 1086, 1087.

"Homicide by misadventure," constituting excusable homicide, is the accidental killing of another where the slayer is doing a lawful act, unaccompanied by any criminally careless or reckless conduct. *State v. Blackburn (Del.)* 75 Atl. 536, 539, 7 Pennewill, 479.

#### HOMICIDE CASE

A stenographer, appointed by a board of coroners and entitled to receive an amount per folio for all transcripts made for the use of the district attorney's office, on being directed to make transcripts for all "homicide cases," could recover the statutory compensation for the transcripts furnished in all cases of death, whether from negligence or otherwise; but on the stenographer in-

cluding in his claim compensation for transcripts in cases of "constructive homicide," it was wrongfully assumed that he had no right to recover for cases of such description. *Strassner v. City of New York*, 39 N. Y. Supp. 669, 670, 6 App. Div. 370.

### **HOMICIDE IN SELF-DEFENSE**

See Self-defense.

### **HONES**

Lexicographers uniformly agree that the word "hones" and the word "whetstones" in their descriptive force each implies a stone used for sharpening edged tools, instruments, etc., by friction. The one unit of similarity between the two is that the stones must be articles used for sharpening edged tools. The provisions for "hones" and "whetstones" in paragraph 574, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 198, include only articles used in sharpening edged tools. *R. J. Waddell & Co. v. United States*, 135 Fed. 211, 213.

Articles of hone stone, which are used in polishing marble and lithographic stones, and which are not shown to be known commercially as "hones," are not free of duty as "hones" under the Tariff Act, but are dutiable as unenumerated manufactured articles. *R. J. Waddell & Co. v. United States*, 135 Fed. 211, 213.

### **HONEST**

#### **HONEST BELIEF**

The expression "honest belief," as used in the rule that a defendant, in a prosecution for homicide defended on the ground of self-defense, must have had an honest belief of the existence of danger, does not differ from the expression "reasonable belief." Both are used conjunctively and disjunctively by different courts. Just how a belief can be reasonable and not be an honest belief, as applied to the law of self-defense, cannot be perceived. Webster defines "reasonable" as meaning "just; honest." *State v. Churchill*, 100 Pac. 309, 314, 52 Wash. 210 (quoting *Tillery v. State*, 5 S. W. 842, 24 Tex. App. 251, 5 Am. St. Rep. 882).

The use of the language "sound reason," "honest belief," in connection with instructions as to self-defense, can only be understood to mean that defendant must actually, in good faith, have thought that he was in danger of losing his life or suffering great bodily harm, and that he had reason and cause for such belief. *Robinson v. Territory*, 85 Pac. 451, 456, 16 Okl. 241.

#### **HONEST CRITICISM**

See Fair and Honest Criticism.

### **HONESTY**

See Intrinsic Fairness and Honesty.

### **HONEY**

Judicial notice should be taken that "glucose" is an element entering into many different articles of food and is not used by itself as such. "To the ancients 'honey' was known by the name of 'glucose,' and it is still somewhat difficult to draw the line of demarcation. Furthermore, it is a matter of common knowledge that honey deposited by the honey bee is on occasion almost entirely pure 'glucose,' dependent upon the food which the bee may eat." *People v. Berghoff*, 95 N. Y. Supp. 257-259, 47 Misc. Rep. 1.

### **HONOR**

See Office of Honor or Profit.

### **HOOD**

A "hood" used in connection with a rip-saw is a tin or sheet iron cap partly covering the saw, and preventing the board from flying up, while the saw is cutting it, and striking the operative. *Dean v. St. Louis Woodenware Works*, 80 S. W. 292, 294, 106 Mo. App. 167.

A "hood" is an iron block used in connection with a pile driver and placed over the top of the pile being driven to prevent the weight from splitting it. *Huston v. Quincy, O. & K. C. R. Co.*, 107 S. W. 1045, 1046, 129 Mo. App. 578.

### **HOOK**

See Bridling the Hook; Clip Hooks; Sister-Hook.

### **HOOKER**

The term "hooker," when used in connection with railroad work and dealing with the construction of bridges, is equivalent to the term "topman." *Southern Indiana Ry. Co. v. Harrell (Ind.)* 66 N. E. 1016, 1017.

### **HOOPLIKE VIBRATIONS**

Tubular bells, without a stiffening or loading device, emit inharmonic sounds technically called "hooplike vibrations." *Durfee v. Bawo*, 118 Fed. 853-855.

### **HOP CLOTH**

The term "hop cloth," contained in Tariff Act Aug. 27, 1894, c. 349, § 2, Free List, par. 424½, 28 Stat. 539, was only inserted as another name for burlap, to which such paragraph related. *Corbitt & Macleay Co. v. United States*, 153 Fed. 648, 652.

### **HOPE**

The word "hope," used by testator in a will to express his desire that the executor will conduct a fund in a specified manner,

testator having power to command, will not be construed as precatory only, but as a command clothed in the language of civility, and to impose on the executor an enforceable duty, sufficient to create a trust. *Trustees of Pembroke Academy v. Epsom School Dist.*, 75 Atl. 100, 101, 75 N. H. 408, 37 L. R. A. (N. S.) 646.

## HOPE OF RECOVERY

See *Lost All Hope of Recovery*.

## HOPPER

### HOPPER BOTTOM

"Hopper bottoms" of railroad gravel cars are bottoms which open out, so that the contents of the cars may be emptied on the track. *Gulf, C. & S. F. R. Co. v. Jackson*, 109 S. W. 478, 480, 49 Tex. Civ. App. 573.

## HORN

A "deer which has no horns" protruding through the skin, so that they can be seen and ascertained to be horns, is not a "deer having horns," within the statute making it an offense to kill wild deer not having horns. *State v. St. John*, 59 Atl. 826, 827, 77 Vt. 175.

## HORSE

See *Bay Horse*; *Work Horse*.

"All the authorities agree that the word 'horse' is a generic term, ordinarily including in its signification the different species of that kind of animals, and generally it is sufficient in charging larceny to describe an animal by the name of the class to which it belongs." *State v. Matejousky*, 115 N. W. 96, 98, 22 S. D. 30.

Under Pen. Code 1901, art. 881, relating to theft of a horse, "the genus 'horse' includes a stallion, mare, gelding, etc." *Beard v. State*, 83 S. W. 824, 825, 47 Tex. Cr. R. 183 (citing *State v. Morales*, 21 Tex. 298; *McKenzie v. State*, 25 S. W. 426, 32 Tex. Cr. R. 568, 40 Am. St. Rep. 795; *Cummins v. State*, 12 Tex. App. 121; *Smith v. State*, 39 S. W. 933, 37 Tex. Cr. R. 342).

### As cattle

See *Cattle*.

### As chattel

See *Chattel*.

### Colt

The term "horse," in its generic sense, embraces all the different varieties of that animal, however diversified by age, sex, or condition. As a general rule, when a statute names adult animals only, the young are included under the same description. Under a statute making it grand larceny to steal a "mare," the stealing of a female colt is grand larceny. *Miller v. Territory*, 80 Pac. 321, 322, 9 Ariz. 123.

### Mare

The word "horse" includes the female sex of that genus. A complaint charging the killing of a horse is sustained by proof that the animal was a mare. *Southern Ry. Co. v. Pogue*, 40 South. 565, 566, 145 Ala. 444.

Notwithstanding Pen. Code, § 487, providing that the larceny of a horse, mare, gelding, etc., is grand larceny, proof of the theft of a mare does not constitute a variance from an information charging the theft of a horse, since the word "horse" is used in its generic sense, and includes all animals of the horse species, whether male or female. *People v. Melandrez*, 88 Pac. 372, 373, 4 Cal. App. 396 (quoting and adopting definition in *People v. Pico*, 62 Cal. 52).

### As merchandise

See *Merchandise*.

### Mule

The word "horse" is generic, and includes mules and asses as species; but the term "mare" is not descriptive of a female of the species mule. *McLamb & Co. v. Lambertson*, 62 S. E. 107, 109, 4 Ga. App. 553.

The term "work horses," used by the constitutional exemption provision, includes mules. *McElveen v. Golings*, 41 South. 229, 116 La. 977, 114 Am. St. Rep. 574 (citing *Ray v. Hayes*, 28 La. Ann. 641; *Goldsmith v. State*, 1 Head [38 Tenn.] 156).

### As tool

See *Tools—Tools of Trade*.

## HORSE POWER

While the term "horse power" designates a definite amount of mechanical force, it may also be used in connection with a given head of water, to designate a definite quantity of water. Given the head and the mechanical power to be produced in terms of "horse power," the equivalent quantity of water can in theory be ascertained by mathematical calculation. In practice, however, allowance must be made for inevitable leakage, friction, and other inevitable losses in converting the water into mechanical force. *Union Water Power Co. v. Inhabitants of Lewiston*, 65 Atl. 67, 71, 101 Me. 564.

The unit of power, called the "watt," equals 10,000,000 units of power in the C. G. S. system, or one ampere times one volt. One horse power is 746 watts or  $\frac{3}{4}$  kilowatt. *Peoria Waterworks Co. v. Peoria Ry. Co.* 181 Fed. 990, 1001.

### Pounds pressure distinguished

The terms "horse power" and "pounds pressure," as applied to steam, are entirely different in meaning and application: "horse power" expressing quantity of steam, and "pounds pressure" the quality of pressure at which the steam is delivered. *Fox v. Coggeshall*, 88 N. Y. Supp. 676, 679, 95 App. Div. 410.



**HORSE RACING**

As gambling device, see Gambling Device.

As game, see Game.

Betting on race as gaming, see Gambling—Gaming.

**HORSE STEALING**

The offense of "horse stealing," denounced by Act No. 30, p. 38, of 1892, is a mere unlawful and malicious trespass committed on the horse, mule, or ox of another. It does not fall within the definition of an attempt to steal. *State v. Gouvernale*, 36 South. 817, 112 La. 956.

If accused acquired possession of horses under a false and fraudulent pretense of hiring them, and with a felonious intent to convert them to his own use and to deprive the owner permanently of them, he was guilty of "horse stealing" within Ky. St. 1903, § 1195, without proof of a subsequent sale or other wrongful disposition by accused; but, if he hired the horses in good faith and was prevented from returning them by the owner's act in having him arrested, he was not guilty. *Smith v. Commonwealth*, 112 S. W. 615, 616, 129 Ky. 433.

Obtaining possession of a horse under pretense of hiring it, without intending to return it, and with the felonious intent to convert it and deprive the owner permanently of it, is "horse stealing," without a subsequent sale or other wrongful disposition of the horse; but if he hired the horse in good faith, with intention of returning it, and was prevented from doing so by the owner's act in having him arrested, he is not guilty. *Walklate v. Commonwealth (Ky.)* 118 S. W. 314, 315.

**HORSEBACK**

In mining parlance, the term "horseback" means that the actual deposit has been forced up into a ridge or hill by the uneven surface of the underlying strata of rock. The effect of the horseback is to compress the coal, and the vein is thinner at the horseback than elsewhere, and it not infrequently happens that the vein is entirely pinched out by the horseback. *Jones & Adams Co. v. George*, 81 N. E. 4, 5, 227 Ill. 64, 10 Ann. Cas. 285.

When referring to land underlaid by coal, the term "horsebacks" means faults in the coal stratum. *Lloyd v. Catlin Coal Co.*, 71 N. E. 335, 338, 210 Ill. 460.

**HORSEMAN**

As seamen, see Seaman.

**HORSESHOEING**

As business, see Business.

**HOSE**

See Web Hose.

**HOSPITAL**

See Private Hospital; Public Hospital.

As charity, see Charity; Public Charity.

As college, see College.

As public corporation, see Public Corporation.

State hospital as corporation, see Corporation.

A statute conferring on boards of county commissioners the power to provide for the care of the indigent sick and erect hospitals therefor, to provide a farm for the support of the poor of the county, to provide suitable rooms for county purposes, and to cause to be erected a courthouse, jail, hospital, and "such other buildings as may be necessary," does not authorize a board of county commissioners to establish a county detention hospital; the word "hospital" in the statute meaning a hospital for that class of persons for whom the board may provide. *Yegen v. Board of County Com'rs of Yellowstone County*, 85 Pac. 740, 743, 34 Mont. 79.

**HOSPITAL PHYSICIAN**

As employé, see Employé.

**HOST**

To establish the relation of "host" and "guest" at an inn, the traveler must visit the inn to avail himself of the entertainment offered, and the innkeeper must receive the traveler to entertain him, and it is not necessary that the traveler should register. *Hill v. Memphis Hotel Co.*, 136 S. W. 997, 998, 124 Tenn. 376.

**HOSTILE****HOSTILE FIRE**

An ordinary fire in a stove is deemed, with relation to fire insurance, a "friendly" and not a "hostile" fire; but where a fire in a stove ignited the soot in the chimney, and the smoke and soot from the burning chimney escaped into the room and damaged property, the fire in the chimney was a "hostile fire." *O'Connor v. Queens Ins. Co. of America*, 122 N. W. 1038, 1040, 140 Wis. 388, 25 L. R. A. (N. S.) 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118 (citing *Way v. Abington Mut. Fire Ins. Co.*, 43 N. E. 1032, 166 Mass. 67, 32 L. R. A. 608, 55 Am. St. Rep. 379).

**HOSTILE POSSESSION**

Within the rule that to constitute adverse possession it is necessary that the possession be "actual, continuous, notorious, and hostile." "Hostile" means opposed and antagonistic to the claims of all others. *Bradbury Marble Co. v. Laclede Gaslight Co.*, 106 S. W. 594, 599, 128 Mo. App. 96.

The word "hostile," within the rule that adverse possession must be "hostile" in its

beginning, means hostile as a matter of law. *Purtle v. Bell*, 80 N. E. 350, 352, 225 Ill. 523.

An instruction, where defendant claims title by adverse possession, that he must show open, actual, continuous, notorious, exclusive, and hostile possession for a period of 10 years before action brought as against all parties, and defining the word "hostile" as meaning a holding possession, claiming to hold against all other claimants, is not prejudicial to defendant. *Taylor v. Hover*, 108 N. W. 149, 150, 77 Neb. 97.

#### Adverse possession synonymous

In ejectment, a charge to find for plaintiff unless defendant had been in "uninterrupted, continuous, adverse, and hostile possession," etc., was not erroneous in using the word "hostile" in addition to "adverse," as the two words mean the same in law. *Weller v. Wagner*, 79 S. W. 941, 943, 181 Mo. 151.

## HOSTLER

A "hostler," in railway parlance, is one employed in taking the locomotives as they come into the yard, and are left by the engineer who has been in charge, to the roundhouse, or other place of shelter, security, or repairs, or for supplies, and bringing them out again, as occasion requires, to the place where the engineer assumes charge for the purpose of making his trip. He is also more or less employed in conducting the engine about the yard for the purpose of shifting cars in making up trains and in distributing them. *Baltimore & O. R. Co. v. Doty*, 133 Fed. 866, 867, 872, 67 C. C. A. 38.

One charged with the duty of operating a yard engine in switching and making up trains and the like is called in railroad parlance a "hostler." Though his duties and work be confined to the depot yard, he is as much an "engineer" as one operating an engine from point to point on a line of railroad. *Howard v. Chesapeake & O. Ry. Co.* (Ky.) 90 S. W. 950, 951.

A "hostler" is an employé of a railroad company whose duty it is to take engines that have just arrived from the custody of the engineer and fireman and run them into the roundhouse. *Loomis v. Lake Shore & M. S. R. Co.*, 75 N. E. 228, 229, 182 N. Y. 380.

A locomotive engineer, whose duty is to relieve the engineers that come in off the road, take the train and put it away, and carry the engine to the shop and put it up, is called a "hostler." *Central of Georgia Ry. Co. v. Goodson*, 45 S. E. 680, 681, 118 Ga. 833.

## HOT

### HOT BLOOD

"Bad blood," which produces a cherished intention to deliberately kill, is not to be confused with "hot blood," excited by a sudden

and unexpected emergency, with which the slayer, through no fault of his own, is unfortunately confronted. *Jenkins v. State*, 51 S. E. 598, 600, 123 Ga. 523.

### HOT WIRE

The term "hot wire" is used in electricity to describe a wire charged with a dangerous voltage of electricity. *Potts v. Shreveport Belt Ry. Co.*, 34 South. 103, 110 La. 1, 98 Am. St. Rep. 452.

An inquiry by an employé of a telephone company sent out to fix a defective telephone, whether there was "anything hot on it" is an inquiry whether the wires of the telephone which he was sent out to fix had become surcharged from any cause with a dangerous quantity of electric fluid. *Dow v. Sunset Telephone & Telegraph Co.*, 106 Pac. 587, 588, 157 Cal. 182.

## HOTCHPOT

"Hotchpot" is bringing into the estate an estimate of the value of advancements made by him to his children, that the whole may be divided in accordance with the statute of descent. *Lindsley v. McIver*, 48 South. 628, 629, 57 Fla. 466.

## HOTEL

See Apartment Hotel; Public Hotel.

A "hotel" is a place where lodging is furnished to transient guests, as well as one where both lodging and food are furnished. *Metzler v. Terminal Hotel Co.*, 115 S. W. 1037, 1038, 135 Mo. App. 410.

Where a building consisted of a barroom, grocery store, six bedrooms, two dining rooms, and a kitchen, and was occupied continuously by a family consisting of a husband and wife and five children, and two others, guests being accommodated at night only occasionally, it was not a bona fide "hotel" within San Jose City Ordinance July 1, 1908, regulating the issuance of liquor licenses. *Richter v. Lightston*, 118 Pac. 790, 791, 161 Cal. 260, Ann. Cas. 1913B, 1028.

An indictment for playing cards in the "hotel" of L. N. is merely descriptive of the place, and not of the essence of the place, since the word "hotel" may mean a private boarding house or other building designated as a "hotel." *State v. Kyer*, 46 S. E. 694, 695, 55 W. Va. 46.

A corporation incorporated to do a general hotel business has authority to take over the business of one operating a café in a hotel building owned by the corporation, together with the bar and cigar stand in connection therewith, for the power to do a general hotel business necessarily includes the authority to buy and sell refreshments, cigars, wines, etc.; a "hotel" being defined as a place for the accommodation of travelers

with food and lodging. *Judell v. Goldfield Realty Co.*, 108 Pac. 455, 457, 32 Nev. 351.

Hotels are established and maintained for the purpose of serving the public. The opening of a hotel is an invitation to the public to become its guests. Hotels are not conducted for the social enjoyment of the owners, but for the convenience of the public; that is, those whose business or pleasure may render it necessary that they shall ask and receive food and shelter at a place of public entertainment for compensation. A "hotel" is a quasi public institution. A contract between competing proprietors of hotels in a town, whereby one of them agreed to keep his hotel closed for three years, reserving the right to rent the same for offices and to roomers, and whereby the other agreed to pay a specified sum monthly to the former during the three years, is in restraint of trade and illegal, because the hotel is a quasi public institution. *Clemons v. Meadows*, 94 S. W. 13, 14, 123 Ky. 178, 6 L. R. A. (N. S.) 847, 124 Am. St. Rep. 339.

Act 33d Gen. Assem. c. 168, providing for the inspection of hotels, and declaring that every structure kept, used, advertised, or held out to the public to be an inn, hotel, or public sleeping house, or place where sleeping accommodations are furnished for hire to transient guests, in which ten or more sleeping rooms are used for guests' accommodation, shall be defined to be a "hotel" within the act, is not unconstitutional, as arbitrary in its classification of hotels. *Hubbell v. Higgins*, 126 N. W. 914, 916, 148 Iowa, 36, Ann. Cas. 1912B, 822.

A building is a "hotel" within the meaning of the term in Laws 1897, c. 312, p. 233, relating to the liquor traffic, when it is used and kept open for the feeding and lodging of guests, and there are at least six furnished bedrooms for their occupancy, and no other dwellers therein but the family and servants of the hotel keeper. In re *Brewster*, 83 N. Y. Supp. 564, 565, 85 App. Div. 235.

A house having 24 bedrooms and a dining room containing the required amount of space, and with adequate kitchen facilities, and harboring between 30 and 40 people, was a "hotel," within Laws 1897, p. 234, c. 312, § 31, cl. "k," authorizing a holder of a liquor tax certificate, who is a keeper of a hotel, to sell liquor on Sunday to his guests with their meals. In re *Cullinan*, 87 N. Y. Supp. 660, 661, 93 App. Div. 427.

Under the Liquor Tax Law excepting from the general prohibition against the sale of liquor on Sunday keepers of hotels who may sell liquors to guests, and defining a hotel as a building which, among other things, contains a certain number of bedrooms with certain requirements, sales by the keeper of a hotel which does not comply with the requirements of the law, because of deficiency in the number of rooms, in the

area of some of those which did exist, an insufficient thickness of partitions, failure of legal entrances to bedrooms, etc., are illegal, and cannot be justified on the ground that an excise agent told him that his building was sufficient in its structure and conditions to enable him to conduct business as a hotel keeper and to bring him within the exception of the statute. *Cullinan v. O'Connor*, 91 N. Y. Supp. 628, 630, 100 App. Div. 142.

Under the Liquor Tax Law, defining a "hotel" as a building regularly kept open for the accommodation of all able to pay for their entertainment, and who, without any stipulated engagement as to the duration of their stay, or as to compensation, are supplied with meals, lodgings, and attention, and in which the only other dwellers are the family and servants of the hotel keeper, the fact that certain dwellers in the building pay a stipulated weekly or monthly sum for their entertainment does not deprive an establishment otherwise within the terms of the statute of its character as a hotel. *Cullinan v. Clark*, 93 N. Y. Supp. 256, 257, 46 Misc. Rep. 188.

Under the Liquor Tax Law, defining a "hotel" as a building regularly used and kept open as such for the feeding and lodging of guests, stating the manner of such use, and the structural requirements of the building when situate within a city, evidence that the building had 25 rooms fitted with all the accouterments of a hotel, but not showing what such accouterments were, did not show that the building was a hotel. In re *Cullinan*, 92 N. Y. Supp. 802, 45 Misc. Rep. 497.

In a statute making it unlawful to sell liquor on Sunday, but providing that the holder of a tax certificate who is the keeper of a hotel may sell liquor to the guests with their meals, "hotel" is defined as a building regularly used as such for the feeding and lodging of guests, and "guest" is defined as one who in good faith, during the hours when meals are served, resorts to the hotel for the purpose of obtaining and actually orders and obtains, a meal. On a petition for the revocation of a liquor license, it was admitted that the premises conformed to the law with respect to the requirements of a hotel, but it was shown that on a Sunday agents of the excise department entered a sitting room at the rear of the barroom, and found the room furnished with tables, and people sitting about at tables ordering and being served with drinks, that the agents purchased sandwiches, which were served, and that they then purchased drinks. It appeared that there were no knives or forks on the tables, and none of the usual appliances for a meal. Held, that the facts showed a violation of the statute. In re *Clement*, 102 N. Y. Supp. 37, 40, 117 App. Div. 5.

The Liquor Tax Law permits the sale of liquor in hotels on Sunday. Section 31 requires all buildings used as a hotel under the act to conform to the laws and regulations pertaining to hotels, including all regulations pertaining to the building and other departments, and subdivision 2 (page 236) thereof requires buildings to be used as a hotel under the act to contain at least 10 bedrooms above the basement. The building code of the city of New York regulates the erection and construction of various classes of buildings, and, in prescribing what buildings shall be subject to the provisions thereof, section 10 defines a "hotel" as every building used for supplying food, etc., and containing more than 15 sleeping rooms above the first story. Held, that the definition of a hotel in the building code applied only to the provisions of that code, and a hotel containing 10 bedrooms above the basement complied with the liquor tax law, though it did not contain more than 15 rooms above the first floor as provided by the building code, and hence a statement in an application for a license to sell liquor in such a building that it conformed to the regulations relating to hotels was not false so as to justify the revocation of the certificate. In re Clement, 113 N. Y. Supp. 392, 394, 129 App. Div. 229.

On an application for a liquor tax certificate, the fact that the building where the business was to be conducted had only five bedrooms instead of six, that one of these was materially deficient in floor area and air space, that four had no independent access by a door leading into a hallway, and that the premises failed in other respects to comply structurally with Liquor Tax Law (Laws 1910, c. 494) § 30, cl. "n," defining a "hotel," was ground for refusing the certificate. People ex rel. Higgins v. Hegeman, 135 N. Y. Supp. 90, 94, 75 Misc. Rep. 163.

#### **Boarding house distinguished**

The fact that the house is open for the public, that those who patronize it come to it by the invitation, which is extended to the general public, and without previous agreement for an accommodation, and without any previous agreement as to the duration of their stay, marks the important distinction between a "hotel," or inn, and a boarding house. Under a statute entitling all persons to full and equal enjoyment of the accommodations of inns and eating houses, a place where meals are served to whoever applies at prices charged to all is an eating house. Humburd v. Crawford, 105 N. W. 330, 128 Iowa, 743 (quoting and adopting Fay v. Pacific Imp. Co., 26 Pac. 1099, 28 Pac. 943, 93 Cal. 253, 16 L. R. A. 188, 27 Am. St. Rep. 198, and citing Schouler, Bailm. p. 253).

#### **As building**

See Building (In Criminal Law).

#### **As dwelling house**

See Dwelling—Dwelling House.

#### **Inn synonymous**

See Inn.

#### **As mercantile pursuit**

See Mercantile.

#### **Private lodging house distinguished**

"There is a clear distinction between a mere 'private lodging house' and a 'hotel' where no meals are served. Such a 'hotel' or inn is a house the proprietor of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided and who come in a situation in which they are fit to be received. The keeper of such a house is bound, without making any special contract therefor, to provide all to the limit of his facilities at a reasonable price; but the proprietor of a 'private lodging house' is not bound to receive all who apply, but he has the right to select his guests, contracting specially with each." Nelson v. Johnson, 116 N. W. 828, 829, 104 Minn. 440, 17 L. R. A. (N. S.) 1259.

#### **As restaurant**

See Restaurant.

#### **Tavern synonymous**

See Tavern.

#### **HOTEL COMPANY**

As trading corporation, see Trading Corporation.

#### **HOUND**

See Beagle Hound.

#### **HOUR**

See Business Hours; Office Hours; Reasonable Hours.

"Hour" means a particular time, a fixed or appointed time. Andreask v. New Jersey Tube Co., 63 Atl. 719, 720, 73 N. J. Law 664, 4 L. R. A. (N. S.) 913, 9 Ann. Cas. 1006 (quoting Cent. Dict.).

#### **HOUSE**

See Apartment House; Assignment House; At Your House; Boarding House; Chicken House; Community House; Courthouse; Disorderly House; Dog House; Dwelling House; Eating House; Gambling House; Hen House; Inhabited Dwelling House; Larceny from the House; Lewd House; One Dwelling House; One House; Open House; Opera House; Outhouse; Private House; Quiet House; Roundhouse; Schoolhouse; Station or Station House; Storehouse; Tenement House; Tippling House; Town House; Uninhabited House. Any other house whatsoever, see Any Other.

Unoccupied house, see Unoccupied.

A bay window built up from a foundation wall is a part of a "house," within a building restriction covenant. *Righter v. Winters*, 59 Atl. 770, 772, 68 N. J. Eq. 252.

A showcase set in a vestibule of a building, under the floor of the first story. It was five or six feet square and six or eight feet high, with a cover on it and a door in it, on which was a lock. From four to six men could stand up in the case. It was not attached to the building and could be moved. Held, that it was not a "house," within Pen. Code 1895, art. 843, making it burglary to unlawfully enter a house. *Clark v. State*, 120 S. W. 892, 893, 56 Tex. Cr. R. 494.

An owner of land conveyed a part by deed, retaining the rest; the deed providing that no dwelling house should be erected upon the premises. The grantee built a structure thereon, on the first floor of which was a garage and a boiler house, and on the second floor bedrooms and a bathroom, occupied by the servants of a lessee. Held, in an action to enjoin the use of the building as a dwelling house or habitation, and to compel it to be torn down and removed, that the four walls and the roof of the structure constituted a "house," and that the interior arrangement determined that a portion of it was a "dwelling house," and that complainant was entitled to enjoin the use of any part of the house as a dwelling house, although not to compel its removal. *Goater v. Ely*, 82 Atl. 611, 612, 80 N. J. Eq. 40.

Laws 1897, p. 467, c. 415, § 18, provides that one employing another to furnish labor in the erection, repairing, etc., of a house, building, or structure, shall not furnish or erect for performance of such labor unsafe scaffolding, ladders, or other mechanical contrivances, and section 19 requires all scaffolding to be constructed so as to bear four times the maximum weight to be placed thereon. Plaintiff, while repairing a car 47 feet long, 8½ feet wide, and 16 feet high, jacked up about 6 feet above the floor of the shops, and around which was erected a staging of "painter's horses," like ladders with rungs about 12 inches apart, and planks placed on them about 8 feet above the floor, was injured by breaking of a plank. Held, that "house," in common speech, embraced every structure designed for human habitation, but in a legal sense was even more comprehensive, and "building" included every form of artificial house, as well as many other structures, and "structure," in its broadest sense, included any artificial production composed of parts joined together in a definite manner, and, in view of the meaning of the terms, and of the language of the statute, the word "structure" used therein did not include merely structures similar to those mentioned, and included the car on which he worked when injured. *Caddy v. Interborough Rapid Transit Co.*, 88 N. E. 747, 748, 195 N. Y. 415, 30 L. R. A. (N. S.) 30.

#### Apartment, office, or room

A house alleged to have been burglarized was a storehouse with two wings. In one of the rooms hay had been stacked as high as the joists making a partition in the room, and here the beer stolen at the time of the burglary was stored. The parts of the room divided by the hay each had an outside entrance and were in the possession of different persons. A person could go from one part to the other by climbing over the hay through a space between the joists and the roof of the building. Held, that an instruction that each end of the room so divided was a separate "house," within the law relating to burglary, was proper. *Kinney v. State (Tex.)* 148 S. W. 783, 784.

The word "house," used in the term "disorderly house," may mean a single room in a house or building, or any place used as a shelter for disorderly conduct. *Walt v. People*, 104 Pac. 89, 92, 46 Colo. 136 (citing *State v. Garity*, 46 N. H. 61).

Under Pen. Code 1895, art. 843, which is a part of the chapter punishing burglary, and which provides that a "house" within the statute is any building or structure erected for public or private use, one compartment in a cold storage plant is a "house" within such statute, and one stealing meat stored therein is guilty of burglary. *James v. State*, 140 S. W. 1086, 1087, 63 Tex. Cr. R. 559.

Pen. Code 1895, art. 388b, makes it a felony for any person to keep any premises, building, place, or room for the purpose of being used as a place for gambling with cards; and Vagrancy Act (Acts 31st Leg. c. 59) § 1, subd. "k," declares that every keeper of a house of gambling or gaming is a vagrant. Held, that there is a distinction between the offense of keeping a "room," denounced by Pen. Code 1895, § 388b, and keeping a "house," denounced under the vagrancy act, for "room" and "house" are not synonymous or convertible terms, so that the vagrancy act does not repeal the provision of the Penal Code. *Parshall v. State*, 138 S. W. 759, 766, 62 Tex. Cr. R. 177.

#### Chicken house

A chicken house is within a statute making it burglary to enter a "house" or other building with intent to commit a felony. Evidence that defendant took chickens from a "coop" by cutting a hole in the wire around it did not sustain a charge of burglary, under such statute, making it burglary to enter any house or building, as a chicken coop is not necessarily a house. *Gunter v. State*, 96 S. W. 181, 182, 79 Ark. 432, 116 Am. St. Rep. 85.

#### Curtilage or land included

The word "house" imports land. *State ex rel. Post v. Board of Education of Clarksburg School Dist.*, 76 S. E. 127, 128, 71 W. Va. 52 (citing *Devlin, Deeds*, § 863).

The term "buildings" or "houses" includes the real estate on which they are situate, unless the general meaning of the term is modified by the language of the context. A devise of all the rents of a building carries the property itself, there being nothing in the statutes to prevent the operation of such rule. *Gidley v. Lovenberg*, 79 S. W. 831, 835, 35 Tex. Civ. App. 203.

Where a lessee under a gas lease agreed to equip the "house" of the lessor for the use of natural gas, he was not required to furnish lights outside the house, between the "house" and a spring on the premises. *Gillespie v. Iseman*, 59 Atl. 266, 267, 210 Pa. 1.

Where buildings on land consisted of an erection 1½ stories high with three rooms, and this erection was very nearly completed, and in the rear and annexed thereto was another erection one story high designed for a kitchen, and annexed to that was another designed for a washroom and other appendages, the entire structure was a "house," within the meaning of a contract of sale by which the "house" was to be finished. *Hovey v. Luce*, 31 Me. 346, 350.

#### **Ginhouse**

Where there was no question that the house which was burned was a ginhouse, a definition by the court in its charge that a "house" is any building, edifice, or structure inclosed with walls and covered, whatever be the material used for the building, was sufficient and not misleading, and was in accord with Pen. Code 1895, art. 757. *Allen v. State*, 137 S. W. 1133, 1136, 62 Tex. Cr. R. 501.

A "house" is defined by Pen. Code 1895, art. 757, as a "building, device or structure inclosed with walls and covered, whatever be the material used for building." Within this definition it is held that a gin set up on posts, and the lower part used for the engine, the upper part entirely inclosed with walls, with an opening at one end of the gin room, out of which the bales of cotton were rolled, which opening had no doors which could be closed, constituted a "house." *Caddell v. State*, 97 S. W. 705, 706, 50 Tex. Cr. R. 380.

#### **Porch**

To steal articles of value from the porch of a building used as a restaurant, the porch being used as a part of the restaurant, is "larceny from the house." *Johnson v. State*, 58 S. E. 684, 2 Ga. App. 405.

#### **Premises**

See Premises.

#### **Railroad car**

Pen. Code 1895, art. 838, states that the offense of burglary is committed by entering a "house" by means and under conditions enumerated. Article 849, part of the same chapter as article 838, provides a penalty for

an attempt to commit burglary. Article 851, part of the following chapter, makes it penal for one, by the means enumerated in article 838 and, under certain conditions, to enter a vessel, steamboat, or railroad car, but does not in terms make or define this to be burglary. The chapter containing article 851 makes no provision relative to attempts. Held, that an attempt to break and enter a "railroad car" is not an offense. *Summers v. State*, 90 S. W. 310, 49 Tex. Cr. R. 90.

#### **Shed**

A shed was a "house," within the burglary statute, though it was entirely closed by planking, and had no door, so that one could not enter without pulling off the planking. *Crow v. State*, 85 S. W. 1057, 1058, 48 Tex. Cr. R. 25.

#### **Warehouse platform**

Theft of articles from a warehouse platform, used to carry goods into the warehouse and remove them therefrom, as well as for temporary deposit of goods, is larceny from the "house." *Wilson v. State*, 70 S. E. 1125, 9 Ga. App. 297.

#### **Wharf**

A "house" or building, within Pen. Code 1895, §§ 178, 179, defining larceny from a house, is a structure having a roof and lateral inclosure in which persons live or work, animals are confined, or property is stored; and a wharf where vessels discharge their cargo, covered by a roof, but otherwise wholly uninclosed, is not within the statute. *McCabe v. State*, 58 S. E. 277, 278, 1 Ga. App. 719.

#### **HOUSE AND LOT**

My house and lot, see My.

#### **HOUSE BOAT**

As dwelling house, see Dwelling—Dwelling House.

Within a marine insurance policy covering a "house boat," a house boat was a vessel manifestly not intended for navigation on the ocean. It is commonly defined as a boat fitted up as a house and commonly more or less resembles one in form and arrangements for permanent or temporary habitation. Such boats have long been the only dwellings of many thousands of people in the waters of eastern countries intended either to be stationary or to be moved by towing or by oars or sweeps. *Fulton v. President, etc., of Insurance Co. of North America*, 127 Fed. 413, 416 (quoting and adopting definition in Cent. Dict.).

#### **HOUSE NUMBER**

See Street and House Number.

#### **HOUSE OF ANOTHER**

The phrase "the house of another," used in defining arson, means the house of the oc-

cupant, and not of the owner of the fee. *Heard v. State*, 94 S. W. 605, 606, 116 Tenn. 713.

### HOUSE OF COMMON PROSTITUTION

"Houses of common prostitution" are public places. They are places to which all men may resort without invitation, and any house maintained for the indulgence of vice, and to which all may resort day or night for indulgence therein, is a public place, and the approaches which are furnished, and which are generally used in order to reach such places, are public ways. No public place whose existence is devoted exclusively to vice can claim immunity from the peaceful presence of officers upon its public passageways and approaches, with a view of suppressing it. *Pon v. Wittman*, 81 Pac. 984, 989, 147 Cal. 280, 2 L. R. A. (N. S.) 683.

### HOUSE OF CORRECTION

A "house of correction" is designed for the reformation of youthful criminals. *Ex parte Watson*, 72 S. E. 1049, 1052, 157, N. C. 340.

### HOUSE OF ILL FAME

See *Reputed House of Ill Fame; Sporting House*.

See, also, *Bawdyhouse; Lewd House*.

There is no difference in meaning between the two expressions "house of ill fame" and "lewd house or place for the practice of fornication or adultery." *Cotton v. City of Atlanta*, 73 S. E. 683, 684, 10 Ga. App. 397.

### HOUSE OF LEGISLATURE

The word "house" is used in the Constitution in varying senses to three entities, namely, the place of legislative session, the total elected membership of a branch of that department, and the body, whether upper or lower, as legally constituted to perform its legislative functions. *State ex rel. Woodward v. Skeggs*, 46 South. 268, 270, 154 Ala. 249.

### HOUSE OF PROSTITUTION

Operating house of prostitution, see *Operate*.

### HOUSE OF PUBLIC WORSHIP

House used exclusively for public worship, see *Exclusively Used*.

The parish of a house of a church was situated near it and used in connection with it for the observance of various religious services usually deemed essential in the support of public worship, which was the primary purpose of its erection. The building subserved all the religious uses for which it was erected and was maintained as a house of public worship so far as the needs and convenience of the church required. Held, that it was a "house of public worship," within Pub. St. 1901, c. 55, § 2, exempting such

places from taxation, though it was occasionally used for secular entertainments, such use not interfering with its use for religious purposes, and though a fee was received for such secular use, the statute not contemplating that a building should be exclusively used for public worship to be exempt. *St. Paul's Church v. City of Concord*, 75 Atl. 531, 532, 75 N. H. 420, 27 L. R. A. (N. S.) 910, Ann. Cas. 1912A, 350.

### HOUSE OF RELIGIOUS WORSHIP

The use of the Bible in the public schools does not make the schoolhouse a "house of religious worship." *Hackett v. Brooksville Graded School Dist.*, 87 S. W. 792, 798, 120 Ky. 608, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36.

The property of a corporation organized to secure the maintenance in the city of evangelical preaching for the young and destitute, etc., consisting of a building, valuable parts of which are not used for religious worship and have no relation to a religious use, and parts of which are used in part for worship by a church organization under a lease, or license, or contract, not making the corporation a trustee for the religious organization, is not exempt from taxation, under Rev. Laws, c. 12, § 5, cl. 7, exempting a "house of religious worship." *Evangelical Baptist Benevolent & Missionary Soc. v. City of Boston*, 90 N. E. 572, 573, 204 Mass. 28.

### HOUSE OF USUAL ABODE

See, also, *Usual Place of Abode*.

The term "house of usual abode," as used in the statute relating to service of process, means a person's customary dwelling place or residence, and presumptively, in the case of a married man, the house of his usual abode is where his wife and family reside. *Lovin v. Hicks*, 133 N. W. 575, 576, 116 Minn. 179.

In its relation to the question "to whether a summons has been left at the house of his usual abode," the quoted term means one's fixed place of residence for the time being, the place where defendant is actually living at the time, and may be synonymous with "residence." But ordinarily "usual place of abode" is a much more restricted term than "residence" and means the place where the defendant is actually living at the time when service is made. Service at the dwelling house of defendant, which is not described as his usual place of abode, is not sufficient. The purpose of the use of the term in an act relating to the service of process has primary reference to the place where the defendant is usually to be found. Therefore "usual place of abode" means "present place of abode." As defined in this state, the term means the customary or settled place of residence. In the case of a married man, the "house of usual abode" is prima facie the house wherein his wife and family reside. *Berryhill v. Sepp*, 119

N. W. 404, 405, 106 Minn. 458, 21 L. R. A. (N. S.) 344 (citing Missouri, K. & T. Trust Co. v. Norris, 63 N. W. 634, 61 Minn. 256; State v. Toland, 15 S. E. 599, 600, 36 S. C. 515; Du Valin v. Johnson, 39 Ark. 182, 192; Walker v. Stevens, 72 N. W. 1038, 52 Neb. 653; Mygatt v. Coe, 44 Atl. 198, 199, 63 N. J. Law, 510; Ser v. Bobst, 8 Mo. 506, 507; Earle v. McVeigh, 91 U. S. 503, 23 L. Ed. 398; Madison County Bank v. Suman's Adm'r, 79 Mo. 527, 530).

### HOUSE OF WORSHIP

The erection of a vestry or parish house is not the erection of a "house of worship," within the meaning of a will giving a legacy on condition of an additional sum being raised for the erection of a new house of worship. If a house of public worship was erected containing a vestry within its walls, it would not be contrary to the provisions of the will; but if a fund was raised for the erection of a meetinghouse and vestry which might be separate structures, with no provisions showing what part of the fund was to be used for the meetinghouse and what part for the vestry, the fund as a whole would not be for the erection of a house of worship. Trustees of the Ministerial Fund of the First Parish in Cambridge v. First Parish in Cambridge, 71 N. E. 74, 75, 186 Mass. 85.

### HOUSE OFFAL

Under a city ordinance providing that no person shall collect house offal or carry the same through the streets of the city, except the one duly appointed by the sanitary committee, the term "house offal" includes refuse food and swill, though none of it be in a decayed condition. State v. Robb, 60 Atl. 874, 875, 100 Me. 180, 4 Ann. Cas. 275.

### HOUSE SERVANT

Workman distinguished, see Workman.

### HOUSE SLANT

A "house slant" is merely a "Y" on the sewer pipe and of the same thickness as the pipe. When an ordinance provides for house slants for a sewer pipe of a specified internal diameter, it is necessarily understood, in the absence of any further specifications as to dimensions, as requiring house slants of that thickness which is ordinarily used with sewer pipes of the specified internal diameter. Sheedy v. City of Chicago, 77 N. E. 539-541, 221 Ill. 111.

### HOUSE WRECKER

Persons known as "house wreckers" buy buildings and demolish same for the use of the materials. Morris v. Lurie, 103 N. Y. Supp. 213.

### HOUSEBREAKING

The offense of "housebreaking," under the statute, making every person who in the daytime shall enter a dwelling house, with

intent to steal, guilty of housebreaking, is complete when the house is entered with the specific intent to steal, and the actual stealing or attempt to steal property therein is but evidence of such intent, and the allegation in the indictment of ownership of the property in the house is mere surplusage. State v. Simpson, 104 Pac. 244, 32 Nev. 138, Ann. Cas. 1912C, 115.

### HOUSEBOTE

"Housebote" is the right to a sufficient supply of wood to repair and burn in the house. Anderson v. Cowan, 101 N. W. 92, 93, 125 Iowa, 259, 68 L. R. A. 641, 106 Am. St. Rep. 303.

### HOUSEHOLD

See, also, Family.

The words "family" and "household" are often interchangeably used. A family is a collective body of persons living in one house and under one manager. It consists of those who live with the pater familias. Pearre v. Smith, 73 Atl. 141, 142, 110 Md. 531.

The word "family" is of flexible meaning, and its meaning varies as it may arise under the homestead laws, exemption laws, etc., its primary meaning being a collection of persons who live in one house and under one head or management, and in that sense it is frequently said to be synonymous with "household." Webster gives the primary meaning as "persons collectively who live together in a house or under one head or manager; a household including parents, children, and servants, and it may be lodgers or boarders;" but the cases do not generally sustain the inclusion of the latter. To constitute the family relation between persons living together it must be permanent and domestic in character, and not temporary. It embraces a household composed of parents, children, or domestics; in short, every collective body of persons living together within one curtilage subsisting in common and directing their attention to a common object. Robbins v. Bangor Ry. & Electric Co., 62 Atl. 136, 141, 100 Me. 496, 1 L. R. A. (N. S.) 963 (citing 3 Words and Phrases, p. 2673, and cases cited).

Servants in the family are part of "household," within the meaning of the statute as to family expenses chargeable upon the wife's property. Perkins v. Morgan, 85 Pac. 640, 641, 36 Colo. 300.

### HOUSEHOLD ARTICLE

See Family Article.

As baggage, see Baggage.

### HOUSEHOLD EFFECTS

See Household Furniture and Effects.

The term "household effects," as used by a revenue agent in the statement filed by him of property belonging to a person omitted



from taxation, means all the furnishings of one's house. *Commonwealth v. Glover*, 116 S. W. 769, 774, 132 Ky. 588.

The provision for "household effects used abroad \* \* \* not less than one year," in *Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 504, 30 Stat. 196*, includes automobiles. *Hillhouse v. United States*, 152 Fed. 163, 164, 81 C. C. A. 415.

St. 1909, § 4260, obligates a county revenue agent to cause to be listed for taxation all property omitted by the assessor and other taxing officer, and provides that he shall file a statement of property omitted, and that such statement shall contain "a description and value of the property proposed to be assessed." A revenue agent acting under such statute filed a statement of property belonging to a person named omitted from taxation, and such statement specified "accounts" of a stated value, 200 shares of railroad stock of a specified value in a number of railroads named, 350 shares of foreign industrial stock of a stated value in a number of corporations named, 25 traction bonds of a specified value in a number of railroad companies named, 20 railroads bonds of a stated value of a number of railroads named, 18 industrial bonds of local corporations of a stated value, 28 industrial bonds of a stated value in a number of corporations named, a certain amount of cash on hand, household effects, library, pictures, and jewelry, each of a value specified. Held, that the statement was sufficient as to the cash, household effects, library, pictures, and jewelry, as the "household effects" are universally understood to mean all the furnishings of one's residence, and "library" means such books or works of literature, science, art, or business as one may have in his residence or office, and "pictures" include all of the paintings, drawings, and sketches on the walls of one's residence or office building, and "jewelry" includes the rings, pins, and other ornaments worn by the taxpayer, his wife, and other members of his family dependent upon him and for whose taxes he is responsible, but the statement as to the rest of the property was not sufficiently definite to comply with the requirements of the statute. *Commonwealth v. Glover*, 116 S. W. 769, 774, 132 Ky. 588.

### HOUSEHOLD FURNITURE

"Household furniture" has no broader meaning than "household goods," and in the construction of wills and contracts the former phrase has been held to describe articles that are in the house for the common use of the household, or for ornament, and which are not consumed in using. *Lamb v. King*, 62 Atl. 493, 494, 73 N. H. 400.

Linoleum, which is an article customarily used as a floor covering in dwellings, is, though it is knowingly sold to cover the floor of a store, "household furniture," within the meaning of Gen. St. 1902, § 4864, providing

that the requirements that contracts of conditional sales shall be in writing, describing the property and conditions of sale, and be acknowledged and recorded, shall not apply to household furniture. *Boston Furniture Co. v. Thoms*, 61 Atl. 949, 950, 78 Conn. 273.

The provision for "house or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood," in *Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168*, is intended to cover all finished manufactured wooden articles, however different they may be in nature or appearance from "house or cabinet furniture"; and wood flour, a completed product, already prepared for use, is therefore not to be excluded under the rule of ejusdem generis. *Nairn Linoleum Co. v. United States*, 151 Fed. 955, 956.

### Piano

An exemption from execution of "household and kitchen furniture" would include a piano. *Utz v. Insurance Co. of North America*, 122 S. W. 318, 319, 139 Mo. App. 153 (citing *Alsop v. Jordan*, 6 S. W. 831, 69 Tex. 300, 5 Am. St. Rep. 53).

A piano is "household and kitchen furniture" within the exemption statute, when used as furniture in housekeeping. Where a married man abandoned housekeeping, with a view of leaving his residence, and placed his piano in the salesroom of a music dealer for sale, the piano was not exempt from execution as "household and kitchen furniture." *McCoy v. Thompson (Tex.)* 138 S. W. 1062.

A piano, used as a means of support by the widow and minor children of a decedent, may be set apart to the widow and minor children, under Code 1896, § 2072, authorizing the setting apart to the widow and minor children of a decedent of "household furniture" necessary for the use and comfort of the family. *Phillips v. Phillips*, 44 South. 391, 392, 151 Ala. 527, 125 Am. St. Rep. 40, 15 Ann. Cas. 157.

### China, linen, and plate

Insurance of \$1,300 on "household and kitchen furniture, useful and ornamental," includes a Japanese vase valued at \$500, although not specifically named. *Utz v. Insurance Co. of North America*, 122 S. W. 318, 319, 139 Mo. App. 153 (citing *Bowne v. Hartford Fire Ins. Co.*, 46 Mo. App. 473).

A "silver card receiver used on hat rack" is "household furniture," within Code 1896, § 2072, authorizing the setting aside to the widow and minor children of a decedent of his "household furniture." *Phillips v. Phillips*, 44 South. 391, 392, 151 Ala. 527, 125 Am. St. Rep. 40, 15 Ann. Cas. 157 (citing 4 Words and Phrases, pp. 3364, 3365).

A bequest of "household furniture" includes silverware. *Scoville v. Mason*, 57 Atl. 114, 115, 76 Conn. 459.

**Hotel or restaurant furniture**

Plaintiff, who had previously kept a restaurant at the home occupied by himself and wife and rented to lodgers rooms fitted with common household furniture, formed a partnership, and the firm continued the business. All of the rooms in the house, if required, were available for the accommodation of guests or lodgers. Held, that the furniture, having become partnership property for use in running a hotel, ceased to be "household furniture," within Rev. Laws 1902, c. 102, § 53, providing that a mortgage of household furniture on which interest is charged at the rate of 18 per cent. or more per annum made to secure a loan of less than \$1,000 shall not be valid unless it states with substantial accuracy the amount of the loan, terms, etc.; and hence a mortgage of such property is valid, even if it fails to set out the actual transaction with substantial accuracy. *Colby v. Bissell*, 84 N. E. 313, 198 Mass. 315.

**Wearing apparel**

A bequest of "household furniture" does not include mere garments and articles of clothing. *Scoville v. Mason*, 57 Atl. 114, 115, 76 Conn. 459.

**HOUSEHOLD FURNITURE AND EFFECTS**

A will disposed of all a testator's real estate, consisting of four separate parcels, and made eight specific bequests or dispositions of personal property. Then followed a clause by which he bequeathed "all the household furniture and effects." A large portion of testator's personal property was not included within the specific bequests. Held, that the words "and effects" were limited by their context to "household effects" and did not convey to the legatee thereof the personal property not specifically disposed of. *Gallagher v. McKeague*, 103 N. W. 233, 234, 125 Wis. 116, 110 Am. St. Rep. 821.

**HOUSEHOLD GOODS**

"Household goods" is a wider term than "furniture," including everything about the house that is usually held and enjoyed therewith, and that tends to the comfort and accommodation of the household. *Webb v. Downes*, 101 N. W. 966, 967, 93 Minn. 457.

**Books, paintings, etc.**

Under a contract for carriage of "household goods," the carrier is not liable, in the absence of gross negligence, for injury to a valuable oil painting, included in the shipment without the carrier's knowledge, where the carrier had filed with the Interstate Commerce Commission a tariff including a rate for paintings three times the amount of the rate of household goods; the shipper being presumed to know the classification. *Stokes v. Delaware, L. & W. R. Co.*, 132 N. Y. Supp. 428, 429, 74 Misc. Rep. 402.

**Piano**

Under Pub. St. 1901, p. 62, c. 2, § 2, providing that in the construction of statutes words and phrases shall be construed according to the common and approved usage of language, pianos are "household goods," within the meaning of Pub. St. 1901, p. 448, c. 140, § 23, providing that no lien reserved on personal property sold conditionally, and passing into the hands of the purchaser, "except a lien upon household goods," shall be valid against attaching creditors or subsequent purchasers without notice, unless the seller takes and records a memorandum witnessing the lien, etc. *Lamb v. King*, 62 Atl. 493, 494, 73 N. H. 400.

Pub. St. 1901, c. 140, § 23, requiring a memorandum of a conditional sale of personalty to be recorded, expressly excepts from its operation "a lien upon household goods created by a lease thereof, containing an option in favor of the lessee to purchase the same at a time specified." Held, that a piano, the subject of a conditional sale, kept for use in a family, is an article of "household goods" within the statute, whether kept for the use of a landlord's family in a hotel or in a private house; the question of whether it is so kept being one of fact. *Wood Piano Co. v. Huckins*, 78 Atl. 614, 615, 75 N. H. 611.

**Clothing**

Wearing apparel is not necessarily included within the term "household goods," when the question of good faith or fraud in fixing the value of such goods in a contract for carriage is involved. *Larsen v. Oregon Short Line R. Co.*, 110 Pac. 983, 986, 38 Utah, 130.

**HOUSEHOLD REMEDIES**

The term "household remedies" is synonymous with "family medicines," "domestic remedies," etc., and includes such things as camphor, quinine, paregoric, spirits of turpentine, castor oil, saltpeter, epsom salts, etc., but not a preparation containing sulphuric acid. *Lewis v. Brannen*, 65 S. E. 189, 190, 6 Ga. App. 419.

**HOUSEHOLDER**

A juror who owns and controls a room is qualified as a "householder." *Mays v. State*, 96 S. W. 329, 332, 50 Tex. Cr. R. 165.

**As freeholder**

"Householders" is not synonymous with "freeholders," as the latter term is used in a constitutional provision that compensation for property taken for public use shall be ascertained by a jury or board of not less than three freeholders. *Grossman v. Patton*, 85 S. W. 548, 550, 186 Mo. 661.

**As head of family**

The term "householder," as used in statutes exempting property from execution, has a well-defined meaning, and imports the mas-

ter or head of a family who reside together and constitute a household. *O'Reilly v. Erlanger*, 92 N. Y. Supp. 56, 57, 46 Misc. Rep. 278 (citing *Chamberlain v. Darrow* [N. Y.] 46 Hun, 48, 51).

One keeping house with a hired servant, doing the cooking and housework for him in a house in which he made his home and residence and which he rented from a corporation bearing his name, in which he owned a majority of stock and controlling interest, was a "householder" within the statute, so as to qualify him as a surety on a bond for discharge of an attachment. *Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co.*, 102 Pac. 963, 965, 31 Nev. 348; *Same v. D. Mackenzie & Co.*, 102 Pac. 967, 31 Nev. 359.

#### Housekeeper synonyms

The word "housekeeper," as used in Rev. St. 1909, § 6704, is synonymous with "householder," and it was not the intention to grant the exemption to two distinct classes of persons, but the terms "housekeeper" and "head of a family" apply to the same persons, so that a right of homestead cannot attach unless it appear that the person asserting the right then has one or more dependent persons living with him, and hence a widow living alone upon land purchased after the death of her husband, and with no one dependent upon her is not a "housekeeper" entitled to a homestead. *Elliott v. Thomas*, 143 S. W. 563, 564, 161 Mo. App. 441.

#### HOUSEKEEPER

See Private Housekeeper.

According to the standard dictionaries, a "housekeeper" is a woman who oversees the work of servants in a house, either as a mistress or as an upper servant. As is said in *Edgecomb v. Buckhout*, 46 N. E. 991, 146 N. Y. 322, 28 L. R. A. 816: "Generally speaking \* \* \* the term 'housekeeper' has reference to services performed in the taking care of a house in connection with the inmates residing therein; but exactly what special and particular duties are to be regarded as embraced within the term must almost always be decided by the duties which are actually performed under the agreement as made." *Schrader v. Beatty*, 55 Atl. 958, 206 Pa. 184.

Where a husband, in an action for injuries to his wife, specified that the services of his wife, which he lost owing to her injuries, and which he was obliged to employ others to perform, consisted of the duties of "housekeeper" in their dwelling, which she performed for him and their family, it was error to allow him to prove that she assisted him in his duties as janitor, which consisted of cleaning and lighting the halls and the household duties as well. *Keenan v. Metropolitan St. Ry. Co.*, 103 N. Y. Supp. 61, 63, 118 App. Div. 56.

#### Householder synonymous

See Householder.

#### HOUSEWIFE

A "housewife" is the mistress of a family; the wife of a householder; a female manager of domestic affairs. Whether the keeper of a house of ill fame is a housewife, as stated by her in an application for a policy of insurance, is for the jury. *Perry v. John Hancock Mut. Life Ins. Co.*, 106 N. W. 860, 861, 143 Mich. 290 (quoting and adopting definition in Cent. Dict.).

#### HOW

Under a charter providing that a city should not be liable for injuries received on its streets or public places, unless the injured person should notify the city in writing "when, where, and how" the injuries occurred, a notice stating that plaintiff slipped and fell on the public highway is defective in failing to state how (i. e., through what defect in the walk) the injuries occurred. *Stoors v. City of Denver*, 73 Pac. 1094, 19 Colo. App. 159.

#### HUB-BAND

A "hub-band" is an iron ferrule attached to the ends of a vehicle hub for the protection of the ends, and shielding the nut which holds the wheel on the axle. *Higgin Mfg. Co. v. Murdock*, 132 Fed. 810, 812, 65 C. C. A. 466.

#### HULL

See Oat Hulls.

In article 11 of the inland rules (Act June 7, 1897, c. 4, 30 Stat. 98), which requires a vessel 150 feet or more in length when at anchor to carry a light forward "at a height of not less than twenty and not exceeding forty feet above the hull," etc., the word "hull" includes the forecastle deck. *The Europe*, 190 Fed. 475, 479, 111 C. C. A. 307.

Under article 11 of the Inland Navigation Rules (Act Aug. 19, 1890, c. 802, 26 Stat. 324), providing that a vessel of 150 feet or upward in length, when at anchor, shall carry a white light forward not less than 20 feet above the hull, where a vessel has a forecastle reaching far back on her deck and a poop extending far forward, they are to be deemed a part of her hull. *The Europe*, 175 Fed. 596, 608.

#### HUMANITARIAN

##### HUMANITARIAN DOCTRINE

See, also, *Discovered Negligence*; *Discovered Peril*; *Last Clear Chance*.

The foundation of the humanitarian doctrine is the principle that no person has the right knowingly or negligently to injure an-

other, when he knows, or should know if he is reasonably careful, that his fellow is in danger of injury at his hands, and he possesses the means of removing that danger. *Ross v. Metropolitan St. Ry. Co.*, 112 S. W. 9, 12, 132 Mo. App. 472.

If the negligence of both parties co-operate there is usually no liability, except for the "humanitarian or 'last chance' doctrine," which means that, though the injured party may have been negligent in placing himself in a position of peril, yet if defendant, by ordinary care, did see, or could see, him in time to have averted injury, defendant is liable. *Matz v. Missouri Pac. Ry. Co.*, 117 S. W. 584, 591, 217 Mo. 275.

The "humanitarian doctrine" presupposes negligence or contributory negligence on the part of the party invoking the rule, and, in its essence is that, conceding that plaintiff was guilty of negligence, yet if defendant knew of his peril in time to save his life or limb, by ordinary care, then it was his duty to exercise such care, and a failure to so do renders him liable. *Hall v. Missouri Pac. Ry. Co.*, 118 S. W. 56, 66, 219 Mo. 553.

The "humanitarian doctrine" proceeds upon the precepts of humanity and of natural justice, to the end that every person shall exercise ordinary care to preserve another after seeing him in peril or about to be in peril, when such injury may be averted without injury to others. *Dey v. United Rys. Co. of St. Louis*, 120 S. W. 134, 136, 140 Mo. App. 461.

The "humanitarian doctrine" takes the imperiled person where it finds him and makes one liable for injuring him where he saw, or in the exercise of reasonable care should have seen, the peril and failed to do what he reasonably could to avoid injuring him. *Shipley v. Metropolitan St. Ry. Co.*, 128 S. W. 768, 775, 144 Mo. App. 7.

The "humanitarian doctrine," or last clear chance doctrine, is somewhat of an exception to the general rule of law, by which an injury caused by the joint negligence of the wrongdoer and the person injured is not actionable. *Murphy v. Wabash R. Co.*, 128 S. W. 481, 485, 228 Mo. 56.

Under the humanitarian doctrine, that the negligence of the person injured contributed to place him in peril, is no defense, since the operator of the threatening instrumentality must exercise the care of a reasonably careful person to avoid the accident. *Nipper v. Metropolitan St. Ry. Co.*, 129 S. W. 439, 441, 145 Mo. App. 224.

The "humanitarian doctrine" does not impair the rule that contributory negligence bars a recovery, where such negligence continues to operate as a proximate cause of the injury, but permits a recovery only where, though plaintiff voluntarily imperiled himself, defendant with knowledge of his

peril and opportunity to avoid injuring him, negligently or wantonly injured him. *Laughlin v. St. Louis & S. F. R. Co.*, 129 S. W. 1006, 1010, 144 Mo. App. 185.

The "humanitarian doctrine" is bottomed on the theory that plaintiff was at the time of the injury negligent, but that defendant by the exercise of ordinary care could have prevented the injury, but failed to do so. *Nivert v. Wabash R. Co.*, 135 S. W. 33, 36, 232 Mo. 626.

The humanitarian doctrine requires one to use ordinary care to protect another from impending peril, consistent with ordinary care for the safety of himself and those in the conveyance of which the former has charge, whether the peril results from contributory negligence or not. *Smith v. Heibel*, 137 S. W. 70, 74, 157 Mo. App. 177.

The humanitarian rule takes no account of how the danger was created, but confines itself to the question whether a reasonably careful and prudent man, in the situation of the operator of the threatening instrumentality, would have discovered and averted the danger had he exercised reasonable care. *Rush v. Metropolitan St. Ry. Co.*, 137 S. W. 1029, 1031, 157 Mo. App. 504.

The humanitarian rule which may be invoked against railroads or street railroads for injuries to persons on their tracks applies where, regardless of the cause of the perilous condition of the traveler, the railroad's servant in charge of the engine or car, in the proper performance of duty, could have discovered the danger and averted it, but negligently or wantonly failed to perform that humane duty. *Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493, 495, 167 Mo. App. 404.

An instruction that if the jury find from the evidence that plaintiff was negligent in attempting to cross the street, yet if they further find that defendant's agent or servant in charge of the car alleged to have inflicted the injury either saw or, by the exercise of ordinary care, could have seen the danger of plaintiff's position in time to have avoided the collision, but failed to exercise care and negligently allowed the car to collide with plaintiff and injure her, then plaintiff is entitled to recover presented what is known as the "humanitarian" or "last chance" doctrine. *Hough v. St. Louis Car Co.*, 123 S. W. 83, 86, 146 Mo. App. 58.

A petition, which alleged that deceased was in the act of crossing defendant's railroad track at a public crossing, and while in the exercise of due care defendant's servants so negligently ran its locomotive over its railroad at the public crossing that deceased was struck and killed, does not state a cause of action under the "humanitarian doctrine"; the constitutive facts of a charge of negligence under that rule being that the

injured person was in a situation of peril, and that the operators of the engine or crew had notice of such peril in time, by the exercise of reasonable care, to have averted the injury, and that the injury was the result of their failure to exercise due care. *Wilder v. Wabash R. Co.*, 146 S. W. 837, 839, 164 Mo. App. 114.

Under the "humanitarian or last chance doctrine" it is the duty of a motorman in charge of a running street car to keep a vigilant watch ahead, and where he sees, or by the exercise of due diligence could have seen, the peril of a party to have avoided injuring him, and fails to do so, the company will be liable. *Gebhardt v. St. Louis Transit Co.*, 71 S. W. 448, 450, 97 Mo. App. 373.

## HUMBUG

In determining whether or not the word "humbug" was libelous per se, the court said: "The word 'humbug' has become accepted as good English, and has an approved and well-understood meaning, as imposter; deceiver; cheat. Cent. Dict.; Worcester's Dict.; Standard Dict.; Stormonth's Dict.; Imperial Dict.; March's Thesaurus. Writers of pure and elegant English, like Lowell and Whipple, use it without the apology of quotation marks or of italics. In *Nolte v. Herter*, 65 Ill. App. 430, the appellant uses the word 'humbug' in conversation, and the court say: 'Humbug is an imposition; imposture; deception; and as a verb, signifies to impose upon; to cozen; to swindle—all implying intention to misrepresent by the assertion of what is not the actual condition, or the suppression or concealment of what is.' *McDonald v. Sun Printing & Publishing Ass'n*, 98 N. Y. Supp. 116, 117, 111 App. Div. 465.

A complaint in an action for libel alleged that plaintiff and defendant were the only hardware dealers in the town, and that plaintiff had been there several years, that defendant published in a newspaper then circulated in and around the town that a certain hardware dealer, but not himself, in the town, had sold a defective stove, representing it to be of fine quality and one of the best on the market, and that the stoves sold by his competitor were of no account, that the purchaser of the stove gave it to the drayman to haul away, and then purchased one of defendant's stoves, which were worth a dozen of plaintiff's, and further alleged that while it might be, as had been said, that the American people liked to be humbugged, and that some dealers still think so, yet the great majority prefer a square deal. Held, that the publication was a distinct charge that plaintiff was guilty of unfair and dishonorable practices, and charged him with deceiving the public in his business transactions; the word "humbug" meaning

an imposition under fair pretenses; something contrived to deceive; to impose on; to cozen; to swindle. *Ramharter v. Olson*, 128 N. W. 806, 808, 26 S. D. 499, Ann. Cas. 1913B, 253.

## HUMILIATION

Allegations in a petition, in an action against a sheriff and his deputy, that they wrongfully and unlawfully entered into a house and premises occupied by plaintiff under a lease and dispossessed him, and put his household goods and personal property in the public highway, and so put plaintiff to great trouble and distress, properly authorize a recovery for humiliation and mortification, or any phase of "mental anguish," since the word "distress," being a generic term, includes anguish or suffering, both of mind and body, and since "humiliation" and "mortification" are simply phases of mental anguish. *Perkins v. Ogilvie*, 146 S. W. 735, 738, 148 Ky. 309.

## HUNG

See On and Hung.

## HUNTER

See Iron Hunter.

## HUNTING

As property, see Property.

## HUNYADI

The owner of a trade-mark or trade-name in the words "Hunyadi Janos," for a natural bitter water, is not entitled, in the absence of fraud or unfair competition, to enjoin a manufacturer of an artificial bitter water from advertising and labeling the product, "Artificial Hunyadi"—especially since the word "Hunyadi" has become a generic name for mineral waters of a certain type, coming from a more or less extensive district, if not from anywhere in Hungary. *Saxlehner v. Wagner*, 30 Sup. Ct. 298, 216 U. S. 375, 54 L. Ed. 525.

## HURL

A person who throws a missile into a coach in a moving train while standing on a platform of the coach, violates Laws 1900, p. 141, c. 103, making it punishable for a person to "hurl any missile into a moving train." *State v. Ray*, 39 South. 521, 522, 87 Miss. 183.

## HURRY UP

A direction from plaintiff's foreman to "hurry up," as plaintiff was adjusting the gangplank leading from a freight car to the depot platform, which was not square with

the car door or flush with the platform, preparatory to trucking freight over it, was not negligence; it merely being an order to work faster, and not implying that plaintiff should not straighten the plank. *Silvia v. New York, N. H. & H. R. Co.*, 89 N. E. 1061, 1062, 203 Mass. 519.

## HURT

### HURTFUL

"Hurtful" is a synonym of "prejudicial." *Prunty v. Consolidated Fuel & Light Co.*, 108 Pac. 802, 803, 82 Kan. 541 (citing *Webst. Dict.*)

## HUSBAND

See Independent of a Husband; Lost Her Husband.

Surviving spouse as owner, see Owner.

Under Code Civ. Proc. § 16, declaring that words and phrases must be construed according to the context and the approved usage of the language, but that technical words and phrases or those which have acquired a peculiar meaning are to be construed according to such peculiar meaning, and Code Civ. Proc. § 1474, providing that if a homestead, selected by the husband and wife or either during coverture and recorded while both were living, was selected from the community or from the separate property of the one selecting it or joining in its selection, it vests, on the death of the husband or wife, absolutely in the survivor. The words "husband" and "wife," as used in section 1474, mean, respectively, a man who has a wife and a woman who has a husband, and do not mean an unmarried man or woman; and the word "survivor," as therein used, refers to the husband and wife as such, and means that, upon the death of the husband as a husband or the wife as a wife, the homestead shall vest absolutely in the survivor of such marriage relation, so that the survivor must be a surviving spouse, and the surviving individual after the dissolution of the marriage is not within the statute. *Zanone v. Sprague*, 116 Pac. 989, 993, 16 Cal. App. 333.

#### As heir

See Heirs.

#### As next of kin

See Next of Kin.

#### As trustee of express trust

See Trustee of Express Trust.

## HUSBAND AND WIFE

See Cohabit as Husband and Wife.

"By marriage," under the common law, "the 'husband and wife' are 'one person in law'; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and

consolidated into that of the husband, under whose wing, protection, and cover she performs everything, and is therefore called, in our law French, a feme covert." *Harrington v. Lowe*, 84 Pac. 570, 576, 73 Kan. 1, 4 L. R. A. (N. S.) 547 (quoting definition in 1 Bl. Com. p. 442).

## HUSBAND'S DOWER

The "husband's dower" is a statutory life estate substituted for the common law tenancy by the curtesy (Acts 1904, p. 261, c. 151) and, in order that this estate shall vest on the death of a wife intestate, it is not necessary that issue shall have been born or that the wife shall have been seised of the property in deed. *Snyder v. Jones*, 59 Atl. 118, 119, 99 Md. 693.

## HYDRANT

See Personal Property; Property.

## HYDRATE

See Chloral Hydrate.

## HYDRO EXTRACTOR

A "hydro extractor" or whizzer, used for drying knit goods, is a machine consisting of a perforated metal basket, 40 inches in diameter, attached to a shaft so that it will revolve at a rapid rate of speed. *Thayer v. Utica Knitting Co.*, 75 N. E. 577, 578, 183 N. Y. 18.

## HYGEIA

The word "Hygeia" is the name of the mythological Goddess Hygeia, the daughter of Esculapius. She was the goddess of health. From her name we derive the noun "hygiene" and the adjectives "hygeian" and "hygienic." It will thus be seen that while the name Hygeia may suggest purity and health, just as the names of other mythological deities suggested their characteristics, such name "Hygeia" has never become an adjective and a descriptive word any more than the adjective "martial" has made the name Mars a descriptive word, and it does not fall within the principle that precludes the exclusive use of words of description as trade-marks. *Hygeia Distilled Water Co. v. Consolidated Ice Co.*, 144 Fed. 139, 141.

The word "Hygeia" is not used in the English language as a word of descriptive or qualifying import. "It is a noun, not an adjective, a name, not an epithet, and accordingly it has been applied, of course but appellatively, to a planetoid that was discovered in 1849. Its association in thought to the concept of health is natural and probable." On the question as to whether the name may be lawfully appropriated as a trade-mark, "Hygeia" is not "hygienic." The two words have not the same meaning. Consolidated

*Ice Co. v. Hygeia Distilled Water Co.*, 151 Fed. 10, 11, 80 C. C. A. 508.

## HYOSCIN HYDRABROMATE

"Hyoscin hydrabromate" is a chemical salt whose use is solely medicinal, and in its preparation alcohol is necessarily used. *Schering v. United States*, 119 Fed. 472.

## HYPNOTISM

As prescribing remedies for the cure of disease, see *Prescribe*.

"Hypnotism" is defined to be a name applied to a condition, artificially produced, in which the person hypnotized, apparently asleep, acts in obedience to the will of the operator; and we are told by the authorities upon the science that upon awakening there may be a vivid recollection of all that happened during the apparent sleep." *Austin v. Barker*, 96 N. Y. Supp. 814, 818, 110 App. Div. 510.

## HYPOTHECATE

### HYPOTHECATION

"Hypothecation," when applied to maritime transactions, is perhaps about the same as bottomry or respondentia, though it is usually predicated of a loan by the master on the vessel, freight, or cargo, made in order to raise money for the necessities of the voyage, to secure any debt or engagement without a delivery or possession. The shipowner's lien for the carriage of goods, or for freight money, is dependent upon possession. Such lien is not an "hypothecation" of the cargo which will remain a charge upon the goods after the shipowner has parted with possession. *Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co.*, 145 Fed. 687, 692.

The mortgage of a ship on the stocks, raised and building, to be built and completed afterwards, as security for advances made and to be made, without actual possession or delivery, is not available, by way of "hypothecation," against attaching creditors. *Goode-now v. Dunn*, 21 Me. 86, 93.

"Hypothecation" is defined as the "privilege to take and sell by judicial process in order to satisfy your demand." *The Pleroma*, 175 Fed. 639, 640.

## HYPOTHESIS

See *Reasonable Hypothesis*.

## HYPOTHETICAL QUESTION

It is a general rule that "hypothetical questions" put to experts should be based upon the facts which the evidence tends to show. The question need not be based upon conceded facts, nor is technical accuracy required in framing the questions. If they are entirely without the support of evidence, they should be excluded. Ordinarily opposing counsel will not be slow in re-examination of the witnesses to correct the hypothesis upon which the question is based, if it be incorrect. In propounding such a question, counsel may assume the facts in accordance with his theory of them. It is not essential that he state the facts as they exist, but the hypothesis should be based on a state of facts which the evidence tends to prove. Under familiar rules of practice, each side has its theory as to what is the true state of facts, and assumes facts, or can prove them, to the satisfaction of the jury, and, so assuming, shapes "hypothetical questions" to experts accordingly. A "hypothetical question," not entirely accurate in its assumptions, and not assuming all the facts which the evidence in the case tends to prove, yet which is a fair résumé of the facts supported by some evidence which plaintiff's counsel evidently considered as favorable to his version of the case, is not objectionable as being an unfair summing up of the evidence or as eliminating important facts supported by the evidence and including facts not so supported. *Order of United Commercial Travelers of America v. Barnes*, 90 Pac. 293, 295, 75 Kan. 720.

While the question should have for its basis some principle or at least possible theory to be deduced from the evidence in the case, counsel had a right to frame the question to accord with their theory of what the material facts are as shown by that evidence and in so doing may omit facts which from their point of view have no material bearing upon the subject. Where there is evidence in the record of a criminal case of all the facts embodied in a "hypothetical question" asked of a medical expert, an objection that it is not founded on the facts proven by the prosecution is properly overruled, as it is not necessary that the question should embrace all the evidence in the case. *People v. James*, 90 Pac. 561, 562, 5 Cal. App. 427 (quoting and adopting *People v. Hill*, 48 Pac. 712, 116 Cal. 566, and citing and adopting *2 Jones, Ev. § 372*).

## I

A mortgage, though using the pronouns "I" and "my," being signed by both husband and wife, included the wife as well as the husband, though she was not named in the body of the instrument, and was therefore sufficient to cover the grantors' homestead interest in the land. *Bray v. Ellison* (Ky.) 83 S. W. 96, 97.

While the words "I" and "my" in a mortgage ordinarily refer to the actor or speaker, who expresses himself through the draftsman, the connection in which they are used may sometimes make it doubtful to whom they refer, and they will not be considered to have been so used, where the effect would be to burden the mortgagee with a condition which the mortgagor could not impose. *Jones v. Norris*, 60 S. E. 714, 715, 147 N. C. 84.

**I BEAMS**

Certain iron girders used in the construction of buildings are called "I beams." *Louisville R. Co. v. Esselman* (Ky.) 93 S. W. 50, 51; *Detroit United Ry. v. Board of State Tax Comm'rs*, 98 N. W. 997, 999, 136 Mich. 96.

**I BELIEVE**

"The words 'I believe' ordinarily indicate that what follows them is merely the opinion of the witness; but this is not always so. They may be words of caution, in which event the evidence is admissible, notwithstanding the statement may be prefaced by these words." A statement of a witness in relation to an act which took place in his presence: "It seems to me that he closed the door behind him, but I cannot say positively that he did close the door; I was so far away"—is not subject to objection on that ground that it is opinionative. *Mimbs v. State*, 58 S. E. 499, 500, 2 Ga. App. 387.

**I HAVE HEREUNTO SET MY HAND AND SEAL**

My hand and seal, see *My*.

**I MAY POSSESS**

All I may possess, see *All*.

**I THINK**

"There is no rational distinction between the expression 'I think' and 'according to my recollection,' as applied to the testimony of a witness as to the existence of a fact which came within his personal knowledge." *Dublin & S. W. Ry. Co. v. Akerman & Akerman*, 59 S. E. 10, 11, 2 Ga. App. 746.

**I WANT HER TO HAVE**

The phrase "I want her to have," as used in a will which, after describing a certain person, recited, "I want her to have \$3,000

and then I want her to have an equal share with my brothers and sisters," is equivalent to the words "give" or "bequeath." In *re Smith's Estate*, 94 N. Y. Supp. 90, 92, 46 Misc. Rep. 210.

**I WILL**

Decedent executed an instrument reciting: "I hereby grant, bargain, sell, convey and warrant" to G. (his wife) "her lifetime the following described property," and at the end of G.'s life "I will" this property" to B. (a daughter) "all of her lifetime, and after her (B.'s) lifetime said described property goes to her children and their heirs and assigns forever." Held, that the instrument, having been executed and acknowledged as a deed, should have been considered as one and not as a will. It was intended to take effect after death, the phrase "I will" not destroying the character of the instrument as a conveyance, and it should be construed as a conveyance to a succession of donees then living, and to the heirs of the body of the remaindermen, as authorized by Code 1892, § 2436. *Brinson v. Sandifer*, 42 South. 89, 90, 90 Miss. 41.

**I WILL SEE YOU PAID**

Where plaintiff refused to sell lumber to a contractor until defendant stated to plaintiff, "I will see you paid," it imported a collateral promise to answer for the debt of another. *East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Congregation*, 59 Atl. 180, 181, 100 Md. 125.

**ICE**

As commodity, see *Commodity*.

As property, see *Property*.

A contract for the sale of "ice" for the market means merchantable ice. *Campion v. Marston*, 59 Atl. 548, 549, 99 Me. 410.

**ICE COMPANY**

As trading corporation, see *Trading Corporation*.

**ICE CREAM**

A provision of a sanitary code adopted by a city board of health that no owner, lessee, or occupant of any restaurant, etc., which shall purchase milk or cream from any person or corporation not having obtained a license as therein provided, shall use, sell, or dispose of any milk, cream, or ice cream without obtaining a license, only requires a person selling ice cream to obtain a license where it is made from milk or cream purchased from an unlicensed person or corporation, and not where the ice cream itself is so purchased, since, while "ice cream" is mostly cream or milk, it is a manufactured



article with other ingredients, and is not covered by the term "milk or cream." *Syracuse Ice Cream Co. v. City of Cortland*, 138 N. Y. Supp. 338, 339, 153 App. Div. 456.

## ICHTHYOL

Inasmuch as, technically and commercially, the term "ichthyol" includes no other ichthyol compounds than ichthyol ammonium, the unqualified enumeration of "ichthyol" in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199, should not, in the absence of words indicating an intention to include such compounds, be held to include ichthyol sodium. *Merck & Co. v. United States*, 177 Fed. 482, 483.

## IDEA

The word "idea" is frequently used as a substitute for the word "intention," especially by careless talkers. *Lewis v. Paull*, 42 Ala. 136, 144.

## IDEM SONANS

The well-understood meaning of the term "idem sonans" is "sounding the same; substantially identical in sound." *Cleveland, C., C. & St. L. Ry. Co. v. Pierce*, 72 N. E. 604, 605, 34 Ind. App. 188 (quoting *Anderson's Law Dict.* p. 520).

Names are said to be "idem sonans" if the attentive ear finds difficulty in distinguishing them when pronounced, or if a long-continued usage, as by corruption or abbreviation, has made them identical in pronunciation. *State v. Johnson*, 79 Pac. 732, 734, 70 Kan. 861; *Graton v. Holliday-Klotz Land & Lumber Co.*, 87 S. W. 37, 41, 189 Mo. 322 (quoting and adopting rule in *Robson v. Thomas*, 55 Mo. 582); *Title Guaranty & Surety Co. of Scranton, Pa., v. Commonwealth*, 133 S. W. 577, 581, 141 Ky. 570 (citing 4 Words and Phrases, p. 3380).

The rule of "idem sonans" is that absolute accuracy in spelling names is not required in legal documents or proceedings, but that if a name as spelled in the document, though different from the correct spelling thereof, conveys to the ear when pronounced, according to the commonly accepted methods, a sound practically identical with the sound of the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of a clerical error. *Kelly v. Kuhnhausen*, 98 Pac. 603, 604, 51 Wash. 193, 130 Am. St. Rep. 1093; *Davison v. Bankers' Life Ass'n*, 150 S. W. 713, 715, 166 Mo. App. 625 (quoting 4 Words and Phrases, p. 3380).

The foregoing rule also applies where the duty devolves upon the eye instead of the ear to distinguish the names. *Kelly v. Kuhnhausen*, 98 Pac. 603, 604, 51 Wash. 193, 130 Am. St. Rep. 1093.

No matter how names are spelled, if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation, they are "idem sonans." *Macomber v. Kinney*, 128 N. W. 1001, 1005, 114 Minn. 146; *Maier v. Brock*, 120 S. W. 1167, 1172, 222 Mo. 74, 133 Am. St. Rep. 513, 17 Ann. Cas. 673.

Where two names are spelled differently, but sound alike in their pronunciation, they are regarded as the same, under the doctrine of "idem sonans." *Bloomer v. Cristler*, 123 Pac. 966, 967, 22 Colo. App. 238.

Unquestionably the doctrine of "idem sonans" may be invoked to cure immaterial variations in the spelling of a name. But the doctrine is inapplicable unless the combination of letters and syllables produce the same sound as the true name. *Steinman v. Jessee*, 62 S. E. 275, 276, 277, 108 Va. 567.

Whether one name is "idem sonans" with another depends upon pronunciation and not on spelling, and depends less on rule than on usage. The term does not necessarily mean that the two names to which it is applied are pronounced precisely alike but that, when one of them is uttered, it may readily be taken for the other. *Roland v. State*, 56 S. E. 412, 413, 127 Ga. 401 (citing *People v. Flick*, 26 Pac. 759, 89 Cal. 144; *Chapman v. State*, 18 Ga. 736; *Jeffries v. Bartlett*, 75 Ga. 230; *Biggers v. State*, 34 S. E. 210, 109 Ga. 105; *Washington v. State*, 39 S. E. 298, 113 Ga. 698; *Veal v. State*, 42 S. E. 705, 116 Ga. 589).

## IDENTICAL

Where a contract for the sale of onion seed contained a provision that if the seller found that, if "identical" contracts did not exist between the buyer and certain other growers, the contract should become void, and the court found that contracts substantially identical with the contract in question did exist between buyer and others mentioned, the contract was not void notwithstanding verbal conditions in the minor details. "The finding of the court that the other contracts of Braslan were substantially identical with that of the defendants is equivalent to a finding that they were identical in all matters of substance. The meaning of the word 'identical' as here used is to be determined by the context and by the apparent purpose for which it is used. Manifestly it was not the intention of the parties that those other contracts should be identical in date, or in the names of the parties, or in the amount or description of the seed contracted for, but identical merely in matters pertaining to the purpose of the contract and in the terms upon which it was entered into." *Bernard v. Sloan*, 84 Pac. 232-235, 2 Cal. App. 737.

Where a brokers' association adopted a new constitution in a new name, elected new officers, changed the amount of dues, and transferred the assets of the old to the new association, the two associations were not "identical," and hence members of the old association were not ipso facto members of the new. *Konta v. St. Louis Stock Exch.*, 87 S. W. 969, 972, 189 Mo. 28.

## IDENTIFICATION

See Certificate of Identification.

As selection, see Select—Selection.

Imputable negligence is sometimes called "Identification" from analogy to the Roman law. *Duval v. Atlantic Coast Line Co.*, 46 S. E. 750, 751, 134 N. C. 331, 65 L. R. A. 722, 101 Am. St. Rep. 830.

"'Identification' is almost always a matter of opinion or belief." *Germinder v. Machinery Mut. Ins. Ass'n*, 94 N. W. 1108, 1109, 120 Iowa, 614.

## IDENTIFY

A railroad engine which set out a fire near the right of way is "identified" when it is shown to have been the engine which probably caused the fire; it not being necessary that the engine should be known by its number, size, or shape from all other engines, since the identification is not to distinguish it from other engines generally but to point it out as the engine that caused the injury. *Shelly v. Philadelphia & R. Ry. Co.*, 60 Atl. 581, 582, 211 Pa. 160.

Where the stenographer who took the testimony of a witness, since deceased, was also dead at the time the testimony was sought to be used, and no one could be found who could read the stenographer's notes or testify to the correctness either of the notes or to the transcript or to the fact that the transcript embodied the testimony of the witness given at the former trial, it was not "identified," as required by Code Civ. Proc. § 3146, and was inadmissible. *Pew v. Johnson*, 88 Pac. 770, 772, 35 Mont. 173, 119 Am. St. Rep. 852.

## IDENTITY

"'Identity' means the condition of being the same with something described, claimed, or asserted." *City of St. Louis v. Williams*, 139 S. W. 340, 344, 235 Mo. 503 (dissenting opinion by Valliant, J., quoting and adopting definition in *Webst. Dict.*).

### Of association or organization

The word "identity," when applied to associations or organizations formed by agreements between individuals, means the distinctive thing or entity, dependent on the relations formed and which has only a legal existence; and the legal creation, while the

result of a compact in some form among the contracting parties, has an existence distinct from the individuals composing it. *Clark v. Brown (Tex.)* 108 S. W. 421, 439.

### Of name

See *Idem* Sonans.

In order to apply the evidentiary rule that "identity of names" is *prima facie* evidence of identity of persons, the names must be in fact identical, and this identity must extend to the Christian names; mere identity of initials not being sufficient. A marriage certificate showing that George W. Bowman, of Haleystown, Md., then 25 years of age, was married to Catherine McGranagan, of East Harrisburg, Pa., did not prove that such persons were identical with G. Walter Bowman, of Hagerstown, Md., who at that time was 27 years of age, and Catherine Bowman, née McGranagan, who then actually lived in Hagerstown. *Bowman v. Little*, 61 Atl. 223, 226, 101 Md. 273.

### Of patent

Formal "identity" of claims is not necessary to constitute "identity" of a United States and a foreign patent, within the purview of Rev. St. § 4887, providing that no person otherwise entitled shall be deprived from receiving a patent for his invention or discovery by reason of its having been first patented by the inventor or his representatives in a foreign country, unless the application for the foreign patent was filed more than seven months prior to the filing of the application in this country, in which case no patent shall be granted in this country, but substantial identity of the invention as governed by the claims is sufficient. *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, 148 Fed. 31, 34.

### Of time

When there is no date affixed to a guaranty, so that it is left uncertain whether it was written after the instrument guaranteed was executed and delivered, parol proof may be admitted to show "identity of time"; that is to say, that the guaranty was written and signed at the time of the execution and delivery of the note. *Klosterman v. United Electric & Power Co.*, 60 Atl. 251, 252, 101 Md. 29.

## IDIOT—IDIOCY

An "Idiot" or natural fool is one that hath no understanding of his nativity, and therefore is by law presumed never likely to obtain any. A man is not an "idiot" if he have any glimmering of reason, so that he can tell his parents, his age, or the like common matters. An "idiot" is a natural fool or fool from his birth; a human being in form, but destitute of reason or the ordinary intellectual powers of a man; a foolish person; one unwise. An "idiot" is one having no power of mind whatever. "Idiocy" is

that condition of mind in which the reflective, or all, or a part of the affected powers are either wanting or manifested to the least possible extent. "Idiocy" is that condition in which a human creature has never had from birth any, or the least, glimmering of reason, and is utterly destitute of all intellectual faculties in which man in general is so eminently and peculiarly distinguished. *Hauber v. Leibold*, 107 N. W. 1042, 1044, 76 Neb. 706 (citing *In re Owings*, 1 Bland [Md.] 370, 17 Am. Dec. 311; Webster's Dict.; *Bicknell v. Spear*, 77 N. Y. Supp. 920, 38 Misc. Rep. 389; *Bouv. Dict.*; quoting and adopting definition of Blackstone, cited in *Clark v. Robinson*, 88 Ill. 498, 502).

In a prosecution for unlawfully having carnal knowledge with an idiot, the court instructed that an idiot was "a natural fool; a fool from birth; a human being in form but destitute of reason from birth and of the ordinary intellectual power of man," as the word "fool" is defined by Webster to be "one destitute of reason or of the common powers of understanding; an idiot; a natural; a person deficient in intellect; one who acts absurdly or pursues a course contrary to the dictates of wisdom, one without judgment; a simpleton; a dolt." Held, that while the words "a natural fool," "a fool from birth" might well have been omitted, they did not prejudice accused, and the instruction as a whole clearly defined the term "idiot," though it might be more aptly defined as one who has been from birth or infancy deficient in mental capacity, and destitute of the ordinary intellectual powers. *Sandefur v. Commonwealth*, 137 S. W. 504, 505, 143 Ky. 655.

#### Imbecility distinguished

"Imbecility" has been used to denote different grades of mental weakness, but as used in the Code (Civ. Code 1895, §§ 3267, 3268), in respect to testamentary incapacity, it means a complete or total imbecility, with which is being contrasted weakness of intellect less than that. The difference between "imbecility," as thus used, and "idiocy" is generally said to be that the latter is congenital, while the former arises from subsequently causes, such as old age, disease, or accident. *Slaughter v. Heath*, 57 S. E. 69, 73, 127 Ga. 747, 27 L. R. A. (N. S.) 1.

#### As insane person

See Insane—Insanity.

### IDLE

See Loiter, Loaf, and Idle.

The word "idle," used in a fire policy covering a manufacturing plant, refers to the stopping of the machinery and mechanism in general by which the manufacturer is affected. *Brehm Lumber Co. v. Svea Ins. Co.*, 79 Pac. 34, 35, 36 Wash. 520, 68 L. R. A. 109.

### IDLE AND DISORDERLY

The neglect by a married woman of her duties as a wife, whether she is supported by her husband or by some other person, may constitute criminal idleness, as well as her neglect of the duty of earning her own living. A defendant may be convicted of being an "idle and disorderly" person, under Pub. St. c. 207, § 29, including as such "those persons who neglect all lawful business, and habitually misspend their time by frequenting houses of ill fame, gaming houses, or tippling shops," though she was supported by her husband or some other person. *Commonwealth v. Tay*, 48 N. E. 1086, 1087, 170 Mass. 192.

### IDLE AND INOPERATIVE

Certain mining property, consisting of a quartzmill, hoist building, bunkhouse, assay office, and other buildings necessary and constituting a part of the entire system, were insured against fire. The policies specified specific amounts upon the mill and contents, and upon the other buildings and their contents, and contained the following warranties: "Warranted by the assured that at all times when the property herein described shall be 'idle or inoperative,' a constant day and night watchman shall be kept on duty, provided that, if such property be idle or shut down for more than 30 days at any one time, notice must be given to this company and permission to remain idle for such time must be indorsed hereon, or this policy shall immediately cease and determine." "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if a building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied and so remain for ten days." Held: (1) The property described in the policies referred to and included the entire system, and not the particular property specified as the "mill," which, under the evidence, was not shut down and "idle" within the meaning of the warranties. *Central Montana Mines Co. v. Fireman's Fund Ins. Co.*, 99 N. W. 1120, 1122, 92 Minn. 223.

A fire policy on a sawmill and electric light plant, requiring that at all times when the property remained "idle or inoperative" a constant day and night watchman should be kept on duty, and that, if the property was idle or "shut down" for more than 30 days at a time, permission should be obtained and indorsed on the policy. Held, that the words "idle or inoperative" should be construed as synonymous with "shut down," to mean a cessation of operation from the ordinary running of the plant, and not merely the usual shutting down for the night, or over Sunday, or on a holiday; and hence the policy was not broken by the insured's failure to keep a watchman on duty while the plant was temporarily shut down over Sunday.

Tillamook Lumbering Co. v. Liverpool & London & Globe Ins. Co., 175 Fed. 508, 510.

## IDLER

An "idler" is a loose pulley on which a power belt may operate when not used to drive the machine for which it is provided. *Owensboro Wagon Co. v. Polling* (Ky.) 107 S. W. 264, 265; *McCreery v. Union Roofing & Mfg. Co.*, 119 N. W. 738, 739, 143 Iowa, 303.

## IF

Under a will directing that testator's interest in certain property should be divided between two person named, with the provision that if either should die his share should go to the one remaining, if both, to E. or his mother, if living, and then to E., the first two persons named on surviving the testator took a fee, the contingency of their death being referable to the time of testator's death, as she knew the devisees must die at some time, and when she used the word "if" she must have referred to some definite time or occurrence. *Holmes v. Stanhope*, 66 Atl. 146, 147, 217 Pa. 63.

### Condition imported

"The word 'if,' in legal as in ordinary phraseology, imports a condition." In re *Alexander's Estate*, 85 Pac. 308, 309, 149 Cal. 146, 9 Ann. Cas. 1141.

The word "if" is commonly used to express a condition in the case of a conditional limitation. *Matlock v. Lock*, 73 N. E. 171, 178, 38 Ind. App. 281.

### As when

The word "if" in a will may be construed to mean "when" to advance the apparent intention of the testator; and words are not construed as importing a condition if fairly capable of another interpretation, particularly where a construction of the language as importing a condition precedent will defeat the plain intention of the testator. *Hyde v. Rainey*, 82 Atl. 781, 784, 233 Pa. 540, Ann. Cas. 1913B, 726.

### Where synonymous

See Where.

## IF ABLE

The phrase "if able," in Rev. St. c. 18, § 51, providing that, when any person is affected with any disease or sickness dangerous to the public health, the local board of health may remove him to a separate house and there care for him at his charge, if able, relates to the pecuniary ability of the party at the time the expenses were incurred. *Inhabitants of Greenville v. Beauto*, 58 Atl. 1026, 1027, 99 Me. 214.

## IF ANY

Where the court expressly directs the jury to take into consideration the physical pain and mental anguish, "if any," in their

determination of the damages, the words quoted are to be read and implied in all parts of the instruction. *Wells v. Missouri-Edison Electric Co.*, 84 S. W. 204, 207, 108 Mo. App. 607.

The words "if any," as used in Pub. Acts 1903, p. 338, § 50, authorizing creditors and stockholders of an insolvent corporation to apply to the court for the appointment of a receiver, and empowering the court, on its being satisfied from the affidavits, and after such notice to the corporation, if any, as the court may prescribe, to proceed to hear the proof which may be offered by the parties, and if upon such hearing it appears, etc., it may issue an injunction to appoint a receiver, may have reference to those cases of great emergency when it is necessary to appoint a receiver without notice in order to preserve the property from destruction, but such words do not have the effect to dispense with notice in any other cases than those excepted by prior decisions. *Ensley Development Co. v. Powell*, 40 South. 137, 141, 147 Ala. 300.

## IF BY LAW SUCH RECORDING OR REGISTERING IS REQUIRED

The words "if by law such recording or registering is required," in the Bankruptcy Act of 1898, defining a preference, and providing that the four months' period within which a transfer of property of the character defined shall constitute a preference shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required, must mean the same as they would if the words "to make the transfer valid as against the person executing it," or "to make the transfer valid as against the general creditors of the person executing it," were added after the word "required." The word "required" does not mean the same as "permitted" or the same as the words "required in any case or for any purpose." In re *Hunt*, 139 Fed. 283, 286.

## IF DESIRED BY CREDITORS

The words "if desired by the creditors thereof," in a will by a member of a firm giving his property to trustees to use in securing extension or payment of his liabilities as member of the firm or as indorser, providing that such liabilities are intended to be chargeable on the trust estate for the full amount of the obligations of the firm, if desired by the creditors, means if the creditors thereof signify such desire by the presentation of their claims to the trustees. *Smith v. Rhode Island Hospital Trust Co.* (R. I.) 67 Atl. 795, 796.

## IF ESTABLISHED

The words "if established," in an instruction that it is contended by the defendant here that at the time of the commis-

sion of the homicide he was at a place other than the scene thereof, and consequently that it was impossible that he should have committed the same, this particular contention constitutes and is termed in law an alibi and, if established, is a perfect refutation of any crime charged, did not make the instruction insufficient as in effect telling the jury that it rested with the defendant to prove that contention by a preponderance of the evidence, but the words should be construed to mean, as they were manifestly, when read by the light of the other instructions, so intended, that, if the proof in favor of the contention of alibi was of that degree that it would create a reasonable doubt of the defendant's guilt, then such alibi would be established and the accused entitled to an acquittal. *People v. Mar Gin Sule*, 103 Pac. 951, 958, 11 Cal. App. 42.

#### IF FOR ANY REASON

The words "if for any reason" are general. According to Lord Bacon, "all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter and person." Where plaintiff subscribed money for reorganization of a corporation in consideration that he should be given the position of business manager, and should render competent and efficient services, and, if for any reason he should not be given such position, the other parties would purchase his stock, the words "any reason" mean any reason other than the plaintiff's failure to render competent and efficient service. *Hall v. Hardaker*, 55 South. 977, 979, 980, 61 Fla. 267.

#### IF HIS ADDRESS IS KNOWN

The expression, "if his address is known," in Rev. St. 1899, § 10571, providing for a warehouseman giving notice by mail to the owner of goods stored, if his address is known, of sale of the goods for storage, means if his address is known or could be ascertained by reasonable inquiry. *Ward v. Moor Transfer & Storage Co.*, 95 S. W. 964, 965, 119 Mo. App. 83.

#### IF IN ANY CASE

The claim of one whose title under a Mexican land grant is perfect and complete, and who is therefore not bound under the act of March 3, 1891, to apply to the court of private land claims for confirmation, is not cut down to the extent that the land has been patented by the United States to third parties, because he appeared and prayed confirmation in a suit brought against him by the United States under the authority of section 8 of that act, to remove the government's doubt as to title or boundaries, on the theory that the language of section 14, giving that effect to such patents "if in any case" it shall appear that the lands or any part thereof, decreed to any claimant un-

der the act, shall have been sold by the United States, applies not only to the proceeding brought by the claimant himself for confirmation, but also to the proceeding on behalf of the government, in which the court is to determine the matter, subject to all lawful rights adverse to the claimant or possessor, and as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the applicable statutory provisions. *Richardson v. Ainsa*, 31 Sup. Ct. 23, 24, 218 U. S. 289, 54 L. Ed. 1044.

#### IF IT APPEARS

The phrase "if it appears," as used in Code Civ. Proc. § 2623, providing that if it appears to the surrogate that the will was duly executed, and that the testator at the time of executing it was in all respects competent and not under restraint, it must be admitted to probate, is equivalent to a requirement that the fact of competency must be established by sufficient evidence. In re *Goodwin's Will*, 88 N. Y. Supp. 734, 95 App. Div. 183.

"Section 2623 of the Code of Civil Procedure expressly provides that, 'if it appears to the surrogate' that the will was duly executed and that the testator at the time of executing it was, in all respects, competent to make a will and not under restraint," then it must be admitted to probate. "The phrase 'if it appears to the surrogate,' as used in this section, implies that there must be some evidence given tending to show that the person who made the will was competent to make it, and at the time of its execution not under restraint. Evidence is the only way by which a fact can be made 'to appear' to one acting in a judicial capacity." In re *Schreiber's Will*, 98 N. Y. Supp. 483, 484, 112 App. Div. 495.

#### IF NEEDED

In subscribing for corporate stock, defendant agreed to pay the sum in certain installments, beginning on the call of the board of directors, and a specified amount every 60 days thereafter, "if needed," until the whole amount was paid. The prospectus which was made a part of the contract recited that "\$1 per share is to be paid at the time of subscribing, \$1 per share at the call of the board of directors, and \$1 per share every 60 days thereafter, until by sale of the lots of the company such payment should be declared unnecessary by the board of directors." Held, that the words "if needed" did not render the time for payments indefinite. *Williams v. Matthews*, 48 S. E. 861, 862, 103 Va. 180.

#### IF NO AGREEMENT IS REACHED

The words "if no such agreement is reached," in Laws 1901, c. 466, § 1436, providing for condemnation of real estate if no such agreement with the owners thereof is

reached, implies only the absence of agreement, and an attempt to acquire the property by purchase is unnecessary. In re City of New York, 91 N. Y. Supp. 987, 992, 45 Misc. Rep. 184.

#### IF NONE

The words "if none," as applied to a failure of issue, mean an indefinite failure of issue; and so where testator, dying in 1883, devises a farm to his son W. and his heirs, and "if W. has no heir" to F. or next nearest kin, the quoted expression is equivalent to "if W. shall die without issue," and under the rules of construction existing before Act July 9, 1897, imports a general and indefinite failure of issue, so that W., the first taker, will take an estate in fee simple. Horton v. McCall, 82 Atl. 472, 233 Pa. 405.

#### IF POSSIBLE

The qualifying phrase "if possible," in Gen. St. §§ 471, 472, declaring it unlawful for any president, director, etc., or other officer of any banking institution to receive deposits, with knowledge that the bank is insolvent, and making it the duty of every such officer, "if possible," to know the condition of the bank, has application to the discovery of wrong conditions by reasonable examination, and does not serve to excuse the want of all examination by a competent director. In short, the requirement of the statute is that the examination must be made, and must be of such a character as would result in a knowledge of the condition of the bank if such knowledge could possibly, within the range of reasonable frequency and thoroughness, be obtained. Forbes v. Mohr, 76 Pac. 827, 829, 69 Kan. 342.

The lexical meaning of the word "possible" is "capable of being done; not contrary to the nature of things"; and the condition of a contract providing that timber should be cut the first winter, "if possible," as expressed in the words "if possible," is to be interpreted with reference to the thing to be done, the cutting and removing of the trees as timber. Brown v. Bishop, 74 Atl. 724, 729, 105 Me. 272.

#### IF REASONABLE

The words "if reasonable ship," as used in a telegram to a buyer of cattle, reading, "If reasonable ship tomorrow four to six loads marketers," meant that the person addressed was not to buy unless the price was in his judgment reasonable. Western Union Telegraph Co. v. N. Lehman & Bro., 67 Atl. 241, 242, 106 Md. 318, 14 Ann. Cas. 736.

#### IF RESIDING IN THE COUNTY

The words "If residing in the county," as used in Civ. Code Prac. § 53, providing that, "If defendant be of unsound mind the summons must be served on him and on one of the following named persons, if residing in the county, viz.: \* \* \*"—refer to the

county where defendant is when served. Bayne v. Stratton, 115 S. W. 728, 730, 131 Ky. 494.

#### IF SATISFIED

Domestic Relations Law, Laws 1896, p. 227, c. 272, § 63, provides that "if satisfied" that the moral and temporal interest of the child will be promoted thereby, the judge or surrogate must make an order allowing and confirming an adoption, reciting the reasons therefor, etc. Held, that the words "if satisfied," at the beginning of the section, constituted a clear grant of discretionary power. In re Ward's Estate, 112 N. Y. Supp. 282, 284, 59 Misc. Rep. 328.

#### IF SHE REMAINS UNMARRIED

Under a statute providing that the words in a will referring to death or survivorship relate to the time of testator's death, unless possession is actually postponed, when they must be referred to the time of possession, a provision in a will providing that testator's child, "if she remains unmarried," should have all that belonged to testator refers to the date of testator's death. In re Alexander's Estate, 85 Pac. 308, 309, 149 Cal. 146, 9 Ann. Cas. 1141.

#### IF SURVIVING

The words "if surviving," relating to the beneficiary in a life insurance policy, did not change the nature or character of the interest of the beneficiary as long as the beneficiary lived, but only affected the question of who was entitled to the money in case the beneficiary died before the assured. Where a particular person is named in a policy, without any such or similar words of qualification, the interest of the beneficiary is a vested interest; and this being so, if the beneficiary dies before the assured, that vested interest passes to the legal representatives of the owner of such vested interest, and the interest is not divested or impaired by reason of the death of the beneficiary. Where a life policy provided that it was to be paid, upon the death of the insured, to his daughter, "if surviving," if not, to his legal representatives, the daughter had a vested interest upon the issuance of the policy, liable to be defeated by the happening of a condition subsequent; and the legal representatives had a contingent interest, depending upon the divestiture of the daughter's vested interest, which they were required to prove before they were entitled to the proceeds of the policy. United States Casualty Co. v. Kacer, 69 S. W. 370, 373, 169 Mo. 301, 58 L. R. A. 436, 92 Am. St. Rep. 641 (citing Cent. Dig. p. 2391, § 1470 et seq.).

#### IF THEN LIVING

See Then Living.

#### IF TITLE IS TAKEN

Defendant then not having title to certain real estate contracted with a broker

that if he sold the same, the broker should be entitled to receive \$150 commission, "if title is taken." Held, that the phrase quoted should be held as a matter of law to refer to the taking of title by the purchaser obtained by the broker and not to the taking of title by defendants from the person from whom they were to derive title. *Thiel v. Schonzeit*, 93 N. Y. Supp. 383, 384, 104 App. Div. 151.

#### IF YOU FIND

Instructions are predicated upon the supposition that the jury finds certain facts to be proved or disproved. To accomplish the purpose of an instruction, the formal words "if you shall believe from the evidence" or "if you shall find from the evidence" and the like are employed in written instructions by trial courts to direct and convey to the minds of the jury that they are to found their findings on the particular evidence of the case, and, to require them to directly regard the testimony for such purposes, the use of the term "if you so find" in an instruction that "if you so find that plaintiff was guilty of contributory negligence," etc., was not objectionable as tending to lead the jury to believe that in the court's opinion the evidence established the existence of certain facts or the relative weight and value of the evidence upon any issue. The expression is a formal use of words obviously intended and meaning to direct and require the attention of the jury to the evidence tending to prove or disprove the particular facts. *St. Louis Southwestern R. Co. of Texas v. Cleland*, 110 S. W. 122, 125, 50 Tex. Civ. App. 499.

#### IF WHEN

The words "if when," in N. Y. Code Cr. Proc. § 143, relating to limitations and providing that, "if when" a crime is committed the defendant is out of the state, an indictment may be found within the term therein limited, etc., show that the paragraph is a dependent sentence, depending upon something that has preceded it to determine its meaning, and is to be construed with section 142, providing terms of limitation. *People v. Sewell*, 107 N. Y. Supp. 382, 384, 56 Misc. Rep. 250.

### IGNORANCE

"Ignorance" is lack of knowledge. *Scott v. Ford*, 80 Pac. 899, 900, 45 Or. 531, 68 L. R. A. 469 (quoting *Bouv. Law Dict.*).

#### IGNORANCE OF FACT

"Ignorance of fact" is the want of knowledge of the fact in question. Ignorance of fact must be excusable; that is, it must not arise from the intentional neglect of the party to investigate them. An error of fact takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist.

This has been denominated "*ignorantia facti*," thus indicating, in practical effect at least, that an error of fact and an *ignorantia facti* are substantially one and the same thing. *Scott v. Ford*, 80 Pac. 899, 900, 45 Or. 531, 68 L. R. A. 469 (quoting and adopting *Bouv. Law Dict.*; *Mowatt v. Wright* [N. Y.] 1 Wend. 355, 360, 19 Am. Dec. 508; *Hurd v. Hall*, 12 Wis. 135, 138).

#### IGNORANCE OF LAW

See, also, Knowledge of the Law.

The maxim, "*Ignorantia juris neminem excusat*," does not apply to a matter of law arising on the doubtful construction of a grant. *New York & Cleveland Gas Coal Co. v. Graham*, 75 Atl. 657, 660, 226 Pa. 348.

"It is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." *Barlow v. United States*, 7 Pet. 404, 411, 8 L. Ed. 728.

The maxim "ignorance of the law excuses no one" has not been applied in Kentucky with the rigor that it has been applied elsewhere, and the doctrine has never been carried further than that where one pays money under a mistake as to his legal liability therefor, which in law, honor, or conscience ought not to be retained, it ought to be recovered back. A widow who is given anything by her husband's will must renounce it within one year from probate unless the time be extended by the chancellor, or she will be deemed to have accepted its provisions and precluded from claiming her dotal or distributive share of the estate, though she may have been ignorant of her rights. *Logsdon v. Haney* (Ky.) 74 S. W. 1073.

"*Ignorantia legis neminem excusat*" is a rule of necessity and is limited in its scope by the reason of it. Such reason is that otherwise mere ignorance in fact of the law would furnish immunity from punishment for violation of the Criminal Code and immunity from liability for actual loss for violations of personal and property rights. *Topolewski v. Plankinton Packing Co.*, 126 N. W. 554, 561, 143 Wis. 52.

"It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse. In addition there ought to be no negligence in attempting to discover the facts." *Utermehle v. Norment*, 25 Sup. Ct. 291, 197 U. S. 40, 55, 49 L. Ed. 655, 3 Ann. Cas. 520.

"Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law." *Rey-*

nolds v. United States, 98 U. S. 145, 167, 25 L. Ed. 244.

### IGNORANT

In law, the name of a person consists of one given name and one surname; the two, using the given name first and the surname last, constituting such person's legal name; and to be ignorant of either the given or surname is to be ignorant of the person's name within Code Civ. Proc. § 148, providing that when plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and that, when his true name is discovered, the pleading or proceeding may be amended accordingly, and that plaintiff must state in the verification of his petition that he could not discover the true name, and the summons must contain the words "real name unknown" and a copy thereof be personally served upon defendant. *McNamara v. Gunderson*, 131 N. W. 183, 184, 89 Neb. 112.

### ILLEGAL—ILLEGALLY

Where the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is to act "illegally," or if the tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts "illegally," but, if a discretion is conferred on the tribunal, its exercise cannot be illegal, nor, if it is clothed with authority to decide on facts submitted to it, can its decision be illegal, whatever it may be, if the subject-matter and the parties are within its jurisdiction. *Iowa Loan & Trust Co. v. District Court in and for Polk County*, 127 N. W. 1114, 1116, 149 Iowa, 66.

If a tribunal, when determining matters within its jurisdiction, proceeds contrary to law, it acts "illegally," within Code, § 4154, so that certiorari will lie; but if a discretion is conferred upon the inferior tribunal, its exercise cannot be illegal. *Finn v. Wineshiek Dist. Court*, 123 N. W. 1066, 1068, 145 Iowa, 157.

Under Rev. St. 1895, art. 3397, empowering any court of competent jurisdiction to adjudge a local option election to be void when it is made to appear from the evidence that the election was "illegally or fraudulently conducted," an election was "illegally," though not "fraudulently," conducted where a sufficient number of merely illegal votes were cast to affect the result. *Whaley v. Thomason*, 93 S. W. 212, 214, 41 Tex. Civ. App. 405.

### ILLEGAL ASSESSMENT

The "illegal assessments" for which a party has a remedy by petition under the provisions of section 1542, Rev. St., are as-

sessments wherein, independently of the exercise of a discretion as to value, there appears error in matter of law, the remedy given by the statute does not extend to individual assessments made by a tax assessor where the alleged illegality is confined entirely to, or results solely in an excessive valuation of the property, whether such excessive valuation resulted from an erroneous exercise of judgment as to value or from the adoption of an erroneous principle in placing value. *Jackson County v. Thornton*, 33 South. 291, 292, 44 Fla. 610 (citing *Shear v. Commissioners*, 14 Fla. 146).

### ILLEGAL COMBINATION IN RESTRAINT OF TRADE

A resolution of the New York Stock Exchange, a voluntary association organized to furnish facilities to its members in buying and selling stocks and bonds for others on commission, which prohibits any member from transacting any business with or for any member of a rival exchange, not adopted through any bad motives, but to protect its own interests, is not an "illegal combination in restraint of trade," in violation of Laws 1899, p. 1514, c. 690. *Heim v. New York Stock Exch.*, 118 N. Y. Supp. 591, 593, 64 Misc. Rep. 529.

### ILLEGAL CONTRACT

Where a contract under which a municipality obtains property is not only void, but is prohibited as bad in itself, it is illegal, being an agreement with an unlawful object, the property cannot be recovered back, as in case of a mere void contract; but a contract, made by the town council of Ft. Deposit for the purchase of property for about \$4,000, while void for want of ratification by the electors, under Ft. Deposit Charter (Acts 1890-91, pp. 594, 598; Acts 1896-97, pp. 972-974, 1265-1267), providing that no contract for the purchase of real or personal property above the amount of \$1,000 shall be valid without ratification of the electors, is not illegal, and a seller may in appropriate proceedings recover back his property. *General Electric Co. v. Town of Ft. Deposit*, 56 South. 802, 804, 174 Ala. 179.

### ILLEGAL FEE

The term "illegal fees," as used in a statute providing for the punishment of an officer charging and collecting illegal fees, is not limited to fees obtained from any specific source or sources, nor that are charged and collected by an officer who is authorized by law to collect fees for specific services, but includes also illegal fees collected from the state, county, or municipality by a public officer for private gain, as well as those collected from a private individual. *Skeen v. Craig*, 86 Pac. 487, 491, 31 Utah, 20.

### ILLEGAL OFFICIAL ACT

Any illegal official act, see *Any*.



**ILLEGAL VOTE**

The phrase "illegal votes," in an action to contest an election, alleging generally that "illegal votes" were cast and counted, does not sufficiently show why the votes cast were illegal, as to whether they were voted by persons who were not residents or by persons who had theretofore voted at the same election, and amounts only to a conclusion of law, and the pleader should state the facts from which, if true, the court can say and find that the votes were illegal in law. *Robertson v. Board of Com'rs of Grant County*, 79 Pac. 97, 99, 14 Okl. 407.

The term "illegal votes," as used in Cal. Code Civ. Proc. § 1111, subd. 4, authorizing an election contest on account of illegal votes, clearly includes votes cast by persons not privileged to vote and votes not entitled to be counted because not cast in the manner provided by law, and it is equally clear that a vote is not illegal because of the commission by the candidate or the election officers of any impropriety or offense, without the participation of the voter. *Bush v. Head*, 97 Pac. 512, 514, 154 Cal. 277.

**ILLEGALITY**

Illegality is predicable of radical defects only, and signifies that which is contrary to the principles of the law, as distinguished from mere rules of procedure. It denotes complete defects in the proceedings. *State v. Norton*, 48 S. E. 464, 465, 69 S. C. 454.

**Ultra vires distinguished**

"The words 'ultra vires' and 'illegality' represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other; for example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the board of directors and under the corporate seal for the building of a church, or college, or an almshouse would be clearly ultra vires, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be ultra vires; but no wrong would be committed, and no public interest violated. So a manufacturing corporation may purchase ground for a schoolhouse, or a place of worship for the intellectual, religious, and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are, in themselves, benevolent and praiseworthy. So a church corporation may deal in exchange. This, although ultra vires, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business." *Arkansas Valley*

*& W. R. Co. v Farmers' & Merchants' Bank*, 96 Pac. 765, 767, 21 Okl. 322.

**ILLEGITIMATE**

**ILLEGITIMATE CHILD**

At common law an "illegitimate child" was the child of no one, "filius nullius," or filius populi, not even entitled to a name unless he gained one by reputation. In *re Garr's Estate*, 86 Pac. 757, 760, 31 Utah. 57.

In *Burns' Ann. St. 1901*, § 2630a, which provides that an illegitimate child or children of any man dying intestate, and having acknowledged such child or children during his lifetime as his own, shall inherit his estate, and shall be deemed to be the heir or heirs of such intestate in the same manner as if such child or children had been legitimate, except that the section shall not apply where the father left surviving legitimate children or descendants of legitimate children, the words "illegitimate child or children" included grandchildren who were the lawful descendants of such illegitimate child or children, so that where the father of a bastard son and daughter, both of whom he had duly recognized, died without legitimate children, the children of the daughter, who predeceased the father, were entitled to share with the son in the father's realty. *Morin v. Holliday*, 77 N. E. 861, 863, 39 Ind. App. 201.

M. and F., slaves, cohabited as husband and wife, and there was born to them J. Thereafter M. cohabited with H., a slave, and there was born to them W. and S. At a still later date M. cohabited with P., a slave, and there were born to them three children. J. alleged that his mother and father, F. and M., lived together as husband and wife after their emancipation, and that he thereby became their legitimate child. *Cobbey's Ann. St. 1907*, § 4932, provides that, if an illegitimate child shall die intestate without issue, his estate shall descend to his mother, or, in case of her decease, to her heirs at law. Held, that W. was an illegitimate child, whose estate must be disposed of as such; that S., his full brother, if living, under section 4932, would take the estate as the sole heir of his mother, but as he was not living his children represented him and took as his representatives; that the children born to M. and P. were without interest in the estate; and that J., the child of M. and F., was without interest in the estate, whether legitimate or illegitimate. *Speese's Heirs v. Shores' Estate*, 116 N. W. 493, 494, 81 Neb. 593.

**As issue**

See Issue (Descendants); Lawful Issue.

**As next of kin**

See Next of Kin.

**As child**

See Child—Children (In Wills).

**As heir**

See Heirs.

**As kindred**

See Kindred.

**ILL FAME**

See House of Ill Fame; Reputed House of Ill Fame.

**ILL-GOVERNED**

A house is "ill-governed," within the meaning of the statute, creating the offense of keeping a common, ill-governed, and disorderly house, if it be habitually not well-governed; that is, if the law be habitually not there observed. *Walt v. People*, 104 Pac. 89, 91, 46 Colo. 136.

**ILLCIT COHABITATION**

"Illicit cohabitation" is a crime at common law. It is not committed by a single act, or even occasional acts, of intercourse. There must be a living together. This living together need not be for any particular length of time, even a single day has been held sufficient. But there must be a cohabitation, an abiding together. There must be that familiar and easy relationship between the parties which characterizes the relation of husband and wife. If this relationship is shown, no matter what other may also at the same time exist, the parties are guilty. The question always is upon all the evidence whether the relationship was such as to induce the belief that they were dwelling together as husband and wife, each receiving from the other such sexual privileges as usually arise out of that relationship. *State v. Cassida*, 72 Pac. 522, 523, 67 Kan. 171 (citing and adopting *Hall v. State*, 53 Ala. 463).

**ILLINOIS CLASSIFICATION**

See Governed by Illinois Classification.

**ILLNESS**

See Serious Illness; Severe Illness or Sickness.

"Illness," as used in Pen. Code 1895, § 964, providing that the illness of counsel, when there is but one, or of the leading counsel, when there is more than one, is a sufficient ground for a continuance, is, as defined in Century Dictionary, an attack of sickness; an ailment; malady or disease. "The illness of counsel contemplated by the law is such a physical condition, resulting from sickness, malady, or disease, as would prevent counsel from properly attending to his duties as

such. It does not mean any mere indisposition, but indisposition of such character as to disqualify a person from the discharge of those delicate and responsible duties which devolve upon counsel in the trial of a case. The determination of whether such an illness in fact exists as is contemplated by the law is reposed in the trial judge before whom the motion for a continuance is made. If the counsel who is ill is absent, evidence should be heard as to his condition, and, where the condition of counsel is in question, the court is authorized to determine this question like all other questions of fact submitted to its decision. If counsel who makes the motion is himself present in court, making and urging the motion in his own proper person, the judge may determine the question by the condition of counsel as it appears to him. Especially would this be the case where counsel had been engaged for a number of days in the trial of other cases before the same judge, who was thus enabled to determine by a trial, in the nature of a trial by inspection, whether counsel's condition on the day the motion is made is essentially different from what it was on other days when he was actively engaged in the conduct of other cases, without complaint as to physical inability. The judge based his refusal to continue the case upon the ground that the energy, activity, and general appearance of counsel at the time that he made the motion was such as to impress him with the fact that, while counsel might have been laboring under an indisposition from cold and work in the other cases, he was still mentally and physically competent to discharge the duties incumbent upon him in the coming trial. The judge states that this impression, made at the time that the motion was made, was emphasized and confirmed by the able manner in which counsel conducted the case through a tedious trial of three days. In addition to this, if the statement of counsel as to his condition is considered in its entirety, it is apparent that he was not ill at all within the sense of the statute. He had a slight cold, probably some huskiness in his voice; but he was suffering under no attack of sickness, disease, or malady, within the meaning of the word 'illness' as it is ordinarily understood. He was merely tired, and this condition of body and mind is not sufficient to postpone the trial of a case, unless it reaches the point where mind and body are so exhausted that the duty in hand cannot be performed with justice to those to whom the duty is due. All who have ever been engaged in the practice of law can appreciate that counsel very often are required to perform their duties when they are physically and mentally tired; but the business of the courts would become blocked if such a condition was recognized as a ground for continuance, when the tired condition of counsel was short of exhaustion,

mental or physical. During a term of court continuing for two weeks, counsel, who are engaged in every case that is tried during that time, of course become tired and more or less exhausted. The same is true of the judge and the jurors, and all others upon whom the responsibility of the administration of the law rests. But a case must not be postponed on account of the physical condition of counsel being affected by the work in the line of his profession or otherwise, unless the physical condition brought about by the work is such that further effort would imperil his health, or an attempt to perform the duty under the circumstances would result in injustice to those interested in the performance of a duty owed to them. This matter, as all matters relating to the continuance of cases upon similar grounds, is addressed to the discretion, judgment, and humanity of the trial judge, and nothing appears in the record which authorizes us to say that this discretion has been abused in the present case." *Rawlins v. State*, 52 S. E. 1, 11, 12, 124 Ga. 31.

A general question in an application for life insurance, calling for information concerning former illnesses, does not require the disclosure of an illness of a trifling, temporary, or unimportant nature. *Gruber v. German Roman Catholic Aid Soc. of Minnesota*, 129 N. W. 581, 582, 113 Minn. 340.

Illness, when applied to the warranty of an insured in a life policy, that he was of sound health, and had never had consumption, means a disease of such a character as to affect the general soundness of the system, and not a mere temporary indisposition which does not undermine and weaken the constitution. *Schofield's Adm'x v. Metropolitan Life Ins. Co.*, 64 Atl. 1107, 1110, 79 Vt. 161, 8 Ann. Cas. 1152.

Under Civ. Code, § 3533, which states the maxim that the law disregards trifles, an insurance policy was not invalidated by answers of the insured, in her application, that she had not been confined to her house by illness or consulted a physician since childhood, though, about two years prior to the application, she had been confined to the house by an acute cold, causing suppressed menstruation and a soreness and congestion of the womb, at which time a physician paid her one visit, as "illness" contemplated in the application is a disease or ailment which affects the soundness and healthfulness of the system. *Poole v. Grand Circle, Women of Woodcraft*, 123 Pac. 349, 350, 18 Cal. App. 457.

An application for an accident policy warranted that insured had never received indemnity for any accident or "illness," except a specified sum for a sprained ankle. He had in fact previously had an operation for chronic appendicitis for which he had

received from another insurance company an indemnity of \$225 for the time he was absent from his work. Held, that since the term "illness" is defined as a disorder of health, or sickness, meaning a disease, or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition which did not tend to undermine or weaken insured's constitution, whether the operation for chronic appendicitis was an illness within such definition was for the jury. *Miller v. Maryland Casualty Co.*, 193 Fed. 343, 349, 113 C. C. A. 267.

The word "illness," as used in a question in connection with an application for insurance, "Give full particulars of any illness you may have had since childhood," is open to interpretation. No man ought to give lasting regard to all his little ailments, bruises, aches, and pains. He cannot fix them in his memory if he would. They do not affect the risk in life insurance, and the insuring company cares nothing about them. Therefore illness clearly means something more than a temporary indisposition, slight and trivial in its nature, and which does not really affect the soundness of the system, substantially impair the health, materially weaken the vigor of the constitution, or seriously derange the vital functions. *Metropolitan Life Ins. Co. v. Brubaker*, 96 Pac. 62, 64, 78 Kan. 146, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267.

## ILLUSORY APPOINTMENT

"Where, by the terms of an instrument, a power is given to appoint property to or among certain persons, the amount that each is to receive being left to the discretion of the donee of the power, and where none of the beneficiaries can be excluded, and where a mere nominal share is appointed to one or more of them, such an appointment is termed 'illusory.'" The doctrine of "illusory appointment" will not be adopted to invalidate the execution of a power of appointment under which merely nominal shares were given to several of the objects of the power which left what each should take to the donee's discretion. *Hawthorn v. Ulrich*, 69 N. E. 885, 887, 207 Ill. 430 (quoting and adopting definition in 1 Bouv. Law Dict. p. 769).

## ILLUSTRATION

See Pictorial Illustration.

## IMBECILE

An "imbecile," as the term is ordinarily used and understood, is one who is mentally weak rather than insane. *Caple v. Drew*, 78 Pac. 427, 429, 70 Kan. 136.

An "imbecile" is defined as one destitute of strength either of body or mind; one who is weak, feeble, impotent, decrepit. "Imbecility" is defined as the quality of being imbecile; feebleness of body or mind. An "imbecile" is neither a lunatic nor an idiot. The word, however, is not of exact meaning, and imbecility is not a disqualification for making a will providing the testator has the capacity which the courts require and that is not determined by any mere generalization of the testator's capacity, but is to be determined from his acts in reference to the particular business in hand. *McGown v. Underhill*, 101 N. Y. Supp. 313, 316, 115 App. Div. 638.

"An 'imbecile' is neither a lunatic nor an idiot. He is defined as one destitute of strength either of body or mind; one who is weak, feeble, impotent, decrepit. \* \* \* It is not a word of exact meaning. \* \* \* Imbecility, as distinguished from idiocy or lunacy, is usually incident to extreme age, and is generally the result of a gradual decay of the mental faculties." *Barnes v. Waterman*, 104 N. Y. Supp. 685, 691, 54 Misc. Rep. 392 (quoting and adopting definition in *McGowan v. Underhill*, 101 N. Y. Supp. 316, 115 App. Div. 642; *Messenger v. Bliss*, 35 Ohio St. 587, 592; 22 Cyc. p. 1112).

The adjective "imbecile," as used in Pub. Acts 1895, p. 667, c. 335, providing that no man or woman, either of which is epileptic, imbecile, or feeble-minded, shall intermarry or live together as husband and wife when the woman is under 45 years of age, is used with an uncertain meaning. The word does not clearly indicate an idiot or a person non compos mentis, for such a person cannot marry by reason of his incapacity to give the requisite assent. Does the Legislature mean by imbecile or feeble-minded person one who has been reduced to a condition of imbecility or feeble-mindedness through epilepsy, or by an epileptic person one whose disease has taken the form of imbecility or feeble-mindedness? It is suggested that the Legislature had in mind a bodily condition which often descended from parent to child. The provisions of the act imply this, but the implication extends as well to the adjectives "imbecile" and "feeble-minded" as to the adjective "epileptic." *Gould v. Gould*, 61 Atl. 604, 612, 78 Conn. 242, 2 L. R. A. (N. S.) 531.

### IMBECILITY

See Corporal Imbecility.

"Imbecility" has been used to denote different grades of mental weakness, but as used in the Code (Civ. Code 1895, §§ 3267, 3268), in respect to testamentary incapacity, it means complete or total imbecility, with which is being contrasted weakness of intellect less than that. The difference between "imbecility," as thus used, and "idiocy" is generally said to be that the latter is con-

genital, while the former arises from subsequent causes, such as old age, disease, or accident. *Slaughter v. Heath*, 57 S. E. 69, 73, 127 Ga. 747, 27 L. R. A. (N. S.) 1.

### IMITATION

See Colorable Imitation.

### IMITATION BUTTER

The words "in imitation of," used in St. 1898, § 4607c, as amended by Laws 1901, p. 185, c. 151, making it an offense to sell certain articles "in imitation of yellow butter," imply a conscious imitation in the manufacture thereof. *Meyer v. State*, 114 N. W. 501, 504, 134 Wis. 156, 14 L. R. A. (N. S.) 1061.

### IMITATION LACE

Collars and cuffs composed of braids sewn together and ornamented with cords and threads held dutiable as "wearing apparel \* \* \* in imitation of lace," under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181. It is not necessary that articles coming within this provision should be imitation lace as known to the trade. *United States v. D. S. Hesse & Bro.*, 158 Fed. 407, 85 C. C. A. 517.

### IMITATION MALT LIQUOR

To sell, give away, barter, or otherwise furnish an "imitation" or "substitute" for malt liquor does not constitute an offense against the laws of Oklahoma, unless such imitation or substitute contains as much as one-half of 1 per centum of alcohol, measured by volume. *Ex parte Hunnicutt*, 123 Pac. 179, 185, 7 Okl. Cr. 213.

### IMITATION MAPLE SUGAR

Rev. Laws, c. 75, § 16, provides that no person shall sell any article of food which is adulterated. Section 17 defines the term "food" to include all articles, simple, mixed, or compound, used in food or drink by man, and section 18 declares that food shall be deemed adulterated if any substance has been mixed with it, so as to reduce, depreciate, or injuriously affect its quality, strength, or purity, or if an inferior or cheaper substance has been substituted for it wholly or in part, or if it is an imitation of or sold under the name of another article, but that such provisions shall not apply to mixtures or compounds not injurious to health and which are recognized as ordinary articles or ingredients of articles of food, if every package sold or offered for sale is distinctly labeled as a mixture or compound with the distinct name of each ingredient therein. Held, that blended maple sugar "part maple and part granulated," itself a well-known article in the trade as a commercial unit of food bought and sold as such, was neither an adulterated food nor an imitation within the statute. *Adams v. New*

England Maple Syrup Co., 97 N. E. 85, 86, 210 Mass. 475.

### IMITATION PARCHMENT

Grease-proof paper, used chiefly for wrapping meat, butter, lard, and other oleaginous substances, and which, though it can be printed upon, is not suitable as printing paper for books and newspapers, is known as "imitation parchment," and is not dutiable as printing paper under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 396, 30 Stat. 187. *Germania Importing Co. v. United States*, 142 Fed. 215.

### IMITATION PRECIOUS STONES

"An 'imitation of precious stone' may be a manufacture of glass, but the latter is not necessarily an imitation of a precious stone, or, more narrowly, an imitation of a precious stone within the meaning of a tariff statute. Every resemblance would not make such imitation, and the suggestion of the counsel for the United States is not without its weight, that the capability and purpose of setting must be considered." *United States v. Morrison*, 21 Sup. Ct. 195, 179 U. S. 456, 461, 45 L. Ed. 275.

Pierced imitation pearls are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189, relating to "beads of all kinds, not threaded or strung," rather than under paragraph 435 (30 Stat. 192), as imitations of precious stones. *United States v. Weinberg*, 139 Fed. 1006.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192, for imitations of precious stones, held to cover imitation whole and half pearls, including such as have been strung on wire for purposes of manufacture. *United States v. Weinberg*, 139 Fed. 1006.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192, for imitation precious stones not exceeding an inch in "dimensions" does not exclude stones exceeding an inch in a single dimension. To be excluded they must exceed an inch in more than one direction. *Albert Lorsch & Co. v. United States*, 146 Fed. 379, 76 C. C. A. 651.

Lenses not ground and polished but molded to a spherical form are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 109, 30 Stat. 158, as "imitation precious stones." *United States v. Robinson*, 140 Fed. 968, 969.

### IMITATION ROSES

Dutiable as artificial flowers, see Artificial Flowers.

### IMITATION SILK

Imitation silk yarn, which is made from cotton waste, subjected to a chemical process, whereby it loses its identity as cotton,

and which resembles silk yarn in quality, texture, and use, is held, by virtue of the similitude clause in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205, to be dutiable at the rate applicable to silk yarn, under paragraph 385 of said act (chapter 11, § 1, Schedule L, 30 Stat. 185). All yarns of this character, whether made from silk waste or from cotton waste, are known as "imitation silk," and the fabric woven therefrom is known as "nearsilk." *Von Bernuth v. United States*, 133 Fed. 800, 801.

### IMMATERIAL

See Irrelevant, Immaterial, and Incompetent.

"Immaterial" is defined by Webster to mean "unimportant," "without weight or significance." *Faulkner v. Bridget*, 86 S. W. 483, 484, 110 Mo. App. 377.

The words "material" and "not material" are absolutely contradictory in that they exclude all middle ground and together include everything thinkable. *Bennett v. Ware*, 61 S. E. 546, 550, 4 Ga. App. 293 (dissenting opinion by Powell, J.).

### IMMATERIAL ALLEGATION

Concerning the rule which governs what may be termed "immaterial allegations," and distinguishes them from mere surplusage, it is said that: "The statement of immaterial or irrelevant matter or allegations is not only censured, as creating unnecessary expense, but also frequently affords an advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary. It is therefore of the greatest importance in pleading to avoid any unnecessary statement of facts, as well as proximity in the statement of those which may be necessary. If a party take unto himself to state in pleading a particular estate, where it was only required of him that he should show a general or even a less estate, title, or interest, the adversary may traverse the allegation, and, if it be untrue, the party will fail." 1 Chit. Pl. p. 325, § 252. The meaning of "immaterial" is that the thing pleaded is unnecessary to plaintiff's action; that he could have succeeded without reference thereto; but, when he sees fit to set forth such matter, then it becomes material. It is an immaterial thing made material by the act and choice of the pleader. *Dunlap v. Kelly*, 78 S. W. 664-666, 105 Mo. App. 1.

### IMMATERIAL MATTER

The phrases "immaterial matters" and "collateral attendant facts" are primarily not absolutely synonymous, for collateral attendant facts may be material; but, when used in an instruction, where the phrase

"collateral attendant facts" is placed in antithesis to the phrase "material facts," they by every fair rule of construction become, for the nonce, equivalent in meaning. *Blanchard v. State*, 69 S. E. 313, 8 Ga. App. 419.

## IMMEDIATE

See Within Immediate Knowledge.

See, also, Remote—Remoteness.

The word "immediate," strictly construed, excludes all intermediate time. It has been held to mean "within such convenient time as is required for doing the thing." *Inhabitants of Robbinston v. Inhabitants of Lisbon*, 40 Me. 287, 288.

The condition precedent on which one who has made a contract of sale of groceries accepts the buyer's offer to cancel the contract and turn the goods over to another, that he have an "immediate" wire routing, is not performed by the sending of a telegram after a day had elapsed. *Van Camp Packing Co. v. Smith, Rouse & Webster*, 61 Atl. 284, 285, 101 Md. 565.

A policy indemnified a telephone company against damages to any person not employed by the assured from the operation of the telephone plant. It was stipulated that the policy should not cover loss from liability for injuries suffered otherwise than during "the immediate doing of the work of construction." The telephone company while putting up a line trimmed a tree on the land of a third person. The owner refused to permit the trimming of the remaining trees unless the tree already cut was trimmed as he desired. While the employees of the telephone company were trimming the tree a person not employed by the company was accidentally killed, and the telephone company was compelled to pay for his death. Held, that the accident happened during "the immediate doing of the work of construction," and the indemnity company was liable. *Camden & Atlantic Telephone Co. v. United States Casualty Co.*, 75 Atl. 1077, 1078, 227 Pa. 242.

### As direct

See Direct.

### As instantaneous

Under Insolvency Act (St. 1880, p. 83, c. 87), § 7, providing that a copy of the order adjudicating one insolvent and appointing a time and place for a meeting of creditors shall be served "forthwith" by mail on all creditors, proof that the order was mailed four days after its making, but prior to the first publication thereof in a newspaper, and more than 30 days before the time fixed for the creditors' meeting, shows a compliance with the statute; the term "forthwith," like the term "immediate," not being construed as a time immediately succeeding, without

an interval. *Newlove v. Mercantile Trust Co. of San Francisco*, 105 Pac. 971, 976, 156 Cal. 657.

### As word of causation

In an accident policy agreeing to pay a certain indemnity for the immediate continuance and total loss of time necessarily resulting from injuries, the word "immediate" will be construed as applying to causation, and not to time. *Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 176, 34 Ind. App. 243.

### Proximate synonymous

"Proximate" is synonymous with "immediate." *Texas & P. R. Co. v. Coutourie*, 135 Fed. 465, 473, 68 C. C. A. 177 (citing *And. Law Dict.* 155).

The words "proximate" and "immediate" are synonyms and are each the antonym of "remote." *Herke v. St. Louis & S. F. R. Co.*, 125 S. W. 822, 823, 141 Mo. App. 613.

In instructions as to the causal connection between defendant's negligence and plaintiff's injury, the use of the word "direct," instead of the word "proximate," is not error; the word "proximate" being synonymous with "direct" and "immediate." *Sivertson v. City of Moorhead*, 138 N. W. 674, 675, 119 Minn. 467.

## IMMEDIATE AMENDMENT

In the statute providing that, where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs, the words "immediate amendment," by necessary implication, exclude the necessity for service and further hearing. *Malonchi v. Nicholini*, 82 Pac. 1052, 1053, 1 Cal. App. 690.

## IMMEDIATE CAUSE

In an action for wrongful death, the court's use of the words "immediate and proximate cause" in an instruction submitting plaintiff's theory of the case was not objectionable, since the words "immediate" and "proximate" were synonyms and the antonym of "remote"; the word "proximate," when connected with the word "immediate," being readily understood by the jury. *Herke v. St. Louis & S. F. Ry. Co.*, 125 S. W. 822, 823, 141 Mo. App. 613.

Under the maxim that it were infinite for the law to judge the causes of causes, and their impulsions, one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree, the term "immediate cause" is not capable of perfect or general definition, and, even if it had an ascertainable logical meaning which is more than doubtful, it would not follow that the legal meaning is the same. *Rodgers v. Missouri Pac. Ry. Co.*, 88 Pac. 885, 75 Kan. 222, 10

L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441

### IMMEDIATE CONSEQUENCES

"For the purpose of civil liability, those consequences, and those only, are deemed 'immediate,' 'proximate,' or 'natural and probable,' which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct." "This principle is commonly expressed in the maxim that 'a man is presumed to intend the natural consequences of his acts,' or, in the terms of a judicial statement, 'a party must be considered, in point of law, to intend that which is the necessary and natural consequence of that which he does.'" *Rodgers v. Missouri Pac. R. Co.*, 88 Pac. 885, 75 Kan. 222, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441 (quoting with approval from *Pol. Torts*).

### IMMEDIATE DEATH

Rev. St. 1903, c. 89, § 9, giving a right of action for wrongful or negligent death, is designed to cover cases of immediate death, which includes both instantaneous death and death preceded by total unconsciousness following immediately upon the accident, irrespective of the duration of such unconsciousness. *Perkins v. Oxford Paper Co.*, 71 Atl. 476, 480, 104 Me. 109.

### IMMEDIATE DELIVERY

"Immediate delivery," as to coal, has a trade meaning among coal shippers, and means during the current month in which the offer is made and accepted. *Feeley v. Boyd*, 76 Pac. 1029, 1030, 143 Cal. 282, 65 L. R. A. 943.

"Immediate delivery," as used in a statute requiring immediate delivery and change of possession, while not requiring a delivery instant, requires delivery within a reasonable time according to the character of the property, its situation, and all the attending circumstances, so that the fact that the seller took the buyer to the barn 10 days after the sale and pointed out the property to him did not constitute an "immediate delivery" within such requirement. *Guthrie v. Carney*, 124 Pac. 1045, 1048, 19 Cal. App. 144.

Determination of what constitutes "immediate change and delivery" and "actual possession," within Rev. St. 1887, § 3021, providing that a sale of personal property is fraudulent when not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property transferred, is not governed by any fixed rule, but is purely a question of fact to be determined by the jury, or the court in case the jury is waived from all the

evidence in each particular case. *Rapple v. Hughes*, 77 Pac. 722, 725, 10 Idaho, 338.

### IMMEDIATE FAMILY

A benefit certificate in a beneficial association provided that the society would pay to the beneficiary named, provided he was the lawful beneficiary of the member at the time of his death, a certain sum of money. The society's charter declared that its purpose was to render pecuniary aid to its members and beneficiaries in the following order: (a) To such person or persons of the "immediate family" of the member as by him designated; (b) to such persons or person, in default of such family, of the blood relatives of such member as by him designated; and (c) in default of any designation by the member or out of the order named, to such family or relatives who are heirs at law, etc. At the time decedent became a member, he was unmarried and resided with his father, whom he named as his beneficiary, but prior to his death he married plaintiff, established a new family, and died without changing the beneficiary in his certificate. Held, that the relationship of the beneficiary to the member was to be determined at the time of the member's death, at which time his "immediate family," within section 1, subd. 1a, of the society's charter, consisted of his wife and his own household, so that she, and not the father named in the certificate, was entitled to the benefit. *Davin v. Davin*, 99 N. Y. Supp. 1012, 1013, 1014, 114 App. Div. 396.

Under the charter of a beneficial association, authorizing a member to designate, as the recipient of the benefit payable on his death, a person of his "immediate family," or, in default of such family, one of his blood relatives a daughter of insured living with him as a member of the same household, with him as its head, may be designated as beneficiary, as one of his immediate family, though she be of age, so that he is not legally bound to support her and she is not under his legal control. Though the daughter is more than 21 years of age and before the death of her father left his home, intending to make a living for herself and using her own earnings for her own benefit, and though the father left a widow and minor children, who had been, and were at his death, a part of his household, dependent on him, such daughter had not necessarily ceased to be a member of the father's "immediate family," and so not entitled to take his death benefit as his designated beneficiary. The primary meaning of the word "family," as used in our language to specify a definite group of persons, is "the collective body of persons who form one household under one head and one domestic government, including parents, children, and servants" (quoting and adopting definition in *Century Dict.*). In construing a writing in which the word "family" is used, this primary meaning should be assum-

ed in determining the expressed intention of the writer unless there is something in the context to show that it is used in some other meaning. The same person may be either a member of the "immediate family" of the insured or one of his "blood relatives." Both groups are composed of persons of the same "family" with the member; in the former reference being had to the primary meaning of family as denoting members of the one household, gathered around one head, and in the latter to "family" as denoting individuals related through descent from one stock. Family is frequently used to denote those connected by the tie of common descent as well as that of a common household. The words "immediate family" is used in this connection to indicate a group of persons of which the insured is one connected as one family and from which is excluded any member who has become separated from the group as constituting one household, and "immediate family" certainly includes all persons bound together by the ties of relationship and parents and children living together as members of one household under one head. *Dalton v. Knights of Columbus*, 67 Atl. 510, 511, 512, 80 Conn. 212, 125 Am. St. Rep. 116, 11 Ann. Cas 568 (citing *Town of Cheshire v. Town of Burlington*, 31 Conn. 326, 329; *Hart v. Goldsmith*, 51 Conn. 479, 480; *Wood v. Wood*, 28 Atl. 520, 63 Conn. 324, 327; *Crosgrove v. Crosgrove*, 8 Atl. 219, 69 Conn. 416, 422; *Knights of Columbus v. Rowe*, 40 Atl. 451, 70 Conn. 545, 550; *Hoadly v. Wood*, 42 Atl. 263, 71 Conn. 452, 456).

#### IMMEDIATE FLIGHT

A trespasser, voluntarily withdrawing from premises on which he may be trespassing when ordered to do so, is in "immediate flight," under Rev. Code 1852, amended to 1893, p. 939, c. 128, § 21, authorizing an arrest by an officer, with or without warrant, of any trespasser on the premises of another, either on the premises or in immediate flight therefrom. *State v. Johnson* (Del.) 78 Atl. 605, 607, 2 Boyce, 49.

#### IMMEDIATE FUTURE

The words "immediate future," referring to the business or wants of a community and the uses of the property condemned, which may reasonably be expected, "contemplate that the especial use must be valuable, practical, and available within a reasonable time." Where there was no dredging of a river at any point within two miles of the owner's land, as was necessary to make it navigable, and the possibility of dredging was very remote, any available use of his land, based on navigation of the river by large vessels, was too speculative to be considered either in fixing the value of the land taken, or damage to the land not taken. *Chicago, M. & St. P. R. Co. v. Alexander*, 91 Pac. 626, 629, 47 Wash. 131.

#### IMMEDIATE INFLUENCE

A charge that the expression "immediate influence of sudden passion," as used in the statute defining manslaughter as voluntary homicide, committed under the immediate influence of sudden passion arising from adequate cause, means that the provocation must arise at the time of the commission of the offense, and the passion must not to be the result of a former difficulty or provocation, was not erroneous where the evidence tended to show that the killing resulted from a prior difficulty, since it followed almost literally the language of Pen. Code 1911, art. 1129, subd. 1, and was applicable to the facts in the case. *Burns v. State* (Tex.) 145 S. W. 356, 365.

#### IMMEDIATE ISSUE

"Immediate issue," as used in Rev. St. § 4200, providing that no estate in lands shall be granted by deed or will to any person but such as are in being, "or to the immediate issue or descendants of such as are in being at the time of making such deed or will, and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donor in tail," includes only the children of a person in being. *Dungan v. Kline*, 90 N. E. 938, 940, 81 Ohio St. 371 (citing *Turley v. Turley*, 11 Ohio St. 173).

The primary and usual meaning of the term "issue," when used as a word of purchase, is descendants of every degree, and is not equivalent to "immediate issue," which, by the settled construction of the statute against perpetuities, means only children. *Bartlett v. Sears*, 70 Atl. 33, 36, 81 Conn. 34.

#### IMMEDIATE NOTICE

##### Of default of employé

An employer's liability bond provided that the insurer should indemnify the employer against fraudulent or dishonest acts of the employé amounting to embezzlement or larceny, subject to the condition that the insurer should be notified in writing of any fraudulent or dishonest act on the part of the employé, which might involve a loss for which the company was responsible, immediately after the occurrence of such act should have come to the employer's knowledge. Held, that the notice required was one which would charge the employé with the commission of a felony, and hence the employer was not bound to give such notice until it had acquired knowledge sufficient to justify a reasonable man in making such a charge. "Immediate notice" (that is, instantaneous notice) is not required to be given, but only such notice as reasonable diligence, under the circumstances of the case, require should be given after knowledge of the facts is obtained. *Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 154 Fed. 545, 549, 83 C. C. A. 431.



**Of default of principal to surety**

Conditions requiring "immediate notice" upon the occurrence of loss or default have been held satisfied by notice given within two days to two months; the time varying with the circumstances of the particular cases. *Van Buren County v. American Surety Co.*, 115 N. W. 24, 28, 137 Iowa, 490, 126 Am. St. Rep. 290 (citing *Perpetual Building & Loan Ass'n v. United States Fidelity & Guarantee Co.*, 92 N. W. 686, 118 Iowa, 735; *Harnden v. Milwaukee Mechanics' Ins. Co.*, 41 N. E. 658, 164 Mass. 382, 49 Am. St. Rep. 467; *Niagara Ins. Co. v. Scammon*, 100 Ill. 644; *Wooddy v. Old Dominion Ins. Co.*, 31 Grat. [72 Va.] 362, 31 Am. Rep. 732; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Kentzler v. American Mut. Acc. Ass'n*, 60 N. W. 1002, 88 Wis. 596, 43 Am. St. Rep. 934).

A requirement in a contractor's bond that the obligee shall give "immediate notice" to the surety of any default by the contractor is equivalent to a requirement of reasonable notice, and what is reasonable notice under a requirement in a contractor's bond that the obligee shall give "immediate notice" to the surety of any default by the contractor is a question of fact for the jury. *Thomason v. Keeney*, 70 S. E. 220, 221, 8 Ga. App. 852.

**Of loss or accident**

The word "immediate," in an insurance policy, in respect to giving notice of any accident or injury for which a claim is to be made, means as soon as practicable under the circumstances of the case, in the absence of some unmistakable limitation to the contrary. *Cady v. Fidelity & Casualty Co. of New York*, 113 N. W. 967, 969, 134 Wis. 322, 17 L. R. A. (N. S.) 260.

"The phrases 'immediate notice,' 'notice forthwith,' 'as soon as possible,' 'as soon as practicable,' used in policies of guaranty insurance, providing that notice of loss shall be given to the insurer by the insured within a certain designated time, have practically the same meaning, to wit, that the insurer shall with all promptitude, considering the probable amount of the loss, and the probability of the 'risks' endeavoring to escape, give notice to the insurer of the occurrence of the loss." *Fidelity & Guaranty Co. v. Western Bank (Ky.)* 94 S. W. 3, 5 (quoting and adopting definition in *Frost, Guaranty Ins.* § 104).

A provision in an accident insurance policy that "immediate written notice" shall be given to the company of any accident or injury for which claim is made required notice to be given within a reasonable time, and where the insured lived for 72 days after an accidental injury, during which time he was in full possession of his faculties, his failure to give any notice of the accident before his death, without any excuse therefor appearing, as a matter of law defeated any right the beneficiary would otherwise have

had to recover on the policy for his death. *Travelers' Ins. Co. of Hartford, Conn. v. Nax*, 142 Fed. 653, 655, 73 C. C. A. 649.

**Same—Reasonable time**

Where a policy of health insurance requires that "immediate written notice" of the disease or illness shall be given to the company, a notice given within a reasonable time under the circumstances of the particular case will satisfy the requirement of the policy. *Reynolds v. Maryland Casualty Co.*, 30 Pa. Super. Ct. 456, 458.

Under a policy requiring that, in case of accident, written notice should be sent the insurer "as soon as possible," the words quoted are substantially equivalent to "forthwith" or "immediate," which in this connection mean that such notice shall be sent with reasonable promptness. *Everson v. General Accident Fire & Life Assur. Corp., Limited, of Perth, Scotland*, 88 N. E. 658, 660, 202 Mass. 169.

The word "immediate" in a provision of an accident policy, requiring immediate notice in writing of any accident or injury to be given to the company, will not be construed literally, but only to require notice within such time as beneficiary can reasonably obtain information upon which to base it. *Aetna Life Ins. Co. v. Bethel*, 131 S. W. 523, 526, 140 Ky. 609.

Due diligence by insured resulting in notice to the insurer of loss under a fire policy within a reasonable time after the fire, under all the circumstances of the case, is a compliance with a requirement of the policy that "immediate notice" of the loss be given. *Will & Baumer Co. v. Rochester German Ins. Co.*, 125 N. Y. Supp. 606, 608, 140 App. Div. 691.

A policy requiring the giving of "immediate notice" of a loss to the insurer requires the giving of a notice within a reasonable time. *Downs v. German Alliance Ins. Co. (Del.)* 67 Atl. 146, 147, 6 Pennewill, 166 (citing *Trask v. State Fire & Marine Ins. Co. of Pennsylvania*, 29 Pa. 198, 72 Am. Dec. 622).

In a fire insurance policy, providing that the assured should give "immediate notice" and render a particular account of the loss, the word "immediate" meant within a reasonable time in view of all the attending circumstances. *Carey v. Farmers' Ins. Co.*, 40 Pac. 91, 92, 27 Or. 146.

The word "immediate," as used in a policy of accident insurance, requiring an "immediate notice" of an accident, means a reasonable time after the accident, under the circumstances of the particular case. *Hughes v. Central Acc. Ins. Co.*, 71 Atl. 923, 924, 222 Pa. 462; *Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York*, 78 S. W. 320, 322, 104 Mo. App. 157.

In an accident insurance policy requiring "immediate notice" of accident and in-

jury to be given to the company, the word "immediate" means such convenient time as is reasonably necessary under the circumstances to do the thing required. Where an accident resulted in death, and the beneficiary gave no notice until 29 days after she learned of the accident, the notice was insufficient. *Foster v. Fidelity & Casualty Co. of New York*, 75 N. W. 69, 70, 99 Wis. 447, 40 L. R. A. 833.

**Same—Two to six days**

"Immediate notice" by one insured under an accident policy, means notice within a reasonable time. On April 29, 1905, plaintiff suffered an accidental injury, but did not realize the seriousness thereof or that it would prevent him from following his occupation until May 1, 1905, whereupon he gave notice thereof under his accident policy on the succeeding day. Held, that such notice was given within a reasonable time, and constituted compliance with the provision of the policy requiring "immediate notice." *Young v. Railway Mail Ass'n*, 103 S. W. 557, 559, 126 Mo. App. 325.

**Same—One to two months**

Where a policy requires the giving of "immediate notice" of the injury, the notice must be given within a reasonable time, compliance with the requirement being treated as a condition precedent to the right of assured to maintain an action on the policy, and, without a showing of good cause therefor, the failure of the insured to give notice until six weeks after the injury constitutes in law a breach of the condition requiring "immediate notice." *Myers v. Maryland Casualty Co.*, 101 S. W. 124, 126, 123 Mo. App. 682.

A policy insuring the owner of a building against liability for injuries sustained by passengers in an elevator in the building provided that, on the occurrence of an accident and on receipt of any notice of a claim on account of an accident, insured should give "immediate notice" in writing to the insurer. Held that, where insured knew of an accident immediately after its occurrence, and within a month knew that the injured person intended to hold him for damages, but gave insurer no notice until two months thereafter, and then merely by means of a telephone message as to the occurrence of the accident, insurer was not liable, though the word "immediate" qualifying the word "notice" must necessarily be given a reasonable construction, having regard to the circumstances of the particular case, and it meant within a reasonable time. *Barclay v. London Guarantee & Accident Co.*, 105 Pac. 865, 867, 46 Colo. 558.

**Same—Four or more months**

"Immediate notice," within the meaning of an employer's liability insurance policy, means notice within a reasonable time. A notice after eight months was not within a

reasonable time and was not a compliance with the policy. *Deer Trail Consol. Min. Co. v. Maryland Casualty Co.*, 78 Pac. 135, 136, 36 Wash. 46, 67 L. R. A. 275.

"Immediate written notice," as used in an indemnity policy, required immediate written notice of accidents and injuries, together with all other information of the insured relating to the accident, and was not fulfilled by notice not given until seven months after an accident for which a liability was sought to be imposed. *National Const. Co. v. Travelers' Ins. Co.*, 57 N. E. 350, 351, 176 Mass. 121.

**IMMEDIATE POSSESSION OR RECORDING**

"Immediate possession" of a chattel mortgage means with reasonable dispatch. *Hardcastle v. Stiles & McClay*, 55 Atl. 104, 105, 69 N. J. Law, 551.

"Immediate possession," essential to the validity of a chattel mortgage, means as soon as may be by reasonable dispatch under the circumstances of the case. *Brockhurst v. Cox*, 64 Atl. 182, 183, 71 N. J. Eq. 703.

**IMMEDIATE RECORDING**

"Immediate recording" of a chattel mortgage means with reasonable dispatch. *Hardcastle v. Stiles & McClay*, 55 Atl. 104; 105, 69 N. J. Law, 551.

"Immediate recording," essential to the validity of a chattel mortgage, means as soon as may be by reasonable dispatch under the circumstances. An unexplained delay of 15 days in recording a mortgage renders it invalid as against the mortgagor's creditors. A chattel mortgage was dated May 2d and was delivered to the mortgagee May 3d. It was filed for record May 18th. The mortgagee could either by messenger or mail have easily recorded the mortgage on the 4th or 5th of May. No attempt at any explanation for the delay was made. Held, that the mortgage was invalid as against the creditors of the mortgagor. *Brockhurst v. Cox*, 64 Atl. 182, 183, 71 N. J. Eq. 703; *Roe v. Meding*, 33 Atl. 394, 53 N. J. Eq. 350.

**IMMEDIATE REPORT**

Where plaintiff required defendant, its general agent, to make an "immediate" report on policies he was holding beyond the period authorized by his contract, which provided that it should terminate immediately on defendant's failure to fulfill its conditions, defendant, though entitled to a reasonable time to comply with the demand, was not entitled to 24 hours therefor, it appearing that the report could be made in much less time. *State Life Ins. Co. v. Schwarzkopf*, 84 S. W. 353, 354, 109 Mo. App. 383.

**IMMEDIATE TRANSPORTATION**

To make a carrier liable for baggage delivered to it, it must be delivered and accept-

ed for transportation within a reasonable time before departure of the train, so that, if an issue was submitted in an action for loss of baggage as to whether the trunk was received for "immediate" transportation, the court should have instructed that the term "immediate" did not have its usual meaning of "instantly, forthwith, nothing intervening either as to place, time, or action," but rather meant within a reasonable time having due regard to the circumstances. *Williams v. Southern Ry. Co.*, 71 S. E. 346, 351, 155 N. C. 260 (citing 4 Words and Phrases, p. 3393).

### IMMEDIATE VICINITY

Where a contract ancillary to the sale of a business provided that the stockholders of the seller would not again engage in a similar business for a period of 10 years in the territory, or the "immediate vicinity of the territory," dealt in by the corporation, or operated in by it or its agents, or the "immediate vicinity of such territory," the localities guarded against were restricted to those in which the selling company had establishments for doing business, and the immediate vicinity thereof, and did not include all parts or every one of the United States in which a former customer resided, or into which the corporation's correspondence had extended, or through which an agent of the company had traveled. *Davis v. A. Booth & Co.*, 131 Fed. 31, 32, 39, 65 C. C. A. 269.

### IMMEDIATELY

See As Soon as Practicable; At Once.

The word "immediately" is defined by Webster as "without intermediary; in direct connection or relation; in a way to concern or affect directly or closely; without the intervention of any person or thing; proximately; directly; closely." Under Code Civ. Proc. § 320, Gen. St. 1909, § 5914, providing that no party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such third party with a deceased person when the adverse party is the executor, administrator, heir at law, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person, etc., a plaintiff, who is suing to recover real estate claimed by her by virtue of being the wife of the decedent, where the defendants are the grandchildren and great-grandchildren of decedent, and who acquire their interest in the real estate, through the daughter of the decedent, is not prohibited from testifying to communications and transactions had personally with the decedent, as the parties adverse to her did not acquire their title to the cause of action immediately from the decedent. *Williams v. Campbell*, 113 Pac. 800, 801, 84 Kan. 46.

The word "immediately," as used in a will providing, "And immediately at her

death, I give, devise, and bequeath all of my said property, or, the proceeds thereof in case of the disposal thereof, \* \* \*" implies that, upon the death of the life tenant, the estate shall vest at once in the remaindermen and determines the power of the executors to sell under the provisions of the will. *Stebbens v. Turner*, 105 N. Y. Supp. 945, 947, 55 Misc. Rep. 587.

The phrase "at the time of sale," as used in Rev. Codes 1899, § 5894, providing that the mortgagor or his assignor may redeem at the time of sale of personal property on foreclosure, should be construed to convey the same meaning as "immediately" would convey if used in the same connection. *Brown v. Smith*, 102 N. W. 171, 173, 13 N. D. 580.

### As soon as practicable

"Immediately" means "as soon as practicable," and conversely it is proper to construe "as soon as practicable" to mean "immediately." *Chicago, B. & Q. R. v. Richardson County*, 100 N. W. 950, 952, 72 Neb. 482 (citing *Huff v. Babbott*, 15 N. W. 230, 14 Neb. 150; *Lydick v. Korner*, 12 N. W. 838, 13 Neb. 10).

### As forthwith or instantly

"Immediately," according to Webster, means "at once; without interval of time." *Cody v. Norton Coal Co.*, 66 S. E. 33, 34, 110 Va. 363.

In a recital in the bill of exceptions that "immediately" upon the reading of the verdict the sentence was passed, the word "immediately" means instantly; at once. *McCullough v. State*, 73 S. E. 546, 548, 10 Ga. App. 403.

The words "immediately thereafter" contained in the provision of the statutory bond required to be given under section 2 of the Insolvent Debtors Act (2 Comp. St. 1910, p. 2825) by an insolvent debtor petitioning for the benefit of the Insolvent Laws, that he, the debtor, will, if refused a discharge, surrender himself immediately thereafter to the sheriff or keeper of the jail of said county, construed to have the meaning of "directly" or "at once," after the debtor's discharge has been refused. *Braden v. Rosenstone*, 83 Atl. 906, 907, 83 N. J. Law, 251.

The word "immediately" as applied to an accident policy providing that the injury should "immediately" prevent the insured from the prosecution of his business, is not synonymous with "instantly," and "without delay," but a disability is immediate, when it follows directly from an accidental hurt within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation. *Order of United Commercial Travelers of America v. Barnes*, 80 Pac. 1020, 1024, 72 Kan. 293, 7 Ann. Cas. 809.

Under Act March 3, 1899, c. 425, § 15, 30 Stat. 1152, which provides that, whenever a vessel is wrecked and sunk in a navigable channel, it shall be the duty of the owner of such sunken craft to "immediately" mark it with a buoy beacon. The owner of a canal boat which was sunk in New York bay, who received notice of the sinking at once and could have had it marked as required by statute within an hour, is liable for the damages caused by a passing vessel coming into collision with the wreck six hours later, when it was still unmarked. *The Anna M. Fahy*, 153 Fed. 866, 867, 83 C. C. A. 48.

The word "immediately," as used in a request for an instruction, in an action for the death of a pedestrian at a crossing, to the effect that if deceased "entered upon and on the track immediately in front of a rapidly moving train," etc., means without lapse of time, instantly, at once, without intervention of anything as a medium; directly. This is the common acceptance of the term, and doubtless the one which would have been given application by the jury, if they had been allowed to consider the charge. *International & G. N. R. Co. v. Ploeger (Tex.)* 93 S. W. 226, 229.

#### As within reasonable time

The word "immediately," whether occurring in contracts or statutes, refers to the act that must be performed within such convenient time as is reasonably requisite, and what is a reasonable time must be determined from the facts of the particular case. *Meyers v. Dunn*, 104 S. W. 352, 354, 126 Ky. 548, 13 L. R. A. (N. S.) 881 (citing *Lincoln v. Field*, 16 S. W. 288, 54 Ark. 471; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261; *Pittsburgh, V. & C. Ry. Co. v. Commonwealth*, 101 Pa. 192; *Martin v. Pifer*, 96 Ind. 245; *Kent v. Miles*, 27 Atl. 194, 65 Vt. 582).

The word "immediately" will not be construed strictly according to its literal meaning, but will be held to mean within a reasonable time in view of the circumstances of each case. *Peterson v. Hansen*, 107 N. W. 528, 530, 15 N. D. 198.

"Immediately" does not mean instantaneously, but requires action to be taken within a reasonable time. *Lucas v. Western Union Telegraph Co.*, 109 N. W. 191, 193, 131 Iowa, 669, 6 L. R. A. (N. S.) 1016.

The terms "immediately" and "forthwith," as used in contracts, are to be liberally construed. They never mean the absolute exclusion of any interval of time but only that no unreasonable length of time shall intervene before performance. A contract for the sale of goods calling for a delivery "immediately" was complied with by delivery within a reasonable time. *Claus-Shear Co. v. E. Lee Hardware House*, 53 S. E. 433, 434, 140 N. C. 552, 6 Ann. Cas. 243.

Where the contract called for shipment by the seller "immediately" after the latter

part of a certain month, time of shipment was of the essence. The word "immediately," as employed in a contract which calls for shipment immediately, means, ordinarily and unexplained, "forthwith; at once"; and while the celerity implied from such terms excludes the idea of reasonable time, as understood in legal parlance, where no time is specified, some appreciable time must be allowed under a contract containing such terms, which necessarily lapsing time would be a reasonable time in a sense referable to the urgent words. *Clauss-Shear Co. v. Alabama Barber Supply Co.*, 56 South. 49, 50, 1 Ala. App. 664.

One desiring to rescind a contract for fraud must do so immediately upon discovering the fraud, "immediately," however, meaning a reasonable time, under the circumstances, within which to do the things necessary to rescind, and not to deliberate whether to rescind, and one induced to make a contract for territorial rights for a cigar vending machine by fraud could not rescind on that ground three months after discovering the fraud; that period being too long for merely consulting with attorneys and having them prepare a notice of rescission. *Long v. International Vending Mach. Co.*, 139 S. W. 819, 820, 158 Mo. App. 662.

Defendant's assignor, to assist a clothing house to settle with its creditors, including defendant, took a mortgage on his stock for \$1,700, specified in a note, and as a part of the same "transaction," upon execution and delivery of the note and mortgage, delivered to the mortgagor's attorney his signed personal checks, payable to the creditors, part of which were filled out and mailed the same day and the rest within a few days as soon as the proper amounts were ascertained and paid by him on presentment; the amount so paid being \$1,650, which, with a previous debt due the mortgagee, exceeded the sum for which the mortgage note was given. The affidavit accompanying the mortgage was that it was made to secure the debt specified in the condition thereof, and for no other purpose, and that the same was a just debt, honestly due and owing from the mortgagor to the mortgagee. Held, in a suit by an attaching creditor of the mortgagor to enjoin foreclosure of the mortgage, that a "transaction" meant a group of facts so connected as to be referred to by a single legal name, that it need not be confined to what was done in one day, nor at one time, nor at one place, and that its immediateness was tested by a logical connection and not by closeness of time, and that the word "immediately" implied such convenient time as was reasonably requisite for completing the thing done; and hence that the affidavit conformed to the purpose of the mortgage and verified the justice and validity of the debt sought to be secured thereby. *Herald &*

Globe Ass'n v. Clere Clothing Co., 84 Atl. 23, 25, 86 Vt. 141.

**As a relative term determined by use**

The word "immediately" is a relative expression; and it is not sufficient, in order to render declarations admissible as part of the *res gestæ*, to show that they were made "immediately" after the transaction, without showing, at least approximately, how nearly they were connected therewith in point of time. *Pool v. Warren County*, 51 S. E. 328, 329, 123 Ga. 205.

There is no precise definition, so far as time is concerned, of the word "immediately." In every case the meaning depends upon the circumstances of the case and the act to be performed. *St. 1906, p. 23, c. 19, § 3*, requiring the Governor "forthwith," on the filing, on or before September, 15th, of the list of corporations delinquent in payment of their license tax, to issue a proclamation that the charters of such domestic corporations and the right of such foreign corporations will be forfeited unless the tax be paid on or before November 30th, and section 4 requiring that the proclamation shall be filed in the office of the Secretary of State "immediately" and the Secretary shall cause it to be "immediately" published in two daily newspapers of the state, is satisfied as to dispatch by the proclamation being issued September 18th and published September 21st. *Lewis v. Curry*, 103 Pac. 493, 156 Cal. 93.

**In relation to disability after injury**

Where a person is bitten in the thumb by a dog, and the use of the hand was interfered with from the moment of the bite, and so continued until death ensued two weeks later, he was "immediately disabled," within the meaning of an accident insurance policy. There was no break in the continuity of the consequences of the injury and no intervening cause in the resulting disability, and the word "immediately," under such circumstances, does not mean accidental. *Farner v. Massachusetts Mut. Acc. Ass'n*, 67 Atl. 927, 928, 219 Pa. 71, 123 Am. St. Rep. 621 (citing *Ritter v. Preferred Masonic Mut. Acc. Ass'n*, 39 Atl. 1117, 185 Pa. 90).

In a contract to indemnify a person, in case of accident, for injury sustained by violent means which shall, "independently of all other causes, immediately, wholly, and continuously prevent him from the prosecution of any and every kind of business pertaining to his occupation," the word "immediately" is not synonymous with "instantly," "at once," and "without delay." A disability is immediate, within the meaning of such contracts, when it follows directly from an accidental hurt, within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation. *Order of United Com-*

*mercial Travelers of America v. Barnes*, 80 Pac. 1020, 1023, 1024, 72 Kan. 293, 7 Ann. Cas. 809.

In a policy insuring against loss of time for injuries through external and accidental means which shall, independently of all other causes, "immediately" and wholly disable the insured from transacting any business in his occupation, the word "immediately" refers to proximity of time with the injury. It is used in the sense of "presently without lapse or material delay," and insurer is not liable where an insured, injured by a fall, was able for about two months to attend to his business, but at the end of that time became totally incapacitated by a stroke of paralysis which was a direct result of the accident. *Merrill v. Travelers' Ins. Co.*, 64 N. W. 1039, 1040, 91 Wis. 329.

Where an accident policy only insured against bodily injuries caused through external, violent, and purely accidental means, causing "at once," and continuously after the accident, total inability to engage in any and every labor or occupation, etc., the term "at once" or "immediately" should be construed as adverbs of time and not causation, and were not intended to mean "reasonable time," but rather "presently," or without any substantial interval between the accident and disability. *Continental Casualty Co. v. Ogburn*, 57 South. 852, 853, 175 Ala. 357.

"Immediately," in stipulations relating to disability following an accident, signifies "presently" or "on the happening of the accident." The word is introduced to prevent uncertainty as to the cause of disability. If an interval elapses, some obscure ailment may supervene and produce physical or mental enfeeblement, which will be attributed to the accident and an unjust liability fall on the insurance company. If eight days passed before the plaintiff was unfit for work or business, he was not "immediately" disabled, within the meaning of the policy. *Wall v. Continental Casualty Co.*, 86 S. W. 491, 499, 111 Mo. App. 504 (citing *Preferred Masonic Mut. Acc. Ass'n of America v. Jones*, 60 Ill. App. 106; *Williams v. Preferred Mut. Acc. Ass'n*, 17 S. E. 982, 91 Ga. 698; *Merrill v. Travelers' Ins. Co. of Hartford, Conn.*, 64 N. W. 1039, 91 Wis. 329).

An accident policy which provides for an indemnity on total disability by reason of an injury which shall "immediately" disable the insured does not cover such disability where the injury did not wholly disable the insured till 22 days after the accident. *Laventhal v. Fidelity & Casualty Co. of New York*, 98 Pac. 1075, 1076, 9 Cal. App. 275.

**In relation to distance**

An assignment of mineral leases covering real estate "immediately surrounding" Mound City was properly interpreted to include a lease of land situated half a mile distant from the townsite. *Rhodes v. Mound City*

Gas, Coal & Oil Co., 104 Pac. 851, 80 Kan. 762.

#### **In relation to judicial proceedings**

Under Rev. St. 1899, § 825, providing that, when an order for change of venue has been made, the clerk shall "immediately" make out a transcript of the record and transmit the same to the clerk of the court, to which the removal is ordered, the transcript should be made out and transmitted in such convenient time as is reasonably necessary for the performance of such duties; the purpose of the statute being to prevent unreasonable delay or negligence in the transmission of the transcript, and to secure an early opportunity for the trial of the cause in the court to which the venue has been changed. *Llewellyn v. Spangler*, 88 S. W. 1021, 1023, 109 Mo. App. 396.

#### **In relation to payment of bid at sale**

Under Sand. & H. Dig. § 7119, providing that a sale of school lands shall be for cash, and, if any bidder shall fail to pay, the collector shall "immediately" resell, where a bidder was allowed an hour after his bid in which to procure the money and make the payment, a finding that the payment was made "immediately" was justified. *Brown v. Toler*, 50 S. W. 696, 697, 66 Ark. 361.

Where bids at a tax sale were made on November 15th, just before the close of the day, and the full consideration was paid on the next day, there was a compliance with Rev. Laws 1905, § 937, that the payment be "immediately" and "forthwith." *Minnesota Debenture Co. v. Scott*, 119 N. W. 391, 394, 106 Minn. 32.

#### **In service of process or notice**

A provision of a bond given by a building contractor to secure the faithful performance of a contract for the construction of certain buildings, and which provided that they should be completed by a certain date, requiring the obligees to notify the surety "immediately after" any default by the contractor which might create liability on the bond, was complied with by service of a written notice, four days before the expiration of the time for completion of the buildings, that they would not be completed within the time, which was at that time apparent from their condition. *Empire State Surety Co. v. Hanson*, 184 Fed. 58, 59, 107 C. C. A. 1.

If the notice be required to be "forthwith" or "as soon as possible" or "immediately," it will meet the requirements, if given with due diligence and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the notice a literal interpretation would, in most cases, strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud. Upon a bond to secure a contractor's performance before November 17th, requiring the owner to give the

surety company immediate notice of the contractor's failure, notice sent on November 21st, and received on November 24th, was a sufficient compliance with the conditions of the bond. *Routt v. Dils*, 90 Pac. 67, 69, 40 Colo. 50 (quoting and adopting 2 May, Ins. [3d Ed.] § 462).

The word "immediately" means without the intervention of other events; forthwith; directly. A notice 11 days after the known failure of a contractor to complete the performance of his agreement is not an immediate notice thereof. *Millard Const. Co. v. Deiches*, 134 N. Y. Supp. 998, 1006, 150 App. Div. 71 (citing *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623).

Under Insolvency Act (St. 1880, p. 83, c. 87) § 7, providing that a copy of the order adjudicating one insolvent and appointing a time and place for a meeting of creditors shall be served "forthwith" by mail on all creditors, proof that the order was mailed four days after its making, but prior to the first publication thereof in a newspaper, and more than 30 days before the time fixed for the creditors' meeting, shows a compliance with the statute; the term "forthwith," like the term "immediate," not being construed as a time immediately succeeding, without an interval. *Newlove v. Mercantile Trust Co. of San Francisco*, 105 Pac. 971, 976, 156 Cal. 657.

Plaintiff, on obtaining notice of an accidental injury for which it was liable, immediately notified defendant insurer thereof, giving full information of all the facts from which the insurer could know what and how defenses might be made to the action. Thereafter a summons was filed in the injury action, returned as served on plaintiff by delivering a copy to a person described as plaintiff's secretary, but who in fact was neither an officer nor agent of plaintiff company. Plaintiff had no knowledge of the summons or suit, or that a default had been taken, until nearly a year thereafter, when immediate notice was given to insurer, requesting it to appear and defend, and informing it concerning the falsity of the return. Defendant denied liability, because the summons had not been immediately forwarded to it, under a provision of the policy requiring assured to immediately forward any summons or other process as soon as it had been served, etc. Held, that there was a substantial compliance with the contract by assured. *Frank Parmelee Co. v. Aetna Life Ins. Co.*, 166 Fed. 741, 743, 92 C. C. A. 403.

#### **IMMEDIATELY AND EXPEDITIOUSLY**

In Laws 1903, p. 207, § 1, which imposes a duty on officers, when informed by any citizen that an offense against the laws of the state is being committed or is about to be committed, to "immediately and expeditiously" proceed to the place where the alleged offenders are to be found and to arrest them, it is perceived that the duty is not alone to

proceed immediately and expeditiously to the place where the alleged offenders are to be found, but also to arrest them. Were it not for the insertion of the words "immediately and expeditiously," the only duty imposed would be to arrest, because of the impossibility of making an arrest without coming to the place where the offenders are to be found. Such words were evidently inserted for the purpose of compelling prompt action on the part of the officer. The purpose of the statute is to provide for the arrest of the offender, and hence an information against a policeman, alleging that he refused to proceed to the place where alleged offenders were to be found, was insufficient. *State v. King*, 72 Pac. 657, 658, 28 Mont. 268.

## IMMIGRANT

See *Allen Immigrant*; *Person Arriving in the United States*.

An unmarried man who immigrated to the United States in 1892, with the intention of making his home there, remaining about two years, working at his trade, and then, being taken ill, returning to his native country, remaining about 10 months, doing no work, and then in 1895 returning to the United States, was not an "immigrant" on his return in 1895. Under the *Allen Contract Labor Law*, as amended by Act March 3, 1903, 32 Stat. 1214, § 4, c. 1012, a man who entered the United States as an immigrant from Germany when young, remaining continuously domiciled, and working in this country for 12 or more years, although without becoming naturalized, and who then went temporarily into Canada, and within two weeks enters into a contract for labor, is not an immigrant on his return. *United States v. Aultman Co.*, 143 Fed. 922, 926, 927.

Act Cong. Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904, provides that any "alien" who shall enter the United States in violation of the law, and such as become public charges from causes existing prior to landing, shall, on the warrant of the Secretary of Commerce and Labor, be deported at any time within three years after the date of entry. Held, that the word "alien," was not synonymous with "immigrant," but was intended as a broader term, and included a Russian unmarried woman, who entered the United States in 1897 or 1898, and remained therein continuously until March, 1908, when she returned to Russia, after having engaged in prostitution for a considerable time, and who attempted to re-enter the United States in June, 1908, she being within three years thereafter an alien of the excluded classes and subject to deportation. *Ex parte Hoffman*, 179 Fed. 839, 841, 103 C. C. A. 327.

## IMMIGRANT AGENT

An "immigrant agent," within the meaning of the act of the state of Georgia levying

a tax upon the occupation of "immigrant agent," is "a person engaged in hiring laborers within the state, but to be transported and employed beyond its limits." *Musco v. United Surety Co.*, 90 N. E. 171, 174, 196 N. Y. 459, 134 Am. St. Rep. 851.

## IMMIGRATE

"Immigrate" means to move into a country for the purpose of permanent residence. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent resident, but aliens composing the crew of a vessel visiting our sea ports are in no sense immigrants. *Moffitt v. United States*, 128 Fed. 375, 380, 63 C. C. A. 117 (quoting and adopting definition in *Cent. Dict.*; *United States v. Sandrey*, 48 Fed. 550).

## IMMIGRATION

"Immigration" is the passing or removing into a country for the purpose of permanent residence. The legislation contained in the various statutes that have been passed, relating to immigration, is clearly directed against the immigration into this country of certain classes of persons who come in with the intent of entering into and becoming a part of the mass of its citizens or population. *Moffitt v. United States*, 128 Fed. 375, 380, 63 C. C. A. 117 (quoting and adopting *Cent. Dict.*; *United States v. Burke*, 99 Fed. 895).

## IMMIGRATION INSPECTOR

Board of immigration inspectors as court, see *Court (Of Justice)*.

## IMMINENT

## IMMINENT DANGER

In an action by a person using a threshing machine against the manufacturer thereof for injuries from negligent construction of a deck thereon, through which plaintiff fell, a charge that plaintiff must prove that the deck as constructed was imminently dangerous to life or limb of those operating the machine, and that defendant knew it to be so; that the term "imminent danger" is such danger as must be instantly met, and which cannot be guarded against by calling on others for assistance; and that this is the kind of danger that persons must be subjected to, to be in imminent danger, under the claim of plaintiff—was not misleading, as indicating that the danger should involve an instant consummation rather than be impending. *Pierce v. C. H. Bidwell Thresher Co.*, 122 N. W. 628, 629, 158 Mich. 356.

## IMMINENT AND APPARENT DANGER

The words "imminent and apparent danger," as used in the law of self-defense, mean such overt, actual demonstration as would make the killing of another apparently necessary to prevent death or great bodily harm. The danger must be unavoidable according to

the facts and circumstances as they honestly appeared at the time to the defendant, but it is not necessary that the danger should have in fact existed at the time, if the defendant had reason to believe and did believe that it existed, but no words of abuse can be excuse for an assault. *State v. Gray*, 79 Pac. 53, 54, 46 Or. 24.

## IMMORAL

### IMMORAL PURPOSE

Any other immoral purposes, see Any.

The importation of an alien woman into the United States in order that she may live with the person importing her as his concubine is for an immoral purpose, within the meaning of Act Feb. 20, 1907, c. 1134, 34 Stat. 898, making it a crime against the United States to import alien women for the purposes of prostitution or for any other immoral purpose. *United States v. Bitty*, 28 Sup. Ct. 396, 208 U. S. 303, 52 L. Ed. 543.

## IMMOVABLE

Ordinarily speaking, a growing crop is not movable but "immovable property," but, under the statute relating to privileges in the administration of a succession, crops growing on the land at the death of decedent are held to be movable property. *National Bank of Commerce v. Sullivan*, 41 South. 480, 485, 117 La. 163 (citing *Weill v. Kent*, 28 South. 295, 52 La. Ann. 2141).

### IMMOVABLE BY DESTINATION

Property immovable by destination is such movables as cannot be removed without breaking the building to which they are attached, under the express provisions of Civ. Code, arts. 468, 469. *Bank of Lecompte v. Lecompte Cotton Oil Co.*, 51 South. 1010, 1011, 125 La. 844.

"Immovables by destination" are all movables which are permanently attached to realty by the owner and the movables which are placed thereon by the owner for its service and exploitation. *Morton Trust Co. v. American Salt Co.*, 149 Fed. 540, 541.

## IMMUNITY

See Personal Immunity; Privileges and Immunities; Right, Privilege, or Immunity; Special Privilege or Immunity.

An "immunity" is freedom from duty or penalty. *Leatherwood v. Hill*, 89 Pac. 521, 523, 10 Ariz. 243.

"Immunity" does not mean that no acts in fact were ever done, but that there may be no prosecution in respect thereto. Immunity does not wipe out the history of events. *United States v. Swift*, 186 Fed. 1002, 1017.

"The 'privileges and immunities' which are protected by the constitutional inhibi-

tion concern the personal and private rights of the citizen, such as his right to acquire and possess property, to pursue ordinary callings, and secure happiness and safety, etc., and do not include within their meaning the right to hold office. The state may decline to confer official power on residents of other states without depriving such non-residents of any 'privilege' or 'immunity' protected by the Constitution of the general government." *In re Mulford*, 75 N. E. 345, 346, 217 Ill. 242, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

The fourteenth and fifteenth amendments to the federal Constitution operate on state action only, and the privilege and immunity clause applies to privileges and immunities arising out of the nature and essential character of the federal Government, and granted or secured by the Constitution, and the provision is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed; the words "immunity" and "privilege" referring to a right conferred peculiar to some individual or body, or an affirmative act of selection of special subjects of favors not enjoyed by citizens in general under the federal Constitution or laws. *Hammer v. State*, 89 N. E. 850, 851, 173 Ind. 199, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034.

"The right to be appointed and act as an executor is not a 'privilege' or 'immunity,' the denial whereof is prohibited by the federal Constitution." *In re Mulford*, 75 N. E. 345, 346, 217 Ill. 242, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

### Exemption from taxation

The word "immunities," as used in a statute declaring that a reorganized corporation shall "possess all the powers, rights, immunities, privileges and franchises" which were possessed by the original corporation, is an apt term to express the intention of the Legislature that an exemption from taxation conferred on the original corporation should be included in the rights vesting in the new corporation. *Wicomico County Com'rs v. Bancroft*, 135 Fed. 977, 979, 982, 70 C. C. A. 287.

An act for the consolidation of corporations, providing that the new corporation should have all the powers, privileges, and "immunities" possessed by each of the corporations and special immunity from general taxation of one of the corporations, was not one of the franchises and could not be claimed by the new corporation. *State v. Maine Cent. R. Co.*, 86 Me. 488, 514.

## IMPAIR

"The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.'"



*Blakemore v. Cooper*, 106 N. W. 566, 569, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574 (quoting and adopting definition in *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793).

To "impair" is to diminish, decrease, or deteriorate, and to allege that ability to earn money has been impaired, coupled with the statement that the cause that produced that result is permanent, is the assertion of the fact that the impairment likewise is permanent, and therefore raises the issue of a permanent deterioration in earning capacity and satisfies the rule that loss of earnings, being in the nature of special damages, must be specially pleaded. *Goodloe v. Metropolitan St. Ry. Co.*, 96 S. W. 482, 485, 120 Mo. App. 194.

"Anything which makes the exercise of a right more expensive or less convenient, more difficult or less effective, 'impairs' that right." The statute making it an offense for a civic league or members thereof to publish the results of an investigation of character or qualifications of candidates for public office, without stating in full on what facts the report or recommendation is based, with the names and addresses in full of all persons furnishing the information concerning such candidate and a full statement of the information furnished by them, is unconstitutional as impairing the liberty of speech and of the press. *Ex parte Harrison*, 110 S. W. 709, 710, 212 Mo. 88, 126 Am. St. Rep. 557, 15 Ann. Cas. 1.

The term "impair" means to weaken or diminish, within Laws 1890, c. 565, p. 1131, § 162, as amended by Laws 1892, c. 676, p. 1416, providing that no examination, request, or advice of the state board of railroad commissioners, or any investigation or report made by it, shall impair the legal rights, duties, or obligations of any railroad corporation, or its legal liabilities for negligence. *Baruth v. Poughkeepsie City & W. F. Electric Ry. Co.*, 85 N. Y. Supp. 822, 823, 89 App. Div. 324.

### IMPAIRED ABILITY

The expression "impaired ability" to labor and earn money and the expression "impairment of his ability" to labor and earn money convey the same idea to the mind, and the use of the expression "impaired ability" instead of "impairment of his ability" in an instruction, in an action for injuries, was not calculated to mislead the jury. *Dallas Consol. Electric St. Ry. Co. v. Ely* (Tex.) 91 S. W. 887, 889

### IMPAIRING OBLIGATION OF CONTRACT

See, also, *Obligation of Contract*.

The law does not impair the obligation of a contract if neither party is relieved thereby from performing anything of that

which he obligated himself to do, but, if either party is absolved from performance, the obligation is impaired, whether effected directly or indirectly. *State ex rel. National Bond & Security Co. v. Krahmer*, 117 N. W. 780, 783, 105 Minn. 422, 21 L. R. A. (N. S.) 157.

The obligation of a public corporation to contract is "impaired," within the prohibition of the federal Constitution, when the power of taxation conferred by law is withdrawn or lessened by subsequent legislation, leaving the creditors without adequate means of satisfaction. *State of Louisiana ex rel. Hubert v. City of New Orleans*, 30 Sup. Ct. 40, 43, 215 U. S. 170, 54 L. Ed. 144.

Impairment by a state of the obligation of a contract must be by legislation subsequent to the making of the contract enacted either directly by the Legislature of the state or, through delegation, by one of its municipalities. If an ordinance of a municipality is relied on as constituting an impairment of the obligation of a contract, it must be shown to have been enacted pursuant to, or under color of, legislative authority from the state, granted either subsequent to the contract or, if prior, of continuing effect. A mere repudiation of a contract by a municipal corporation or a denial of liability thereon, whether by ordinance or otherwise, is not an "impairment of the obligation" of the contract. *American Telephone & Telegraph Co. of Alabama v. Town of New Decatur*, 176 Fed. 133, 135.

"Where the Legislature has reserved the right to amend, alter, or repeal any and all corporate charters, the withdrawal of an exemption from taxation does not 'impair the obligation of any contract.'" Const. 1846, art. 8, § 1, provides that corporations may be formed by special acts and that all acts passed may be altered or repealed. The charter of the Pratt Institute (Laws 1887, c. 398) provides that it shall possess the powers and privileges and be subject to the liability of a corporation conferred by Rev. St. (1st Ed.) pt. 1, c. 18, tit. 3, and section 8 thereof provides that the charter of every corporation shall be subject to alteration, suspension, or repeal. Laws 1896, c. 908, repealing special exemptions granted the Pratt Institute in its charter, does not impair the obligation of any contract. *Pratt Institute v. New York*, 91 N. Y. Supp. 136, 138, 90 App. Div. 525 (citing *Cooley*, Const. Lim. [7th Ed.] p. 396).

The action of a state in enlarging, restricting, or destroying the corporate existence of a town does not impair contract obligations within the meaning of the Constitution. *Sargent v. Clark*, 77 Atl. 337, 83 Vt. 523.

### Change of remedy

The obligation of a contract is impaired within the federal Constitution by an act

preventing enforcement of the contract, or materially abridging the remedy for enforcing it which existed when it was entered into and which does not supply an alternative remedy equally adequate. Acts 1908, c. 305, recognizing the obligation of stockholders of a corporation to its creditors, requiring enforcement by a bill in equity on behalf of all creditors against all the stockholders in the state, and protecting a creditor whose action at law has been abated from loss of the costs of the action by providing that they shall be taxable in the proceedings in equity, though changing the form of the remedy of an existing creditor to enforce unpaid stock subscriptions, is not invalid as impairing the obligation of a contract, for it gives the creditor an alternative remedy equally adequate. *Pittsburg Steel Co. v. Baltimore Equitable Soc.*, 77 Atl. 255, 256, 113 Md. 77.

"The obligation of a contract' is impaired, in the constitutional sense, by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious." *McNamara v. Keene*, 98 N. Y. Supp. 860, 862, 49 Misc. Rep. 452 (citing *McGahey v. Virginia*, 10 Sup. Ct. 972, 135 U. S. 662, 34 L. Ed. 304; *People ex rel. Reynolds v. Common Council of City of Buffalo*, 35 N. E. 485, 140 N. Y. 300, 37 Am. St. Rep. 563; *Lewis Pub. Co. v. Lenz*, 83 N. Y. Supp. 841, 86 App. Div. 452).

The protection against the "impairment" of the obligation is absolute, and all legislative acts which work that result, whether by directly changing its terms or indirectly by rendering it ineffective, and of less value through a change of remedies, are prohibitive. *Blakemore v. Cooper*, 106 N. W. 566, 569, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574.

"Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only as a remedy, is directly obnoxious to the prohibition of the Constitution." "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not 'impair the obligations' contracted, and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." *Gen. St. Kan.* 1868, c. 23, § 32, provided that, on return nulla bona of an execution against a corporation, it might be issued against any stockholder to an extent equal in amount to the stock held by him. An act approved in January, 1899 (Laws 1898-99, p. 35, c. 10), amending the former statute, provides that on the return of an execution nulla bona a receiver shall be appointed, who shall sue all the stockholders for the benefit of all

creditors. Held that, as against a creditor of a Kansas corporation who obtained a judgment prior to the latter statute and was seeking to satisfy his claim under the former statute, the latter was inoperative as "impairing the obligation of contract." *Pusey & Jones Co. v. Love* (Del.) 66 Atl. 1013, 1015, 6 Pennewill, 80, 11 L. R. A. (N. S.) 953, 130 Am. St. Rep. 144 (citing *Cooley*, Const. Lim. [8th Ed.] pp. 344-346).

Pol. Code, § 3443, as amended, so as to provide an additional method for contesting the right of one to purchase public land, on the ground that, at the time of application to purchase, the land had been reclaimed and made fit for cultivation (the method being by action by one who had occupied the land for 10 years before the application), though retroactive in applying where an application to purchase was made and a certificate of purchase was issued prior to adoption of the statute, "impairs" no obligation of contract, as it merely gives a new remedy. "A change in the law to this extent affects only remedy, and disturbs or impairs no existing legal right. The cases uniformly hold that, as long as vested rights are not impaired, retrospective laws giving new and additional remedies for existing rights, or giving a remedy at law where one previously existed in equity only, or vice versa, are valid. As said in *Rich v. Flanders*, 39 N. H. 304, a party has no right to complain of these things as violations of the Constitution, so long as the laws leave him a competent court bound to administer justice to him according to the rights the law gave him, when his right of action or defense became invested." *Boggs v. Ganear*, 84 Pac. 195-199, 148 Cal. 711.

#### Exemption laws

Statutes lessening exemptions, being favorable to a creditor, do not impair any contractual obligation; to "impair" being to weaken or diminish in some way the power which the court had when the contract was made to enforce it if specifically enforceable or to give damages for its breach. *Brearley School v. Ward*, 94 N. E. 1001, 1003, 201 N. Y. 358, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251; *Id.*, 123 N. Y. Supp. 614, 138 App. Div. 833.

#### Police regulations

The constitutional prohibition of state laws "impairing the obligation of contracts" does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. *Meffert v. State Board of Medical Registration & Examination*, 72 Pac. 247, 250, 66 Kan. 710, 1 L. R. A. (N. S.) 811 (quoting and adopting definition in *Mugler v. Kansas*, 8 Sup. Ct. 273, 123 U. S. 623, 31 L. R. A. 205).

"The interdiction of statutes 'impairing the obligation of contracts' does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals." The obligations of an agreement to remove an existing dam from a navigable stream, and to allow the stream to remain open and unobstructed, are not unconstitutionally impaired by a state statute subsequently enacted in the exercise of the police power to subserve the drainage of lowlands, authorizing the construction of a dam across the stream by the very person making such agreement. *Manigault v. Springs*, 26 Sup. Ct. 127, 130, 199 U. S. 473, 50 L. Ed. 274.

#### IMPAIRING RIGHT TO PRIVATE PROPERTY

The phrase "impairing the right to private property," in the organic act of the territory which inhibits the passage of any law "impairing the right to private property," does not interfere with the power of the Legislature to protect property and promote morals and good order. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority essential to the safety, health, peace, good order, and morals of the community; and, while the Legislature may not constitutionally declare that void which in its nature is and under all circumstances must be entirely harmless, it may place such reasonable restrictions on the right of an owner in relation to his property as becomes necessary to conserve the interests of the public and to prevent frauds among individuals. *Sess. Laws 1903*, p. 249, c. 30, § 1, regulating the sale of stocks of merchandise in bulk, does not impair the right to private property. *Williams v. Fourth Nat. Bank of Wichita, Kan.*, 82 Pac. 496, 497, 15 Okl. 477, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

#### IMPAIRMENT

"Loss of time," as an element of damages for a personal injury means time totally lost because of the inability of the injured person to follow any wage-earning occupation and is more than the impairment of the power to earn money, as "impairment" implies that he can perform some services and his ability to earn money, though reduced, is not totally destroyed. *Blue Grass Traction Co. v. Ingles*, 131 S. W. 278, 281, 140 Ky. 488.

#### IMPAIRMENT OF MENTAL FACULTIES

There is a clear distinction between "mental suffering" and "impairment of the mental faculties." *Gagnier v. Fargo*, 96 N. W. 841, 843, 12 N. D. 219.

#### IMPANEL

##### As swearing jury

The word "impaneled" means the final formation by the court of the jury. It is the act that precedes the swearing of the jury and which ascertains who are to be sworn. It cannot be presumed that the grand jury was sworn from the statement that it was "impaneled." *State v. Hurst*, 99 S. W. 820, 123 Mo. App. 39 (quoting and adopting definition in *State v. Ostrander*, 18 Iowa, 446).

In a record reciting that the jury was "impaneled" to try the cause, the word "impaneled" does not imply that the jurors were sworn. In American practice the word "impaneled" is used of a jury drawn for trial for a particular case by the clerk as well as a general list of jurors returned by the sheriff. The record on appeal in a criminal case, which recites merely that 12 persons, naming them, were selected as a jury out of a panel of qualified jurors, and that the jury returned into the court the verdict, "We, the jury," etc., does not show that the jury was sworn as required by Rev. St. 1899, § 2627, and a conviction based thereon cannot stand. *State v. Mitchell*, 97 S. W. 561, 562, 199 Mo. 105, 8 Ann. Cas. 749.

#### IMPARLANCE

See General Imparlance.

#### IMPARTIAL

##### IMPARTIAL JURY

Const. art. 6, § 28, giving accused a right to trial by "an 'impartial' jury," gives him a right to trial by jurors qualified to dispose of the case on the testimony presented to them. A jury is not "impartial" whose members are already so impressed with the guilt of the accused that evidence will be required to overcome such impressions. *People v. Mol*, 100 N. W. 913, 915, 137 Mich. 692, 68 L. R. A. 871, 4 Ann. Cas. 960 (citing *Stephens v. People*, 38 Mich. 739; *Smith v. Eames*, 3 Scam. [4 Ill.] 76, 36 Am. Dec. 515).

An "impartial jury" is a jury that must be composed of 12 impartial men. If one of such jurors is incompetent because of actual bias entertained by him against the accused, and conceals such incompetency on his voir dire, the jury as a whole is vitiated. *State v. Mott*, 74 Pac. 728, 730, 29 Mont. 292.

**IMPEACH—IMPEACHMENT**

See Successfully Impeached; Collateral Impeachment.

The rule is that jurors cannot impeach their own verdict, but this does not prevent a party showing by affidavits of jurors that the insertion in the answer in a special verdict was by mistake, and that the jury agreed on the opposite answer. Such evidence did not impeach the verdict of the jury, for that is not the written paper filed, but is the agreement which the jury reached, and the former, like most records or writings, is but the expression of evidence of some mental conception. Hence it may well be said that a showing that such writing is not correct is not impeachment of the verdict itself. *Wolfgram v. Town of Schoepke*, 100 N. W. 1054, 1056, 123 Wis. 19, 3 Ann. Cas. 398.

**IMPEACHMENT OF WASTE**

See Without Impeachment of Waste.

**IMPEACHMENT OF WITNESS**

Proof of the conviction of a witness of a felony as permitted by Civ. Code Prac. § 597, is an impeachment of the general reputation of the witness within section 599, providing that evidence of the good character of a witness is inadmissible until his general reputation has been impeached. *Shields v. Conway*, 117 S. W. 340, 341, 133 Ky. 35.

Strictly speaking, the words "successfully impeached," when used in this connection, mean no more than the word "impeached." If a witness is impeached at all, he is "successfully impeached," while an attempt to impeach may, of course, be either successful or unsuccessful. *Chicago City R. Co. v. Ryan*, 80 N. E. 116, 117, 225 Ill. 287 (citing *Powell v. State*, 29 S. E. 309, 101 Ga. 9, 65 Am. St. Rep. 277; *Smith v. State*, 35 S. E. 59, 109 Ga. 479; *Commonwealth v. Welch*, 63 S. W. 984, 111 Ky. 530; *Beedle v. People*, 68 N. E. 434, 204 Ill. 197).

The word "impeach," as used in Louisiana Code of Practice (Act 126, 1908, § 1), providing that the parties shall be entitled to examine their opponent after cross-examination and shall not be held as vouching for the credibility of such opponents or as estopped from impeaching the testimony given, includes all that would be meant if the word "rebut" were added, since to impeach the testimony of a witness or to impeach a judgment means to show that it is erroneous. *Pratt v. McCoy*, 52 South. 151, 152, 125 La. 1040 (citing 21 Cyc. p. 1737).

The credibility of a witness is for the determination of the jury, and it was not error to instruct that a witness may be believed though impeached for general bad character, if the jury believe the witness has sworn to the truth, the use of the word "impeached" being the equivalent of "attacked"

or "assailed." *Ector v. State*, 48 S. E. 315, 316, 120 Ga. 543.

**As attempt to impeach**

The word "impeached" is frequently used as synonymous in meaning with the words "attempted to impeach." Where a witness is contradicted as to a material matter, or evidence is offered showing that he has made statements at another time inconsistent with his testimony as to a material matter, he is not thereby impeached, according to the more restricted significance of the word, unless the jury believe from the contradiction, or from the proof of inconsistent statements made at another time, that he has willfully sworn falsely as to the material matter in reference to which he has been contradicted or in reference to which it is charged he has made inconsistent statements at another time. *Chicago City R. Co. v. Ryan*, 80 N. E. 116, 117, 225 Ill. 287 (citing *Gullilher v. People*, 82 Ill. 145; *Swan v. People*, 98 Ill. 610; *Hoge v. People*, 6 N. E. 796, 117 Ill. 35; *Perkins v. Knisely*, 68 N. E. 486, 204 Ill. 275; *Beedle v. People*, 68 N. E. 434, 204 Ill. 197).

**Conflict of evidence**

A party may contradict his own witness, for contradiction is not impeachment, as impeaching evidence is that which is directed solely to the question of the credibility of the witness. *De Noyelles v. Delaware Ins. Co. of Philadelphia*, 138 N. Y. Supp. 855, 858, 78 Misc. Rep. 649.

The newly discovered evidence on which new trial is sought is not "impeaching evidence," merely where it contradicts the testimony of opposing witnesses. *Hughes v. Rhode Island Co. (R. I.)* 67 Atl. 450.

Testimony tending to contradict material testimony given by a prosecutrix was substantive in character, and it was error to instruct that such evidence was called "impeaching evidence" and was for the purpose of casting doubts upon the truth of her testimony. *State v. Dolan*, 109 N. W. 609, 610, 132 Iowa, 196.

**IMPEDE**

A bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a federal court did not obstruct or "impede" the administration of justice, so as to constitute a contempt, punishable under Rev. St. § 725, under the rule that, to constitute such contempt, the act done by the accused must naturally and directly tend to such destruction. As stated in *United States v. Seeley*, 27 Fed. Cas. 1010; "To 'obstruct,' independent of the acceptance the word has obtained in the criminal law, would seem to stand *ex vi termini* a direct and positive interposition, which prevented, or tended to prevent, the action of the officer or court in respect to a matter then to be proceeded in. 'Impede' must neces-

sarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the Legislature to give these terms an application only to direct acts of violence or menace is inferable from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, etc., by threats or force, would necessarily imply the effort to put forth some act, which in its natural, if not necessary, consequence must be attended with an obstruction, and with a forced and compelled interruption of further progress in the administration of justice." *United States v. Carroll*, 147 Fed. 947, 953 (citing *United States v. Bittinger*, 24 Fed. Cas. 1149; *Ex parte McRae*, 77 S. W. 211, 45 Tex. Cr. R. 285).

### IMPEDIMENT

The word "impediment," as used in a statute prohibiting the obstruction of any public road by "a fence, bar, or other impediment, except by gates" erected by leave of county commissioners, means an obstruction of a nontemporary nature of the same character as a fence, bar, or gate erected across the highway, and does not include a freight car pushed by a railroad employé across a public road and permitted to remain there for a space of seven hours, when it is voluntarily removed. *Central of Georgia Ry. Co. v. State*, 40 South. 991, 992, 145 Ala. 99.

### IMPERATIVE STATUTE

Directory statute distinguished, see *Directory Statute*.

### IMPERCEPTIBLE

Accretion is the process of gradual and imperceptible addition to riparian land, made by water to which the land is contiguous, and the addition is imperceptible if its progress is not perceptible, although the fact of the addition may be perceptible after a long lapse of time. In re *Broadway in Borough of the Bronx*, 122 N. Y. Supp. 281, 283, 137 App. Div. 652.

### IMPERFECT

#### IMPERFECT GRANT

An imperfect grant is one which requires a further exercise of the granting power to pass the fee in the lands; is one "which does not convey full and absolute dominion, not only as against private persons, but as against the government, and which may be affirmed or disavowed by the political or granting authority." *Territory*

*v. Delinquent Tax List of Bernalillo County*, 78 Pac. 316, 317, 12 N. M. 169.

A Spanish grant made, in 1728, by the Governor and Captain General of New Mexico, and not shown to have been confirmed by a Spanish official, is an imperfect grant—that is, one requiring further action of the political authorities to its perfection, recognition of which is forbidden by Act Cong. March 3, 1891, c. 539, § 12, 26 Stat. 859, in the absence of a proceeding within two years for establishment of its validity—the Royal Regulation of the King of Spain of October 15, 1752, § 3, providing that all persons holding grants made after 1700 should exhibit their title to the proper officer for confirmation, and that failure so to do should result in their being deprived of and ejected from such lands, and grants of them being made to other persons, and section 12, conferring the confirmatory power on the governors of distant provinces, acting under the advice of certain other officials, as to land therein. *Sena v. American Turquoise Co.*, 98 Pac. 170, 172, 14 N. M. 511.

#### IMPERFECT OBLIGATION

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest." *Blakemore v. Cooper*, 106 N. W. 566, 569, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574 (quoting and adopting *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793).

#### IMPERFECT OWNERSHIP

Ownership is imperfect when it terminates at a certain time or on a condition. *Ruddock Cypress Co. v. Peyret*, 36 South. 105, 107, 111 La. 1019.

Ownership is "imperfect" when it is terminable at will, or on a condition or at a certain time. Where a claim against a city was assigned to a person in payment of a debt due him, and on further condition and consideration that he should devote the balance to be collected pro tanto to the payment of the debts due to the assignor's other creditors in whose favor, to that extent, such person bound himself by written contracts, as to the remaining interest in the claim his ownership was imperfect, in that it was subject to the condition that such remaining interest should, on the payment of the claim by the city, be surrendered to the holders of the equitable title in satisfaction of the debts due them. *Sintes v. Commerford*, 36 South. 656, 659, 112 La. 706.

According to Code, art. 490, ownership is "imperfect" when it is to terminate at a cer-

tain time or on a condition, or if the thing which is an object of it, being immovable, is charged with any real right towards a third person, as a usufruct use of servitude. *Crochet v. McComant*, 40 South. 474, 476, 116 La. 1, 114 Am. St. Rep. 538.

### IMPERFECTION

See Trivial Imperfection.

Where the record proper shows the entry of an order permitting the filing of a bill of exceptions in vacation prior to a designated date, and a bill of exceptions was approved and indorsed by counsel for respondent and submitted to the trial judge to be signed and approved, and ordered to be made a part of the record within the time fixed, the omission of the trial judge to affix his name to the order at the time he made it within the specified time could be supplied by his signature affixed after the expiration of the time, and, when that was done, the bill of exceptions must be deemed filed in compliance with Rev. St. 1909, § 2029; the imperfection being within sections 2119 and 2120, defining imperfections for which a judgment will not be set aside, and permitting the curing of such imperfections by amendment. *Buchanan v. Louisiana Purchase Exposition Co.*, 149 S. W. 26, 28, 245 Mo. 337.

### IMPERSONAL EXEMPTION

"Impersonal exemptions" from taxation are those in which the exemption is granted directly to the property, and in which the granting clause generally provides that the property of the class designated, when acquired or created in compliance with the provisions of the enabling legislation, shall be exempt from taxation. *Grand Canyon R. Co. v. Treat*, 95 Pac. 187, 189, 12 Ariz. 69.

### IMPERSONATING ANOTHER

One who went to a wholesale cigar store, and, giving an assumed name, falsely represented that he had come to get cigars for a retail dealer, and thereby procured the cigars and converted them to his own use, was guilty of "larceny," since the wholesaler intended to deliver him merely the possession of the goods for the retailer, and not to sell them to him personally, and was not guilty of "obtaining property by impersonating another," within the meaning of Rev. St. 1899, § 1930. *State v. Kosky*, 90 S. W. 454, 457, 191 Mo. 1.

### IMPERTINENCE—IMPERTINENT

"Impertinence," in a pleading in equity, consists in the introduction of any matter into the pleading which is not properly before the court for decision at the particular stage of the suit. *Blanton v. Chalmers*, 158 Fed. 907, 909 (citing *Wood v. Mann*, 30 Fed. Cas. 445, 1 Sumn. 506; *Chapman v. School*

*District 5 Fed. Cas. 483, Deady*, 108; *Woods v. Morrell* [N. Y.] 1 Johns. Ch. 103).

An answer is not "impertinent" which is relevant, or which can influence the decision of the suit, either as to the subject-matter of the controversy, the particular relief to be given, or as to costs. *Holsendorf v. Terrell*, 42 South. 584, 585, 52 Fla. 525.

A motion to strike out parts of an amended bill as "irrelevant, redundant, surplusage, and immaterial," while a proper pleading under the Idaho Code, is not proper practice on the equity side of the federal court sitting in that state; such objection being availed of by exceptions for "impertinency." To charge that matter alleged in an amended bill is irrelevant and redundant is substantially to charge that it is subject to exceptions as impertinent. Where a motion to strike matter from an amended bill as irrelevant, redundant, surplusage, and immaterial was erroneously filed instead of exceptions to the bill for impertinency, the misnomer, not being prejudicial, would be disregarded and the motion regarded as exceptions to the bill. *United States v. Kettenbach*, 175 Fed. 463, 464.

### IMPLEAD

The record of an order, entitled "The People \* \* \* vs. T. (Impleaded)," and showing that "said defendant" was arraigned, shows that T. was arraigned; the word "impleaded" not being synonymous with "et al.," but when used in formal pleadings and in court records is properly used, following the name of a defendant when there is more than one defendant and only one defendant appears, to designate that there are defendants other than the defendant, who is then present in court. *People v. Tierney*, 95 N. E. 447, 448, 250 Ill. 515.

### IMPLEMENT

#### Bowling alley

A bowling alley is not exempt from seizure and sale on execution as the tools or "implements" of the keeper's trade or business. *Williams v. Vincent*, 79 Pac. 121, 122, 70 Kan. 595, 68 L. R. A. 634, 109 Am. St. Rep. 469.

#### Bridge builders' appliances

A buggy used by a bridge company to elevate steel beams, consisting of a tongue with two large wheels connected by an axle, constituted an "implement," within Employers' Liability Act (Laws 1897, c. 415, p. 467, § 18), requiring reasonable care on the part of the master in furnishing "implements." *Pluckham v. American Bridge Co.*, 93 N. Y. Supp. 748, 750, 104 App. Div. 404.

#### Cheesemaker's appliances

Cheese vats, presses, curd knives, and the like, used by the owner, a cheese maker,

in making cheese by hand, are tools and "implements," within the meaning of the exemption laws. *Fish v. Street*, 27 Kan. 270, 272, 274.

#### Horse and wagon

A buggy and harness belonging to an insurance agent, used by him with his horse to carry on his business, are exempt as tools and "implements" used and kept to carry on a trade or business, exempted under subdivision 8 of section 3 of the act relating to exemptions. *Wilhite v. Williams*, 21 Pac. 256, 257, 41 Kan. 288, 13 Am. St. Rep. 281.

#### Lumberman's appliances

"Implements" are things necessary to any trade, without which the work cannot be performed. A portable engine and boiler, with saw attachments, with which one makes his livelihood, and on which he depends exclusively therefor, and which he uses and keeps for the purpose of carrying on his business of lumberman, are "implements," within *Mills' Ann. St. § 2562*, relative to exemptions. *Eckman v. Poor*, 87 Pac. 1088, 38 Colo. 200 (citing *And. Law Dict.*; *Stemmer v. Scottish Union & National Ins. Co.*, 49 Pac. 588, 53 Pac. 498, 33 Or. 65).

A traction engine and the saws, belt, carrier, and other appliances commonly used in connection with such an engine for sawing logs and making lumber are "tools" and "implements," within the meaning of subdivision 8, § 3018, *Gen. St. 1901*, and are exempt from execution. *Reeves & Co. v. Bascue*, 91 Pac. 77, 78, 76 Kan. 333, 123 Am. St. Rep. 137.

#### As merchandise

See *Merchandise*.

### IMPLICATION

See *Amendment by Implication*; *Necessary Implication*; *Plain Implication*; *Repeal by Implication*.

"Whatever is implied in a contract is as effectual as what is expressed. 'Implication' is but another name for intention, and if it arises from the language of the contract when considered in its entirety, and is not gathered from the mere expectation of one or both of the parties, it is controlling." *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 809, 72 C. C. A. 213.

#### IMPLIED ADMISSION

In an action brought by the plaintiff to recover for services alleged to have been rendered on the defendant's farm at her request and for her benefit, the defendant admitted on cross-examination that, after the plaintiff's claim had been made known to her, she mortgaged the farm for \$900 for the purpose of taking up a mortgage given by her husband on property belonging to him, but on redirect examination the inquiry whether in giving this mortgage she had any purpose

to defeat the collection of the plaintiff's claim was excluded by the court. Held: (1) That, if the testimony be called purely collateral, it was not for the plaintiff to call out collateral facts which might prejudice, and then object to an explanation of them. (2) That the testimony that the defendant had given the mortgage under such circumstances might operate as an "implied admission" of liability on her part, and was therefore material and not purely collateral evidence. *Pelkey v. Hodgdon*, 67 Atl. 218, 219, 102 Me. 426 (citing 1 *Wigmore, Ev. § 282*; 1 *Encyc. of Evidence*, p. 366; *Hencky v. Smith*, 10 Or. 349, 45 Am. Rep. 143).

#### IMPLIED AMENDMENT

"Implied amendments" is a convenient phrase used to indicate that rule of construction by which a repugnant provision in a constitution or statute modifies or abrogates an earlier one. *People ex rel. Elder v. Sours*, 74 Pac. 167, 186, 31 Colo. 369, 102 Am. St. Rep. 34.

#### IMPLIED AUTHORITY

"Implied authority" is that which the principal intends his agent to possess, and which is proper, usual, and necessary to the exercise of the authority actually granted. It includes all such acts and things as are connected directly with and are essential to the business in hand. *Dispatch Printing Co. v. National Bank of Commerce*, 124 N. W. 236, 240, 100 Minn. 440.

#### IMPLIED CONSENT

In *Const. art. 1, § 21*, authorizing the Legislature to provide for waiving of a jury where the consent of the parties is given, an "implied consent" is sufficient, and there is an implied consent where a party defaults or where, after appearance in the action, he fails to appear at the trial or does not deny the plaintiff's claim. *State ex rel. Clark v. Neterer*, 74 Pac. 668, 670, 33 Wash. 535.

Exemption laws should be liberally construed, and under *Laws 1901, p. 365, § 269*, extending the homestead exemption to a tenant in common having a homestead on the land with the consent, "express or implied," of his cotenant, the cotenant's acquiescence under such circumstances as raise a presumption of consent, is sufficient; proof of consent directly given viva voce or in writing being unnecessary. *Bartle v. Bartle*, 112 N. W. 471, 473, 132 Wis. 392 (citing 2 *Words and Phrases*, p. 1349).

#### IMPLIED CONTRACT

See *Contract Implied by Law*; *Contracts Implied in Fact*.

A contract is "implied" where the agreement is matter of inference and deduction. *Gillan v. O'Larry*, 108 N. Y. Supp. 1024, 1027, 124 App. Div. 498; *Indianapolis Coal Traction Co. v. Dalton*, 87 N. E. 552, 554, 43 Ind. App. 330.

A contract is implied where one party receives benefits from the other under such circumstances that the law presumes a promise on the part of the person benefited to pay a reasonable price for the same. *Jones v. Tucker* (Del.) 84 Atl. 1012.

An "implied contract" is one which the law infers from the facts and circumstances of the case, but it will not be inferred in any case where an express contract would for any reason be invalid. When the law lays on one a duty to another, it creates a promise from the former to the latter to discharge the duty. The limit of the doctrine is that where, from the nature of the case, not merely from inability of the party, there could not be a contract in fact, the law does not undertake to create the impossible. *Graham v. Tucker*, 47 South. 563, 564, 56 Fla. 307, 19 L. R. A. (N. S.) 531, 131 Am. St. Rep. 124 (quoting *Chase v. Second Avenue R. R. Co.*, 97 N. Y. 384, 49 Am. Rep. 531; *Bish. Cont.* [2d Ed.] §§ 182, 186).

An implied contract is one which reason and justice dictate, and which, therefore, the law presumes that every person undertakes to perform, and a contract may be implied from circumstances or from the conduct of the person sought to be charged. *Ottumwa Mill & Construction Co. v. Manchester*, 115 N. W. 911, 912, 139 Iowa, 334.

Of implied contracts there are two kinds, first, where a man takes property and the owner waives the tort and sues in assumpsit, i. e., where there is no meeting of minds; second, where the parties meet, and their meeting results in an unexpressed agreement. *Harley v. United States*, 25 Sup. Ct. 634, 198 U. S. 229, 49 L. Ed. 1029.

The term "implied contract" has been used to denote not only contracts implied in fact (that is, obligations where the mutual intention to contract, although not expressed, is implied or presumed from the acts of the parties or from surrounding circumstances), but also to denote that class of obligations imposed or created by law without the assent of the party bound, and sometimes even notwithstanding his actual dissent, upon the ground that they are dictated by reason and justice. *Harty Bros. & Harty Co. v. Polakow*, 86 N. E. 1085, 1086, 237 Ill. 559.

The plaintiff, a real estate agent, was requested by the defendant to secure for her a tenant for one or more years of her estate. He secured a tenant, under a written lease, "to hold for five seasons as follows: 1903, 1904, 1905, 1906, and 1907, June 1st to October 15th." The lease provided that, in the event of the property being sold, " \* \* \* this lease to be determined and ended at the end of the season immediately following the contract of sale." The plaintiff executed the lease for the defendant as her agent. He was paid an annual commission of \$150 for each of the years 1903 and 1904. The prem-

ises were sold by the defendant during the season of 1904. There was no express contract for commissions, either as to time or amount. Held, that the defendant is not liable to the plaintiff for commissions, as upon an "implied contract," for the years 1905, 1906, and 1907. *Mears v. Jones*, 67 Atl. 555, 557, 102 Me. 485.

A seller of a traction engine for use by the buyer in the performance of his contract with the government under the reclamation act (Act June 17, 1902, c. 1093, 32 Stat. 388), who as mortgagee for the price remained the owner with right to possession for the failure of the buyer to pay at maturity the first note for the price, could, on the government taking possession, as authorized by section 7 of the act, of the contractor's machinery and completing the work, sue the government for the value of the use of the engine either on an "implied contract" to pay therefor, or on its constitutional obligation within the Tucker act (Act March 3, 1887, c. 359, 24 Stat. 505), authorizing actions on claims founded on the Constitution or on contracts, express or implied. *United States v. Buffalo Pitts Co.*, 193 Fed. 905, 906, 114 C. C. A. 119.

#### As contract

See Contract.

#### Express contracts compared

An "implied contract" requires, the same as an express contract, the element of a mutual meeting of the minds and of an intention to contract, and the two classes of contracts differ only in methods of proof, and an "implied contract" is established by proof of circumstances from which the intention to contract is implied as matter of fact, and the implication arises on legal principles, and is conclusive in the absence of something efficiently displacing it, as a presumption of law. *Wojahn v. National Union Bank of Oshkosh*, 129 N. W. 1068, 1077, 144 Wis. 646.

The terms "express contracts" and "contracts implied in fact" are used to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which the contract is proved, and the same elements are essential in each case. *Fordtran v. Stowers*, 113 S. W. 631, 634, 52 Tex. Civ. App. 226.

#### As implied by law

"By reason of the relation of parties or the existence of an obligation or duty, a contract may be implied by law which a party never actually intended to enter into, and the obligation of which he did actually intend never to assume." A contract between a common carrier and a passenger is implied from the fact of receiving the passenger to carry for hire, and an action by the passenger against the carrier from personal injuries caused by negligence is an action on an "implied contract," within the municipal court



act. *Chudnovski v. Eckels*, 83 N. E. 846, 847, 232 Ill. 312.

An implied contract is one where liability exists from implication of law arising from facts and circumstances independent of agreement or presumed intention based on the doctrine of unjust enrichment; the implied agreement being one defining the duty rather than his intention. *Board of Highway Com'rs, Bloomington Tp., v. City of Bloomington*, 97 N. E. 280, 284, 253 Ill. 164, Ann. Cas. 1913A, 471.

The term "implied contract" includes not only contracts in fact, but also that class of obligations imposed or created by law without the consent of the party bound, and in some cases even notwithstanding his actual dissent, called also "constructive contracts," or "contracts implied by law." *Harty Bros. & Hartly Co. v. Polakow*, 86 N. E. 1085, 1086, 237 Ill. 559.

"Implied contract" is applied to obligations imposed or created by law, regardless of the assent of the party bound, on the ground that they are dictated by reason and justice, and are allowed to be enforced by an action *ex contractu*, and are not contract obligations in the true sense, but are clothed with the semblance of contract for the purpose of the remedy, and are described by the term "quasi contract" or "constructive contract." *Leonard v. State*, 120 S. W. 183, 187, 56 Tex. Cr. R. 307.

#### IMPLIED COVENANT

An owner who divides his lands into lots and streets, as shown by a map filed by him with the county clerk, and who sells lots as shown thereon, does not, in the absence of a neighborhood scheme calling for the erection of but one building on a single lot, "impliedly covenant" not to sell the lands except in the parcels delineated on the map, but he may subdivide the land into smaller tracts and sell them in such parcels or devote any part of the same to public uses as streets, parks, etc., but he does impliedly covenant not to use the land designated as streets, and a purchaser of a lot may enjoin a change either in the location or width of the streets without first showing that the first will result in depreciation of the value of the lot purchased. *Herold v. Columbia Investment & Real Estate Co.*, 67 Atl. 607, 608, 72 N. J. Eq. 857, 14 L. R. A. (N. S.) 1067, 129 Am. St. Rep. 718, 16 Ann. Cas. 580.

#### IMPLIED DEDICATION

"An 'implied dedication' is one arising by operation of law from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written. It is essential, however, that the donor should intend to set the land apart for the benefit of the public, for there can be no dedication unless there is present the intent to appropri-

ate the land to the public use. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose." *Tise v. Whitaker-Harvey Co.*, 59 S. E. 1012, 1013, 146 N. C. 374 (quoting and adopting *Elliott, Roads & S.* [2d Ed.] §§ 121-123, et seq.).

An "implied dedication" is one arising by the operation of law from the acts of the owner and is founded on the doctrine of equitable estoppel. It is essential that the owner intended to set the land apart to the use and benefit of the public, but this need not be evidenced by deed, and it is enough that there has been some clear, unequivocal act or declaration evidencing an intention to set it apart for a public use, and that there has been an acceptance on the part of the public. *Evans v. Scott*, 83 S. W. 874, 877, 37 Tex. Civ. App. 373 (citing *Elliott, Roads & S.* [2d Ed.] § 123).

#### IMPLIED EASEMENT

Easements by "implied" grant are those which are strictly necessary to the principal thing granted, and mere convenience is not enough. *McSweeney v. Commonwealth*, 70 N. E. 429, 430, 185 Mass. 371.

An "implied grant of easement" in favor of a grantee arises from circumstances where, at the time of the conveyance, the grantor was the owner of land constituting both the dominant and servient estates. *Brown v. Dickey*, 75 Atl. 382, 384, 106 Me. 97.

An "easement by implication" arises only from necessity, as where the owner of land sells a part of it to another, and the part so sold is wholly surrounded by the land of the vendee, so that the purchaser is entitled to a right of way for ingress and egress. Where an easement, consisting of an alleged right of way through certain doors, capable of being closed, connecting the rotunda of a hotel with plaintiff's saloon, did not exist by express grant, it could not be implied from the fact that the owner of the room in which the saloon was operated, who was also a part owner of the hotel, had caused such doors to be placed according to plans and specifications prepared for the hotel with the consent of the other owners thereof; additional means of access to the saloon having been provided. *Belser v. Moore*, 84 S. W. 219, 222, 73 Ark. 296 (citing 2 Bl. Comm. 36).

#### IMPLIED EMANCIPATION

An "implied emancipation" results where the parent, by his acts or conduct, impliedly

consents that the minor may leave home and shift for himself; the father, under these circumstances, however, being authorized to renounce the same within a reasonable time. *Rounds Bros. v. McDaniel*, 118 S. W. 956, 958, 133 Ky. 669, 134 Am. St. Rep. 482, 19 Ann. Cas. 326.

### IMPLIED INVITATION

See Licensee by Implied Invitation.

An "implied invitation" to use dangerous premises, as distinguished from a mere "license," arises where some benefit accrues or is supposed to accrue to the party extending the invitation, or the invitation is in the interest of both parties, or the going on the premises is upon the business of the owner. In other words, where a servant in going to his work has but one way to go, and that way is on the master's premises, and that way is in fact dangerous, and he knows it, and the knowledge of the danger and the use of the way is alleged to have been known to the master, he is more than a licensee, and he cannot, as a matter of law, be said to have assumed the risk, or been negligent in so doing, where the negligence counted on is running of a train in violation of an ordinance owing to the rule that in such case there is no assumption of the risk. *Cleveland, C., C. & St. L. R. Co. v. Powers*, 88 N. E. 1073, 1077, 173 Ind. 105 (citing *Northwestern El. R. Co. v. O'Malley*, 107 Ill. App. 599; *Plummer v. Dill*, 31 N. E. 128, 156 Mass. 426, 32 Am. St. Rep. 463; *Dixon v. Swift*, 56 Atl. 761, 98 Me. 207; 29 Cyc. p. 454).

### IMPLIED LICENSE

Where the owners of adjoining real estate entered into a contract for the common construction of a hotel, each reserving the right to use the ground floor portion, except the rotunda, and doors were constructed between the rotunda and a saloon operated in a room owned by one of such co-owners, the operator of the saloon had an "implied license" to use the rotunda as a passageway to the saloon so long as the doors remained open. *Belser v. Moore*, 84 S. W. 219, 222, 73 Ark. 296.

An "implied license" to use or cut timber from real property partakes of the nature of an estoppel, and may be found to exist from the representations of the owner, or from silence, where the owner sees and knows the extent of an act or acts done on his property, and fails to object thereto. *Stevens v. Howerton*, 96 N. E. 968, 970, 49 Ind. App. 151.

### IMPLIED MALICE

A charge in a prosecution for murder, defining "implied malice" as that which the law infers from or imputes to certain acts, however suddenly done, is correct. *Burns v. State* (Tex.) 145 S. W. 356, 362; *Sue v. State*, 105 S. W. 804, 809, 52 Tex. Cr. R. 122.

"Implied malice" is that legal implication of malice which arises in cases of homicide, where one man willfully and deliberately kills another, although express malice cannot be shown. *Turner v. State*, 126 Pac. 452, 457, 8 Okl. Cr. 11 (quoting 4 Cooley, Bl. Comm. 195).

"Implied malice" is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the facts do not establish express malice beyond a reasonable doubt, nor tend to excuse or justify the act under the law of justifiable homicide, nor tend to reduce the offense to manslaughter. *Sue v. State*, 105 S. W. 804, 809, 52 Tex. Cr. R. 122.

"Implied malice" in the law of homicide is an inference or conclusion of law from the facts found by the jury. *State v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24; *Same v. Mills* (Del.) 69 Atl. 841, 842, 6 Pennewill, 497; *Same v. Brown* (Del.) 61 Atl. 1077, 1078, 5 Pennewill, 339; *Same v. Wiggins* (Del.) 76 Atl. 632, 635, 7 Pennewill, 127; *Same v. Di Guglielmo* (Del.) 55 Atl. 350, 351, 4 Pennewill, 336.

"Implied malice" in the law of homicide, is an inference or conclusion of law from facts found by the jury. Where the killing was done under the influence of a wicked and depraved heart, or with a cruel and wicked indifference to human life, the law implies malice. *State v. Borrelli* (Del.) 76 Atl. 605, 606, 1 Boyce, 349.

"Legal or implied malice (as distinguished from ill will or 'malice' in the vernacular sense of the word) is defined to be the intentional doing of a wrong act without just cause or excuse." An instruction which states that malice does not mean mere spite, hatred, or dislike, but that condition of mind which makes a person disregard the rights of others by doing an act without just cause or provocation, is erroneous. *Ickenroth v. St. Louis Transit Co.*, 77 S. W. 162, 166, 102 Mo. App. 597.

"Implied malice" as an element of homicide includes that general malignity and reckless disregard of human life which proceed from a heart devoid of a just sense of social duty and fatally bent on mischief. Where the fatal act is done deliberately or without adequate cause, the law presumes that it was done with malice. *State v. Tilghman* (Del.) 63 Atl. 772, 773, 6 Pennewill, 54.

"Implied malice" is such as arises or may be inferred from the intentional doing of an unlawful or wrongful act with a wrongful purpose. *Burns v. Commonwealth*, 124 S. W. 409, 412, 136 Ky. 468.

"Malice," as an element of murder, contemplates wickedness and excludes a just or legal cause of excuse. It is "expressed" where there is positive direct evidence showing that at the time of the killing it was real-

ly entertained and "implied" where the evidence does not directly show that the malice was entertained at that time but is necessarily indirectly implied from the circumstances and facts which have been proved. *State v. Lee*, 60 S. E. 524, 525, 79 S. C. 223.

A charge defining "implied malice" in a portion thereof excepted to stating, in the language of Pen. Code 1895, arts. 51, 717, that "the instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending," and that, "if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears," and adding that the act of killing must be unlawful and with implied malice as defined, and if the design to kill is formed in a mind excited by passion or disturbed by any inadequate cause, and cooling time has not elapsed before the execution of that design, the homicide will be of no greater magnitude than murder in the second degree, etc., is sufficient as against the objection that the court failed to define adequate cause, which it did define in its instruction on manslaughter. *Manning v. State*, 98 S. W. 251, 253, 51 Tex. Cr. R. 211.

**As arising from abandoned heart or lack of provocation**

Where, in a prosecution for homicide, the evidence shows no considerable provocation in the killing, or the circumstances attending it show an abandoned and malignant heart, then malice is implied. *State v. Fleming*, 106 Pac. 305, 313, 17 Idaho, 471.

An instruction that malice is "implied" from a wanton and willful act done without legal provocation is a correct statement of the law. *State v. Thompson*, 56 S. E. 789, 791, 76 S. C. 116.

"Malice," within the definition of murder in Pen. Code, § 187, as the unlawful killing of a human being with malice aforethought, is "implied" when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. *People v. Frank*, 83 Pac. 578, 579, 2 Cal. App. 283.

**As arising from deliberate, cruel acts**

"Implied malice" is an inference or conclusion of law from the facts proved, and is implied by law from every unlawful, deliberate, and cruel act committed by one person against another, however sudden the act may be. *State v. Underhill* (Del.) 69 Atl. 880, 882, 6 Pennewill, 491.

"Implied malice," essential to constitute murder in the second degree, is an inference from the facts proved, and is implied by law from every deliberate cruel act committed by one against another, however sudden the

act may be. *State v. Cephus* (Del.) 67 Atl. 150, 151, 6 Pennewill, 160.

Malice as an element of murder, may be implied from the deliberate selection and use of a deadly weapon, or from any deliberate, cruel act committed by the assailant against his victim, no matter how sudden such act may be; and whenever such act from which death ensues is proven, unaccompanied by circumstances of justification, excuse, or mitigation, the law presumes that the homicide was committed with malice, and it then devolves on accused to show that the killing was not malicious, and that the act was not murder. *State v. De Paolo* (Del.) 84 Atl. 213, 214.

"Implied malice" means that which may be inferred from the acts and facts shown. Thus, when a wanton, wicked, cruel, or revengeful act is shown, the inference or implication may be drawn that the person who did such an act was actuated by malice. And when one person assaults another with a deadly weapon (that is, a weapon that will likely produce death), the law presumes malice from that fact alone, in the absence of proof, either direct or implied, to the contrary. The selection and use of a weapon, such as a revolver, in a deadly manner, without legal excuse, raises a presumption and is evidence of malice. *State v. Hayden*, 107 N. W. 929, 931, 131 Iowa, 1.

"Implied malice" in murder cases may be proved by a deliberately formed design to kill, by the preparation of the weapon or other means for doing great bodily harm, by circumstances of brutality attending the act, or by previous hostility, or threats and declarations of intention to kill or to do serious injury. *Esterline v. State*, 66 Atl. 269, 270, 105 Md. 629.

**As arising from unlawful killing**

"Implied malice" is where a man without any cause whatever, regardless of law and society, suddenly shoots down another man. The law implies malice. He has a depraved heart. *State v. Reeder*, 51 S. E. 702, 704, 72 S. C. 223.

"Implied malice" is an inference or conclusion of law from an unjustifiable and inexcusable killing done without design or premeditation, but under the influence of a depraved heart, or with a reckless disregard of human life. *State v. Watson* (Del.) 82 Atl. 1086, 1088.

"Implied malice" is that malice presumed by law from an unexplained and intentional killing, when there are no facts which showed express malice nor circumstances which would excuse, mitigate, or justify the killing. *Hernandez v. State*, 110 S. W. 753, 755, 53 Tex. Cr. R. 468.

"Implied malice" is that which the law infers from or imputes to certain acts. Thus, when the fact of an unlawful killing is es-

tablished, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law imputes malice." *Thomas v. State*, 74 S. W. 36, 38, 45 Tex. Cr. R. 111 (quoting with approval from *Boyd v. State*, 12 S. W. 737, 28 Tex. App. 137).

"Implied malice" is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree. *McLin v. State*, 90 S. W. 1107, 1108, 48 Tex. Cr. R. 549; *Rice v. State*, 103 S. W. 1156, 1168, 51 Tex. Cr. R. 255.

An instruction that implied malice might be inferred from the fact of an unlawful killing, given in connection with the general charge of the court defining "implied malice," is not error. *Friday v. State* (Tex.) 79 S. W. 815, 816.

In a prosecution for homicide, the court correctly charged that "implied malice is constructive malice, and not a fact to be proved specifically. It is an inference or conclusion, founded upon the facts and circumstances of the case as they are ascertained to exist, thus: When the proof shows an unlawful killing, and no evidence has been adduced establishing the existence of express malice on the one hand, or which tends to establish any justification, excuse, or mitigation on the other, the law implies malice, and the murder is of the second degree. But in this connection you are charged that where an indictment charges murder on implied malice alone, and the evidence establishes or tends to establish express malice as a fact, it is not to be understood that such proof would on the one hand be incompetent, nor on the other that it would create a variance from the allegation in the indictment; but such evidence, notwithstanding it shows express malice, would in such case be sufficient to warrant a conviction for murder in the second degree, since express malice comprises and embraces implied malice, just as murder of the first degree embraces murder of the second degree." *Wilson v. State*, 90 S. W. 312, 315, 49 Tex. Cr. R. 50.

Pen. Code 1901, § 172, declares that "murder" is the unlawful killing of a human being with malice aforethought. Such malice is express or implied. Section 173 declares that all murder perpetrated by poison or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of certain crimes, is murder in the first degree, and all other kinds of murder are in the second degree. Held, that the word "other" in section 173 was used to supply the sense of addition to the enumera-

tion; and hence an instruction that it was not essential to a verdict of murder in the first degree by poison that there should be proof that defendant administered the poison to decedent with a specific intent to kill him was proper; malice being implied. *Eytinge v. Territory*, 100 Pac. 443, 445, 12 Ariz. 131.

In a prosecution for murder, the court instructed that the next lower grade of homicide than murder in the first degree is murder in the second degree; that malice is necessary to murder in the second degree, but the distinguishing feature, so far as the element of malice is concerned, is that for murder in the first degree, malice must be proved beyond a reasonable doubt as an existing fact, while in murder in the second degree malice will be implied from an unlawful killing. The next instruction defined "implied malice" as that which the law infers from or imputes to certain acts, however suddenly done, as when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, or tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree, and the law does not define murder in the second degree further than if the killing is shown to be unlawful, and there is nothing in the evidence on the one hand to show express malice, nor on the other hand to reduce the killing below the grade of manslaughter, then the law implies malice, and the homicide is murder in the second degree. Held that, considering both instructions, the first did not assume that there was an unlawful killing, but the instruction properly presented the law on second degree murder. *Barton v. State*, 111 S. W. 1042, 1044, 53 Tex. Cr. R. 443.

#### Intent

Implied or constructive malice is an inference or conclusion of law from the facts found by the jury, and, among these, the actual intention of the prisoner becomes an important and material fact; for, though he may not have intended to take away life or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act from which the law raises the presumption of malice. *State v. Brinte* (Del.) 58 Atl. 258, 262, 4 Pennewill, 551.

#### IMPLIED NOTICE

"Implied notice" or legal notice is the same as constructive notice. *Cooper v. Flesner*, 103 Pac. 1016, 1020, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

"Legal or implied notice" is the same as "constructive notice," which, according to *Wilson's Rev. & Ann. St. 1903*, c. 28, § 12, is notice imputed by the law to a person not having actual notice. "Implied notice" does not include either positive knowledge or in-

formation so direct as to necessarily carry conviction to the mind of the person notified, and neither does it belong to that class which depends on legal presumption, but it is substantial evidence from which the jury, after estimating its value, may infer notice. *Cooper v. Flesner*, 103 Pac. 1016, 1020, 1021, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29 (quoting *Wilson v. Brown*, 15 N. Y. 354; *Wade*, Notice, §§ 3-5).

### IMPLIED POWERS

An "implied power" of a corporation is one that is directly and immediately appropriate to the execution of its express powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation.\* *People v. Illinois Cent. R. Co.*, 84 N. E. 368, 372, 233 Ill. 378, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181, 13 Ann. Cas. 285.

"Implied powers" of corporations presumptively exist only to an extent necessary to enable them to carry out express powers granted and to accomplish the purpose of their creation, and an incidental power is one that may be immediately appropriate to the execution of the specific power granted, and not one that has some slight or remote relation to it. *Robert Gair Co. v. Columbia Rice Packing Co.*, 50 South. 8, 11, 124 La. 193.

A testator made the following provisions in his will: "Item. I give, devise and bequeath to my wife, E. A. M. all my estate both real and personal wherever found and however situate for her use during life. Item. At the death of my said wife, whatever may remain of said estates, I give, devise and bequeath to my daughter, E. A. Y." Held, that a power of sale by the life tenant was annexed by "implication" to the devise of the life estate in the first item, and that it sufficiently appears that the testator intended the power of sale to extend to both the real and the personal estate. The devise of whatever "should remain of said estate" was not a devise of whatever should remain of his estate in general but whatever should remain of the real estate and of the personal estate. The word "estates" in the plural naturally has this significance, and in this case it expressed the real intention of the testator. By saying that only so much of the real estate as might "remain" at the death of the wife should pass to the daughter, testator expressed a purpose that the use given to the wife should extend to a sale of the property subject to the use, if she wished to sell the same or the proceeds of the property was needed for her support. Unless this construction is placed on the language, there is no practical significance in the use of the word "remain." *Young v. Hillier*, 67 Atl. 571, 572, 103 Me. 17, 125 Am. St. Rep. 283.

### IMPLIED PROMISE

A so-called "implied promise" is, in truth, no contract at all except by legal fiction. It is a disputable legal presumption raised on considerations of equity and custom. *Fitzpatrick v. Dooley*, 86 S. W. 719, 721, 112 Mo. App. 165.

An "implied promise" exists where equity and justice require a party to a contract to do or refrain from doing a particular thing, where the covenant on one side involves a corresponding obligation on the other, where by the relation of the parties and the subject-matter of the contract a duty is owing by the one not expressly bound by the contract to the other in reference to the subject of the contract, and where it may be rightfully assumed that it would have been made if attention had been drawn to it. *Marvin v. Rogers*, 115 S. W. 863, 866, 53 Tex. Civ. App. 423.

Plaintiffs, who were subcontractors for the stone for a municipal bridge, in performing alleged extra work and furnishing higher grade stone than required by the contract, had knowledge that the bridge and highway district looked to the contractors to furnish the stone, and understood that plaintiffs were furnishing the same to the contractors and were to receive their pay only from them, who were the only ones having any right to look to the district for payment. Plaintiffs made out their bills for extra work and presented them monthly to the contractors, of which fact the district was informed; and plaintiffs did not understand that they were furnishing such extras on the credit of the district. Held, that there was no "implied promise" on the part of the district to pay for the extras. *Beattie v. McMullen*, 67 Atl. 488, 496, 80 Conn. 160.

### IMPLIED REPEAL

See Repeal by Implication.

### IMPLIED REVOCATION

3 Starr & C. Ann. St. 1896, c. 148, par. 17, declaring that no will shall be revoked, otherwise than by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, by his direction, or by some other will, and no words spoken shall revoke any will, did not abrogate the common law as to implied revocation of a part of a will by a conveyance by the testator in his lifetime of the property devised. *Phillippe v. Clevenger*, 87 N. E. 858, 859, 239 Ill. 117, 16 Ann. Cas. 207.

"Ademption" has to do with the subject-matter of bequests and is entirely distinct from an "implied revocation" of the terms of a will. "Ademption" involves action upon the part of the testator, the doing of some act with regard to the subject-matter which interferes with the operation of the will (that is, he anticipates the gift there made

by bestowing it during his lifetime upon the legatee or disposes of the subject-matter in some way which puts it out of the question to follow his directions as set forth in the will), while "implied revocation" is founded upon a presumed and neglected duty upon the part of the testator, or upon a change in his family relations. The reason which lies behind the doctrine, as defined both in the common law and in the statutes is that some obvious injustice may be prevented; that some moral duty, which has been overlooked, it is presumed, by the testator, may be discharged. A bequest to "my wife, M. B.," is not revoked by implication because subsequently the wife procured an absolute divorce. *In re Jones' Estate*, 60 Atl. 915, 923, 211 Pa. 364, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Ann. Cas. 221.

### IMPLIED TRUST

An "implied trust" is one which arises by operation of law. *Norton v. Bassett*, 97 Pac. 894, 895, 154 Cal. 411, 129 Am. St. Rep. 162.

"Implied trusts" arise by an implied agreement between the parties as to the trust intended. *Stevens v. Fitzpatrick*, 118 S. W. 51, 55, 218 Mo. 708.

An "implied trust" is one which the facts and circumstances of the case force upon the notice of the court by the mandate of the law and compels its recognition. *Orton v. Knab*, 3 Wis. 576, 596.

"Implied trusts" are those arising when trusts are not directly declared in terms, but the court from the whole transaction and the words used implies that it was the intent of the parties to create a trust. *Lehrling v. Lehrling*, 115 Pac. 556, 557, 84 Kan. 766.

An "implied trust" is one which is deducible from a transaction, as a matter of clear intention, but not in the words of the parties, or which is superinduced upon the transaction by operation of law, as a matter of equity, independent of the particular intention of the parties. *United States Fidelity & Guaranty Co. v. Smith*, 147 S. W. 54, 55, 103 Ark. 145; *Jones v. Byrne*, 149 Fed. 457, 463; *In re Harper*, 133 Fed. 970, 974 (quoting and adopting definition in 2 Bouv. Dict. 754).

"Implied trusts" and resulting or constructive trusts are creatures of equity and take form whenever title is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive. In such cases mere forms will be disregarded, and equity will ascertain and act on the substance of things, regarding that as done which should have been done. *Sanguinetti v. Rossen*, 107 Pac. 560, 562, 12 Cal. App. 623.

"Implied trusts" are of two species; one denominated a "resulting trust," and the other a "constructive trust." In the first

class are those trusts which attach to a legal estate acquired by consent of the parties, not in violation of any fiduciary duty or trust relation, for the common benefit of both trustee and cestui que trust. This trust arises out of, and is declared in favor of, the intent of the parties creating it. Its inception is in good faith and in furtherance of fair and honest dealing. The other species of implied trusts, which is called "constructive trusts," is one imposed by a court of equity for the purpose of enforcing an equitable right as against the fraudulent intent of the trustee *ex maleficio*. This latter class of implied trusts have their origin in the bad faith of the trustee and are imposed by a court of conscience to defeat his wrongful ends. *Hanson v. Hanson*, 111 N. W. 368, 372, 78 Neb. 584.

Trusts are classified into two general divisions, "direct or express trusts" (that is, those springing from agreement of the parties), and into 'constructive or implied trusts' (that is, those created by the rules and principles of equity). Under this latter class, fall all of those trusts known distinctively as implied or constructive, as well as those called resultant; in short, all those that do not spring from the agreement of the parties. \* \* \*

A constructive trust is one not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice." *Newman v. Newman*, 55 S. E. 377, 379, 60 W. Va. 371, 7 L. R. A. (N. S.) 370.

Under Civ. Code 1895, § 3152, "implied trusts" are such as are inferred by law from the nature of the transaction or the conduct of the parties. A petition alleging that E., being the owner of land, conveyed the same to defendant to secure an indebtedness of \$375, that the conveyance was made by a deed absolute on its face but upon the following trusts and conditions: Defendant to hold the title to the property to secure him in the payment of the indebtedness without interest and to sell the same after the death of E., and, after deducting from the proceeds of sale the amount of the indebtedness, to pay the balance to the children of E. in equal proportions—that E. died intestate, owing no other debts than that to defendant, that there has been no administration upon E.'s estate, that such estate is of the value of \$3,000, that defendant denies that he holds such property in trust but claims the absolute title thereto, does not set forth a trust inferred by law "from the nature of the transaction or the conduct of the parties," but the facts alleged amount to an express trust. *Eaton v. Barnes*, 49 S. E. 593, 594, 121 Ga. 548.

If a mother buys lands with her own funds, and causes the title to be made to her son under an understanding and agreement that the property is to be hers, and that the

son will make to her such conveyance as she may require, a trust in favor of the mother will be implied. *Wilder v. Wilder*, 75 S. E. 654, 655, 138 Ga. 573.

### IMPLIED WAIVER

"Implied waiver" is akin to estoppel in pais, and is the intentional relinquishment of a known right, or such conduct as warrants an inference of its relinquishment, and a waiver occurs when one in possession of a right with knowledge of the facts does something inconsistent with its existence, or of his intention to rely on it. *Marquette County Sav. Bank v. Koivisto*, 127 N. W. 680, 682, 162 Mich. 554.

An "implied waiver," of a forfeiture for instance, is where one party has pursued such a course of conduct, with reference to the other party who has incurred the forfeiture, as to evidence an intention to waive the same, or where the conduct pursued is inconsistent with any other honest intention than an intention to waive the forfeiture, and the one who has incurred the forfeiture has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble and expense thereby. *Astrich v. German-American Ins. Co.*, 131 Fed. 13, 20, 65 C. C. A. 251.

An "implied waiver" of proofs of loss is one which may be inferred from circumstances, as where the conduct of the insurer is such as to induce delay or render the production or correction of the proof useless or unavailing by a distinct denial of liability and refusal to pay upon a specific, substantive ground, unconnected with the proof of loss, before the time had expired within which the insured was bound by the terms of the policy to present formal proofs, or to induce in the mind of the insured a belief that no proofs will be required, or that those already furnished, though defective, are satisfactory and therefore sufficient. *Frost v. North British & Mercantile Ins. Co. of London and Edinburgh*, 60 Atl. 803, 806, 77 Vt. 407.

### IMPLIED WARRANTY

#### In sales

"A warranty is 'implied' where, from the circumstances surrounding the parties at the time of the sale or from the nature of the thing sold, the law assumes it to be just that the buyer should be protected, in addition to the contract of sale, by a further implied contract or guaranty on the part of the vendor, and so raises by implication a warranty on the seller's part." *Haines v. Neece*, 92 S. W. 919, 923, 116 Mo. App. 499.

The prohibition of a contract of sale against any agreement, condition, or stipulation, not contained in the contract, does not cover "implied warranties" which are not matters of agreement but arise by operation

of law. A written contract for the sale of binder twine, which in terms contains no warranties of quality, but contains a provision that no agreement, verbal or otherwise, not contained in the written contract will be recognized unless approved by the vendor in writing, does not exclude the warranties which arise upon such sales under Rev. Codes 1899, §§ 3976, 3978, relating to latent defects and merchantability. *Hooven & Allison Co. v. Wirtz*, 107 N. W. 1078, 1080, 15 N. D. 477 (citing and adopting *Hoe v. Sanborn*, 21 N. Y. 563, 78 Am. Dec. 163; *Kellogg Bridge Co. v. Hamilton*, 9 Sup. Ct. 537, 110 U. S. 114, 28 L. Ed. 86).

"The principles applicable to sales of personal property, when the buyer has had an opportunity to examine before buying, may be stated as follows: The buyer must avail himself of opportunity and make reasonable use of his senses to discover defects. Failing to do this, he is without just cause of complaint if the article purchased is blemished with defects, the existence of which could have been ascertained had he performed his duty. No agreement of the seller to warrant against such defects will be 'implied.' \* \* \* With respect to defects, the existence of extent of which are not discoverable upon ordinary inspection, but which are known to the seller, an agreement to warrant will be implied from representations of soundness. The seller is not permitted to take unfair advantage from his superior knowledge. If, before sale, the buyer discloses to the seller his intention to purchase the article for a special use, the latter, in making the sale at a sound price, agrees by implication that the article is free from hidden defects that would impair its usefulness for such purpose. Even want of knowledge of such defects will not relieve him, for his liability as a warrantor infixes the contract of sale by his assurance, express or implied, that the article is suitable for the purpose of its intended use." *Moore v. Koger*, 87 S. W. 602, 603, 113 Mo. App. 423.

Where a written contract of sale contains an express warranty, there is no further "implied warranty" involved in the sale. *Gaar, Scott & Co. v. Hodges* (Ky.) 90 S. W. 580.

Where a merchant engaged in general mercantile business sold a boom of logs, and his agent graded and scaled and delivered them to the purchaser, who inspected them before running them through its mills, there was no "implied warranty" as to the soundness of the logs, and the purchaser could not recover for damages to its mill on account of iron imbedded in the logs. *Ketchum v. Stetson & Post Mill Co.*, 73 Pac. 1127, 1128, 33 Wash. 92.

Where defendants wrote that they had booked plaintiff's order for a car load of corn, the corn to be loaded and sent to destination as promptly as railroad facilities

would permit, the contract was an executory one, and there was an "implied warranty" on defendants' part that the corn would be sound and merchantable on arrival at the place of delivery. *Atkins Bros. Co. v. Landa*, 95 S. W. 949, 950, 119 Mo. App. 119 (citing 2 *Mechem, Sales*, § 1340; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Howard v. Hoey* [N. Y.] 23 Wend. 350, 35 Am. Dec. 572; *Murchie v. Cornell*, 29 N. E. 207, 155 Mass. 60, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290).

"Where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose known to him, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an 'implied warranty' that it shall be reasonably fit for the desired purpose. This implies that the material and workmanship shall be good, and the vendor is liable in such case for any latent defect not disclosed to the purchaser arising from the manner in which the article was manufactured." *The Nimrod*, 141 Fed. 215, 216 (citing 2 *Benj. Sales*, 988-993; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *Kellogg Bridge Co. v. Hamilton*, 3 Sup. Ct. 537, 110 U. S. 108, 28 L. Ed. 86; *Nashua Iron & Steel Co. v. Brush*, 91 Fed. 213, 33 C. C. A. 456; *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39; *Pullman Palace-Car Co. v. Metropolitan St. Ry. Co.*, 15 Sup. Ct. 503, 157 U. S. 108, 39 L. Ed. 632).

Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no "implied warranty" that it shall answer the particular purpose intended by the purchaser. *Beggs v. James Hanley Brewing Co.*, 62 Atl. 373, 375, 27 R. I. 385, 114 Am. St. Rep. 44 (citing *Benj. Sales*, § 657; 1 *Parsons, Cont.* 589; *Seitz v. Brewer's Refrigerating Mach. Co.*, 12 Sup. Ct. 46, 141 U. S. 510, 35 L. Ed. 837).

## IMPLICIT

### IMPLICIT NOTICE

Notice to the purchaser of a note may be of two kinds, "explicit notice" of the fraud or illegality, and "implicit" or "general notice." If the purchaser of notes at the time of buying them had notice or knowledge of some illegality or fraud which vitiated them, though he was not apprised of its nature, this would be such "general notice" as would affect his title. Mere negligence, however gross, not amounting to this willful and fraudulent blindness, will not of itself amount to notice; but the jury may and should consider the fact of such negligence

as it may tend to prove such "general notice." *Mack v. Starr*, 61 Atl. 472, 473, 78 Conn. 184.

## IMPORT—IMPORTATION

Owner of import, see Owner.

The word "imported" means at least *prima facie* dutiable. *United States v. White*, 171 Fed. 775, 777.

To "import" liquor into a county is to bring such liquor across the county line, either by one's self or by an agent. *State v. Williams*, 61 S. E. 61, 68, 146 N. C. 618, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562.

Where alcoholic liquors imported from a foreign country were stored in New York, their transmission to New Orleans was not an "importation," but a "transportation," within the Wilson Act (Act Cong. Aug. 8, 1890, c. 728), though the storing in New York was only temporary and the liquors were originally intended for New Orleans. *State v. Frederick De Bary & Co.*, 58 South. 892, 894, 130 La. 1090.

An indictment charging that defendants conspired and agreed with another with a view to lessen and destroy full and free competition in the sale of coal oil "imported into this state" was a charge of an agreement in reference to oil already imported and not oil to be imported. *Standard Oil Co. v. State*, 100 S. W. 705, 711, 117 Tenn. 618, 10 L. R. A. (N. S.) 1015.

Acts 1903, p. 268, c. 140, prohibiting agreements between persons or corporations with a view to restrict competition in the "importation or sale of articles imported into the state," or in the manufacture or sale of articles of domestic growth or of domestic raw material, or which tend to advance or control the price or cost to the producer or consumer of any such article, and providing penalties for the making of such agreements, being intended only to apply to intrastate commerce, was not in violation of Const. U. S. art. 1, § 8, vesting in Congress the power to regulate interstate and foreign commerce, etc. The phrase "importation or sale of articles imported into this state" was intended to include and describe, among the articles of commerce to be protected, those which had been imported from other states and countries, commingled with the common mass of property in this state, and no longer articles of interstate commerce. *State ex rel. Cates v. Standard Oil Co. of Kentucky*, 110 S. W. 565, 580, 120 Tenn. 86.

Rev. St. § 3082, imposes a penalty on any person who shall fraudulently or knowingly import or bring into the United States any merchandise contrary to law. Section 2802 imposes a penalty whenever any article subject to duty is found in the baggage of a person arriving within the United States which was not at the time of making entry therefor mentioned to the collector. Held,



that the term "import or bring" does not require that the offense designated in section 3082 should be complete before the merchandise is landed, so as to exclude cases within section 2802, where the entry is not made till after the baggage is landed, but includes the whole act of bringing dutiable articles into the United States. *United States v. Chesbrough*, 176 Fed. 778, 782.

#### As arrival at port of entry or harbor

"Importation," as used in the Tariff Law, means the bringing into this country from a foreign country, and cannot be complete until the vessel has reached the end of her voyage and has performed her office of carrier or bringer with the intention of delivering her cargo to the consignees. The whole scheme of the Tariff Laws and general statutes regulating collections contemplate that importation shall precede entry. *United States v. Edwin S. Hartwell Lumber Co.*, 142 Fed. 432, 436, 73 C. C. A. 548.

The "importation date" is undoubtedly the date of the arrival of the merchandise in a port of entry of the United States, and not the date of liquidation, or even of entry. *Franklin Sugar Refining Co. v. United States*, 178 Fed. 743, 747.

#### Bring distinguished

See Bring.

#### IMPORT A CONSIDERATION

"At common law, negotiable instruments are said to 'import a consideration' (that is, in the absence of evidence on the point, it will be presumed that there was a sufficient consideration); and it is for the party denying the existence of a consideration to show that there was none. This is true even if no consideration is recited on the face of the instrument, and words, such as 'value received,' are wanting." *McGuffin v. Coyle*, 86 Pac. 962, 964, 16 Okl. 648, 6 L. R. A. (N. S.) 524 (quoting and adopting definition in 1 Page, Cont. § 279).

#### IMPORTER

Where a railroad company whose line extended across the boundary between Mexico and the United States, pursuant to authority of its directors, appointed two agents to receive and enter at a customs port of the United States all goods imported by or consigned to the company, and one of such agents made the declaration on a consular invoice of goods, as agent of the railroad company, and the other as consignee made the entry, paid the duty with money of the company, and received the goods, the company may be held as "importer" or consignee for an additional duty assessed on a reliquidation, and it was error to direct a verdict for the company. *United States v. Mexican International R. Co.*, 151 Fed. 545, 549, 81 C. C. A. 61.

#### IMPORTS

The term "imports" always implies the idea of goods, wares, or merchandise manufactured, produced, or prepared in one jurisdiction and carried into another for the purpose of sale. *Cook v. Marshall County*, 93 N. W. 372, 373, 119 Iowa, 384, 104 Am. St. Rep. 283.

The terms "imports" and "exports" apply only to articles imported from foreign countries, or exported to them. *Red C. Oil Mfg. Co. v. Board of Agriculture*, 172 Fed. 695, 706 (citing *Pittsburgh & S. Coal Co. v. State of Louisiana*, 15 Sup. Ct. 459, 156 U. S. 590, 39 L. Ed. 544).

The term "imports" covers nothing not actually brought within the limits of a country. Goods shipped in good order in a foreign country and which become utterly worthless during the voyage are not imported into the United States, even though the decayed remnants are not thrown overboard, but are brought into the port of entry with the remainder of the cargo; and sugar shipped from Porto Rican ports on April 8, 1899, when Porto Rico was a foreign country, but which did not arrive at the port of New York until April 17th, after Porto Rico had passed by treaty to the United States, was not subject to the duty prescribed on articles imported from foreign countries. *American Sugar Refining Co. v. Bidwell*, 124 Fed. 683, 685 (quoting and adopting definition in *Lawder v. Stone*, 23 Sup. Ct. 79, 187 U. S. 281, 47 L. Ed. 178).

"While foreign liquors imported according to the regulations of Congress remain in the cask, bottles, etc., in the original form, then the importer may sell them in that form at the port of entry or in any other part of the United States; nor can any state law hinder the importer from doing so; nor does it make any difference whether the imported article pay a tax on its introduction or was admitted as a free article; until it passes from the hands of the importer, it is an 'import' and belongs to regulated foreign commerce and is protected." Acts 1899, p. 175, c. 93, § 1, prohibiting the docking of horses and the importation and use of them, in so far as it prohibits the importing from other states of docked tailed horses, or the using of them while they are still owned by the person who brought them into the state, violates the federal Constitution, giving Congress the right to regulate commerce between the states. *Stubbs v. People*, 90 Pac. 1114, 1119, 40 Colo. 414, 11 L. R. A. (N. S.) 1071, 122 Am. St. Rep. 1008, 13 Ann. Cas. 1025 (quoting and adopting *Thurlow v. Massachusetts*, 5 How. [46 U. S.] 589, 12 L. Ed. 256).

"Imports" can cover nothing which is not actually brought into our limits; that is the whole amount which is entered at the custom house, and all which goes into the consumption of the country; that, and that

alone, is what comes in competition with our domestic manufactures. The "additional" duty imposed by Tariff Act July 24, 1897, c. 11, § 5, 30 Stat. 205, on articles of merchandise imported into the United States, and upon which an export bounty has been paid by the country of Production, and which it is provided shall be "equal to the net amount of such bounty," is leviable only upon the article or merchandise which enters the United States, and in case of merchandise dutiable by weight, and as to which the bounty as declared by the Secretary of the Treasury, is also by weight, such as sugar, where the quantity entered at the custom house, as shown by the official weigher, is less than that shown by the foreign invoice, the "additional" duty, like the regular duty, is assessable only on the quantity so entered, and the cause of the loss or shrinkage is immaterial. *Franklin Sugar Refining Co. v. United States*, 142 Fed. 376, 378, 73 C. C. A. 476 (quoting and adopting *Marriott v. Brune*, 9 How. [50 U. S.] 619, 13 L. Ed. 282).

## IMPORTANT CASE

An action for libel by the president of a borough, charged with being personally interested in paving contracts, is an "important case," within Laws 1901, p. 1462, c. 602, as amended, providing that where it appears that, because of the importance of a case, a special jury is required, the court may order it to be so tried. *Coler v. Brooklyn Daily Eagle*, 117 N. Y. Supp. 273, 274, 133 App. Div. 300.

## IMPOSE

Under sections 29 and 30 of the war revenue act of July 1, 1898, c. 448, 30 Stat. 464, 465, as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946, 948, which provided for a tax on legacies, to become "due and payable in one year after the death of the testator," and to be a lien, etc., such tax did not become a lien and was not "imposed" until one year after the testator's death; and hence legacies left by a testator who died within one year prior to July 1, 1902, at which time the act repealing such sections took effect, are not taxable thereunder, the repealing act of April 12, 1902, c. 500, § 8, 32 Stat. 97, saving only taxes which had been "imposed" prior to its taking effect. *Eidman v. Tilghman*, 136 Fed. 141, 143, 60 C. C. A. 139.

Within the meaning of Act April 12, 1902, c. 500, § 8, 32 Stat. 97, repealing War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, which provided for legacy taxes "to become due and payable in one year after the death of the testator," but excepting from its operation all taxes "imposed" by said section 29 prior to the taking effect of

the repealing act, on July 1, 1902, a tax was "imposed" one year after the death of a testator and where such year expired prior to July 1, 1898, the tax was collectible although not assessed until after such date. *Title Guarantee & Trust Co. v. Ward*, 184 Fed. 447, 449, 107 C. C. A. 41.

A legacy tax under War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, was not "imposed" within the meaning of the saving clause of the repealing act of April 12, 1902, c. 500, § 8, 32 Stat. 97, until its assessment, and there remained no power to make a valid assessment after July 1, 1902, when the repealing act took effect. *Farrell v. United States*, 167 Fed. 639, 641.

The War Revenue Act of June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465, as amended by Act March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946, 948, provided for a tax on legacies to become due and payable in one year after the death of the testator and to be a lien and charge on his property for 20 years. Such provisions were repealed by Act April 12, 1902, c. 500, §§ 7, 8, 32 Stat. 97, with a saving clause as to all taxes imposed thereby prior to July 1, 1902, when the repeal took effect. Act June 27, 1902, c. 1160, § 3, 32 Stat. 406, prohibited the further assessment or imposition of any tax under said act "upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment" prior to July 1, 1902, and required the refunding of taxes previously collected on any such interests. Held, that where a testator who died in December, 1901, bequeathed a share of his residuary estate in trust, the income to be paid to a son during his life, the life estate of the son in the income of the trust property became absolutely vested in enjoyment at once on the death of the testator, and subject to the tax; that the tax was "imposed" by the statute itself at the time of such vesting without reference to the time when it became due and payable, or to any act of assessment by the internal revenue officers, which was merely an administrative detail necessary to fix the amount but not affecting the time when the tax was imposed or became a lien. *Westhus v. Union Trust Co. of St. Louis*, 164 Fed. 795, 797, 90 C. C. A. 441.

## IMPOSED DUTIES

"Imposed duties" for the neglect of which a city may be liable are those which are superadded to merely governmental functions like the special private corporate duty to maintain streets in a safe condition for public travel, or the duty to maintain and manage corporate property so that city employes shall have safe places in which to work. *Edson v. City of Olathe*, 105 Pac. 521, 523, 81 Kan. 328, 36 L. R. A. (N. S.) 861.

## IMPOSSIBLE

The word "impossible" is defined in the Standard Dictionary as "impracticable in the nature of the case." The phrase "practically impossible" expresses only that meaning which would be ascribed to the word "impossible" standing alone, and does it with exactness and aptitude. *Clevenger v. Matthews* (Ind.) 75 N. E. 836, 837.

## IMPOSSIBILITY

See Next Thing to an Impossibility;  
Physical Impossibility.

## IMPOSTS

"Imposts" are terms commonly applied to levies made by governments on the importation or exportation of commodities, frequently being called duties. *Flint v. Stone Tracy Co.*, 31 Sup. Ct. 342, 349, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

## IMPOTENCY

"Impotency," as a cause for divorce, means an incurable defect, and not every temporary or occasional incapacity, but permanent and lasting inability for copulation. *Bunger v. Bunger*, 117 Pac. 1017, 1019, 85 Kan. 564, Ann. Cas. 1913A, 126.

## IMPRACTICABLE

Where the holder of an interchangeable mileage ticket, stipulating that coupons from the ticket would not be honored on trains, except from nonagency stations and agency stations not open for sale of tickets, failed to exchange coupons for a ticket at an agency station where the train stopped several minutes, or to make any attempt to exchange for a ticket, though he knew that the train would stop for several minutes, he could not tender coupons from the ticket, because it was not "impracticable" for him to make the exchange; "impracticable" being defined as incapable of being effected from lack of adequate means. *Des Portes v. Southern Ry. Co.*, 69 S. E. 148, 149, 87 S. C. 160 (citing 4 Words and Phrases, p. 3443).

## IMPRESSION

See Matter of Impression or Opinion.  
Device, print, or impression, see Device.

The word "impression" is equivalent to the word "mistake" in an instruction, in an action for reformation of a deed for mutual mistake, stating that plaintiffs were entitled to a verdict if the parties were at the time of the execution of the deed under the "impression" that the deed described other property. *Metcalf v. Lowenstein*, 81 S. W. 362, 364, 35 Tex. Civ. App. 619.

The word "impression," as employed in defining "'moral certainty' as a state of 'impression' produced by facts," does not vary essentially in meaning from "conviction." "Impression" itself is a stamping in upon the mind. *People v. Lew Fook*, 75 Pac. 188, 141 Cal. 548.

### As inference or recollection

The "impression" of a witness, though it may convey the idea of a certain degree of recollection, is an equivocal term, and the information which the witness assumes to give may have been derived from others or from an unwarrantable deduction of the mind from premises not well established. *Clark v. Bigelow*, 16 Me. 246, 248.

"Impressions" of a witness were properly admitted in evidence as expressions in qualification of memory, where they were merely the product of an imperfect recollection, and not an inference, an unwarranted deduction of the witness' own mind, or derived from others. *Tichnor Bros. v. Barley*, 134 N. Y. Supp. 129, 130, 149 App. Div. 871.

### Opinion distinguished

An "impression" is only a deduction drawn from an assumption of a fact, while an opinion is predicated on the existence or nonexistence of a fact; and where a witness, who was interrogated as to an alleged lost paper, was unable to say whether or not he had ever seen the paper, no error was committed in refusing to permit him to testify as to what his "impression" was in regard to it. *Cross v. Aby*, 45 South. 820, 822, 55 Fla. 311 (quoting and adopting definition in *Chaires v. Brady*, 10 Fla. 133).

An "opinion," within the meaning of *Bates Ann. St. § 7278*, providing that, if a juror has formed an opinion, the court shall thereupon proceed to examine him on the grounds of such opinion, etc., is well defined as being a conclusion or judgment held with confidence but falling short of positive knowledge, and, while an "opinion" and an "impression" are alike in mind, there is an essential difference between the two in degree: an impression, as applied to this subject-matter, being correctly defined as a notion, remembrance, or belief, especially one that is somewhat indistinct or vague. *Lindsey v. State*, 69 N. E. 126, 131, 69 Ohio St. 215.

Within *Gen. St. p. 853, § 205*, providing that it shall be good cause of challenge to a juror that he has formed or expressed an opinion on the issue, or any material fact to be tried, an "impression," depending only on the newspaper account, of the truth of which he had no knowledge, is not an "opinion." *State v. Medlicourt*, 9 Kan. 257, 279 (citing 1 *Burr's Trial*, 416; *Holt v. People*, 13 Mich. 224; *State v. Potter*, 18 Conn. 166; *Smith v. Eames*, 3 Scam. [4 Ill.] 79, 36 Am. Dec. 515; *Gardner v. People*, 3 Scam. [4 Ill.] 85; *Leach v. People*, 53 Ill. 311; *State v. Kingsbury*, 58 Me. 238; *Morgan v. State*, 31 Ind. 193).

**IMPRESSION-RECEIVING BAND**

The "impression-receiving band" on a workman's time recorder is a band moving longitudinally in either direction in proximity to the printing wheels, and having a longitudinal row of consecutive numbers marked upon it. *Dey Time Register Co. v. Syracuse Time Recorder Co.*, 152 Fed. 440, 443.

**IMPRISON—IMPRISONMENT**

See Duress by Imprisonment; False Imprisonment; Fine and Imprisonment; Period of Imprisonment; Unlawful Imprisonment.

The term "imprisonment" usually imports a restraint contrary to the wishes of the person restrained. *Ex parte Davidge*, 51 S. E. 269, 271, 72 S. C. 16 (quoting and adopting definition in *Hurd, Habeas Corpus*, p. 453).

"Imprisonment," in its general sense, is the restraint of one's liberty. As a punishment it is a restraint by judgment of a court or lawful tribunal, and is personal to the accused. *United States v. Mitchell*, 163 Fed. 1014, 1016.

Any physical detention is "imprisonment," within the meaning of the law imposing liability for false imprisonment. *Eggleston v. Scheibel*, 99 N. Y. Supp. 969, 970, 113 App. Div. 798.

The essential thing to constitute an "imprisonment" is constraint of the person, which may be by threats as well as by actual force; and if the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. *Hebrew v. Pulls*, 64 Atl. 121, 122, 73 N. J. Law, 621, 7 L. R. A. (N. S.) 580, 118 Am. St. Rep. 716.

Imprisonment is not confined to the act of putting a man in prison; nor is it necessary to constitute imprisonment that the confinement should be in a place usually appropriated to that purpose. It may be in a locality used only for the specific occasion; or it may take place without actual application of any physical agencies of restraint, such as locks or bars, as by verbal compulsion and the display of available force. Any restraint of a man's personal liberty constitutes "imprisonment." *Savannah Guano Co. v. Stubbs*, 75 S. E. 433, 434, 138 Ga. 409.

Any detention of a person by another, with force, or against the will of the one detained, is "imprisonment" in law, and, where it is without right, it is unlawful. Temporarily restraining a person creating a disturbance at a religious meeting or doing an act tending to lead to a disturbance on the grounds where it is held would not be unlawful "imprisonment," if done in good faith

without using unnecessary force. *Rich v. Bailey*, 97 S. W. 747, 123 Ky. 827.

"'Custody' in criminal law is the same thing as 'detention' in civil law, and is synonymous with 'imprisonment.'" "'Imprisonment' is the detention of a person contrary to his will." "While the provisions of the Code in bail trover proceedings contemplate imprisonment in jail, the defendant may petition for release from any detention against his will by a sheriff or his deputy by virtue of proper bail process." *Everett, Ridley & Co. v. Holcomb*, 58 S. E. 287, 289, 1 Ga. App. 794 (citing *Rapalje & Lawrence, Law Dict.*).

**Arrest**

Mere words are sufficient to constitute "imprisonment" if they impose a restraint and deprivation of liberty, though there was no touching of the person of the party arrested. *Martin v. Houck*, 54 S. E. 291, 293, 141 N. C. 317, 7 L. R. A. (N. S.) 576.

Where an officer, in the discharge of his duty, in good faith invites one to the police station for the purpose of interrogating him and investigating a charge against him with a view of deciding on future action, and without any then intention of putting him under arrest or restraint, and the circumstances do not warrant a reasonable apprehension that force will be used in the absence of submission, and the person voluntarily accompanies the officer and consents to be searched, there is no arrest or false "imprisonment." *Gunderson v. Struebing*, 104 N. W. 149, 151, 125 Wis. 173.

**As imprisonment in the county jail**

The word "imprisonment," in its ordinary sense, contemplates and means within the county jail rather than in the penitentiary. *Ex parte Cain*, 93 Pac. 974, 976, 20 Okl. 125 (citing *Cheaney v. State*, 36 Ark. 75; *State v. McNeill*, 75 N. C. 15; *Hockheimer, Crimes & Cr. Proc.* §§ 112, 345).

**As imprisonment at hard labor**

A sentence in a criminal case at imprisonment in the penitentiary is in fact, though not in the precise words, "an 'imprisonment' at hard labor." *State v. Davis*, 46 South. 673, 121 La. 623.

**As within jail limits**

A person in custody under an execution against the person is "imprisoned," though he may have been admitted to jail liberties. *People v. Monaco*, 105 N. Y. Supp. 401, 402, 54 Misc. Rep. 25.

**IMPRISONMENT FOR DEBT**

The word "debt," in Gen. Laws 1896, c. 260, § 1, allowing a citation to any person imprisoned for debt, is limited in its scope by section 10, which provides that no person who shall be committed on execution in any action of trover or detinue, or for any malicious injury to the person, health, or reputation of the plaintiff in such suit, shall be

deemed to be within section 1. *Taylor v. Bliss*, 57 Atl. 939, 940, 26 R. I. 16.

The act of Congress relating to the administration of civil government in the Philippine Islands, which provides that no person shall be "imprisoned for debt," was not intended to take away the right to enforce criminal statutes and punish wrongful embezzlements of money, but was rather intended to prevent the commitment of debtors to prison for liabilities arising under their contracts. *Freeman v. United States*, 30 Sup. Ct. 592, 593, 217 U. S. 539, 54 L. Ed. 874, 19 Ann. Cas. 755.

"Imprisonment for debt," being abhorrent to the spirit of free government, will not be tolerated under the form of penal statutes. The word "debt," as used in Const. art. 1, § 17, inhibiting imprisonment for debt, is confined to obligations arising from contract, expressed or implied, and does not include torts. Hence *Sess. Laws* 1903, p. 244, c. 131, making it an offense to obtain accommodation at a hotel, etc., without paying therefor, with intent to defraud, etc., is not violative of said section. *Ex parte Milecke*, 100 Pac. 743, 744, 52 Wash. 312, 21 L. R. A. (N. S.) 259, 132 Am. St. Rep. 968.

#### **Breach of contract**

"Debt" is that which is due from one person to another, whether money, goods, or services, and whether payable at present or at a future time." Cr. Code 1902, § 357, declaring a laborer under contract to labor on farm lands, who shall receive advances, and thereafter willfully and without just cause fail to perform the reasonable service required by the contract, guilty of a misdemeanor and punishable by imprisonment, is in violation of Const. art. 1, § 24, prohibiting "imprisonment for debt," except in cases of fraud, since the conduct so made criminal is failure to pay a debt, and a willful and unjust failure to carry out the contract, without bad faith, does not constitute fraud. *Ex parte Hollman*, 60 S. E. 19, 21, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105 (citing *Cent. Dict.*; 13 Cyc. p. 399).

#### **Failure to pay over money**

Imprisonment for contempt in refusing to obey a judgment or decree for payment of alimony and maintenance is "imprisonment for debt," contrary to the Constitution. *Ex parte Kinsolving*, 116 S. W. 1068, 1071, 135 Mo. App. 631.

A commitment for contempt for failing to comply with an order requiring the payment of money is not "imprisonment for debt" within the meaning of the Constitution. *Perry v. Pernet*, 74 N. E. 609, 610, 165 Ind. 67, 6 Ann. Cas. 533.

An order requiring a bankrupt to pay over money or surrender property forming part of his estate is not one for the payment of a debt, and his commitment for refusing

to obey such an order is not an "imprisonment for debt." *Samel v. Dodd*, 142 Fed. 68, 70, 73 C. C. A. 254.

#### **Nonpayment of fine or penalty**

A sentence that defendant be confined until the fine assessed was paid is not unconstitutional as an "imprisonment for debt." *People v. Zito*, 86 N. E. 1041, 1044, 237 Ill. 434.

To be a "debt," within the meaning of the constitutional provision against "imprisonment for debt," the obligation existing between the parties must be either purely contractual or arising from some legal liability growing out of the debtor's dealings with another. The term "debt," as so employed, does not extend to or embrace any pecuniary obligation imposed by the state as a punishment for crime, whether the money, the payment of which is demanded, be for fines or costs or, even in certain quasi criminal proceedings, other penalties of a moneyed nature which may be lawfully inflicted by a court. *Ex parte Dig*, 38 South. 730, 86 Miss. 507 (citing *Ex parte Meyer*, 57 Miss. 85; *Ex parte Bridgeforth*, 27 South. 622, 77 Miss. 418, 78 Am. St. Rep. 532).

#### **IMPRISONMENT FOR LIFE OR LESS THAN NATURAL LIFE**

One convicted of murder in the first degree, and sentenced to death at a time to be appointed by the Governor after one year from time of his conviction, is not during his detention in the penitentiary incapable of managing his own estate, within Code Cr. Proc. §§ 337, 338, providing that when any person shall be imprisoned for life his estate shall be administered as if he were dead, and when he is imprisoned for less than his natural life a trustee shall be appointed, as such a sentence is not one of "imprisonment for life," nor for a term less than his natural life. *Gray v. Stewart*, 78 Pac. 852, 853, 70 Kan. 429, 109 Am. St. Rep. 461.

#### **IMPROBABLE STATEMENT**

See Grossly Improbable Statements.

#### **IMPROPER—IMPROPERLY**

"If the jury believe from the evidence that a flagman of the defendant improperly and inopportunistically signaled the plaintiff's team," etc., was not rendered misleading by omission of the words "carelessly" and "negligently." *Pennsylvania Co. v. Sloan*, 17 N. E. 37, 39, 41, 125 Ill. 72, 8 Am. St. Rep. 337.

#### **IMPROPER ACT**

Defendant company wrongfully procured possession of a note to plaintiff, and refused to permit plaintiff to see it. Plaintiff had forgotten who executed the note, and thought it was executed by defendant's president, and

sued him within the statutory period, which defendant knew for several years, during which time it refused to let her see the note, and did everything possible to prevent her from learning the real maker. Rev. St. 1900, § 1905, provides that if any person, by any improper act, prevents the commencement of an action, such action may be commenced "within the time herein limited, after the commencement of such action shall have ceased to be so prevented." Held that, when sued on the notes, defendant was estopped from pleading limitations by reason of its "improper act" in refusing to surrender the note to plaintiff. *Sonnenfeld v. Rosenthal-Sloan Millinery Co.*, 145 S. W. 430, 432, 241 Mo. 309.

### IMPROPER CONDUCT

In a prosecution for homicide, an instruction defining "provocation" as any such provocation by "improper conduct" of deceased toward defendant as to cause defendant to be so far under the dominion of sudden passion in consequence thereof as to be unable to judge rightly as to the nature and quality and consequence of his acts, or to materially impede or interfere with such judgment, and take away deliberation and prevent a cool state of the blood, was a sufficient definition of such term. "Improper conduct" has no technical meaning, and if there is any criticism of this instruction it is because it is too favorable to the defendant by using such a broad expression. *State v. Barrington*, 95 S. W. 235, 251, 198 Mo. 23.

### IMPROPER MOTIVE

The terms "malice" and "improper motives," when used in reference to alienation of a wife's affections, mean the same thing. "Malice" does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition; but, if the conduct was unjustifiable and actually caused the injury, malice in law will be implied. *Boland v. Stanley*, 115 S. W. 163, 166, 88 Ark. 562, 129 Am. St. Rep. 114.

### IMPROVE

See Discharged as Improved; Usually Cultivated and Improved.  
Otherwise improve, see Otherwise.

The body of an ordinance entitled one "to improve a portion of the sidewalk on both sides of B. street," between designated points, provided that the "sidewalk on both sides of B. street between, etc., shall be regraded, recurbed and repaved with brick pavement." Held that, regrading, recurbing, and repaving being necessary to properly improve the sidewalk, the title of the ordinance embraced but one subject; the word "improve" meaning "to make better," "to increase the value or good qualities of." *Gocke v. Staebler & McFarland*, 132 S. W. 167, 168, 141 Ky. 66.

The word "improving," within the meaning of a statute authorizing the freeholders to contract for the supplying and furnishing of materials necessary in constructing, "improving," and maintaining roads, held to refer to work upon roads already constructed which might be called repairs, or improvements, or maintenance. *Middle Valley Trap Rock Mining Co. v. Board of Chosen Freeholders of Morris County*, 60 Atl. 358, 359, 71 N. J. Law, 333.

### IMPROVE IN GOOD FAITH

Rev. St. 1895, art. 4218, provides that, if the purchaser of school land shall fail to reside upon and improve in good faith the land purchased, he shall forfeit the land, etc. Held, that in view of provisions in the preceding article, declaring that purchasers shall have the option of paying for their lands in full at any time "after they have occupied the same for three consecutive years," and that, when they have made such payment "together with the proof that they have occupied the land for three consecutive years," they shall receive patents, etc., the phrase "and improve in good faith" adds nothing to the requirement that the purchaser shall reside upon the land, and his failure to make improvements to an extent beyond that incident to the required settlement and occupancy is no ground for forfeiture of the sale. *McLendon v. Bumpass*, 114 S. W. 462, 464, 51 Tex. Civ. App. 586.

### IMPROVED

The designation of a city lot as "improved" was not a sufficient designation of its condition in a petition of sale of testator's real estate. In *re Levy's Estate*, 75 Pac. 317, 319, 141 Cal. 639.

#### In relation to sickness or disease

The ordinary meaning of the word "improved," when reference is made to one afflicted with mental or physical disease or sickness, that his condition has been ameliorated; that he has grown better; that he is making progress towards a recovery. It does not convey the idea that there has been a complete recovery, nor that the patient is well. The term "discharged as improved" is not the equivalent of "discharged as cured," within the meaning of the latter term as used in Gen. St. 1909, § 8484, providing for restoring the rights of persons discharged as cured of insanity. *Johnson v. Schoch*, 118 Pac. 696, 697, 85 Kan. 837.

### IMPROVED AND UNDER DEVELOPMENT

Where a tract of coal land consisting of 1,264.75 acres was leased for 100 years, which period would be required under present conditions to mine and market the coal, it appearing that it was not practicable under existing circumstances to mine a larger area than 85 acres annually or 170 acres during

an assessment period of two years, and that only 250 acres of the boundary had been opened up by mine entries, only that amount should have been assessed as "improved and under development." *Commonwealth v. Pocahontas Coal & Coke Co.*, 60 S. E. 84, 85, 107 Va. 666.

### IMPROVED LAND

"Improved lands," in the sense in which the phrase is used in Civ. Code 1895, § 3065, which provides that "the right of private way over another's land may arise \* \* \* from prescription by seven years' uninterrupted use through improved lands, or twenty years' use over 'wild lands,'" comprehends the entire tract, though only part thereof be in actual cultivation. The woodland on such a tract is not wild land, but, in connection with the portion which is cultivated, constitutes a single tract of "improved land." If a tract of land is cultivated in part and a road through the entire tract traverses both field and woodland, the woodland adjacent to the field is not to be treated as wild land. The land which the statute designates as wild is that which is located separate and apart from lands which are partly in cultivation. It is a segregated tract of land, remaining in a state of nature, uninclosed, and with no indications of use by the owner. The woodland of a plantation is not wild land simply because it is uninclosed, where it adjoins lands which are in cultivation and the woodland in its natural state is retained by the owner, either for plantation uses, or because he prefers to defer the time for bringing it into cultivation. *Hopkins v. Roach*, 56 S. E. 303, 304, 127 Ga. 153 (citing *Watkins v. Country Club*, 47 S. E. 538, 120 Ga. 45; *Kirkland v. Pitman*, 50 S. E. 117, 122 Ga. 256).

When an adjoining landowner had inclosed her lands with a wire fence, consisting of posts with four strands of wire attached thereto, and was using the land for a pasture for cattle, it was "improved land," within Code 1907, § 4247, providing that partition fences between improved lands shall be erected at the joint expense of the occupants. *Johnson v. Frederick*, 50 South. 910, 163 Ala. 455.

Code Civ. Proc. § 370, provides that for the purpose of constituting adverse possession by one claiming title founded upon a written instrument, etc., land is deemed to have been possessed, where it has been usually cultivated or improved. Defendants and their predecessors had openly and notoriously for a sufficient length of time to create the presumption of a grant, cut and removed for purposes of husbandry the hay which grew on salt meadow land; that being the only purpose for which the land could be used. Held, that as to "cultivate" meant to improve the product of the earth by manual industry,

and "improved" land generally meant such as had been reclaimed and was used for husbandry, whether for tillage, meadow, or pasture, the yearly cutting and removal of the grass was such an act of ownership as to constitute a technical adverse possession within the statute. *Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich*, 116 N. Y. Supp. 532, 537, 132 App. Div. 118.

### IMPROVEMENT

See Internal Improvement; Local Improvement; Model of Invention and Improvement; Original Improvement; Permanent Improvement; Permanent Street Improvement; Pertaining to Public Improvements; Practical Improvement of Navigation; Single Improvement; Street Improvement; Valuable Improvements; Works of Improvement and Public Works.

All improvements thereon, see All.

Assessments for as taxes, see Tax—Taxation.

Cost of improvement, see Cost.

In good faith, see Good faith.

"Improvement" is defined by lexicographers as "that by which the value of anything is increased, its excellence enhanced, or the like," or "an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes." *Stevens v. City of Port Huron*, 113 N. W. 291, 297, 149 Mich. 536, 12 Ann. Cas. 603.

"Improvements," within the meaning of the law, are technically and commonly denominated "betterments," and the definition of the term "betterments" to be found in the books is "improvements made to an estate." *Greer v. Fontaine*, 77 S. W. 56, 57, 71 Ark. 605, 609.

The word "improvement" is a relative term, and its meaning must be ascertained from the context and the subject-matter of the instrument or writing in which it is used. *Wolff Chemical Co. v. City of Philadelphia*, 66 Atl. 344, 347, 217 Pa. 215.

### IMPROVEMENT (In Patent Law)

*Robinson on Patents*, § 210, defines an "improvement" to be an addition to or alteration in some existing means which increases its efficiency without destroying its identity. And in section 213: "But inasmuch as no improvement can subsist without an original on which to rest, this development must always leave the essence of the original invention unimpaired. Whenever, in extending the efficiency of an idea of means, the line which separates that means from every other is crossed through any change in its essential characteristics, identity is lost, the idea of the original invention is excluded, and the

result of the inventive act becomes a new substantive invention." And again in section 215: "If the changes indicate the introduction in the idea of means of a different force and different object or of a different mode of application, it is more than a change of form, more than even an improvement. It is a separate invention." *McAuley v. Chaplin-Fulton Mfg. Co.*, 66 Atl. 750, 753, 217 Pa. 477.

An "improvement," as understood in the patent law, embraces the original and adds thereto or alters it. *Stitzer v. Withers*, 91 S. W. 277, 280, 122 Ky. 181 (quoting and adopting definition in opinion of Hobson, C. J., on a former appeal).

#### IMPROVEMENT (Of Building)

Where a lessor and a lessee agreed that all "improvements" made by the lessee or "embellishments and reconstructions" were to remain in the building, articles which did not enter into and form a part of the property, leased separate therefrom and not attached to the lessee's property, belonged to the lessor. *Morris v. Pratt*, 38 South. 70, 71, 114 La. 98. In order to include property within these terms in a lease as property to be left to the lessor, it would have to clearly appear that it was the lessor's intention, as expressed in the contract, to make needful repairs on the building to put the fixtures and appurtenances in order and to give up without consideration all the other articles not attached to or forming part of his building or of the appurtenances therein. *Morris v. Pratt*, 38 South. 72, 114 La. 103.

A lease provided that a tenant should, on receiving six months' notice that a bona fide sale of the property had been made, and on payment of pro rata amount of expenditures in repairs and improvements on the property, to be paid by the landlord as specified, surrender possession at the end of the six months' notice, and that the landlord should, on the termination of the lease by reason of sale prior to the termination of the term named, reimburse the tenant for outlays for all repairs, etc. Held, that the word "improvements" meant changes or betterments in the existing building or structure demised. *Douglaston Realty Co. v. Hess*, 108 N. Y. Supp. 1036, 1037, 124 App. Div. 508 (citing *Ames v. Trenton Brewing Co.*, 38 Atl. 858, 861, 56 N. J. Eq. 309, 317; *Winberly v. Mayberry*, 10 South. 157, 94 Ala. 240, 14 L. R. A. 308).

The lease required the lessee of rooms in an office building to surrender the premises in as good condition as reasonable use permitted, and provided that all alterations, additions, or improvements made by either party, except movable office furniture put in by the lessee, should be surrendered to the lessor as a part of the premises. The lessee removed some of the permanent partitions with the lessor's consent, agreeing to restore

them at the termination of the lease, and constructed temporary partitions, which did not extend to the ceiling, and were lightly nailed to the floor and walls, and at the termination of the lease the permanent partitions were restored. Held, that the reasonable intention of the parties was the test of whether fixtures were annexed to the realty, and the word "improvements" alone, though of wider meaning than "fixtures," did not include the temporary partitions; and, construing the word in connection with the exceptions in the lease, and in view of the intention shown thereby that such partitions should not be permanently annexed, they were not "improvements," but were "movable office furniture," within the meaning of the lease, and removable by the lessee. *United Booking Offices v. Pittsburgh Life & Trust Co.*, 119 N. Y. Supp. 216, 217, 65 Misc. Rep. 31.

Where the lease of a building for a saloon and hotel authorized the lessee to make alterations, and declared that "all improvements, betterments, and changes or alterations," at the expiration of the lease, should be and remain on the premises and belong to the lessor, the words quoted were limited to the alterations made in remodeling the building, and did not include saloon fixtures and appliances put in by a brewery company under a contract with the lessee that he should have the use of the same while he sold the company's beer. *Wright v. La May*, 118 N. W. 964, 966, 155 Mich. 119.

#### IMPROVEMENT (Of Canal)

Any alteration of existing canals which still preserves them as commercial highways connecting the lakes with the ocean in substantially the same location, affording facilities for increased usefulness, must be held to be an improvement, if so declared by the Legislature pursuant to Const. art. 7, § 10, authorizing the improvement of canals in such manner as the Legislature may provide by law, and the nature and extent of the improvement is clearly a question for it alone, under such circumstances, and canal lands rendered no longer useful for canal purposes, may, after the improvement, be disposed of by the state under existing laws, without infringing the prohibition of section 8 against the sale of the Erie and other canals, and hence the Barge Canal as outlined in Laws 1903, p. 332, c. 147, providing for the improvement of the Erie and other canals by canalizing certain rivers, but leaving the canals substantially as they were before as to their general location and navigation between the same termini, except that steam or other power will necessarily be substituted for the present use, must be regarded as an improvement of existing canals within the Constitution, and not to infringe the same, though contemplating the probable sale of several hundred miles of the present ca-



nals when rendered no longer necessary or useful. *Pelo v. Stevens*, 120 N. Y. Supp. 227, 230, 66 Misc. Rep. 35.

#### IMPROVEMENT (Of Homestead)

Where a building association, in loaning money to an individual, advanced part of the loan for a purpose other than for the improvement of the debtor's homestead, and held the balance until a building erected by the debtor was practically completed, when for its own protection it required releases of mechanics' liens and distributed the money to the contractor and subcontractor, the debt so created was not one incurred for an improvement of the homestead, within the meaning of the law making such debts first liens on property. *Steger v. Traveling Men's Building & Loan Ass'n*, 70 N. E. 230, 240, 208 Ill. 236, 100 Am. St. Rep. 225.

#### IMPROVEMENT (Of Land)

"Nothing can be deemed an 'improvement' for which compensation may be allowed which does not benefit the land and increase its value to the true owner." *Proctor v. Maine Cent. R. Co.*, 64 Atl. 839, 841, 101 Me. 459.

The term "improvements," in the provision of the Constitution of The Five Nations that the improvements on their land are the exclusive and inalienable property of the citizens respectively who made, or may rightfully be in possession of them, meant not only "betterments," but occupancy. *Shulthis v. McDougal*, 170 Fed. 529, 534, 95 C. C. A. 615 (citing *Cherokee Nation v. Journeycake*, 15 Sup. Ct. 55, 155 U. S. 196, 210, 39 L. Ed. 120).

Where a deed to land reserved the timber to be removed one half in 5 years and the other half in 10 years, and also contained a covenant that the grantor would cut the timber off of such part of the lands as was required by the grantee for improvements, the word "improvements," was ambiguous and justified parol evidence which showed that it was used with reference to such portions of the land as were necessary for a residence and the incidents thereto, for a person engaged in stock raising, and did not refer to any greater portion of the land which the grantee might arbitrarily designate as being required for improvements. *Jacobs v. Parodi*, 39 South. 833, 838, 50 Fla. 541.

The "settlement" or "improvement" upon land with a view to receiving water for agricultural purposes, as provided for in section 5, art. 15, of the Constitution, means an actual settlement or an actual improvement thereon, and a constructive settlement will not meet the purpose or requirements of the Constitution. *Mellen v. Great Western Beet Sugar Co.*, 122 Pac. 30, 31, 21 Idaho, 353, Ann. Cas. 1913D, 621.

In the statute giving a mechanic's lien for improvements on a homestead, and giving such lien for work and material used in constructing improvements thereon, and then only when contracted for in writing with the consent of the wife; the lien to secure such debt being declared to be for "improvements thereon as hereinbefore provided." The clause quoted means improvements actually made by the use of the work and material; both the contract and the employment of the work and material on the homestead in compliance therewith being essential to the lien. *Murphy v. Williams*, 124 S. W. 900, 902, 103 Tex. 155.

Under Lien Law § 2, defining a contractor as one entering into a contract with the owner of real property for the improvement thereof, and defining a materialman as any person other than the contractor furnishing materials for such improvement, and defining the term "improvement" as including the erection, alteration, or repair of any structure on real estate, and any work done on the property or materials furnished for its improvement, a contract requiring one to furnish all the window frames, sash, glass, and trim in and to buildings in course of construction for a lump sum, payable in installments as the work progressed, and requiring him to make a large part of the materials according to plans, is a contract for the permanent improvement of real estate within the lien law, and he is entitled to a lien for the materials furnished and work done. *Western Sash, Door & Lumber Co. v. Gaul Const. Co.*, 126 N. Y. Supp. 1110, 1111.

Code Civ. Proc. § 3414, makes a laborer's or materialman's lien prior to a contractor's. Lien Law (Consol. Laws, c. 33) § 2, defines a "contractor" as one who contracts with an owner of land to improve it, a "materialman" as one, other than a contractor, who furnishes material for such improvement, and an "improvement" as including work done on property or "materials furnished for its permanent improvement." Held, that the lien of one who installed plumbing, of one who furnished trim for the building under contract with the owner, and of one who sold brick and mason's building materials to the owner for use in the building, are all on equality, being entitled to preference in the order of time. *Jackson v. Egan*, 94 N. E. 211, 212, 200 N. Y. 496.

#### Building

The term "improvements," as used in a clause in a lease binding the tenant to make "improvements" to a certain amount, covers not only repairs and additions, but also new buildings. *Peters v. Stone*, 79 N. E. 336, 337, 193 Mass. 179.

A "water right" is the legal right to the use of any unappropriated water of any natural stream, water course, or source of

supply, and exists only in contemplation of law, and is for purposes of taxation "personal property," within Const. art. 12, § 17, and Pol. Code, 1895, §§ 16, 3680, defining "property" as including money, franchises, and other things capable of private ownership, and defining "real estate" as including the possession or ownership of land, mines, minerals, and quarries, and "improvements" as including all buildings, structures, etc., and "personal property" as including everything which is the subject of ownership, not included within real estate or improvements, so that under section 3716, providing that the personal property and franchises of water companies must be assessed in the district where the principal works are located, a water company owning a water right without the limits of a school district and conveying water by pipe lines into the district, where it is distributed to the inhabitants thereof, is properly assessed in the district; that being the place of business and principal works of the company. *Helena Waterworks Co. v. Settles*, 95 Pac. 838, 839, 37 Mont. 237.

#### Drainage

Const. art. 11, § 11, provides that the homestead exemption shall not operate against public taxes, nor debts contracted for the purchase money of the homestead, or improvement thereon. Held, that the drainage of homestead swamp lands, authorized by the drainage law (Acts 1909, c. 185), was an "improvement" thereon, and that the land was subject to assessment therefor. *State ex rel. Bigham v. Powers*, 137 S. W. 1110, 1116, 124 Tenn. 553.

The character of a culvert or bridge that a railroad company shall erect, being no part of the plat or profile or of the plans of the drainage engineer, formed no part of the "improvement" contemplated by Acts 30th Gen. Assem. p. 66, c. 68, §§ 18, 19, providing for the establishment of drainage ditches across the right of ways of railroad companies and providing for an agreement as to the place and manner and method in which the improvement shall cross the right of way, etc. *Mason City & Ft. Dodge R. Co. v. Board of Sup'rs*, 121 N. W. 39, 41, 144 Iowa, 10.

The term "improvement," as used in section 19, c. 68, p. 66, 30th Gen. Assem. provides that where the supervisors establish any drainage district, and the drain crosses a railroad right of way, it shall, after notice, construct the same in accordance with the plans and specifications of the engineer, and that if it fails to do so, the auditor shall cause the work to be done, and charge the cost to the railroad, and that the cost of constructing the "improvement" shall be considered as an element of the railroad company's damages, to be assessed by the appraisers, refers to the proposed "ditch, drain,

or change of natural water course," and the statute did not provide that the cost of constructing a new bridge by the railroad necessitated by the making of the improvement, should be an element of the railroad company's damages. *Chicago & N. W. Ry. Co. v. Drainage Dist. No. 5 Sac County*, 121 N. W. 193, 195, 142 Iowa, 607.

#### Engine and machinery

Mechanic's Lien Law, Laws 1897, p. 516, c. 418, § 3, gives a contractor performing labor or furnishing materials for the improvement of real property a lien therefor. Section 2 (page 515) provides that the term "improvement" includes the erection, alteration, or repair of any structure connected with real property, and any work done on such property or materials furnished for its permanent improvement. Section 22 (page 525) requires a liberal construction. Held, that machinery purchased for the purpose of fitting up an empty building as a manufacturing establishment, and by the installation of which it was so altered, was an improvement entitling the contractor furnishing the same to a lien. *Griffin v. Ernst*, 108 N. Y. Supp. 816, 818, 124 App. Div. 289.

#### As fixtures

Under the lien law (Laws 1897, c. 418), giving a lien for labor or materials for the improvement of real property, and defining the word "improvement" as including the erection, alteration, or repair of any structure on, connected with, or beneath the surface of, any real property, and any work done on such property, or materials furnished for its permanent improvement, and specifically repealing Laws 1895, c. 673, giving a lien for materials used in improving or equipping any house with any fixtures for supplying gas or electric light, gas and electric fixtures furnished to a house do not constitute an improvement of real property, because such fixtures are not permanently annexed to the building, but are merely for the temporary use of the occupant, subject to be removed by him. *Caldwell v. Glazier*, 123 N. Y. Supp. 622, 626, 138 App. Div. 826.

Double cases with shelves, exhibition cases, partition base, cupboards, a platform, lockers, dressers, bulletin boards, and supply cases, in a building designed for a public library, made of the same wood as the finish of the rooms, and fitted to them, and fastened by holdfasts, nails, screws, angle irons, etc., and without which equipment the building could not be used for library purposes, were an improvement of the realty protected by a mechanic's lien. *Rieser v. Commeau*, 114 N. Y. Supp. 154, 157, 129 App. Div. 490.

Ky. St. § 2463, provides that a person who furnishes materials in the erection or repairing of a house, or for any fixture or machinery therein, or for the improvement of real estate by contract with, or by the written consent of, the owner, contractor,

subcontractor, or authorized agent, shall have a lien thereon, etc. Held, that a heating boiler purchased by a contractor and installed in defendant's residence constituted a "fixture" and "machinery," within the statute, and also an improvement of the property, within the section, so as to entitle the seller to a materialman's lien therefor. *Menne v. American Radiator Co.*, 150 S. W. 24, 25, 150 Ky. 151.

Gas and electric light fixtures, consisting of electric light ceiling lamps or chandeliers, electric light reflectors, pendants, brackets, and lanterns, and gas and electric light brackets, specially designed and manufactured with reference to the general decorative scheme and architecture of the building in which they are installed, and to harmonize with one another, constitute an "improvement of real property," and the designing, manufacturing, installing, and furnishing thereof constitutes the performance of labor and furnishing of materials for the improvement of real property, within Lien Law (Consol. Laws 1909, c. 33) § 3, giving a lien to any person performing labor or furnishing materials for the improvement of real property, where they are intended to be permanently attached to, and form a part of, the realty, as evidenced by a provision in the lease, authorizing their installation by the lessee, that the lessee shall deliver up the premises, together with the fixtures and appurtenances. *Wahle-Phillips Co. v. Fifty-Ninth St.-Madison Ave. Co.*, 138 N. Y. Supp. 13, 16, 153 App. Div. 17.

#### **Lot as including**

See Lot.

#### **Mausoleum**

The construction of a mausoleum is not "an improvement of real property" within the Lien Law (Consol. Laws 1909, c. 33) §§ 3-25, giving a lien on such structure. *Brown v. City Nat. Bank of Plattsburgh*, 131 N. Y. Supp. 92, 97, 72 Misc. Rep. 201.

#### **Mining**

A coal mine is an improvement within Wilson's Rev. & Ann. St. 1903, § 4817, authorizing liens for labor and material for improvements. *Peaceable Creek Coal Co. v. Jackson*, 108 Pac. 409, 410, 26 Okl. 1, Ann. Cas. 1912B, 1.

Code Civ. Proc. § 1192, giving a lien for "every building or other improvement mentioned in section 1183 of this Code, constructed upon any lands," does not include or apply to "mining" work, which consists in removing ore, solely by the subtractive process, and which does not constitute for any purpose an improvement to the mine or the land. *Higgins v. Carlotta Gold Min. Co.*, 84 Pac. 758, 760, 148 Cal. 700, 113 Am. St. Rep. 344.

#### **As real estate**

See Real Property.

#### **Repairs**

As repair, see Repair.

To "repair" is to mend, to restore to a sound state whatever has been partially destroyed, to make good an existing thing, restoration after decay, injury, or partial destruction. An "improvement" is a valuable and useful addition, something more than a mere repair or restoration to the original condition. *Dougherty v. Taylor & Norton Co.*, 63 S. E. 928, 930, 5 Ga. App. 773 (citing 7 Words and Phrases, p. 6096).

Under Mechanic's Lien Law (Laws 1897, p. 515, c. 418, § 2), providing that the term "improvement," when used in the law, includes the erection, alteration, or repair of any structure on or connected with real property, etc., a person performing labor or furnishing material for repairs upon such a structure may have a lien upon the property. *Etna Elevator Co. v. Deeves*, 108 N. Y. Supp. 718, 719, 57 Misc. Rep. 632.

The word "improvements" in Gen. St. 1894, § 5853, declaring that the word "improvements," as used in the act relating to actions concerning improvements on realty, shall be construed to include all kinds of buildings, fences, ditching, drains, grubbing, clearing, breaking, and all other necessary or useful labor or permanent value to the land, does not include ordinary repairs, but all improvements which are of permanent value to the land are within its scope. The test is whether the alleged improvements are of permanent value to the land. *Northern Inv. Co. v. Bargquist*, 100 N. W. 636, 638, 93 Minn. 106.

A covenant in a lease obligating lessee to keep the premises in good order and repair during the term does not imply a consent by lessor, within Mechanic's Lien Law, Laws 1897, p. 516, c. 418, § 3, providing that a contractor or materialman who performs labor or furnishes material for the improvement of real property with the owner's consent shall have a lien; there being a distinction between "improvements" and "repairs," within the contemplation of that section. *Etna Elevator Co. v. Deeves*, 107 N. Y. Supp. 63-66, 56 Misc. Rep. 565, 110 N. Y. Supp. 124, 125 App. Div. 842.

#### **Sewers**

A system of sewers is an "improvement" of lots within the sewer district, within the meaning of Code Civ. Proc. § 1191, providing that a person who, at the request of the reputed owner of any lot, grades, fills in, or otherwise "improves" the same, has a lien on the lot for his work. *Williams, Belser & Co. v. Rowell*, 78 Pac. 725, 726, 145 Cal. 259.

#### **Sidewalk**

Kirby's Dig. § 4970, provides that every mechanic or materialman shall be entitled to a lien on the building or "improvement," and

on the land belonging to the owner, etc. Section 4971 declares that the entire land, to the extent aforesaid, on which any building or other improvement is situated, etc., shall be subject to all liens created by the act; and section 4972 provides that the lien shall attach to the buildings or other improvements in preference to any prior lien, etc. Held, that the word "improvement," as used in section 4970, was not used to mean something similar to a building or erection, but included a sidewalk constructed in the street in front of premises, which were therefore subject to a lien for materials used in constructing the same. *Leiper & Mills v. Minnig*, 86 S. W. 407, 408, 74 Ark. 510, 4 Ann. Cas. 1013.

#### IMPROVEMENT (Of Municipality)

The phrase "improvement or improvements" in San Francisco Charter, art. 16, § 29, requiring that when the supervisors shall determine that the public interest requires the construction of any permanent improvement or improvements, etc., includes the construction of sewers. *Law v. City and County of San Francisco*, 77 Pac. 1014, 1017, 144 Cal. 384.

#### IMPROVEMENT (Of Navigable Water)

As public work, see Public Work.

Permanent piers resting on piles and extending beyond high-water mark and attached to land in the city of Baltimore, by a railroad owning land bordering on a navigable river, were "improvements" within Code Pub. Gen. Laws Md. art. 54, §§ 47-49, giving to proprietors of land bordering on navigable waters the exclusive right to make improvements into the waters in front of their respective land, etc. *Western Maryland T. R. Co. v. City of Baltimore*, 68 Atl. 6, 10, 106 Md. 561.

The word "improvements," as used in Greater New York Charter, § 822, relating to the acquisition by the city of land under water, and providing that if the property of the riparian owner has been built on or improved, and if such building or improvements are upon single tracts contiguous to or adjoining lands under water, his compensation shall be measured in a certain way, is not limited to buildings; but, if the lands originally under water have been brought to grade upon an established street, they have been improved within the meaning of the statute. In re *City of New York*, 105 N. Y. Supp. 750, 759, 120 App. Div. 849.

The construction by the state of a barge canal which follows the general line of a stream constituting a public highway is an improvement of the stream, within the rule that a riparian proprietor cannot recover damages resulting from the improvement of a public stream, though the canal deviates from the stream so far as is necessary to

straighten it. The construction of a barge canal which follows the general line of a stream constituting a public highway is an improvement of a navigable stream as against the objection that the canal is an artificial waterway under control of the state, in which adjoining landowners have not the rights they possess in a navigable stream, where no damages are claimed for the deprivation of rights to navigation, for the canal is a public waterway, and the fact that the use thereof is under special regulation does not make it any the less such a public improvement as is within the authority of the state to make. *Champlain Stone & Sand Co. v. State*, 127 N. Y. Supp. 131, 134, 142 App. Div. 94.

#### IMPROVEMENT (Of Railroad)

Under Act March 17, 1869, § 1 (P. L. 12), authorizing railroad companies to condemn other lands than those originally taken, for the purpose of "improving their lines," a railroad may take land for the purpose of erecting tanks to supply water to its locomotives. *Wilson v. Pittsburgh & L. E. R. Co.*, 72 Atl. 235, 236, 222 Pa. 541.

#### IMPROVEMENT (Of School Property)

Under Pol. Code, § 1943, authorizing an expenditure by the district of part of the school fund received by it for purposes of building an improvement, such "improvement" must be of such a character as to enhance materially the value and effectiveness of the school property for the purposes for which it is held. That which partakes of the nature of a luxury which lasts but a single day, and then disappears and leaves the property in the same condition in which it was before, is not such an "improvement" as justifies the expenditure of the school fund. *City of Butte v. School Dist. No. 1*, 74 Pac. 869, 871, 29 Mont. 336.

#### IMPROVEMENT (On Mining Claim)

The word "improvements," in an agreement for the sale of mining claims which stipulated that if the purchaser failed to perform his agreement the improvements should become the property of the seller as rent for the occupation of the premises by the purchaser and as damages sustained by reason of a breach of the contract, includes removable betterments placed on the land by the purchaser, and which he might, in the absence of an agreement to the contrary, take away. *Smith v. Detroit & D. Gold Min. Co.*, 97 N. W. 17, 19, 17 S. D. 413.

The word "improvement," in Rev. St. U. S. § 2324, requiring the making of annual improvements on mining claims, means such an artificial change of the physical conditions of the earth in, on, or so reasonably near a mining claim as to evidence a design to discover mineral therein, or to facilitate its extraction, and in all cases the altera-

tion must be reasonably permanent in character. *Fredricks v. Klauser*, 96 Pac. 679, 682, 52 Or. 110.

In the development of a mining claim, the maxim that equity regards as done what was intended has no application, and material taken to a mining claim and not used cannot be reckoned as an improvement of the claim. *Fredricks v. Klauser*, 96 Pac. 679, 682, 52 Or. 110.

Under Comp. Laws, § 4019, which divides property for the purpose of taxation into two classes, real estate and personal property, and declares the former to include "improvements," which are defined to include all buildings, structures, fixtures, and fences erected upon or affixed to the land whether title has been acquired to the land or not, improvements upon an unpatented mining claim become, upon their sale for taxes, so associated with the realty as to constitute an incumbrance thereon within the meaning of Comp. Laws, § 2304, allowing the holder of an incumbrance to perform the annual labor so as to prevent relocation. *McVelgh v. Velg*, 117 Pac. 857, 859, 16 N. M. 453.

#### IMPROVEMENT (On Public Land)

Allotments of lands of citizens of the Cherokee Nation were made under Act of Congress, July 1, 1902, c. 1375, 32 Stat. 716, and thereunder citizens of the Cherokee Tribe were entitled to select as their allotments lands on which were located their improvements, and the setting of posts merely for the purpose of marking a prospective allotment did not constitute a lawful improvement. *Ross v. Wright*, 116 Pac. 949, 952, 29 Okl. 186.

Rev. St. 1901, pars. 4035-4037, providing that actual or bona fide settlers who have placed improvements on school lands shall have the preferred right to lease the same, and defining "improvements" as anything permanent in character, the result of labor or capital, enhancing the value of the land, etc., require, to acquire a preferred right to lease school land, that a person be an actual and bona fide settler and that he place on the land improvements permanent in character, the result of labor or capital, which enhance the value of the land. *Schley v. Vail*, 95 Pac. 113, 114, 11 Ariz. 226.

#### IMPROVEMENT CERTIFICATE

An instrument providing that the city should make and collect an assessment for an improvement with due diligence, and that in case the assessment should not be collected to meet the certificate within two years from the date of confirmation the city would pay the amount of the certificate upon 30 days' notice of default in the collection of the assessment, is called an "improvement certificate." *Dime Sav. Inst. v. Mayor, etc., of City of Hoboken*, 42 N. J. Law, 283, 285.

Where sealed instruments certify and covenant that there is a certain sum of money due the holders for improvements in certain streets, who are entitled to receive the same from the treasurer of the town, with interest, in amounts not less than \$50 at any time, as the money on said assessment should come to the hands of said treasurer, that the town binds itself to use due diligence in making and collecting the said assessment, but, in case said assessment shall not be collected within a specified time, that it will pay said principal sum, with interest, to the holder, "upon thirty days' notice of default in the collection of the assessment," such instrument is called an "improvement certificate." *Morgan v. Town of Guttenburg in Hudson County*, 40 N. J. Law, 394, 395.

#### IMPROVEMENT DISTRICT

See Street Improvement District.  
As corporation, see Corporation.

#### IMPROVEMENT FUND

See City Improvement Fund.

#### IMPROVEMENT FUND TAX

Code, § 894, authorizes any city to levy an "improvement fund tax" to pay for street improvements. Section 830 provides for payment of street improvements out of the "city improvement fund." Held, that both statutes refer to the same fund, and contracts for paving which provide for payment of difference between amount due for paving and amount raised by special assessments out of the "paving fund" and "general paving fund" refer to the fund specified in the statutes. *Corey v. City of Ft. Dodge*, 111 N. W. 6, 8, 133 Iowa, 666.

#### IMPROVIDENCE

Where a son failed in business conducted in his own name and involved his father to a certain extent, and thereafter the father paid the obligations of the son and took the business and permitted the son to use his name, and other losses occurred, but the father allowed the business to be conducted in this way until death, no such case of "improvidence" is shown as excludes the son from the right to administer on his father's estate under Code Civ. Proc. § 2661. "In order to disqualify a person under the statute, the 'improvidence' or want of understanding must amount to a lack of intelligence." In re *Greene's Estate*, 96 N. Y. Supp. 98, 102, 48 Misc. Rep. 31 (citing *Emerson v. Bowers*, 14 N. Y. 455; *Coggshall v. Green* [N. Y.] 9 Hun, 471; *Coope v. Lowerre* [N. Y.] 1 Barb. Ch. 45).

Where the statute provided that no person should serve as administrator who is adjudged to be incompetent by reason of "improvidence" or want of understanding, the court properly removed an executor who was

palpably deficient in the understanding necessary to enable one to transact business, who made no sufficient effort to collect the debts due the estate and who never read and did not know the contents of affidavits attached to his report and was ignorant of his personal business relations with the decedent whose estate he was administering. In re Courtney's Estate, 79 Pac. 317, 818, 31 Mont. 625.

### IMPROVIDENTLY EXERCISED

The phrase "improvidently exercised," as used in stating the rule that an appellate court will not interfere with the discretion of the trial court in granting a new trial, unless improvidently exercised, means thoughtlessly exercised, or without due consideration. *Blackwood v. Eads*, 135 S. W. 922, 924, 98 Ark. 304 (citing *Webst. Int. Dict.*).

### IMPULSE

See Irresistible Impulse

### IMPURE

The term "impure" is a common word which may be assumed to be understood in the common meaning by an ordinary jury without definition. *Commonwealth v. Buckley*, 86 N. E. 910, 911, 200 Mass. 346, 22 L. R. A. (N. S.) 225, 128 Am. St. Rep. 425.

### IMPURE MILK

Act June 13, 1906, § 3, defines the term "impure milk" to be such milk as contains more than 88 per centum of watery fluids or less than 12 per centum of solids. *Board of Health of State of New Jersey v. Vandruens*, 72 Atl. 125, 126, 77 N. J. Law, 443.

### IMPUTATION

In an instruction that defendant is "liable for the slightest negligence, and compels them to repel by satisfactory proof every imputation of such negligence," the word "imputation" means charge. If it can be said that a jury should find that the defendant is guilty of negligence because negligence is imputed to it, then the consequential result of that would be that the burden would be shifted upon the defendant to show that it was not guilty of negligence. That is plainly the effect of this instruction. By saying that the defendant must repel by satisfactory proof every "imputation" of negligence, it could mean nothing else than to tell the jury that the burden is upon the defendant to prove that the injury was not the result of its negligent act. *Blake v. Camden Interstate Ry. Co.*, 50 S. E. 408, 409, 57 W. Va. 300.

### IMPUTED APPRECIATION OF RISK

The test of "imputed appreciation of risk" is whether the servant understood the risk, or by the exercise of ordinary observa-

tion ought to have understood it. *Rase v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 120 N. W. 360, 366, 107 Minn. 260, 21 L. R. A. (N. S.) 138.

### IMPUTED KNOWLEDGE

The doctrine of "imputed knowledge" as to actual existing conditions necessarily rests upon the duty of the master to furnish his employé with a safe place in which to work, and is inapplicable where there is no such duty. It is ordinarily the duty of the master, as the court instructed the jury, to furnish his employé a suitable and safe place in which to work, and suitable appliances wherewith to perform the work; and, where such duty exists, the master is held to the exercise of care in making the place and appliances safe, and cannot be heard to say that he did not know of defects and dangers that he might have ascertained by the exercise of reasonable care. *Roche v. Llewellyn Ironworks Co.*, 74 Pac. 147, 149, 150, 140 Cal. 563.

The words "imputed knowledge," as applied in actions by a servant against his employer for injuries, mean that the servant injured is, or is not, chargeable with a comprehension of the conditions which caused his injury and of the risks created by those conditions, according as it may reasonably be inferred that those conditions or those risks would or would not have been comprehended by a person of ordinary prudence, whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same as those of the servant himself. *Sullivan v. R. D. Wood & Co.*, 86 Pac. 629, 631, 43 Wash. 259, 117 Am. St. Rep. 1047 (adopting definition in 1 Labatt, Mast. & S. § 391).

The test of "imputed knowledge" of danger is not the exercise of ordinary care to discover danger, but whether it is known to or plainly observable by the employé. *Rase v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 120 N. W. 360, 366, 107 Minn. 260, 21 L. R. A. (N. S.) 138.

### IMPUTED NEGLIGENCE.

See Repel Imputation of Negligence.

As identification, see Identification.

After an exhaustive review of the judicial decisions in the various states on the question of "imputed negligence," the court says: "The rule fairly deducible from our own cases, and supported by the great weight of authority by courts of other jurisdictions, is that where an adult person, possessed of all his faculties and personally in the exercise of that degree of care, which common prudence requires under all the surrounding circumstances, is injured through the negligence of some third person and the concurring negligence of one with whom the plaintiff is riding as guest or companion, between whom and the plaintiff the relation of mas-

ter and servant or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the one but for whose wrong his injuries would not have been sustained. Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the actions of the driver, so as to constitute in fact the relation of principal and agent, or master and servant, or his voluntary, unconstrained, noncontractual surrender of all care for himself to the caution of the driver. Thus where a person was injured through the negligence of a third person and the concurring negligence of one with whom she was riding as guest, the driver's negligence would not be imputed to her, where in entering and continuing in a conveyance she acted with reasonable caution, and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver was so sudden or of such a character as not to permit or require her to act for her own protection." *Shultz v. Old Colony St. Ry.*, 79 N. E. 873, 877, 878, 193 Mass. 309, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402.

Where two fellow servants having duties to perform, the one wholly distinct from the other, are severally engaged in the performance of such duties, the negligence of one should not be "imputed" to the other. The negligence of a driver of a fire engine is not imputable to the engineer who in the performance of his duty is riding on the rear end of the engine at the time of a collision with a street car. *McKernan v. Detroit Citizens' St. Ry. Co.*, 101 N. W. 812, 814, 138 Mich. 519, 68 L. R. A. 347.

## IN

See Brought In; Butting In; Contained In.

Where a railroad station is not wholly "in" a village, but is half in it and half in another village, the railroad cannot be compelled by Railroad Law (Laws 1892, p. 1392, c. 676) § 34, requiring a railroad station in a village to have the same name as the village, to change the name of the station to that of the village. *People ex rel. Village of North Pelham v. New York, N. H. & H. R. Co.*, 110 N. Y. Supp. 2, 125 App. Div. 641.

A fire policy, with a rider attached permitting a removal of the property to another location and providing that it should cover the property "in both locations during the removal," does not cover the property tempo-

rarily stored in a building other than the building in which it was insured, with a view to the subsequent removal to the new location. *Palatine Ins. Co. of London v. Kehoe*, 83 N. E. 866, 867, 197 Mass. 354, 15 L. R. A. (N. S.) 1007, 125 Am. St. Rep. 375, 14 Ann. Cas. 690.

An elevator was standing at the first floor of a building, with the door, which extended to the roof of the elevator, wide open; the attendant being elsewhere. The car was operated by a lever on the side wall to the right of one entering the door, and, while the elevator was stationary, this lever was in the center of its arc of operation. In order to start the elevator it was necessary to push down a button at the center of the arc, which permitted the movement of the lever to the right or left. The elevator was in perfect condition, both before and after the accident, which no one saw. The building superintendent found insured hanging head downward into the elevator, her body caught between the roof of the elevator and the floor of the building. One limb which had been caught at the thigh was projecting over the floor. When the elevator was released, insured fell into it on its floor. Held, that insured was "in" the elevator when the injuries were inflicted, within a policy insuring against accidental injury while "in" a passenger elevator. *Depue v. Travelers' Ins. Co.*, 166 Fed. 183, 184.

The lessor of a suite of rooms in an apartment house covenanted that he would "at his own expense" light and keep neat and clean the common stairs "in" said building. Even if the covenant does not necessarily cover back stairs outside the house but in a platform connected with it, there is at least room for doubt that it is not limited to the front stairs; so that evidence of the practical construction put on it by the landlord, by taking care of the outside stairs as well as the front stairs, and cleaning ice and snow therefrom as a part of the duty, is admissible in a suit involving the landlord's duty and liability. *Nash v. Webber*, 90 N. E. 872, 874, 204 Mass. 419.

## As for

The words "in her natural life," as used in a will in which testator gave and bequeathed to his wife all his estate, real and personal, to have and to hold in her natural life, were probably intended to be used for the phrase "for her natural life." If they were taken to mean the same as that phrase, the property was given to the wife for life with power of disposition. *In re Pierson*, 110 N. Y. Supp. 476, 479, 58 Misc. Rep. 94 (quoting *Rood v. Watson*, 7 N. Y. Supp. 212, 54 Hun. 85).

## As from

The word "from" is often used interchangeably with "in." An indictment charging larceny "from" a residence on fire charg-

es an offense under Comp. Laws, § 11,551, prohibiting larceny by stealing "in" any building on fire. *People v. Klammer*, 100 N. W. 600, 137 Mich. 399.

#### **As in and about**

Under a statute giving a lien to the class of persons named therein who may labor or perform services in any office, etc., manufactory, or mill of any character, etc., the term "in any manufactory or mill of any character" refers to labor performed in or about such place, and no lien exists where the services are wholly performed at a place miles distant from the mill and have no immediate connection with the operation thereof, and hence one engaged at a distant place in cutting and hauling logs to be sawed at the mill was not entitled to a lien. *Bush Bros. Lumber & Milling Co. v. Eastwood* (Tex.) 132 S. W. 389, 392.

#### **As on**

On construed as in, see On—Upon.

Where the indictment charged that accused unlawfully shot a pistol "while in a passenger car," and the evidence showed that he discharged the pistol while on the steps of the car, the variance was not material, the words "in the car," as used in Pen. Code 1895, § 511, as amended by Acts 1905, p. 86, being equivalent to "on the car." *Andrews v. State*, 70 S. E. 111, 112, 8 Ga. App. 700.

#### **Of**

Of construed as in, see Of.

#### **As within, inside of, within the bounds or limits of**

The words "in one year," in a will directing that, on the death of one of the beneficiaries, the executors in one year therefrom shall divide the portion of the principal held in trust for him among his heirs equally, means within one year, and thereby the testator desired to express his intention that the time when the different remaindermen would come into actual possession and use of their estates should not be postponed beyond one year from the date of the death of a life tenant, and in no sense can they be taken to work any enlargement of the time of payment. *Nichols v. Nichols*, 86 N. Y. Supp. 719, 722, 42 Misc. Rep. 381.

The word "in" means "inside of" "within the bounds or limits of," and under Railroad Law, § 26, allowing a railroad to cross any street or highway "in" any city at grade, with the consent of the municipal authorities, a boulevard may be so crossed at grade with such consent at a point within a city, though the boulevard was built by the county authorities and extended far beyond the city limits. *Board of Chosen Freeholders of County of Hudson v. Central R. Co. of New Jersey*, 59 Atl. 303, 307, 68 N. J. Eq. 500.

#### **IN ACT OF**

In a prosecution for homicide, the court charged that if defendant honestly believed, without fault or carelessness on his part, that when he killed deceased the latter was in the act of killing defendant's father, or of inflicting on him great bodily injury, and that the danger appeared to defendant to be urgent, defendant was justified in striking deceased to prevent his father from being killed or from receiving great bodily injury. Held, that the words "in the act of" should be construed to mean "about to," and that the instruction was therefore not objectionable as requiring that it must appear to the jury that deceased was about to kill defendant's father, or inflict on him great bodily injury, before they could find defendant not guilty. *Mabry v. State*, 97 S. W. 285, 287, 80 Ark. 345.

#### **IN ADDITION TO**

Rev. St. 1898, § 4490, provides that on escape from prison the guilty person shall be punished by imprisonment, not to exceed 10 years, in addition to his former sentence; and section 4494 declares that, in case of a prisoner breaking jail, he shall be punished by imprisonment for one year in addition to the unexpired term of the former sentence. The words in section 4490, "in addition to his former sentence," and in section 4494, "in addition to the unexpired term," were used to indicate that the punishment for the second offense is not deemed to abridge the execution of the judgment theretofore pronounced. The theory of the law is that where a judgment has once been rendered bearing solely on the person, as in the case of a sentence to confinement at hard labor for punishment of crime, it can only be satisfied by death of the party, his confinement at hard labor for the length of time mentioned in the sentence, less any good time earned according to law, by a reversal of the judgment, or by pardon. The sections do not preclude the recapture and confinement of a person escaping from custody to serve the unexpired term of his original sentence without judicial proceedings, the time of his voluntary absence not being counted in his favor. *In re McCauley*, 100 N. W. 1031, 1032, 123 Wis. 31, 3 Ann. Cas. 414.

Under Laws 1897, c. 414, § 130, providing that a "village shall not incur indebtedness if thereby its total contract indebtedness, exclusive of liabilities for which taxes have already been levied, shall, in addition to obligations issued to provide for the supply of water, exceed ten per centum of the assessed valuation of the real property, subject to taxation, as it appeared on the last preceding village assessment roll," the indebtedness incurred for water supply must be excluded from the entire indebtedness of the village in determining whether it has reached the 10 per cent. limitation; the phrase "in addition



to obligations issued to provide for the supply of water" not limiting the first word "indebtedness." *Lines v. Village of Otego*, 91 N. Y. Supp. 785, 787.

The phrase "in addition to curtesy," as used in Rev. St. 1899, § 111 (Ann. St. 1906, p. 375), providing that if a wife die intestate, owning personal property, her widower shall be allowed to keep as his absolute property "in addition to curtesy" all the articles and property and be entitled to all the remedies as relates to his deceased wife's property, as is provided for the widow in the deceased husband's property, did not mean that the provision therein made for the surviving husband was conditioned on his having curtesy, but that he was entitled to the same, whether he had any estate of curtesy or not. *Ferguson's Estate v. Gentry*, 104 S. W. 108, 109, 206 Mo. 203.

#### IN ALL LIKELIHOOD

Where a physician testified that the results of plaintiff's injury "in all likelihood" were permanent, the term quoted should be treated as equivalent to "reasonable certainty." *Ballard v. Kansas City*, 86 S. W. 479, 480, 110 Mo. App. 391.

#### IN AND ABOUT

A servant injured while engaged in removing, by means of a cable and a locomotive on a railway, large chunks of iron, the result of a "boil" at a furnace, was engaged "in and about the operation of a railway" within the Employers' Liability Act. *Woodward Iron Co. v. Sheehan*, 52 South. 24, 25, 26, 166 Ala. 429 (Code Ala. 1907, § 3910).

#### IN ANY APPRECIABLE DEGREE

See Appreciable Degree.

#### IN ANY CASE

See Any; *If in Any Case*.

#### IN ANY DEGREE

See Any.

#### IN ANY MANNER

See Any.

#### IN ANY PLACE

See Any.

#### IN ANY WAY MENTIONED

See Any.

#### IN BANK

See Money Deposited in Bank.  
Deposit in bank as money, see Money.

#### IN BEHALF OF

The word "behalf," in the phrase "in behalf of the state," means in the name of, on account of, benefit, advantage, interest, prof-

it, defense, vindication. *Meyers v. State*, 105 S. W. 48, 49, 47 Tex. Civ. App. 336.

The word "behalf" means in the name of, on account of, benefit, advantage, interest; and in any of these senses a suit in the name of the state, for the use of the county, to recover a penalty on a liquor dealer's bond, is a suit in behalf of the state, within the meaning of the Constitution of Texas, although the recovery inures to the benefit of the county. *State v. Eggerman*, 16 S. W. 1067, 1068, 81 Tex. 569.

#### IN BEING

See Life or Lives in Being.

#### IN BULK

See Stored in Bulk.

See, also, Laden.

The term "in bulk" has long been understood in commercial circles as contradistinguished from "package" or "parcel," as where wheat, lard, and the like are sold in bulk. The common and approved usage of language, the technical meaning given by the business world, and the legal definition of the expression "in bulk" are opposed to the idea of a number of packages, parcels, or barrels containing merchandise being regarded as being in bulk. *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, 1022, 119 Ky. 75.

Where a storekeeper, after selling at auction part of his stock of goods, sold at a private sale all but a few dollars worth of the balance, such sale was a "sale in bulk," defined by Laws 1901, p. 224, c. 100, § 4, to be a sale of a stock of goods out of the usual course of business. *Fitz-Henry v. Munter*, 74 Pac. 1003, 1004, 33 Wash. 629.

Where personal property, part of a bankrupt's stock, was sold to defendant at three different times shortly before bankruptcy, the goods being less than the bankrupt's entire stock in trade, the sale was not a "sale in bulk" within Laws Mass. 1903, c. 415, regulating sales in bulk. *Carpenter v. Karnow*, 193 Fed. 762, 765.

The words "in bulk" in a tax deed simply mean that the tracts for which the deed was made were sold in bulk, and such recital neither denies nor alleges that the sale included other tracts, or that such sale included all the lands outside of town lots upon which taxes were delinquent, and the presumption, in the absence of anything to the contrary, would be that the county treasurer complied with the statute, and there is nothing in such deed in any manner implying the contrary. *Gibson v. Smith*, 124 N. W. 733, 738, 24 S. D. 514; *Same v. Kitterman*, 124 N. W. 740, 24 S. D. 530.

A sale by one partner of his interests in a mercantile business to his associates is not a "sale of goods in bulk," within Act Aug. 17, 1903 (Acts 1903, p. 92), regulating sales of

stock of goods in bulk. *Taylor v. Folds*, 58 S. E. 683, 684, 2 Ga. App. 453.

#### **Package distinguished**

See Package.

#### **IN THE CAR OF ANY ELEVATOR**

A policy to indemnify insured against loss for injuries to persons "while in the car of any elevator" in a building of insured covers a loss occasioned by an injury to a boy who inserted his head into the elevator shaft far enough to have it struck by a car. *Scarritt Estate Co. v. Casualty Co. of America*, 149 S. W. 1049, 1051, 166 Mo. App. 567.

#### **IN CASE OF DEATH**

An absolute bequest to a person, followed by the expression "in case of his death," cannot be construed to mean "at his death" or "from his death"; the element of contingency being absent in that case, as no proper force could then be given to the expression, "in case of." *Fischer v. Fischer*, 71 Atl. 488, 489, 75 N. J. Eq. 74.

Under a will devising an estate in remainder to testator's children, and providing "in case of the death of one or more of said children," issue of said wife, such shares to be equally divided between all my living children or their issue, the phrase quoted referred to their dying before the mother and before the estate came into possession. *Clements v. Reese* (Ky.) 74 S. W. 1047 (citing *Pruitt v. Holland*, 92 Ky. 641, 18 S. W. 852; *Thackston v. Watson*, 84 Ky. 206, 1 S. W. 398; *Ferguson v. Thomason*, 9 S. W. 714, 87 Ky. 519; *Lee v. Mumford* [Ky.] 44 S. W. 91; *Baxter v. Isaacs* [Ky.] 71 S. W. 907).

#### **As death within testator's lifetime**

Where there is a bequest to one and "in case of his death" to another, the expression "in case of his death" unexplained by the context refers to the event of death happening before the death of the testator. *Fischer v. Fischer*, 71 Atl. 488, 489, 75 N. J. Eq. 74.

The general rule is that, where the context is silent, the words "in case of," and similar expressions referring to the death of the prior legatee in connection with some collateral event, apply to the contingency happening as well after as before the death of testator. *Fischer v. Fischer*, 71 Atl. 488, 490, 75 N. J. Eq. 74.

Where testator devised his residuary estate to his son for life, and, "in case of his death" without issue and leaving a widow him surviving, then the estate to go as therein provided, but, if his son should die leaving issue, then the estate to go to them, the words "in case of his death" mean the son's death subsequent to testator's and not prior thereto. *Chesterfield v. Hoskin*, 113 N. W. 647, 649, 133 Wis. 368.

When a devise is made to one person in fee, and "in case of his death" to another in

fee, the devise over is construed in general to refer only to a death occurring in the testator's lifetime; but, when the death of the first taker is coupled with other circumstances which may or may not take place, the devise over, unless controlled by other provisions of the will, takes effect on the death of the first taker, whether before or after the death of the testator. *Carpenter v. Sangamon Loan & Trust Co.*, 82 N. E. 418, 419, 229 Ill. 486.

After the death of his wife, the life tenant, testator devised to his two sons, James and John, his farm to be equally divided between them; but in a subsequent paragraph provided that, "in case of the death of either of my sons above named I will and bequeath that the remaining son living shall have and hold in his own right the whole of the above named bounded two tracts of land." According to the plain intent, the words "in case of" should be construed to mean "at" or "upon"; and the whole phrase "in case of the death of" as referring to an event to occur subsequently to the death of the testator. *Neal v. Hamilton Co.*, 73 S. E. 971, 975, 70 W. Va. 250.

#### **IN CASE RETURN CANNOT BE HAD**

In Comp. Laws, § 5099, the words "in case return cannot be had," authorizing money judgment for plaintiff in replevin "in case return cannot be had," are equivalent to the words "in default thereof," and when therefore plaintiff is already in possession, if he succeeds in the suit he merely takes a judgment to confirm his possession and for damages. *Longley v. Daly*, 46 N. W. 247, 250, 1 S. D. 267.

#### **IN CHARGE**

See Charge; Put in Charge; Without Any Person in Charge.

#### **IN THE CLEAR**

In the parlance of linemen working with electric wire, keeping "in the clear" means working so as to keep from contact with dangerous wires or circuits. *Potts v. Shreveport Belt Ry. Co.*, 34 South. 103, 105, 110 La. 1, 98 Am. St. Rep. 452.

#### **IN COMMON**

See Interest in Common.

#### **IN CONSIDERATION**

A legacy reciting that it is "in consideration of her care for my invalid mother many years preceding her death, and also her care of my infant son," does not imply a debt, but a bounty. It is not an acknowledgment of a legal obligation, and, when pleaded in an action barred by the statute of limitations to recover for such services, does not remove the bar of the statute. *McNeal v. Pierce*, 75 N. E. 938, 939, 73 Ohio St. 7, 1 L. R. A. (N. S.) 1117, 112 Am. St. Rep. 695, 4 Ann. Cas. 71.

**IN CONTEMPLATION**

See Contemplation of Death.

**IN CONTINUOUS FORCE**

See Continuous Force.

**IN CONTROVERSY**

See Property in Controversy.

**IN COUNTY**

See If Residing in the County.

**IN THE COURSE OF**

See Course.

**IN COURT**

See Day in Court.

**IN CUSTODIA LEGIS**

See Custody of the Law.

**IN CUSTODY**

See Custody; Held in Custody.

**IN DEFAULT OF ISSUE**

A father, by a will made in 1901, gave all his residuary estate to his daughter for her separate use, free from any control of the husband she may now have or may hereafter have, with power to appoint among her children or their issue, and in default of issue to named collaterals. At the date of the will, and at the death of the testator, plaintiff was not married, nor did she contemplate marriage. Held, that under Act July 9, 1897 (P. L. 213), the words "in default of issue" imply a definite failure of issue, and the daughter took a life estate only. *Milworth v. Schuykill Imp. Land Co.*, 69 Atl. 47, 49, 219 Pa. 527.

**IN THE DIRECTION OF THEIR LINES  
CONTINUED TO THE CHANNEL**

As the rights granted by the riparian act of 1856 extend to "all lands covered by water lying in front of any tract of land \* \* \* lying upon any navigable stream or bay of the sea or harbor, as far as the edge of the channel," and the right of action given the grantees to prevent encroachments extends to "all such submerged lands in the direction of their lines continued to the channel," this right of action extends to the space between lines drawn at right angles from the shore line "to the edge of the channel," where the channel runs parallel or practically so with the shore line. *Merrill-Stevens Co. v. Durkee*, 57 South. 428, 432, 62 Fla. 549.

**IN DISGUISE**

The term "persons in disguise" does not include persons in ambush or concealed in bushes, where a person so concealed lies in wait to attack by surprise. *Dale County v. Gunter*, 46 Ala. 118, 143.

**IN DUE COURSE**

See Due Course of Business; Holder in Due Course; Indorsee in Due Course.

**IN DUE MANNER**

"The words 'in due manner sworn' have the same meaning as the word 'duly.' An indictment alleging that the witness was 'in due manner sworn' sufficiently alleged that she was 'duly sworn.'" *State v. Jewett*, 83 Pac. 994, 906, 48 Or. 577 (citing definitions in 3 Words and Phrases, pp. 2259-2264).

**IN EQUAL SHARES**

See Equal Shares.

**IN THE ERECTION**

See For and in the Erection.

**IN THE EVENT**

Under a will providing that "in the event of" the death of both of testatrix's children the residue of the estate was to go to her brother, where one of the children died before the mother and the other shortly after, the unexpended portion of the estate goes to the brother and not to the heirs of the son dying after the mother. *Woolverton v. Johnson*, 77 Pac. 559-561, 69 Kan. 708.

Where the words "in the event of the decease of a devisee" are used in a will, they ordinarily speak as of a death within the lifetime of the testator. Testator devised real estate to his wife for life and directed that his property previously mentioned at his wife's decease should be equally divided between his two daughters, and then directed that, on the decease of either of his daughters, the portion of testator's property held by either of them should descend to their issue and be placed in the hands of a trustee, and, if there was no surviving issue, the property should then pass to the deceased's sister and issue. The daughters acquired an absolute estate in the property on the death of the wife; the limitation being applicable only in case of the daughter's death before the death of the wife. *Ketchum v. Ketchum*, 91 N. Y. Supp. 801, 802, 100 App. Div. 423.

Where testator devised lands to his daughter with the provision that, "in the event she should marry" and die without issue and leave a husband surviving her, the husband should have the lands for life and at his death they should go to the testator's son if living, the words "in the event she should marry" refer to the happening of that event at any time and not merely within the testator's lifetime. *Cooksey v. Hill*, 50 S. W. 235, 236, 106 Ky. 297.

**IN EVERY SUCH CASE**

Civ. Code 1910, § 3863, declares: "If a will be lost or destroyed subsequently to the death or without the consent of the testator, a copy of the same, clearly proved to be such by the subscribing witnesses, and other evidence, may be admitted to probate and record in lieu of the original; but 'in every such case' the presumption is of revocation by the testator, and that presumption must

be rebutted by proof." This Code section is awkwardly expressed, but, properly construed, the words "in every such case" refer to every case wherein it is sought to have admitted to probate and record a copy of a lost or destroyed will in lieu of an original; and therefore, when it is sought to prove and establish a will not to be found at the death of the testator, the propounder is confronted with the presumption that the will was revoked by the testator, and that presumption must be rebutted by proof. *Harris v. Camp*, 76 S. E. 40, 41, 138 Ga. 752.

### IN EXECUTION

The term "in execution," in Const. art. 2, § 33, providing that all prisoners, unless "in execution," or committed for capital offenses, when the proof is evident or the presumption great, shall be bailable by sufficient sureties, includes a defendant who has been convicted of a misdemeanor and sentenced to the house of correction for a term and is in the custody of the sheriff on the mittimus, and he is not entitled as of right to bail pending appeal, though final commitment has not been made. *In re Comolli*, 63 Atl. 184, 186, 78 Vt. 337.

### IN THE EXERCISE OF DUE CARE

The phrase "in the exercise of due care," in Acts 1907, p. 162, providing that an injured servant in the exercise of due care may recover for injuries caused by the negligence of a fellow servant, is intended to preserve to the employer the defense of contributory negligence, and does not change the rule as to the burden of proof, which is still on the employer. *Soard v. Western Anthracite Coal, etc., Co.*, 123 S. W. 759, 760, 92 Ark. 502.

### IN FACE OF THE ENEMY

See Face.

### IN FACT

See Assignee in Fact; Attorney in Fact; Fraud in Fact.

### IN THE FIRST INSTANCE

Under Laws 1910, c. 659, governing the inferior criminal courts of the city of New York, and declaring, in section 31, that the Special Sessions shall have jurisdiction in the first instance of all charges of misdemeanor committed in the city, but that the court shall be divested of jurisdiction, if, before the trial, a grand jury shall present an indictment against the same person for the same offense, the jurisdiction of the Special Sessions over misdemeanors is ipso facto divested on the presentment of an indictment before the commencement of the trial in the Special Sessions; but courts of record are not deprived of jurisdiction by a grand jury to indict for a misdemeanor, though no prosecution is pending in the Special Sessions; the words "in the first instance" not indi-

cating that the proceeding must have been instituted in the Special Sessions before an indictment can be presented by a grand jury. *People ex rel. Moore v. Warden of City Prison*, 135 N. Y. Supp. 883, 887, 150 App. Div. 644.

### IN FORCE

See Be in Force.

An indictment, alleging that the local option law was "in force" at the time of the alleged offense, was equivalent to an allegation that the law had been duly adopted. *State v. Campbell*, 119 S. W. 494, 495, 137 Mo. App. 105.

The term "in force" in a life policy on the 15-year distribution plan, which provides for the payment of quarterly premiums in advance, and which stipulates that the policy shall be credited with its distributive share of the surplus apportioned at the expiration of the 15 years, and that only 15-year distribution policies "in force" at the end of such term shall share in such distribution, requires that premiums shall have been fully paid and that insured shall be alive, and a policy is not entitled to any distributive share of the surplus where insured paid all premiums during the 15-year period and died 11 days before the expiration of the period. *McDonnell v. Mutual Life Ins. Co. of New York*, 116 N. Y. Supp. 35, 38, 131 App. Div. 643.

"Rates in force," to which Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, applies, are not limited to rates under which transportation has actually taken place, but are those which the carrier has established as its present charges, as distinguished from those which are obsolete, tentative, or perhaps only to take effect in the future. They are rates open to public inspection and on which shipments may be made, if offered. *New York Cent. & H. R. R. Co. v. United States*, 166 Fed. 267, 269, 92 C. C. A. 331.

### IN FORM

See Negotiable in Form.

### IN FRAUD OF

The phrase "in fraud of the provisions of this act," in Bankr. Act July 1, 1898, c. 541, § 67c (3), 30 Stat. 564, does not necessarily mean actual fraud or illegality, but intent to prevent equitable distribution of the debtor's property. A lien obtained by a foreign creditor of a bankrupt within four months prior to the bankruptcy, and while the bankrupt was solvent, on property of the debtor in a foreign country through judicial proceedings in the nature of an attachment, which were not opposed, is one sought and permitted "in fraud of the provisions of the act," and, when the creditor realized therefrom payment of a portion of his debt, he is not entitled to prove the remainder as

a claim against the estate in bankruptcy in this country without surrendering the amount so received so as to place him on equitable equality with other creditors. In re Pollmann, 156 Fed. 221, 222.

#### IN FRONT OF

The intersection of streets is not "in front of" a corner lot thereon, within the village law, providing that in case of paving of a village street no landowner shall be liable for the expense of paving any portion of the street not in front of such land. O'Leary v. City of Glens Falls, 93 N. E. 513, 514, 200 N. Y. 218, 21 Ann. Cas. 633; Id., 112 N. Y. Supp. 932, 128 App. Div. 683.

#### IN FULL

Where plaintiff accepted a check, inclosed in a letter which declared that it was paid "in full for services rendered," he could not retain the check, and at the same time repudiate the condition, which acceptance constituted an accord and satisfaction. Legge v. Foster, 131 N. Y. Supp. 582.

Where a marine carrier insured the cargo covered by bills of lading, and against the risks so assumed took out a marine policy which contained the provision that "this insurance is hereby understood and agreed to be in effect a re-insurance of the risks which are, or may at any time be, assumed by the assured, and the assurers agree to pay the insured, 'in full, all claims for such losses arising from perils enumerated in the policy as the assured may, in their judgment, settle for with the owners or other parties interested in the merchandise,' the insurer was liable for the full amount so paid by the carrier to the extent of the amount named in the policy, which was one of re-insurance and not of co-insurance, such as would entitle the insurer to prorate the loss with the carrier. Ocean S. S. Co. v. Aetna Ins. Co., 121 Fed. 882, 886.

The acceptance and deposit of a check, on which is written the words "in full to date," or an equivalent phrase, does not constitute an accord and satisfaction of a controverted claim as a matter of law. Whether a buyer, at the time of sending a check on which was written "in full to date," and whether the seller, on receiving and depositing the check, understood, or ought to have understood, as reasonable men, that the check was in accord and satisfaction of all outstanding claims between them, or whether the seller, on receiving the check had a right to believe that it was sent in payment of a reduced bill for specified goods amounting to the exact amount of the check, held for the jury. Worcester Color Co. v. Henry Wood's Sons Co., 95 N. E. 392, 394, 209 Mass. 105.

Where vendors retain and use checks accompanying an account giving the amount of goods delivered and the price therefor,

at the foot of which was written the words, "To check in full," it does not constitute an accord and satisfaction where, under the contract, the vendee was to accept the goods at a specified price, and he continued to receive goods, though he had repudiated the contract after notification that they were delivered under the contract, and that any check sent would be simply credited on account. Laroe v. Sugar Loaf Dairy Co., 73 N. E. 61, 62, 180 N. Y. 367.

While Const. art. 3, § 15, requires that a bill on its final passage shall be "read at length, section by section," yet if the record shows that the bill was read "in full" it shows a substantial compliance with the Constitution as "read in full" means to "read from beginning to end without omission," and, if so, the bill is read at length, section by section. Tarr v. Western Loan & Savings Co., 99 Pac. 1049, 1053, 15 Idaho, 751.

#### IN FURTHERANCE OF

The phrase "in furtherance of," when applied to a party entering into a contract in furtherance of a prior contract, means in accordance with the prior contract. Thompson v. Erie R. Co., 89 N. Y. Supp. 92, 96, 96 App. Div. 539.

Where defendant was sued as a corporation, and a plea in abatement denied the incorporation and alleged that defendant company was a partnership composed of certain persons, an amended petition making the proper parties defendants was an amendment in "furtherance of justice," within Civ. Code Prac. § 134, providing that the court may at any time, "in furtherance of justice," permit a pleading to be amended by adding or striking out the name of a party, or by correcting a mistake in any other respect. Teets v. Snider Heading Mfg. Co., 87 S. W. 803, 120 Ky. 653.

#### IN GOOD CONDITION

See Good Condition.

#### IN GOOD ORDER

See Good Order.

#### IN GROSS

See Easement in Gross; Sale in Gross. Easement distinguished from right of way in gross, see Easement.

#### IN THE GUM

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 387, 30 Stat. 186, providing for silk fabrics when "in the gum" and when "balled off," held, that fabrics which on boiling lost from 18 to 27 per cent. in weight were classable under the former, rather than the latter, clause. H. Mendelson & Co. v. United States, 154 Fed. 33, 34, 83 C. C. A. 145.

**IN HAND**

Where the judge, in answer to a question by the foreman of a jury as to what constituted a demand, replied "that the officer must have the execution and the receipt in hand, in order, that, if the property be surrendered on demand, he may surrender the receipt," the words "in hand," to one conversant with legal terms and phrases might import in his possession, or on hand; but, to the common and ordinary mind untrammelled by the nice distinctions and technicalities of the law, the word undoubtedly imported the meaning that they were exposed to view, and hence would be misleading to the jury. *Gilmore v. McNeill*, 45 Me. 599, 601.

**IN THE HANDS OF**

See Money in the Hands or Possession of Bank.

The term "in the hands of," as used in an order of court authorizing a sale of all accounts, choses in action, claims, etc., in the hands of the administrator, means in actual possession in such condition that actual control is legally with the person described as holding it. Property is not "in the hands of" a person when it is doubtful that he could obtain possession even by invoking the coercive powers of a court. Mere knowledge of the existence of some sort of claim upon the part of an administrator would not place it in his hands. *Routledge v. Elmendorf*, 116 S. W. 156, 159, 54 Tex. Civ. App. 174 (citing *Price v. Society for Savings*, 30 Atl. 139, 64 Conn. 362, 42 Am. St. Rep. 198; *Swan v. Warren*, 138 Mass. 11; *Fruitt v. Armstrong*, 56 Ala. 306).

Property delivered to a carrier and in transit when garnishment summons is served is not "in the hands of the consignee," within St. 1898, § 3719, making a garnishee liable for property in his hands belonging to defendant. *Kuehn v. Nero*, 130 N. W. 56, 57, 145 Wis. 256.

**IN HIS DISCRETION**

See Discretion.

**IN HIS FAVOR**

Const. art. 1, § 18, giving to accused compulsory process for witnesses "in his favor," does not require the court to issue compulsory process for any one the accused may designate as a witness, but there must be a showing that the person wanted is a witness in favor of accused, and that his testimony will be material. *State v. Pope*, 58 S. E. 815, 816, 78 S. C. 264.

**IN HIS OWN RIGHT**

See Holder in His Own Right; Own Right.

**IN HIS OWN WRONG**

See Guardian de Son Tort.

**IN HIS PRESENCE**

See Presence of the Testator.

**IN INVITUM**

See Trust in Invitum.

**IN ISSUE**

See Contract in Issue; Put in Issue.

**IN JEOPARDY**

See Jeopardy (In Criminal Law).

**IN JUSTICE**

See Gross Injustice.

**IN KIND**

See Partition in Kind.

**IN LAW**

See Assignee in Law; Fraud in Law.

**IN LIEU OF**

The expressions "in lieu of dower" and "as dower" are often used interchangeably, and the former expression is not sufficient to indicate a purpose to convey a fee-simple title, and where a widow instituted actions to recover dower, and thereafter stipulated that she waived all claim to dower in specified lands and received "in lieu of dower" the homestead allotted to her husband, she did not acquire a fee-simple title to the land awarded to her, but acquired only a life estate. *Perry v. Dance* (Ky.) 112 S. W. 911, 913.

St. 1898, § 1222k, as amended by Laws 1905, p. 766, c. 442, provides that trust corporations existing under chapter 86 shall pay the State Treasurer \$500 as an annual license fee for transacting business, and, in addition, 3 per cent. of their net income during the preceding year, the payment of such license and percentage to be in lieu of all taxes for any purpose authorized by law, except taxes on the corporations' real estate. Held, that the provision that the license fee and percentage shall be in lieu of all taxes on the property of the corporations, except their real estate, merely means that their general property shall be exempt from ordinary taxation. *State ex rel. Weller v. Hinkel*, 116 N. W. 639, 640, 136 Wis. 66.

**IN LIKE CASES**

See Like Cases.

**IN LIKE MANNER**

See Like Manner.

**IN LOCO PARENTIS**

A person in loco parentis to a child, is a person who means to put himself in the situation of a lawful father of the child with reference to the father's office and duty of making provision for the child. In *re Robinson's Estate*, 35 Pa. Super. Ct. 192, 195.

**IN THE MANNER**

See Manner.

**IN MONTHLY PAYMENTS AS DUE**

Where defendant authorized plaintiff to insert a certain advertisement in plaintiff's publication for a period of 34 insertions, for which defendant agreed to pay a certain sum "in monthly payments as due," proof of seven insertions between the dates specified in the complaint entitled plaintiff to recover therefor, regardless of whether the contract was entire or for a year. *McKillop, Walker & Co. v. New York Preparatory School*, 91 N. Y. Supp. 338, 339.

**IN THE NATURE OF QUO WARRANTO**

See *Information in the Nature of Quo Warranto*.

**IN OFFICE**

The term "in office" in Kirby's Dig. § 7992, authorizing the circuit to suspend from office an officer for "incompetency, corruption, gross immorality, criminal conduct amounting to felony, malfeasance, misfeasance, or nonfeasance in office," only limits the words, "malfeasance, misfeasance, and nonfeasance," and the circuit court may suspend from office a constable pending an indictment against him for murder in the first degree. *Jones v. State*, 149 S. W. 56, 58, 104 Ark. 261.

**IN OPEN COURT**

See *Open Court*.

**IN OPERATION**

See *Idle and Inoperative*.

An employment contract providing for reduction of salary when the employer's factory is not in operation does not require the factory to be in full operation before the employé is entitled to the higher salary. *Frankfort Modes Glass Works v. Arbogast*, 145 S. W. 1122, 1125, 148 Ky. 4.

**IN OR ABOUT**

Where a complaint for injuries to a passenger alleged that she was engaged "in or about alighting" from the car, the words "in or about" were sufficiently broad in their signification to cover the entire passage from the car from beginning to end. *Birmingham Ry., Light & Power Co. v. Glenn* (Ala.) 60 South. 111, 113.

**IN OR NEAR**

A petition for the location of a high school "in or near" the city of G. was a substantial compliance with the act of the Legislature authorizing the location of a school "at a place" named in the petition therefor. *Territory ex rel. McGuire v. Board of Trustees for High School of Logan County*, 76 Pac. 165, 168, 13 Okl. 605.

**IN OR UPON**

In Rev. Laws 1905, § 2841, providing that no railroad corporation shall maintain a railway in or upon any street without a

franchise, the words "in or upon" refer to a longitudinal occupation, and not to a street crossing. *City of International Falls v. Minnesota, D. & W. Ry. Co.*, 134 N. W. 302, 303, 117 Minn. 14.

**IN PAIS**

See *Estoppel in Pais*.

**IN PARENTAL RELATION**

See *Parental Relation*.

**IN PARI DELICTO**

The maxim does not apply where the rights of a third person have intervened. *Doyle v. Burns*, 99 N. W. 195, 204, 123 Iowa, 488.

One who pays a bribe cannot cover it because the parties are equally criminal. But where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another—the one from their situation and condition being liable to be oppressed or imposed upon by the other—then the parties are not "in pari delicto"; and, in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. *American Mut. Life Ins. Co. v. Bertram*, 70 N. E. 258, 262, 163 Ind. 51, 64 L. R. A. 935.

Where a fund realized as the result of an illegal transaction was paid over to a third person for one of the participants in the transaction, the third person could not retain the fund on the ground of the illegality of the transaction, and the law raises an assumption against him in favor of the party for whose benefit the fund was placed in his hands. *Bendett v. Ellis*, 111 S. W. 795, 801, 120 Tenn. 277 (quoting and adopting *Tate v. Commercial Bldg. Ass'n*, 33 S. E. 382, 97 Va. 74, 45 L. R. A. 243, 75 Am. St. Rep. 770).

In an action to recover money from defendants, obtained from the plaintiff by means of inducing him to believe that a foot race was "fixed" so that one party was sure to win, and persuading the plaintiff to participate to the extent of betting the money of one side to the simulated race as if it were his own, on the assurance that he should receive 20 per cent. of the sum won, he being ignorant at the time that the money all belonged to the parties on both sides of the pretended wager, held that, although he was in delicto, by consenting to act in such deceitful attitude, he was not in "pari delicto" with the conspirators, and is therefore entitled to recover back the sum of \$5,000 which the conspirators persuaded him to intrust to the possession of one of them as a stakeholder, not to be bet on the race, but to be used to make a showing by the stakeholder in the event of a count of the stake money being called for by one of the feigned bettors. *Wright v. Stewart*, 130 Fed. 905, 921.

The rule that relief will not be granted where the parties are "in pari delicto" is not applicable where one of the parties occupies a confidential relation to the other, and, where it is sought to set aside a conveyance, the fact that the conveyance made by the weaker party is illegal does not necessarily place him in pari delicto with the stronger party who dominated the weaker party for his own profit. A bill sought the cancellation of a note and mortgage on the ground that, while complainant was being pressed by creditors, defendant, her brother, in whom she reposed confidence and who managed her business, advised her to execute a bogus mortgage to him. By subsequent amendments such allegations were stricken from the bill and superseded by sections which omitted all statements as to complainant being pressed with claims, etc., but alleged that defendant advised her that, in order to protect her rights in the land and to preserve the same as a homestead for herself and her minor children, it would be necessary for her to give him a mortgage. By another amendment it was alleged that defendant unduly influenced complainant, and that it was not necessary for complainant to have given the mortgage in order to protect her rights in the land and to preserve the same as a homestead. The bill was not demurrable under the principles of equity applicable to parties in "pari delicto." *Phillips v. Bradford*, 41 South. 657, 658, 147 Ala. 346 (citing *Glover v. Walker*, 18 South. 251, 107 Ala. 540; 2 Pom. Eq. Jur. [3d Ed.] pp. 1714, 1717, 1718, 1748, 1749, §§ 940, 942, 956; *Clemmens v. Clemmens*, 28 Wis. 637, 9 Am. Rep. 520; *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197, 199; *Nichols v. McCarty*, 23 Atl. 93, 53 Conn. 299, 55 Am. Rep. 105, 113; *Williams v. Collins*, 25 N. W. 682, 683, 67 Iowa, 413; *Herrick v. Lynch*, 37 N. E. 221, 223, 150 Ill. 283; *McLeod v. McLeod*, 34 South. 228, 137 Ala. 267, 270; *Kyle v. Perdue*, 10 South. 103, 95 Ala. 579, 585; *Ryan v. Price*, 17 South. 734, 106 Ala. 584).

### IN PARI MATERIA

The rule "in pari materia" is that the similar terms of statutes enacted for like purposes shall receive like interpretations. *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321, 330, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

Statutes are in pari materia which relate to the same person or thing or same class of persons or things. *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 639, 20 Okl. 687.

It is a rule of interpretation that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. If, the thing contained in the subsequent statute be within the reason of the former, it should be taken to be within the meaning thereof, and,

if it can be gathered from the subsequent statute "in pari materia" what meaning the Legislature intended to give the words of the former statute, it will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Galveston, H. & S. A. Ry. Co. v. Davidson* (Tex.) 93 S. W. 436, 448.

The doctrine "in pari materia" cannot be invoked to establish a preconceived design by Congress, in the several enactments providing for the admission, respectively, to the Union, of the states of Louisiana, Mississippi, and Alabama, to equalize the water frontage of those states on the Gulf of Mexico; especially in view of the fact that, when Louisiana was admitted into the Union, the territory now composing the coast counties of Mississippi was not actually a part of the Mississippi territory, but was in dispute between the United States and Spain. They provided for the admission of three separate states, and the subject of each was not only not identical with, but not even similar to, that of the others. They did not form part of a homogeneous whole, a common system, so as to allow a claimant under the later act to successfully contend that it changed the earlier act by construction or effected such change because declaratory of the meaning of the prior act. *State of Louisiana v. State of Mississippi*, 26 Sup. Ct. 408, 418, 202 U. S. 1, 50 L. Ed. 913.

### IN PART

See Reversal in Part.

The presence in an article of .276 per cent. of silver, constituting the silver coating therefor, is sufficiently substantial to affect its classification under a tariff provision for articles "in part of silver." *La Manna, Azema & Farnan v. United States*, 154 Fed. 955, 956 (citing *Seeburger v. Schlesinger*, 14 Sup. Ct. 729, 152 U. S. 581, 587, 38 L. Ed. 560).

Fabrics in chief value of flax, but in part of wool, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 346, 30 Stat. 181, relating to goods "the component material of chief value" in which is flax, and not under Schedule K, par. 366, 30 Stat. 184, relating to cloths "in part of wool." *United States v. Charles A. Johnson & Co.*, 154 Fed. 752, 753 (citing *Myers v. United States*, 110 Fed. 940; *United States v. Altman*, 107 Fed. 15, 46 C. C. A. 116; *Converse v. United States*, 113 Fed. 817; *Hartranft v. Meyer*, 10 Sup. Ct. 751, 135 U. S. 237, 34 L. Ed. 110); *United States v. Walsh*, 154 Fed. 749, 750 (citing *Hartranft v. Meyer*, 10 Sup. Ct. 751, 135 U. S. 237, 34 L. Ed. 110).

### IN PERSON

See Office for the Regular Transaction of Business in Person.

The words "in person," used in the constitution of a mutual benefit society directing



that there shall be no liability until the insured shall have had delivered to him "in person" his beneficiary certificate while in good health, was not synonymous with "manual possession," so as to require that the certificate be actually placed in insured's hands to constitute a legal delivery, but was merely intended to require a delivery to insured himself, and not to another for him. *O'Neal v. Sovereign Woodmen of the World*, 113 S. W. 52, 54, 130 Ky. 68.

### IN PERSONAM

See Judgment in Personam.

Action in rem distinguished, see In Rem.

A proceeding in personam is one, in form as well as in substance, between the parties claiming a right, and the judgment binds the defeated party to some sort of personal liability. *Gassert v. Strong*, 98 Pac. 497, 500, 38 Mont. 18.

### IN THE PIECE

The definition of cotton cloth in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 310, 30 Stat. 178, as being "all woven fabrics of cotton 'in the piece or otherwise,'" includes cotton blankets with whipped or hemmed edges and in a finished condition. *United States v. Bernhard*, 150 Fed. 375, 376.

### IN PLACE

"Rock in place" on which quartz mining claims are located means something more permanent than mere shale, slide rock, or debris. *Ambergis Min. Co. v. Day*, 85 Pac. 109, 115, 12 Idaho, 108.

### IN POSSESSION

See Mortgagee in Possession; Possess; Property in Possession.

### IN THE PRESENCE OF

See Presence of the Testator; Signed, Sealed and Delivered in the Presence of.

### IN PRINCIPAL'S NAME

See Sell in Principal's Name.

### IN PROCESS OF COLLECTION

The rule that municipal revenues in process of collection should be counted against indebtedness in determining whether the constitutional limit in that regard has been exceeded does not authorize offsetting taxes voted or levied till the same shall have been duly spread upon the tax roll and that placed in the hands of the proper municipal officer with authority to collect the tax. *Balch v. Beach*, 95 N. W. 132, 134, 119 Wis. 77 (citing *Rice v. City of Milwaukee*, 76 N. W. 341, 100 Wis. 516, 521).

### IN PROPRIA PERSONA

As personally, see Personally.

### IN PURSUANCE OF

The phrase "in pursuance of," according to Webster, means "in accordance with; in prosecution or fulfillment of"; and an indictment alleging that defendant assaulted prosecutor with a deadly weapon, and "in pursuance of said assault" attempted to rob him, etc., means "in fulfillment of," rendering the indictment sufficient to charge an assault with intent to rob. *State v. Hughes*, 102 Pac. 562, 563, 31 Nev. 270.

A charge that a party to a contract may recover where he has performed his service "in pursuance of" such contract is equivalent to instructing that the services must have been such as were called for by the contract, and must have been performed according to the terms of the contract; the words "in pursuance of" including both ideas. *Schofield v. Little*, 58 S. E. 666, 2 Ga. App. 286.

### IN QUESTION

See Drawn in Question.

### IN REGARD TO

An elevator liability insurance policy, which stipulated that, on the occurrence of an accident in regard to which a claim may arise, notice in writing should be immediately given by insured to insurer, that insurer, on receiving notice of any "accident or claim," might settle the same, and that, on any legal proceedings being taken against insured, insurer should be notified, and should have absolute control of the defense, held to require insured, on the occurring of an accident, to immediately notify insurer in writing, and, unless legal proceedings are immediately commenced, he must also give notice to insurer of the action when brought; the word "immediately" referring to the occurrence of the accident, and the words "in regard to which a claim may arise" meaning any accident which may be the foundation of a claim against the insurer. *Aronson v. Frankfurt Accident & Plate Glass Ins. Co.*, 99 Pac. 537, 539, 9 Cal. App. 473.

### IN REM

See Judgment in Rem; Quasi in Rem. Proceeding as suit, see Suit.

A "proceeding in rem" is a proceeding against tangible property, and actual notice is dispensed with, on the theory that the owner is bound to know where his property is. In such proceedings, if the res is within the jurisdiction, the constitutional requirement of "due process" is satisfied by constructive notice. *Joyner v. Joyner*, 62 S. E. 182, 184, 131 Ga. 217, 18 L. R. A. (N. S.) 647, 127 Am. St. Rep. 220 (citing *Minor*, *Conflict of Laws*, 191).

A proceeding "in rem" is prosecuted against a "thing," instead of a person. The court acquires jurisdiction by possession of the subject-matter, rather than by service of process on some person. *Gorham Co. v. Unit-*

ed Engineering & Contracting Co., 95 N. E. 805, 807, 202 N. Y. 342.

An "action in rem" is one directly against property, in which the residence of the opposing claimant is immaterial. *Kean v. Rogers* (Iowa) 118 N. W. 515, 517.

An "action in rem" is a proceeding to determine the state or condition of the thing itself, and a judgment in rem is but an adjudication pronounced on the status of some particular subject-matter. *Gassert v. Strong*, 98 Pac. 497, 500, 38 Mont. 18.

A suit strictly in rem is where the property itself, conceived of as having done the wrong or as having been the instrument of its commission, is being proceeded against. In such a suit personal service within the jurisdiction, or appearance, is not necessary. The decree can, however, extend only to the property in controversy. Public citation to the world is all that is necessary, and the decree binds everybody. *Hill v. Henry*, 57 Atl. 554, 555, 66 N. J. Eq. 150.

Though a proceeding is not strictly "in rem," still where the purpose of the proceeding is not to establish an infinite personal liability against any defendant, but is merely to affect the interest of the defendant in specific real property within the state, which has at the outset of the proceeding been brought within the control of the court, it is a proceeding "quasi in rem" within the contemplation of the act of June, 1906, relating to the establishment and quieting of title to real estate in case of the loss or destruction of public records by fire, flood, or earthquake, and providing that one claiming an estate in real estate may bring an action "in rem" against all the world. *Title & Document Restoration Co. v. Kerrigan*, 88 Pac. 356, 359, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199.

#### Action in personam distinguished

An action in personam is distinguished from an action in rem in that, in the latter, a valid judgment may be obtained, which will bind the res, without personal service of process; while, in an action to procure a judgment in personam, process must be personally served or there must be a personal or authorized appearance. *White v. Glover*, 123 N. Y. Supp. 482, 484, 138 App. Div. 797.

"It was early sought to classify all judicial proceedings and all judgments as 'in personam' or 'in rem'; but the courts and text-writers have encountered extreme difficulty in attempting to formulate satisfactory definitions of these terms. A proceeding in personam is one, in form as well as in substance, between the parties claiming the right, and that it is so inter partes appears from the record itself. \* \* \* The judgment in such a proceeding binds the judgment debtor to some sort of personal liability. Such a judgment debtor 'is not a passive

party, but must be eminently active in the performance of any decree which may be made against him.' \* \* \* 'A judgment in rem I understand to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. A judgment in rem is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it ipso facto renders it what it declares it to be.' \* \* \* 'There is, however, a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of nonresidents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.'" *Gassert v. Strong*, 98 Pac. 497, 500, 501, 38 Mont. 18.

An "action in personam" is one against a specific person, while an "action in rem" is one against or with reference to a specific thing, and so against whom it may concern, or against the whole world. A proceeding in rem is one to determine the state or condition of the thing itself. In a strict sense, it is a term applied to a proceeding taken directly against the property, having for its object the disposition of property without reference to the title of the individual claimant, but, in a true and more general sense, a term applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. The object and purpose is to ascertain the right of every possible claimant, and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested, and notice of the proceeding is given to the whole world to appear and make claim for it. *Holcomb v. Kelly*, 114 N. Y. Supp. 1048, 1051 (citing 22 Cyc. p. 1102, note; *Woodruff v. Taylor*, 20 Vt. 76).

An admiralty "suit in personam" is a suit within the meaning of an act providing that "all suits" to be brought in the federal courts of Missouri, not of a local nature,

shall be brought in the division having jurisdiction over the county where the defendants reside. When the cause as instituted is one in rem and the process directs the seizure of the res only, the fact that the marshal treats the cause as a personal action and serves the owner with process does not make the suit one in personam. *The L. B. X.*, 88 Fed. 290, 294.

#### **Actions included**

"It is true that in a strict sense a proceeding 'in rem' is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings 'in rem' in the broader sense which we have mentioned." *Lesieur v. Simon*, 103 N. W. 302, 303, 73 Neb. 645.

#### **Admiralty proceedings**

A statute providing that a vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names, partakes of all the essential features of an admiralty proceeding in rem, in which exclusive jurisdiction is given to the District Courts of the United States. The exclusive admiralty jurisdiction of the federal courts extends to the enforcement by proceedings in rem of a lien for repairs furnished to a vessel engaged in navigating the Erie Canal, though such vessel was employed wholly in commerce between ports in the same state. *The Robert W. Parsons*, 24 Sup. Ct. 8, 14, 191 U. S. 17, 48 L. Ed. 73.

#### **Bankruptcy proceedings**

Bankruptcy proceeding as proceeding in rem, see Bankruptcy Proceeding.

#### **Divorce suit**

A divorce suit is a "proceeding in rem." *Stone v. Stone*, 113 S. W. 1157, 1158, 134 Mo. App. 242 (citing *Ellison v. Martin*, 53 Mo. loc. cit. 578).

#### **Foreclosure, partition, and quieting title**

A suit in equity for the foreclosure of a mortgage is not a "proceeding in rem" in such sense that the decree and sale therein can cut off rights of third persons, not parties to the suit, in the property acquired from the mortgagor subsequent to the mortgage. *Schwab v. Smuggler-Union Mining Co.*, 174 Fed. 305-311, 98 C. C. A. 160.

A suit to foreclose the lien of a street assessment under a statute authorizing its enforcement by suit against the owner is not a

"proceeding in rem" so as to make the judgment therein binding on the owner, though not made a party. *Page v. W. W. Chase Co.*, 79 Pac. 278, 279, 145 Cal. 578.

A suit in partition is a proceeding in rem, and the jurisdiction of the court is confined to the property described in the complaint. *Sandiford v. Town of Hempstead*, 90 N. Y. Supp. 76, 79, 97 App. Div. 163.

A suit to quiet title is a "suit in rem" or quasi in rem, although the statute permits its institution by one out of possession. *Empire Ranch & Cattle Co. v. Herrick*, 124 Pac. 748, 749, 22 Colo. App. 394.

#### **Garnishment proceeding**

See Garnishment.

#### **Proceeding for administration of estate of decedent**

A proceeding in the probate court to administer upon the estate of a deceased person is a "proceeding in rem." *Michigan Trust Co. v. Ferry*, 175 Fed. 667, 674, 99 C. C. A. 221.

#### **Proceeding for distribution of estate of absentee**

A proceeding for the distribution of the estate of an absentee is in its nature "in rem." *Nelson v. Blinn*, 83 N. E. 889, 890, 197 Mass. 279, 15 L. R. A. (N. S.) 651, 125 Am. St. Rep. 364, 14 Ann. Cas. 147.

#### **Proceeding for distribution of estate of decedent**

A proceeding to secure a decree of distribution of a decedent's estate is essentially one "in rem." *Goodrich v. Ferris*, 145 Fed. 844, 859 (quoting *Mulcahey v. Dow*, 63 Pac. 158, 131 Cal. 73, 77).

#### **Proceeding to contest will**

A proceeding to contest the validity of a will is a proceeding "in rem." *Bradford v. Blossom*, 105 S. W. 289, 304, 207 Mo. 177 (citing *Harris v. Hays*, 53 Mo. 90; *State ex rel. Hamilton v. Guinotte*, 57 S. W. 281, 156 Mo. 522, 50 L. R. A. 787; *Sehr v. Lindemann*, 54 S. W. 537, 153 Mo. 288).

#### **Proceeding to vacate street**

Proceedings to vacate streets are proceedings "in rem." *Detroit Real Estate Inv. Co. v. Wayne Circuit Judge*, 100 N. W. 271, 137 Mich. 108.

#### **Suit to enforce lien**

Pub. St. 1882, c. 192, §§ 14-17, provide for a materialman's lien on a vessel, and that it may be enforced by a petition entered or filed, or inserted in the writ of summons with an order of attachment served like other civil action; also, that a "process of attachment against such vessel" shall issue, be served, etc. Held, that the suit to enforce the lien is a "proceeding in rem" in which the jurisdiction of the court to enter a judgment depends on jurisdiction of the property, and the only judgment that can be entered is one against the property, to be enforced by

an order of sale. *Merriman v. Currier*, 77 N. E. 708, 709, 191 Mass. 133.

## IN RESERVE

See Held in Reserve.

## IN RESPECT TO

An action in a state court against a receiver appointed by a federal court, the purpose of which is to recover land in the possession of such receiver in a suit to foreclose liens thereon, and damages for its detention, is not one "in respect to any act or transaction" of the receiver in carrying on the business in connection with such property within the meaning of Act March 3, 1887, c. 373, § 3, 24 Stat. 554, as amended by 25 Stat. 436, and cannot be maintained under such act without leave of the federal court, but may be enjoined by such court as an unwarranted interference with its possession of the property. *Love v. Louisville & E. R. Co.*, 178 Fed. 507, 508.

## IN THE ROUGH

Rattan reeds, from which the outside has been removed, are not "in the rough," within the meaning of Tariff Act Oct. 1, 1890, c. 11, § 2, Free List, par. 756, 26 Stat. 611, but are "reeds wrought or manufactured from rattans," within the meaning of section 1, Schedule D, par. 229, 26 Stat. 583. *Foppes & Partisch v. United States*, 154 Fed. 866.

## IN THE SAME CONDITION

See Same Condition; Same Form; Same Manner; Same Right.

## IN SESSION

### Courts

An alternative writ of prohibition was issued March 29, 1912, by the Appellate Division for the First Department on application to enjoin a special proceeding pending in the Second Department, on which day the Appellate Division for that department, before adjournment of the March term, but in recess, handed down decisions, and on which day its judges were in attendance at the courthouse and ready to assemble as a court to attend to any business presented. Code Civ. Proc. § 2093, provides that a writ of prohibition issued by an Appellate Division can be granted only at a "term of the Appellate Division" of the judicial department embracing the county wherein the special proceeding is brought, in which the matter to be prohibited originated, unless a term of the Appellate Division of said department is not "in session," when it may be granted by the Appellate Division in an adjoining judicial department. Held, that the Appellate Division for the Second Department was "in session" when the alternative writ was issued, and that the Appellate Division of the First Department was without jurisdiction. *People ex rel. Whitman v. Woodward*, 134 N. Y. Supp. 910, 912, 150 App. Div. 180.

## Grand jury

*Ballinger's Ann. Codes & St. § 6802*, authorizing the prosecuting attorney to file an information when any person is in custody or on bail on charge of felony or misdemeanor, and the court is in session, "and the grand jury is not in session or has been discharged," empowers the prosecuting attorney to file an information during the adjournment of the grand jury; the phrase "in session" meaning in actual session. *State v. Strange*, 97 Pac. 233, 50 Wash. 321.

## IN SETTLEMENT

See Settle—Settlement.

## IN SHOP

See Working in a Shop.

## IN THE STATE

See Institution in the State.

## IN STATU QUO

The "status quo," as used in an information referring to the case in hand, meant the conditions existing at the time of the commencement of that action, modified or altered only by adjudications or proceedings therein. *Eastern Wisconsin R. & Light Co. v. Hackett*, 115 N. W. 1139, 1140, 135 Wis. 464.

The rule that, on the rescission of the contract, the person rescinding must place the other "in statu quo" does not necessarily mean that the other party shall be replaced in every sense—does not mean that the other party shall be restored to the exact position as he was before, as this is impossible; but that the party shall restore whatever he can restore and surrender any advantage he has received. *Whiting v. Derr*, 105 N. Y. Supp. 854, 855, 121 App. Div. 239.

## IN STORE

See Goods in Store.

Personal property received by a corporation for its use in business is not received "in store," within the meaning of Ky. St. § 4768, so as to authorize it to issue warehouse receipts therefor. *Bell & Coggeshall Co. v. Kentucky Glass Works*, 50 S. W. 2, 6, 106 Ky. 7.

## IN STRIPS

See Sheet Steel in Strips.

## IN SUCH ACTION

See Such.

## IN SUCH CASE

See Such.

## IN SUDDEN AFFRAY

See Sudden Affray.

## IN SUDDEN HEAT AND PASSION

See Sudden Heat and Passion.

**IN SUIT**

A claim is not "in suit" before a justice until he has issued summons thereon and delivered the same to an officer to be served, or by the appearance and agreement of the parties without summons and the case docketed within the meaning of Code 1906, § 2084, authorizing a justice to receive money only when tendered to him on any claim in a suit before him. *State v. Wells*, 59 S. E. 743, 744, 63 W. Va. 25.

**IN THEMSELVES**

See *Dangerous in Themselves*.

**IN THIS STATE**

The words "in this state," as used in Cobbey's Ann. St. 1903, § 1531, providing that it shall be unlawful for any creditor of "any laborer, servant, clerk, or other employé, of any corporation, firm, or individual, in this state," to assign the debt for the purpose of attaching or garnishing the wages of such servant or laborer, was intended to define and locate the residence of the parties and has reference to the employé and not the employer. *McCormack v. Tinch*, 110 N. W. 547, 77 Neb. 857.

**IN TIME**

The words "in time," as used in an instruction, in an action against a city for personal injuries caused by plaintiff falling over a coal hole projecting above the sidewalk, that if the city knew of the defect, or by exercising ordinary care could have known thereof in time to have had reasonable opportunity to have repaired it, or to have caused it to have been repaired in time to have prevented the accident, but neglected to do so, plaintiff could recover, were for the purpose of fixing the time when it became the duty of the city to make the repairs, and were but another way of telling the jury that it was the duty of the city to have made the repairs prior to the date of the accident, provided it had knowledge of the defect in time to have done so. *Smart v. Kansas City*, 105 S. W. 709, 721, 208 Mo. 162, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932.

**IN TIME OF WAR**

At the time and after the battle of Manila between the United States and the insurgents in the Philippine Islands war existed, and a naval officer's services in the waters of the Philippines were rendered "in time of war" within Act April 26, 1899 (30 Stat. 365) § 7, providing that in time of war every officer serving with troops operating against an enemy, who shall exercise under assignment any orders issued by competent authority and command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised. *Thomas v. United States*, 39 Ct. Cl. 1, 9.

**IN TRANSIT**

See *Milling in Transit*.

Cattle transported by rail were "in transit," within the terms of a policy designating insured's occupation as a "stock dealer, not working nor tending in transit," until they were unloaded from the cars of the company and placed in pens. *Loesch v. Union Casualty & Surety Co.*, 75 S. W. 621, 625, 176 Mo. 654.

A policy, issued to a railroad company, which covered in general terms all cotton on or in depots, platforms, or grounds adjacent thereto, and in transit, but which provided that cotton in open cars was not covered, insured cotton on a stationary flat car placed on a spur track adjacent to a depot to remain there about 12 hours, though the cotton was subsequently to be transported on the car, since the "open cars" referred to meant cars of that description commonly used for transportation, as the company sought to relieve itself from the increased hazard incident to the transportation of cotton on open cars due to sparks from locomotives in actual transportation, and since the words "in transit" meant in course of passing from point to point. *Royal Ins. Co. v. Texas & G. Ry. Co.*, 115 S. W. 117, 119, 53 Tex. Civ. App. 154.

Where a telegraph company fails to transmit a telegram with reasonable promptness, the company's failure to convey the information, and not the wrongful act of an agent at any particular point prior to the delivery of the telegram to the addressee, constitutes the delict; a message being "in transit," not only while being sent over the wires, but while in the hands of the messenger for delivery after it reaches the place where the addressee resides. *Brown v. Western Union Telegraph Co.*, 67 S. E. 146, 148, 85 S. C. 495, 137 Am. St. Rep. 914.

**IN TRANSITU**

See *Stoppage in Transitu*.

**IN TRUST**

See *Held in Trust*.

In a testamentary provision "in trust" for all my children who shall attain the age of 25 years or marry under that age in equal shares," the words "in trust" refer to a continuance of the trust to pay income which is created by a preceding section for the benefit of testatrix's husband "and from and after his decease or second marriage" continued "in trust for all my children." Each child is given an equal share in the income and principal. *Hayden v. Sugden*, 96 N. Y. Supp. 681, 689, 48 Misc. Rep. 103.

Where testatrix's will devised lands to trustees "in trust for my grandchild, D.," such provision was not equivalent to vesting the title in the grandchild. In *re Dixon's Estate*, 77 Pac. 412, 413, 143 Cal. 511.

Testator, after bequeathing to a trustee \$20,000, with directions to pay the income thereof to testator's son during his life, made a codicil in which he directed that, after the death of the son, "the said \$20,000 in trust" should go in equal shares to seven named nephews and nieces, "to them and their heirs and assigns forever." Held, that no trust was created for the nephews and nieces, as the words "in trust" in the bequest to them were merely descriptive of the fund bequeathed. *McAllister v. Hayes*, 79 Atl. 726, 728, 76 N. H. 108.

A deed granting to a committee of, and in behalf of, a village cemetery certain land, to be held "in behalf of the said corporation, to their use and behoof forever," is a deed in trust for such corporation, though the words "in trust" or "trustees" are not contained in the deed. *Packard v. Old Colony R. Co.*, 46 N. E. 433, 434, 168 Mass. 92.

The words "in trust for a judgment debtor," in Code Civ. Proc. § 1879, prohibiting the maintenance of a judgment creditor's action to reach any property held "in trust for a judgment debtor" where the trust has been created by a person other than the debtor, have reference to trusts in which the debtor's interest is that of a beneficiary, as distinguished from an interest in remainder. *Bergmann v. Leavitt*, 99 N. Y. Supp. 748, 752, 113 App. Div. 899.

The expression "in trust," in a policy of fire insurance covering the product of a glass manufacturer's plant, "his own or held by him in trust" or on commission "or sold but not delivered, for which he may be held liable," is not susceptible of the same construction as when applied to the relations of a guardian and ward or to a testamentary trustee, but signifies property which insured holds as custodian or bailee, and under the policy a contract of insured, whereby he sold to one corporation his total product, is not a transfer or change of title, within an inhibition of the policy to that effect, especially where the contract of sale was conditional only; the seller remaining liable for all losses except by fire and agreeing to pay the premiums for insurance on the product. *Burke v. Continental Ins. Co. of City of New York*, 91 N. Y. Supp. 402, 403, 100 App. Div. 108.

#### IN, UPON, OR ABOUT

Where a conveyance grants all of a party's interest in portions of land "in, upon, or about" that portion of the city of Seattle laid out and known as David S. Maynard's town of Seattle and naming certain described lots and blocks, it was the intention to convey all lands of the grantors in, upon, or about that portion of Seattle covered by such plat, and such description is broad enough to include a strip of land lying immediately adjoining the west line of the

Maynard plat and within the patent lines of the Maynard donation claim. *Columbia & P. S. R. Co. v. Seattle*, 74 Pac. 670, 673, 33 Wash. 513.

#### IN USE

Hurd's Rev. St. 1905, c. 24, art. 5, § 1, cl. 96, authorized the passage of an ordinance imposing a license tax on wagons and other vehicles conveying loads on public streets and alleys in cities and villages, and an ordinance passed pursuant thereto made it unlawful to use any wagon or other vehicle in the transportation of persons and property on the streets of Chicago unless the wagon or vehicle was licensed. Held, that a buggy, carriage, or automobile, when in use on the public streets, whether for pleasure or hire, if persons are carried therein, within the meaning of the statute and ordinance, is in use for carrying a load, and cannot be so used unless licensed. *Harder v. City of Chicago*, 85 N. E. 255, 256, 235 Ill. 294.

#### IN VACATION

See Vacation.

#### IN VIEW

See Fully in View.

#### IN VIRTUE OF HIS OFFICE

Where defendant, as warden of the state penitentiary, wrongfully ordered plaintiff, while a convict, to be manacled, assaulted, and confined in solitary confinement, and unlawfully retained him in custody for a period after his sentence had expired, such unlawful acts were done "in virtue of his office," within Rev. Codes, § 6502, providing that an action against a public officer, for an act done by him in virtue of his office, shall be tried in the county where the cause of action arose, so that an action against defendant therefor should be tried in the county where the unlawful acts were committed. *State ex rel. Stephens v. District Court of Second Judicial District*, 118 Pac. 268, 271, 43 Mont. 571, Ann. Cas. 1912C, 343.

#### IN VOLUNTARY PROCEEDINGS

Under Act Cong. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, amending section 14, subsec. "b," cl. 5, Bankr. Law July 1, 1898, c. 541, 30 Stat. 550, so as to authorize the discharge of a bankrupt "unless he has \* \* \* in voluntary proceedings been granted a discharge in bankruptcy within six years," a bankrupt cannot procure a discharge on his own application, either in voluntary or in involuntary proceedings, where within six years he has been granted a discharge in voluntary proceedings. The words "in voluntary proceedings" refer to the proceedings in which the prior discharge was granted, and not to the proceedings in which the second discharge is sought. *In re Seaholm*, 136 Fed. 144, 145, 69 C. C. A. 142.

**IN WHICH SUCH ACTION OR PROCEEDING IS AT THE TIME PENDING**

Rev. Codes 1905, § 6765, subd. 1, provides that no judge of the district court shall hear or determine any action, special proceeding, motion, or application or make any order or give any judgment in any action or proceeding not pending in the judicial district for which he is elected, except upon the written request of the judge of the district in which such action or proceeding is at the time pending. Held, that it was not the legislative intent to restrict the jurisdiction of the judge so requested to act in the district other than his own to causes which were then pending: the words, "in which such action or proceeding is at the time pending," merely designating the judge who could legally make the request, and not referring to any particular subject-matter over which the requested judge might assume jurisdiction. *State v. Helser*, 127 N. W. 72, 75, 20 N. D. 357.

**IN WHOSE FAVOR**

See Favor.

**IN THE WOODS**

See Woods.

**IN WORK**

As wall-bearing job, see Wall-Bearing Job.

**IN WRITING**

See Write—Writing.

**IN YARD**

Parol evidence is admissible to show that a fire policy, which, besides insuring the property in a building, also insured the property in yard, included by the term "in yard" property located in a vacant lot across the street from the building, where it was manifest that property outside the building was intended to be insured, and there was no yard adjoining the building. *Messenger v. German-American Ins. Co.*, 107 Pac. 643, 646, 47 Colo. 448.

**INABILITY**

See Continuous Total Inability; Physical Inability.

The term "permanent inability to labor," in an instruction as to measure of damages for personal injury, is not the precise equivalent of "permanent reduction in his power to earn money"; and allowing remuneration for "inconvenience" suffered is too latitudinous. *Louisville & N. R. Co. v. Sights*, 89 S. W. 132, 133, 121 Ky. 203.

Within Comp. Laws 1909, § 6075, as amended by Laws 1910, c. 39, § 1, providing that, in case of death or other "inability" of the judge, his successor may settle and sign a case-made, the word "inability" means the quality or state of being unable. *Richardson*

*v. Beldleman*, 126 Pac. 816, 817; *Id.*, 126 Pac. 818, 820, 33 Okl. 463.

The term "inability," as used in a statute that, in case of the failure, inability, or refusal of the mayor to act, the president pro tem. shall perform the duties and receive the compensation of the mayor, embraces disqualification or disability on account of interest in the subject-matter of the action. *Riggins v. Richards*, 77 S. W. 946, 948, 97 Tex. 229.

In a personal injury action, an instruction that the jury, in assessing damages, might consider the bodily and mental pain endured by the injured party, loss of time, and inability to work and earn money, and her diminished capacity for labor, etc., was not erroneous as permitting double damages for the same cause; "inability to work" meaning the total suspension of the power to work, and "diminished capacity to labor" meaning lessening, without totally destroying, the power to labor, and "inability" meaning without ability, and "lessened capacity" meaning that partial ability remains. *Houston & T. C. R. Co. v. Maxwell* (Tex.) 128 S. W. 160, 165.

Under a trust deed, providing that, in case of the trustee's death, inability, or refusal to act when action under the trust might be required, the legal holder of the note might substitute a trustee by writing duly acknowledged, and that the acts of such substituted trustee, including his power to sell, should be as effectual as if done by the first trustee, the written appointment of a substituted trustee need not state any reason for his substitution; and the "inability" of the original trustee did not refer only to his physical or mental capacity, but also to his inability to act, in a practical sense, resulting from his permanent nonresidence. *Webster v. Kautz*, 123 Pac. 139, 142, 22 Colo. App. 111.

**INACCESSIBLE**

A party to a pending case is not, though beyond the jurisdiction of the court when the case is tried, "inaccessible," within the meaning of section 5773 of the Civil Code of 1910, so as to authorize the introduction of his testimony delivered on a former trial of the case. *Crumm v. J. P. Allen & Co.*, 75 S. E. 108, 109, 11 Ga. App. 203.

A witness is not shown to be "inaccessible," within the meaning of Pen. Code 1895, § 1001, so as to authorize evidence as to what was the testimony of such witness on a former trial, when it merely appears that the witness is absent from the county and when last heard from was within the limits of the state. *Taylor v. State*, 55 S. E. 474, 126 Ga. 557 (citing *Pittman v. State*, 17 S. E. 856, 92 Ga. 280 [2]).

There was no error in the refusal to admit in evidence testimony of a witness for

the defendant, who had testified under oath, given at a former trial of the cause, which was offered on the ground that the witness was "inaccessible," for the reason that he was a nonresident of the county where the trial was had, being a resident of an adjoining county. The word "inaccessible," in section 5773 of the Civil Code of 1910, means that the witness whose testimony was desired as evidence at the time of the second trial is a nonresident of the state, and therefore beyond the jurisdiction of the court and not subject to its processes. It does not apply to a witness who, though absent from the county of the trial, is nevertheless, at the time of the trial, a resident of a different county in the same state; for, wherever he may be in the same state, the process of the court can reach him and compel him to testify by interrogatories or depositions. *Brinson Ry. Co. v. Beard*, 76 S. E. 76, 77, 11 Ga. App. 737.

## INADEQUACY

### INADEQUACY OF REMEDY AT LAW

See Adequate Remedy.

By "inadequacy of remedy at law" is meant, "not that it fails to produce the money (that is a very usual result in the use of all remedies), but that its nature or character is not fitted or adopted to the end in view." *Preston v. Sturgis Milling Co.*, 183 Fed. 1, 10, 105 C. C. A. 293, 32 L. R. A. (N. S.) 1020 (quoting and adopting the definition in *Thompson v. Allen Co.*, 6 Sup. Ct. 140, 115 U. S. 550, 29 L. Ed. 472).

### INADEQUATE APPLIANCES

The word "inadequate," as applied to appliances, may signify insufficiency or lack of "appliances." *Bryson v. Gallo*, 180 F. 70, 74, 103 C. C. A. 424.

### INADEQUATE PRICE

By the term "mere inadequacy of price," in the rule that mere inadequacy of price is not a sufficient ground for refusing to confirm or vacating an execution sale, is meant simply an inequality in value between the subject-matter and the price. *O'Dell v. Cox*, 90 Pac. 194, 196, 151 Cal. 70.

A mortgagor's surviving husband, to protect his interest and that of his children, employed F. to bid for the property on foreclosure. One of the tracts was worth \$1,600, and was struck down to B. for \$610. F. immediately claimed the bid was his, but the officer making the sale declined to recognize it, and returned B. as the purchaser. The husband thereupon applied to set the sale aside as to such tract, agreeing on a resale to bid \$1,600. Held, to justify vacation of the sale for mistake and "inadequacy of price," on condition that the husband give bond to bid \$1,600, pay the costs of the first sale and interest on the purchaser's deposit. *Mont-*

*clair Bldg. & Loan Ass'n v. Farmer* (N. J.) 67 Atl. 852, 853 (citing *Porch v. Agnew Co.*, 57 Atl. 726, 66 N. J. Eq. 232).

### INADEQUATE SERVICE

Laws 1907, p. 71, § 12, requires every railroad to furnish reasonably adequate service, equipment, and facilities; and Laws 1907, p. 86, § 30, provides that the Railroad Commission is authorized, if it finds any service inadequate, to direct one that is adequate. Held, that the word "adequate" in such section did not presuppose that some service had existed, but was applicable to a case where the service was insufficient, because never established; and hence such sections conferred on the Railroad Commission power to compel a railroad corporation to install new facilities. *Southern Pac. Co. v. Railroad Commission of Oregon*, 119 Pac. 727, 729, 60 Or. 400.

## INADVERTENCE

"Inadvertence" is defined as the quality of being inadvertent, lack of heedfulness or attentiveness; inattention; negligence; an effect of inattention; a result of carelessness; an oversight, mistake or fault from negligence. Where one of defendant's attorneys had requested the clerk of the district court to inform him of the filing of the remittitur from the Supreme Court, but the clerk had failed to do so, and, though such attorney met plaintiff's attorney nearly every day, he had never referred to the filing of an amended complaint which had been filed after reception of the remittitur, as the result of which judgment was rendered by default against defendant, he was entitled to relief under a Code provision authorizing such relief from a judgment taken against defendant through his mistake, inadvertence, surprise, or excusable neglect. *Greene v. Montana Brewing Co.*, 79 Pac. 693, 694, 32 Mont. 102.

That defendant would have lost his position as an employé of a corporation had he attended the trial of an action against him, which he knew was pending for trial, and which he took no steps to prevent being tried in his absence, was not ground for vacating a judgment entered against him by default on the ground of "inadvertence" and "excusable neglect." *Peterson v. Crosier*, 81 Pac. 860, 862, 29 Utah, 235.

Where, after receiving a fare from a passenger, a street car conductor again demanded his fare, denied that the passenger had paid, and obtained a second fare on threatening to eject him unless he paid his "fare," the second fare was received through "inadvertence or mistake not amounting to gross negligence," and hence the passenger could not recover penalty under Railroad Law, § 39 (Laws 1890, p. 1096, c. 565), penalizing a railroad corporation asking or receiving more than the lawful rate of fare



unless the overcharge is made through "inadvertence or mistake not amounting to gross negligence." *Robinson v. International Ry. Co.*, 103 N. Y. Supp. 588, 589, 54 Misc. Rep. 163.

#### **Willfulness distinguished**

An instruction that willful is what the word implies means an act proceeding from a will, done of a purpose, an intention to do it; that the difference between "inadvertence" and "willfulness" is this: If you send your little boy on an errand for you and tell him to feed your horse, and he returns to you, and you say to him, "Did you feed my horse?" and he says, "No," and you say, "Why?" and he says, "I forgot it," this is an "inadvertence"; but suppose he said to you, "No, I did not feed your horse; I recalled the fact you told me to feed your horse, but I did not want to feed him," this is willfulness—is not erroneous. *Talbert v. Charleston & W. C. R. Co.*, 55 S. E. 138, 139, 75 S. C. 136.

#### **INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLECT**

Where it appears that, before a judgment for sale of land for delinquent taxes, defendant made inquiry as to the amount of assessments against the land, and, having then paid the amount she was informed was delinquent, she gave the action no more attention, but that judgment was afterward taken, without further notice to her, for an amount which plaintiff had failed to include in the statement given her, there was such "inadvertence, surprise, and excusable neglect" as, under *Burns' Ann. St.* 1901, § 399, entitled defendant to relief against the judgment. *Richcreek v. Russell*, 72 N. E. 617, 618, 34 Ind. App. 217.

#### **INADVERTENTLY**

The word "inadvertently" is a derivative term, derived from the word "inadvertence" or "inadvertency," and means lack of heedfulness or inattentiveness; negligence; want of care or circumspection. *Pein v. Miznerr*, 84 N. E. 981, 983, 170 Ind. 659.

#### **INALIENABLE**

The words "alienable" and "inalienable," used to restrict the disposition of lands in the Supplemental Agreement with the Chickasaws and the Choctaws, by Act July 1, 1902, c. 1362, §§ 12, 15, 16, include disposition by will. *Hayes v. Barringer*, 168 Fed. 221, 223, 93 C. C. A. 507.

#### **INC.**

A corporation painting on its place of business its corporate name, followed by the letters "Inc.," does not comply with Ky. St. 1903, § 576, providing that every corporation doing business in the state shall paint on its place of business its corporate name and immediately thereunder the word "Incorpo-

rated," for it cannot be inferred that the Legislature intended that an abbreviation would suffice for the word "Incorporated." *Commonwealth v. American Snuff Co.*, 101 S. W. 364, 365, 125 Ky. 350.

The variance between the name of a corporation "L. Rosenberg, Incorporated," and the indorsement of a note, "Louis Rosenberg, Inc.," is harmless, and does not defeat the intention of the officer of the corporation, indorsing the note on its behalf, to bind it; the abbreviation "Inc." being used instead of the complete word "Incorporated." *Van Norden Trust Co. v. Rosenberg*, 114 N. Y. Supp. 1025, 1028, 62 Misc. Rep. 285.

#### **INCAPABLE**

See Physically Incapable.

The phrases "incompetent," "mentally incompetent," and "incapable," as used in article 15, c. 86, §§ 5485, 5486, Comp. Laws 1909, mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. *Shelby v. Farve*, 126 Pac. 764, 765, 33 Okl. 651.

Gen. St. § 549, providing that the probate court shall appoint an administrator c. t. a. in the place of an executor who is "incapable" to accept the trust, does not empower the court to reject an executor named in the will on the ground that he is lacking in honesty, integrity, and business experience, the purpose of the section being only to authorize the appointment of an administrator when the person named as executor is disqualified by law. *Appeal of Smith*, 24 Atl. 273, 274, 61 Conn. 420, 16 L. R. A. 538.

A finding of the probate court of another state, authorized to declare incompetency and appoint conservators, that a person has become "incapable of managing her affairs by reason of intemperance and mental derangement" is equivalent to a finding that such person "is incompetent to manage herself or her affairs" in consequence of lunacy, idiocy, habitual drunkenness, or imbecility from old age, or loss of memory or understanding, or other causes, within Code Civ. Proc. N. Y. § 2326, authorizing the appointment of a foreign committee. In re *Curtiss*, 119 N. Y. Supp. 556, 560, 134 App. Div. 547 (citing In re *Clark*, 175 N. Y. 139, 67 N. E. 212).

#### **INCAPACITY**

See Emotional Incapacity; Mental Incapacity; Permanent Incapacity; Total Incapacity.

"Incapacity to sue" exists where there is some legal disability, such as infancy or

lunacy, or a want of title in the plaintiff to the character in which he sues. That he may not be the real party in interest, or that the admitted facts may not authorize a recovery, does not detract from his capacity to sue. *Homans v. New York Life Ins. Co.*, 106 N. Y. Supp. 929, 930, 55 Misc. Rep. 574 (citing *Pom. Code Rem.* [3d Ed.] § 711; *Ward v. Petrie*, 51 N. E. 1002, 157 N. Y. 301, 68 Am. St. Rep. 790).

A policy for the payment of sick benefits provided that a total disability to constitute a claim for indemnity for sickness should be continuous, complete, and total, requiring absolute necessary confinement to the house for not less than 14 consecutive days. During a portion of the period for which insured claimed benefits, he was out nearly every day by advice of his physician when the weather was favorable, and he was not actually confined to his bed on account of sickness during that time, but during the period he was not able to perform any labor or pursue his usual calling. Held, that insured was incapacitated within the meaning of the policy which provided for the payment of benefits to insured while incapacitated for performing labor. *Jennings v. Brotherhood Acc. Co.*, 96 Pac. 982, 984, 44 Colo. 68, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109.

## INCENDIARISM

In *Walker v. London & Provincial Fire Ins. Co.*, 22 Irish Law Times, 84, it was held that the word "incendiarism," as used in a policy, included any act of incendiarism, wherever committed, which directly caused the loss or damage sued for. *Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard*, 164 Fed. 404, 407, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

## INCEPTION

The "inception of a cause" in a court, in a constitutional sense and in every other sense, is the first step or proceeding necessary to be taken in order that the subsequent proceedings may follow. The lodging of the papers in the criminal district court, no matter in what shape those papers may be, provided they are sufficient to seize the court of the subject-matter, is the inception of the case. *State v. Bollero*, 36 South. 754, 755, 112 La. 850.

A note made payable to the maker's order, and successively indorsed by him and by a firm for whose accommodation it was made, and by defendant, and after a few days was discounted for the firm by plaintiff, had no "inception" until it was discounted, because suit could not have been maintained on it prior to that time. *Simpson v. Hefter*, 87 N. Y. Supp. 243, 244, 42 Misc. Rep. 482.

## INCESSANTLY

Continuously synonymous, see *Continuously*.

## INCEST

"Incest" is intercourse between people related within the degrees prohibited. *Fearnow v. Jones*, 126 Pac. 1015, 1017, 84 Okl. 694.

"Incest" is sexual intercourse between persons so nearly related that marriage between them would be unlawful. *McCaskill v. State*, 45 South. 843, 844, 55 Fla. 117; *State v. Tucker*, 93 N. E. 3, 174 Ind. 715, 31 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 100.

An information that one had sexual intercourse with his daughter sufficiently states the crime of "incest," defined in Pen. Code, § 285, as the commission of fornication or adultery by persons within the degrees of consanguinity within which marriages are prohibited. *People v. Stratton*, 75 Pac. 166, 167, 141 Cal. 604.

The statutory definition of "incest" (*Balinger's Ann. Codes & St. §§ 7228, 7229*) is the sexual commerce of persons related within the degrees wherein marriage is prohibited. "Persons being within the degrees of consanguinity or affinity, within which marriages are prohibited by law, who intermarry with each other, or who commit fornication or adultery with each other, or who carnally know each other, shall be deemed guilty of the crime of incest, is sufficient and does not contravene the constitutional provision concerning due process of law, because not using the word 'knowingly,' and the word, not being used in the definition, is not necessary to an indictment thereunder." *State v. Glindemann*, 75 Pac. 800, 801, 34 Wash. 221, 101 Am. St. Rep. 1001.

Cr. Code, § 204, which declares that a father who shall rudely and licentiously cohabit with his own daughter shall be guilty of "incest," and provides a punishment therefor, is valid and sufficient in form and substance to create the offense therein described. *Cordson v. State*, 109 N. W. 764, 765, 77 Neb. 416.

The crime of "incest" may be committed with a female who has not arrived at puberty. *Dixon v. State*, 41 South. 734, 147 Ala. 91, 119 Am. St. Rep. 57, 10 Ann. Cas. 957 (citing *Butler v. State*, 25 South. 1024, 120 Ala. 668; *King v. State*, 25 South. 178, 120 Ala. 332).

Under Code, § 4936, declaring intercourse with a daughter "incest," it is enough to show that defendant is the father of the female; it not being necessary that she be legitimate. *State v. Goodsell*, 116 N. W. 605, 606, 138 Iowa, 504.

"Incest," where the statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between two persons too nearly related in consanguinity or affinity to be entitled to intermarry." Under Cr. Code 1896, § 4859, which defines "incest" as the intermarriage of or the sexual intercourse between persons within the degrees of consanguinity or relationship within which marriages are declared by law to be incestuous and void, with knowledge of such consanguinity or relationship, and Civ. Code 1896, § 2837, which provides that "no man shall marry the daughter of his wife," marriage or sexual intercourse between a man and the daughter of his deceased wife is incestuous, where there is living issue of the marriage, which continues the affinity between the husband and the wife's blood relations. *Tagert v. State*, 39 South. 293, 294, 143 Ala. 88, 111 Am. St. Rep. 17.

The word "cohabit," as used in the statute defining the crime of "incest," means any sexual intercourse, whether within a common dwelling or elsewhere, between persons not married. *State v. Spurling*, 40 South. 167, 115 La. 789.

The marriage or cohabitation of first cousins does not constitute the crime of "incest," as defined and denounced by Act 78, p. 101, of 1884. *State v. Conville*, 42 South. 431, 117 La. 935.

A man having carnal intercourse with a daughter of his half-sister commits "incest" in violation of Revisal 1905, § 3352, defining the crime to be such intercourse between "uncle and niece." *State v. Harris*, 62 S. E. 1090, 149 N. C. 513, 128 Am. St. Rep. 669.

#### **Rape distinguished**

The destructive ingredient of the crime of "incest" is the relationship of the parties, while in statutory rape the youthfulness of the female is the important element, and the evidence necessary to convict of incest would not be sufficient to convict of statutory rape; and hence the crimes, though committed by the same act, are different crimes. *State v. Learned*, 85 Pac. 293, 294, 13 Kan. 328.

Under Rev. St. § 7019, declaring it to be incest where persons nearer of kin by consanguinity or affinity than cousins having knowledge of their relationship commit adultery or fornication together, a father may be convicted of incest with his daughter under 14 years of age, though his offense may have been rape under Rev. St. 6816. *Straub v. State*, 27 Ohio Cir. Ct. R. 50, 51.

#### **Consent or use of force**

Under Rev. St. § 7019, making it incest for persons nearer of kin by consanguinity or affinity than cousins having knowledge of

their relationship to commit adultery or fornication together, the crime may be committed with or without the consent of the woman. *State v. Robinson*, 93 N. E. 623, 624, 83 Ohio St. 136, 21 Ann. Cas. 1255.

Under Kirby's Dig. § 1811, providing that persons marrying who are within the degree of consanguinity within which marriages are declared by law incestuous, or who shall commit adultery or fornication with each other, shall be guilty of incest, the gravamen of the crime of "incest" is unlawful carnal knowledge because of consanguinity, and where the parties are within the prohibited degrees, the male may be convicted, though he accomplished the act without the consent of the female and against her will. *Gaston v. State*, 128 S. W. 1033, 95 Ark. 233.

Under Rev. St. 1898, § 4211, declaring that if any person related to another person within the fourth degree of consanguinity shall have sexual intercourse with such other related person with knowledge of the relationship the person so offending shall be deemed guilty of incest, a father having intercourse with his daughter may be convicted of incest, though the daughter did not consent, and the intercourse was had by force. *State v. Winslow*, 85 Pac. 433, 435, 30 Utah, 403, 8 Ann. Cas. 908.

The crime of "incest" was not cognizable at common law in 1805, the date of the passage of the act adopting the common law of England as to the definition of crimes, and hence, to determine the elements of incest, we must look to the statutes of this state alone. Act 78 of 1884, p. 101, provides: "Whoever shall hereafter knowingly intermarry, or cohabit without marriage, being within the degrees of consanguinity within which marriage is prohibited by articles 94 and 95 of the Civil Code of the state of Louisiana, shall be deemed guilty of the crime of incest." It cannot be said that the word "cohabit," as used in the statutes, is to be understood as requiring the consent of both parties. According to the dictionaries and the decisions of the courts, the word "cohabit" means "to dwell together as husband and wife," thus implying a relation based on the consent of both parties. But in the construction of the statute above referred to, the word "cohabit" must be taken as meaning sexual intercourse, and to constitute the crime of incest the concurrence of both parties is not essential. *State v. Freddy*, 41 South. 436, 437, 117 La. 121, 116 Am. St. Rep. 195 (citing *People v. Jenness*, 5 Mich. 305, 321; *De Groat v. People*, 39 Mich. 124; *People v. Burwell*, 63 N. W. 986, 106 Mich. 27; *People v. Skutt*, 56 N. W. 11, 96 Mich. 449; *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321; *State v. Eding*, 141 Mo. 283, 42 S. W. 935; *State v. Jarvis*, 26 Pac. 302, 20 Or. 437, 23 Am. St. Rep. 141; *Noble v.*

State, 22 Ohio St. 545; *State v. Thomas*, 4 N. W. 908, 53 Iowa, 214; *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *State v. Fritts*, 2 S. W. 256, 48 Ark. 66; distinguishing *Cannon v. United States*, 6 Sup. Ct. 278, 116 U. S. 55, 29 L. Ed. 561).

Under the statute prohibiting persons within certain degrees of consanguinity from intermarrying or committing adultery or fornication with each other, consent of the female is not an essential to the crime of "incest." *David v. People*, 68 N. E. 540, 541, 204 Ill. 479.

### INCESTUOUS

"Adultery or fornication, committed by persons who are prohibited by law from marrying on account of being related within certain degrees of consanguinity or affinity, is incestuous." Civ. Code 1895, § 2413, prohibits the marriage of a man with his stepdaughter and declares such a marriage to be incestuous. *Lipham v. State*, 53 S. E. 817, 125 Ga. 52, 114 Am. St. Rep. 181, 5 Ann. Cas. 66.

### INCESTUOUS ADULTERY

Penal Code, § 380, follows the Levitical rule (Leviticus xviii, 17), and carnal intercourse between father and stepdaughter is not only prohibited, but those engaged in such commerce are guilty of "incestuous adultery" and fornication, or incestuous adultery or incestuous fornication, as the parties may happen to be married or single. A conviction of adultery and fornication cannot be sustained where it appears that the female, with whom the alleged unlawful sexual intercourse is charged, did not consent thereto, and where the act appears to have been against her will. The crime of adultery and "fornication necessarily" involves the idea of consent; and while consent in some instances may be procured by force to a certain degree, where force was used in the inception of the offense, it must at least be shown that consent was finally induced thereby. *Nephew v. State*, 63 S. E. 930, 931, 932, 5 Ga. App. 841.

### INCH

See *Miner's Inch*; *Square Inch of Water*.

An "inch" as relating to water measure is estimated on the basis of 40 inches to one "second foot." *Hough v. Porter*, 98 Pac. 1083, 1101, 51 Or. 318.

In a suit to restrain interference with a pipe line used to carry water for irrigation purposes, a finding that the customary flow through such pipe was "40 inches of water" was not fatally defective for failure to specify the particular standard of measurement, since the finding would be construed accord-

ing to the customary water measurement of the locality. *Collins v. Gray*, 86 Pac. 983, 984, 3 Cal. App. 723.

### INCHMAREE CLAUSE

A time policy of marine insurance on a new lake steamboat contained the "Inchmaree clause," providing inter alia: "This insurance also specially to cover loss of, or damage to, the hull or machinery, \* \* \* through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners." This clause was unknown in marine insurance policies prior to the decision of the House of Lords in 1887, in *Insurance Co. v. Hamilton*, 12 App. Cas. 484. The immediate practical consequence of this decision in England was the invention of this special clause, subsequently called the Inchmaree clause, the use of which has become universal there in policies on steamers, particularly in time policies. The clause was evidently designed to cover at least the kind of a risk which was regarded by the House of Lords as not included in the policy in the Inchmaree Case. *Cleveland & B. Transit Co. v. Ins. Co. of North America*, 115 Fed. 431, 434, 435, 436.

### INCHOATE

#### INCHOATE EQUITY

A pre-emption right is sometimes called an "Inchoate equity", or right to call for a grant in compliance with the statute. *N. Carolina Min. Co. v. Westfeldt*, 151 Fed. 290, 303 (citing *Janney v. Blackwell*, 50 S. E. 857, 138 N. C. 439).

#### INCHOATE INSTRUMENT

Instruments that the law requires to be registered are said to be "Inchoate" prior to registration, in that they are then good only between the parties and their privies and persons having notice of them. *Wilkins v. McCorkle*, 80 S. W. 834, 837, 112 Tenn. 688.

#### INCHOATE LAND TITLE

As property, see *Property*.

### INCHOATE LEGAL TITLE

Where a purchaser complies with the provisions of the law for the disposition of public land, pays the purchase price, and receives a final receipt or certificate therefor, he has done all that is required to vest the complete title in him, and he thereby acquires a title of which he cannot be deprived by the government except for fraud or mistake. He may sell or devise the same at pleasure, and may maintain an action of ejectment to recover its possession. In short, he has the substantial and beneficial title, or, as some of the books say, "the inchoate legal title." *Budd v. Galler*, 89 Pac. 638, 639, 50 Or. 42.

**INCHOATE RIGHT OF DOWER**

At common law the "inchoate right of dower" is a contingent right, the value of which depends wholly upon the death of the husband. *Teckenbrock v. McLaughlin*, 152 S. W. 38, 39, 246 Mo. 711.

The "inchoate right of dower" is not a personal claim against the husband, but is a right that may ripen into an estate in case he dies first, and hence a release by a common-law wife of all demands she may have against her husband by reason of past relations or for any cause whatever does not release her dower rights. *Lavery v. Hutchinson*, 94 N. E. 6, 9, 249 Ill. 86, Ann. Cas. 1912A, 74.

**As interest in property**

See Interest (In Property).

**INCIDENT—INCIDENTAL**

The word "incident" is used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends on, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion (1 Hill, R. P. 243), while the right of alienation is necessarily incident to a fee simple at common law, and cannot be separated by a grant (1 Washb. R. P. 54). So a court baron is inseparably incident to a manor, in England (Kitch. 36; Co. Litt. 151). "All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. So the costs incurred in a legal proceeding are said to be incidental thereto." *Commonwealth v. Wampler*, 51 S. E. 737, 738, 104 Va. 337, 1 L. R. A. (N. S.) 149, 113 Am. St. Rep. 1039, 7 Ann. Cas. 422 (quoting and adopting definition in 1 Bouv. Law Dict. [Rawle's Rev.] 1006).

The word "incidents," in an instruction that the jury may take into consideration any testimony tending to show defendant's flight or concealment and other incidents, means circumstances. *State v. Paisley*, 92 Pac. 566, 571, 36 Mont. 237.

Under Pol. Code, § 2631, providing that by taking and accepting land for a highway the public acquire only the right of way and "the incidents necessary to enjoying and maintaining it," the county has no right to bore wells in the highway and use the subterranean water for sprinkling it. *Wright v. Austin*, 76 Pac. 1023, 1024, 143 Cal. 236, 65 L. R. A. 949, 101 Am. St. Rep. 97.

Civ. Code, § 1504, providing that "an offer of payment \* \* \* stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof," has no application to a tender under a decree allowing judgment debtors to redeem their property within a

specified time upon specified conditions, since the decree, being a mere option to redeem, imposed no "obligation" upon them, and neither the title to the land nor its possession was an "incident" to any obligation within the meaning of the section. *Bunting v. Haskell*, 93 Pac. 110, 112, 152 Cal. 426.

"An 'incident' to one subject cannot be presumed, by the very name of such an incident, to be intended to apply to a subject totally different." *Penhallow v. Doane*, 3 Dall. 54, 107, 1 L. Ed. 507.

The right given by Laws 1897, p. 313, c. 384, § 30, to sue the directors personally for the debts of the corporation, where the annual report required by such section is not filed, passes as an "incident to the debt" to an assignee thereof during the lifetime of the creditor, or to a receiver appointed for the creditor in supplementary proceedings against him. *Boynton v. Sprague*, 91 N. Y. Supp. 839, 840, 100 App. Div. 443.

A right of way for an irrigation ditch, and the right to receive water from or discharge the same on land, constitute easements which may attach to other lands as "incidents" or appurtenances. *Jones v. Deardorff*, 87 Pac. 213, 215, 4 Cal. App. 18.

**INCIDENTAL DAMAGES**

"Incidental damages" awarded in proceedings to condemn land for a railroad right of way are those which result to the owner of the land from such inconvenience as results to him from the taking of his land and its use by the railroad company. A charge that the owner should be allowed as direct damages the fair value of the land taken, considering it in relation to the entire tract and such other damages as directly result to the remainder of the tract and improvements, if any, not exceeding in all the difference between the actual value of the land immediately before and its actual value immediately after the taking, and authorizing the jury to find for the owner such "incidental damages" as result to the remainder of the land by the building and operating of the railroad in a prudent manner, less whatever sum is the value of the advantage accruing from the building of the road, is proper. *Chicago, St. L. & N. O. R. Co. v. Rottgering* (Ky.) 83 S. W. 584, 587.

**INCIDENTAL POWER**

An "incidental power" of a corporation "is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has only a slight or remote relation to it." *Western Maryland R. Co. v. Blue Ridge Hotel Co.*, 62 Atl. 351, 353, 102 Md. 307, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362.

An "incidental power" of a corporation is one that is directly and immediately appropriate to the execution of the specific power

er granted, though not necessarily indispensable to it, and not one that has a slight or remote relation to it. *Alton Mfg. Co. v. Garrett Biblical Institute*, 90 N. E. 704, 705, 243 Ill. 298.

An "incidental power" exists only for the purpose of enabling a corporation to carry out the powers expressly granted to it (that is to say, the powers necessary to accomplish the purposes of its existence), and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts or capital to other purposes than such as its charter expressly authorizes or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes. *Victor v. Louise Cotton Mills*, 61 S. E. 648, 650, 148 N. C. 107, 16 L. R. A. (N. S.) 1020, 16 Ann. Cas. 291 (quoting 10 Cyc. p. 1096).

Implied powers of corporations presumptively exist only to the extent that may be necessary to enable them to carry out the express powers granted and to accomplish the purpose of their creation, and an "incidental power" may be defined to be one that may be immediately appropriate to the execution of the specific power granted, and not one that has some slight or remote relation to it. *Robert Gair Co. v. Columbia Rice Packing Co.*, 50 South. 8, 9, 11, 124 La. 193 (quoting and adopting definition in *State ex rel. Jackson v. Newman*, 25 South. 410, 51 La. Ann. 837, 72 Am. St. Rep. 476).

## INCLOSE

While it seems that, where a factory act requires that elevators should be "inclosed or secured," force may be given to both words, as to inclose it might not always make it secure and other precautions might be necessary, yet, the legislative intent being to protect the lives of employes, an "inclosure" will not be considered as complying with the statute unless it makes the elevator "secure" from danger; and an instruction using the term "inclosed and secure," instead of "inclosed or secure," will not be held erroneous. *Fowler Packing Co. v. Enzenperger*, 94 Pac. 995, 998, 77 Kan. 406, 15 L. R. A. (N. S.) 784.

The terms "inclosed or cultivated fields or uninclosed lands," as used in Rev. St. 1899, § 1105, requiring railroads to maintain fences at such places, "have by construction attained the settled meaning of having application only to such territory as is outside of the towns, or, in other words, rural districts. \* \* \* It is well settled that railroads are not required, because the statute by its phraseology excludes, and they are not permitted, to fence inside incorporated towns, where streets and alleys cross the road, or inside of towns not incorporated, which are platted, and streets dedicated to public use cross the road, because to fence

at such places would obstruct public streets and work a nuisance. This exemption from fencing is in favor of the public which use and occupy the streets. It is also well settled that the roads are not required to fence at their depots or stations such portion of the road as is necessary to remain open for the transaction of business with the public and the reception and discharge of freight and passengers." *Acord v. St. Louis S. W. Ry. Co.*, 87 S. W. 537, 540, 113 Mo. App. 84.

In enacting Rev. Codes, § 2815, providing that "every railroad company operating any steam or electric railroad in this state shall maintain lawful fences not less than four feet high on each side of its road where the same passes through, along, or adjoining 'inclosed or cultivated fields or inclosed lands,'" "the Legislature clearly had in mind rural or country districts where the railroad runs through, along, or adjoining inclosed or cultivated fields or inclosed lands, and did not intend to make such section apply to municipalities or towns, whether incorporated or not, unless such town was so extended as to include fields or inclosed lands other than town lots, or to a railroad passing along or in front of town lots or inclosed lots used for residence purposes only." That section did not require a railroad company to fence its road where the same runs through a narrow canyon with a public traveled road occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on one side of the track and residences and stores occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on the other side, and there are no cultivated fields or inclosed lands through, along, or adjoining which such road runs. *Bernardi v. Northern Pac. R. Co.*, 108 Pac. 542, 543, 18 Idaho, 76, 27 L. R. A. (N. S.) 796.

## INCLOSED LAND

The term "owner of inclosed lands" is satisfied only where land is surrounded by a substantial fence or its equivalent, separating the premises from outside territory. St. 1898, §§ 1810, 1813, requiring a railroad operating over inclosed lands to construct farm crossings, and providing that on its failure to do so the owner or occupant may recover a penalty therefor, applies only to land owned by the person or occupant entitled to the farm crossing, shut in on all sides from all other land by a fence or barrier for the protection of the premises against encroachment from without and restraint from within. *Miller v. Chicago & N. W. R. Co.*, 113 N. W. 384, 387, 133 Wis. 183.

Every man's land is, in the eye of the law, "inclosed" by a visible and material fence, or by an ideal, invisible boundary, and in either case every entry or breach constitutes a trespass carrying with it some damages for which compensation may be ob-

tained by action. *Wood v. Snider*, 79 N. E. 858, 859, 187 N. Y. 28, 12 L. R. A. (N. S.) 912 (citing 2 *Waterman*, *Trespass*, § 873).

In order that land shall be "inclosed," within the meaning of V. S. 4626, it must be surrounded by visible objects, natural or artificial, and an imaginary boundary is not enough. It is not sufficient that the locus in quo and an adjoining parcel of land, taken together as one tract, are inclosed. *Payne v. Gould*, 52 Atl. 421, 74 Vt. 208.

A tract of tideland, bounded on one side by the shore, along which run railroad tracks owned by the owner of the tract, and lying between a training wall built by the United States for the improvement of navigation, and a mole built out to deep water in a bay for the passage of railroad trains, with the fourth side open to the bay, is not "inclosed," within Code Civ. Proc. Cal. § 323, so as to be deemed in the actual possession and occupancy of the owner under said section. *Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 Fed. 376, 395, 80 C. C. A. 606.

A charge in trespass to try title, that on defendant's plea of a five-year limitation he could not recover the land, unless it had been "inclosed" within the lines prescribed by his deed, that the mere fencing and taking possession of the land, without a deed which included it, was insufficient, was not erroneous, since by the term "inclosed" the court meant that the land must be included within the lines of his deed. *Dean v. Furrh* (Tex.) 143 S. W. 343, 345.

### INCLOSED PREMISES

Where chickens were taken from a coop in a wagon standing within an inclosed barnyard, they were taken from "inclosed premises," within Acts 30th Gen. Assem. p. 122, c. 133, providing punishment for larceny from inclosed premises. *State v. Norman*, 113 N. W. 340, 342, 135 Iowa, 483.

### INCLOSURE

See *Cultivated Inclosure*; *Substantial Inclosure*; *Unlawful Inclosure*.  
Such inclosure, see *Such*.

In an action under Code 1907, § 6037, for statutory penalty for destruction of fruit trees inclosed on premises, a general charge for defendant because there was no proof that the trees were removed from an inclosure was properly refused; it appearing that the trees were taken from a yard and orchard, which showed prima facie an inclosure; "orchard" being defined by Webster as meaning, among other things, "an inclosure containing fruit trees," etc., and the word "yard" meaning by common acceptance an "inclosure." *Wright v. Sample*, 50 South. 268, 162 Ala. 222.

The word "inclosure," as used in the act of 1797 (*Slade's St.* 1824, p. 450, § 3; *R. S.* 1839, p. 412, § 4), relating to impounding, im-

ports land inclosed by something more than the imaginary boundary line, that there should be some visible, tangible obstruction, such as a fence, hedge, ditch, or something equivalent, for the protection of the premises against encroachment by cattle. *Porter v. Aldrich*, 39 Vt. 326, 332.

Where defendant and plaintiff disagreed as to the division line between their adjoining lands, and defendant built a fence on his own land, extending it outward at each end so as to join plaintiff's fence at the sides, and plaintiff had a fence for a part of the distance only on or near the division line, plaintiff did not have an inclosure, and was not entitled to recover under Rev. St. 1899, § 4373, providing a penalty for voluntarily throwing down any fences and leaving the same down, other than leading into one's own inclosure. *Sperry v. Hurd*, 109 S. W. 76, 130 Mo. App. 495.

### Fence required

"The term 'inclosure,' as regards land, means a tract of land surrounded by an actual fence. That, of course, does not mean necessarily a lawful fence, within the meaning of the statute, nor as to all situations a fence strictly so called, but, as said in many cases, a fence or something equivalent for protection of the premises from without and restraint from within." *Miller v. Chicago & N. W. R. Co.*, 113 N. W. 384, 388, 133 Wis. 183.

In prosecution for cutting shrubs within the inclosure of a place of burial, where it appears that one string was gone from the graveyard fence, and that it was broken down in other places, it is error to refuse to instruct that the word "inclosure" means the act of inclosing, the separating of land from common ground into distinct possession by a fence; and if the jury have a reasonable doubt as to whether the graveyard was an inclosure, as thus defined, they should acquit. Such instruction embodies a correct and pertinent definition of "inclosure." *Bird v. State*, 79 S. W. 25, 26, 46 Tex. Cr. R. 135.

The word "inclosure," as used in Pub. St. 1906, § 5564, providing that a person may impound a beast found in his inclosure doing damage, means not that the land is fenced but only that it is occupied. *Davis v. Mudgett*, 69 Atl. 762, 763, 81 Vt. 252 (citing *Porter v. Aldrich*, 39 Vt. 326; *Keith v. Bradford*, 39 Vt. 34).

### INCLUDE

See *Between and Including*; *Necessarily Included*; *Up to and Including*.

The word "including," according to common usage, is susceptible of different shades of meaning. It may be used in the sense to comprise or embrace; to confine or to contain; to express the idea that a thing in question constitutes a part only of the con-

tents of some other thing; as a word of enlargement, and ordinarily implying that something else has been given beyond the general language which precedes it; to add to the general clause a species which does not naturally belong to it. It is frequently used as the equivalent of "also." *State v. Montello Salt Co.*, 98 Pac. 549, 551, 34 Utah, 458.

The word "including" is the participial form of the verb "include," which by Webster's Dictionary is defined in its primary sense to mean to confine within, to hold, to contain, to shut up, to inclose; by the Century Dictionary, to comprise as a part. The word has also been defined as having an accumulative sense and as classing that which follows with that which has gone before. *Maben v. Rosser*, 103 Pac. 674, 676, 24 Okl. 588.

"Include" is defined by the Century Dictionary as (1) "to confine within something; hold as in an inclosure; inclose; contain." (2) "To comprise as a part, or as something incident or pertinent; comprehend; take in; as the greater includes the less. *Montello Salt Co. v. Utah*, 31 Sup. Ct. 706, 708, 221 U. S. 452, 55 L. Ed. 810, Ann. Cas. 1912D, 633.

"It has been said that the word 'including' means moreover, or as well as; but if this was the meaning of the Legislature it was a very embarrassing mode of expressing the idea." *United States v. Betsy*, 4 Cranch, 443, 452, 2 L. Ed. 673.

The name "Independent Democratic Party" includes that of "Democratic Party," within Election Law (Laws 1896, p. 925, c. 909, § 57), providing that the name which shall be designated as the political name in a certificate of independent nomination shall not "include" the name of any organized political party. In re Carr, 88 N. Y. Supp. 107, 94 App. Div. 493.

In the definition of words and terms in Bankr. Act July 1, 1898, c. 541, § 1a, a provision that a word shall "include" a certain thing does not exclude other meanings. In re Harper, 175 Fed. 412, 423.

Under a devise by which testator gave to his wife "a lifetime interest in the house and land where we now live, including the furniture therein," the word "including" does not mean that the gift of the furniture is "included" in the terms of the life estate but merely that it was included in the property that testator designed that his wife should have. *Wallace v. Phipps*, 1 Tenn. Ch. App. 326, 332.

Pub. Acts 1895, No. 95, provided for the compulsory education of children between the ages of 8 and 14 years, and in cities between the ages of 7 and 16 years. Pub. Acts 1901, No. 83, provided for such education between the ages of 8 and 15, and in cities between 7 and 15. Acts 1905, No. 200, provided for such education of children between and

including the ages of 7 and 15 years. Held, that the latter statute does not apply to children during the fifteenth year and until they become 16, as the word "including" has no force to extend that limit beyond the time specifically designated. *Jackson v. Mason*, 108 N. W. 697, 698, 145 Mich. 338.

A live stock shipping contract contained a stipulation that, as a condition precedent to his right to recover for any loss or injury to the cattle, resulting from the carrier's negligence, including delays, the shipper should give notice in writing before the cattle were removed from pens at destination. Held, that the words "including delays" cannot be regarded as having reference to a loss resulting from a decline in the market occasioned by the carrier's negligent delay in transportation. *Missouri, K. & T. Ry. Co. v. Fry*, 87 Pac. 754, 755, 74 Kan. 546.

#### As in addition to and also

The words "including costs" in a verdict, where the jury find for plaintiffs \$15, "including costs," may either be treated as a surplusage, or the word "including" may be interpreted as meaning "and," which is more probably the intent of the jury, and the verdict is not void for uncertainty, as the portion of the verdict which attempts to award costs will be rejected as surplusage and will not affect the residue. *Southern R. Co. v. Oliver & Morrow*, 58 S. E. 244, 245, 1 Ga. App. 734.

Enabling Act Utah (Act Cong. July 16, 1894, c. 138, 28 Stat. 109) § 8, granted to the state public lands to the extent of two townships to be reserved for the state university, and in addition 110,000 acres to be selected and located as provided, and "including" all the saline lands in said state, for the use of the university. Held, the word "and" before "including" was used to express the relation of addition, and the word "including" was used in the sense of "also," so that the state was entitled to all the saline land, without selection, in addition to the 110,000 acres to be selected and located. *State v. Montello Salt Co.*, 98 Pac. 549, 551, 34 Utah, 458.

The word "including" may have the sense of addition, and of the word "also," or may merely specify particularly that which belongs to the genus. It is the participle of the word "include" which the Century Dictionary defines as "to confine within something; hold as in an inclosure; inclose; contain;" "to comprise as a part, or as something incident or pertinent; comprehend; take in; as, the greater includes the less; \* \* \* the Roman Empire included many nations." Act Cong. June 16, 1894, § 8, granting to the state of Utah certain lands to the extent of two townships in quantity, and in addition 110,000 acres, to be selected, "and 'including' all the saline lands in said state," grants only such saline lands as should be selected as a part of the other lands granted and not



specifically located. *Montello Salt Co. v. State of Utah*, 31 Sup. Ct. 706, 708, 221 U. S. 452; 55 L. Ed. 810, Ann. Cas. 1912D, 633 (citing *Hiller v. United States*, 45 C. C. A. 229, 106 Fed. 73, 74).

In "diamonds \* \* \* not advanced, \* \* \* including miners' diamonds," in *Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 545*, "including" is used as a word of addition, rather than of specification. *Sullivan Machinery Co. v. United States*, 168 Fed. 561, 562.

In construing the provision in paragraph 699, *Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202*, for "round unmanufactured timber including pulp woods," held, that the pulp wood subjected to the robbing process, whereby the bark, skin, and rough places are removed, is not manufactured in any true sense; also that it is not necessary that the "pulp woods" should be "round unmanufactured timber," "including" being used as equivalent to "also." *United States v. Pierce*, 147 Fed. 199, 77 C. C. A. 425 (citing *Hiller v. United States*, 106 Fed. 73, 74, 45 C. C. A. 229).

#### Embrace synonymous

Under 3 Mills' Ann. St. Rev. Supp. § 4389a, authorizing the city council to annex by ordinance any tract adjoining any first-class city, but not within its limits, if it has been platted, or whenever any tract is included or embraced within corporate limits, but has not been made a part of the city, the boundary line must be unbroken and separate property within from that without at every point, and, when property is excluded from its limits by its boundary line, it is not "included" or "embraced" within the city within the statute, so as to authorize annexation; those words being synonymous. *City of Pueblo v. Stanton*, 102 Pac. 512, 514, 45 Colo. 523.

#### As word of limitation

Civ. Code, § 1113, provides that the use of the word "grant" in a conveyance shall imply a covenant that the estate is free from incumbrances, at the time of the execution of the conveyance. Section 1114 provides that the term "incumbrances" includes taxes, assessments, and all liens upon realty. Held that, aside from the statutory definition, an "incumbrance," as used in the phrase "covenant against incumbrances," is any right or interest in land which may subsist in third persons to the diminution of the value of the estate to the grantee, but consistently with the passing of the fee, and both within such definition and under the statute a restrictive covenant against the use of firearms on the premises was an "incumbrance"; the word "includes" being ordinarily a word of enlargement and not of restriction. *Fraser v. Bentel*, 119 Pac. 509, 511, 161 Cal. 390, Ann. Cas. 1913B, 1062.

Where a railroad company demised property of every description, "including" its railroad and all real estate, rights, and appurtenances connected therewith, also all buildings, etc., and equipment "and all personal property and estate owned by said lessor," also all franchises, etc., the word "including" did not restrict the subclauses to distinctively railroad property, but each subclause covered all property of the lessor fairly included by its terms and not excluded by other terms of the lease. *Gray v. Massachusetts Cent. R. Co.*, 50 N. E. 549, 554, 171 Mass. 116, 124, 125.

Under Comp. Laws, § 345, authorizing a townsite trustee before issuing a deed of lots to receive for counsel fees, and for moneys expended in the acquisition of the title and for the administration of the trust, including reasonable charges for time and services while employed in such trust, not exceeding the sum of \$1 for each lot, the word "including," shows that the charges for time and services of the trustee were to be embraced within the maximum charge, which was also to be inclusive of counsel fees and for moneys expended in the acquisition of the title and the administration of the trust. *State ex rel. Jennett v. Stevens*, 116 Pac. 601, 34 Nev. 128.

#### INCLUSIVE DEED

An "inclusive deed" is one which contains within the designated boundaries lands which are excepted from the operation of the deed. *Logan v. Ward*, 52 S. E. 398, 58 W. Va. 366, 5 L. R. A. (N. S.) 156.

#### INCLUSIVE GRANT

An "inclusive grant" from the state is one which includes, within the boundaries designated in the patent, lands which are excepted from its operation. *Logan v. Ward*, 52 S. E. 398, 58 W. Va. 366, 5 L. R. A. (N. S.) 156.

### INCOMBUSTIBLE

A building constructed by erecting a wooden frame, and covering it on the outside with sheets of corrugated iron, the interior, including the flooring, ceiling, etc., being entirely of wood, does not meet the requirements of a municipal ordinance which declares that within certain fire limits all buildings shall be constructed of brick, stone, or other "incombustible" material, and covered with tin or metallic or fireproof roofing. *Century Dictionary* defines the word "incombustible" to mean "not combustible; incapable of being burned or consumed by fire." In *Payne v. Wright* (1892) L. R. 1 Q. B. Div. 104, the meaning of the word was under consideration. The metropolitan building act provided that the roof of every building should be covered externally with "slates, tiles, metal, or other incombustible materials." The roof of a building was covered

externally with materials consisting of woven iron wire coated with an oleaginous compound. The coating would ignite and burn away, leaving the wirework uninjured. It was held that the roof was not covered with "incombustible materials," within the meaning of the act. *City of Sylvania v. Hilton*, 51 S. E. 744, 746, 123 Ga. 754, 2 L. R. A. (N. S.) 483, 107 Am. St. Rep. 162.

## INCOME

See Gross Income; Net Income.

A salary paid to a judgment debtor for his personal services is "income" out of which he may be required, under Act March 22, 1901, P. L. 1901, p. 373, § 3, to make payments on account of an unsatisfied judgment. *White v. Koehler*, 57 Atl. 124, 70 N. J. Law, 526.

Alimony can be allowed to the wife after she obtains a divorce under Civ. Code, art. 160, only from the property and not in excess of one-third of the income of the husband, and the word "property" does not mean earning capacity, nor does "income" mean current earnings, resulting from labor. *Jackson v. Burns*, 41 South. 40, 41, 116 La. 695.

The words "rents, issues, and profits" are commonly connected together with reference to the income of real estate. What are called "rents, issues, and profits" in real estate are the same as what are naturally called "interest and income" when referring to personal property. A testator's use of the word "income" in addition to the word "interest" indicates that he was thinking of productive personal property other than the ordinary interest producing investments. *Oram v. Peirce*, 67 Atl. 1053, 1056, 73 N. J. Eq. 391.

Corporation Tax Act (Act Cong. Aug. 5, 1909, c. 6, § 38), imposes an excise tax on the net income received during the year by insurance companies, to be ascertained by deducting from the gross income all ordinary and necessary expenses actually paid within the year in the maintenance and operation of the business, all losses actually sustained within the year and also all sums other than dividends paid within the year on policy and annuity contracts, interest actually paid within the year on bonded indebtedness, all sums paid by it within the year for taxes, and all sums received by it within the year as dividends on stock of other corporations, etc. Held, that the word "income," as used in such act, meant that which had "come in" or had been already received, and that the net income so taxable should be determined on a cash, as distinguished from a revenue, basis, and did not include uncollected and deferred premiums and interests, accrued and due, but not actually received. *Mutual Benefit Life Ins. Co. v. Herold*, 198 Fed. 199, 215.

## Accumulated surplus or increase of corporate stock

A dividend in stocks of a corporation declared by its directors out of its surplus net earnings is income, and not principal, within a deed conveying property, including the stocks on which the dividend is declared, to trustees to pay the income to certain persons for life, the principal on their death to become the property of others. *Safe Deposit & Trust Co. of Baltimore v. White*, 61 Atl. 295, 296, 102 Md. 73.

Defendants, as administrators with the will annexed, came into possession of a fund of which one of them was a beneficiary. A new trustee was appointed on the application of the remaindermen, and the administrators ordered to account for such fund and "all accretions thereto." Held, that subscription rights in additional stock issued by the corporation represented principal, and not "income." *Jewett v. Schmidt*, 92 N. Y. Supp. 737, 739, 45 Misc. Rep. 471.

The word "income," as used in determining whether a dividend of a corporation was declared out of the accumulated income, means all accumulations, whether in money or property, and regardless of the form when first obtained, or how converted and reconverted, before declaration of the dividend. *Soehnlein v. Soehnlein*, 131 N. W. 739, 746, 146 Wis. 330.

Surplus and undivided profits of a bank apportionable to the shares of stock therein are not "income," so as to go to a widow entitled under her husband's will to the income of bank stock. *Tubb v. Fowler*, 99 S. W. 988, 990, 118 Tenn. 325.

Where a person creates a trust in corporate stock for the benefit of another, providing that such other shall have the income for a stated period, the term "income" covers all distributions made by capitalizing surplus created by income and distributing stock, evidence of liabilities, or otherwise. *Soehnlein v. Soehnlein*, 131 N. W. 739, 746, 146 Wis. 330.

As between the life tenant, entitled to the net income, and the remainderman, entitled to the principal, of a trust estate invested in corporate stock, a stock dividend is a part of the principal of the trust estate, and goes to the remainderman. *Billings v. Warren*, 74 N. E. 1050, 1054, 216 Ill. 281.

A will provided that certain shares of bank stock should be held in trust, and that the "income" should be paid to testatrix's nephew during life. Upon the termination of the life estate, the property was to pass to remaindermen. Five years after testatrix's death, the directors of the bank declared a special dividend of 100 per cent., and the stockholders voted to double its capital stock, giving the stockholders the privilege of subscribing for the new stock at par and

of paying for the same with the special dividend. The transaction constituted a distribution of surplus earnings, a part of which accumulated after the trust was created. Held, that the trustee should make such a division of the stocks or their proceeds as would give the life tenant such part as was equivalent to his interest in the surplus earnings that accrued subsequent to the creation of the trust. *Holbrook v. Holbrook*, 66 Atl. 124, 125, 74 N. H. 201, 12 L. R. A. (N. S.) 768.

Where property in trust to pay the income to certain persons for life, and on the death of the last survivor to pay the principal to certain persons absolutely, consisted of shares in a joint-stock company having a fund used for the payment of losses and the protection of stockholders from personal liability for debts, bonds issued to stockholders on such accumulated fund, with interest payable only from such proceeds of the reserve as should be applicable after making provision for the payment of all debts of the company, were capital and not "income," going to the remaindermen rather than to a life tenant. *D'Ooge v. Leeds*, 57 N. E. 1025, 176 Mass. 558, 560 (quoting and adopting *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705).

Twenty shares of bank stock, of the par value of \$100, had been inventoried by an executor as trustee as of uncertain value. The executor was also a life tenant in part of the estate, and disposed of the entire interest in such stock for \$3,500; 20 shares at \$100 and \$1,500 "surplus and undivided profits." On an intermediate accounting it appeared that no part of the \$1,500 represented a premium on the bank stock, nor any increase in its market value, and was not a part of its working capital. Held, that it belonged to the life tenants, and not to the remaindermen, and was properly credited to "income" and not "corpus." In re *Stevens*, 95 N. Y. Supp. 1084, 1086, 47 Misc. Rep. 560.

#### **Advance in value**

The increase in the value of a fund held in trust to pay the income to one for life, and on his death to transfer the same to others, is a part of the capital, and is not income, and the remaindermen are entitled thereto. *Carpenter v. Perkins*, 74 Atl. 1062, 1065, 83 Conn. 11.

#### **Annuity**

"An 'annuity' is a stated sum per annum, payable annually, unless otherwise directed. It is not 'income' or profits, nor indeterminate in amount, varying according to the income or profits." A bequest to an executor of a sum sufficient to produce \$1,200 annually, to be paid to the annuitant "in payments quarterly of \$300 each," is an annuity. *Steelman v. Wheaton*, 66 Atl. 195, 196, 72 N. J. Eq. 626 (quoting and adopting definition in *Booth v. Ammerman* [N. Y.] 4 Bradf. Sur. 129).

"An 'annuity' is a stated sum payable annually unless otherwise directed. It is not 'income' or 'profits' or indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable; and hence, when a testator gave a beneficiary the interest upon a certain sum payable annually, it is not an annuity but merely an ordinary legacy, for it is not a stated sum but may be more or less according to the earnings of the capital and is merely interest or income. There is a distinction between income and annuity. The former embraces only the net profits after deducting all necessary expenses and charges. The latter is a fixed amount directed to be paid above and without contingency. The income or interest of a certain fund (bequest) is not an annuity but simply profits to be earned, and, although directed to be paid annually, that relates only to the mode of payment and does not change the character of the bequest." *Poe v. Raleigh & A. Air Line Co.*, 54 S. E. 406, 407, 141 N. C. 646 (quoting 1 Words and Phrases, p. 405, and citing *Bartlett v. Slater*, 22 Atl. 678, 53 Conn. 105, 55 Am. St. Rep. 73; *Booth v. Ammerman* [N. Y.] 4 Bradf., Sur. 129).

A gift of an "income" from a certain fund is not an "annuity," and interest does not begin until one year from the death of the deceased. In re *Brown's Estate*, 77 Pac. 160, 162, 143 Cal. 450.

#### **Capital distinguished**

See Capital.

#### **Dividend**

Where a corporation declared a cash dividend from earnings, and voted an increase of the capital stock to a like amount on the same day, giving every stockholder the right to subscribe to the new stock, the cash dividend constituted "income," and such dividends on stock held in trust subject to life estates belong to the life tenants, and not the remaindermen. *Hyde v. Holmes*, 84 N. E. 318, 319, 198 Mass. 287.

Cash dividends on stock should be regarded as "income" and stock dividends as capital. *Smith v. Dana*, 60 Atl. 117, 119, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51.

"Income," as used in a will bequeathing stock, means "dividends." *Lauman v. Foster* (Iowa) 135 N. W. 14, 16.

Under a testamentary gift of the residuary estate, consisting of corporate stock, of testator in trust, to pay the income to a beneficiary for life, with gift over of the estate on her death, a stock dividend, representing accumulated profits, earned in part during testator's lifetime and in part after his death, goes to the life tenant as "income," which is gain or profit, and which proceeds from labor, business, property, or capital. In re *Osborne*, 138 N. Y. Supp. 18, 20, 153 App. Div. 312.

A dividend on corporate stock forming part of a trust estate paid in bonds and scrip from the accumulated earnings of the corporation is "income," and should be distributed to the life tenants, and does not belong to the remaindermen. *In re Baldwin*, 133 N. Y. Supp. 1109, 1110, 74 Misc. Rep. 341.

As between a life tenant, who is entitled to the income from certain stock in a corporation, and a remainderman, who will receive the corpus of the estate after the death of the life tenant, stock dividends declared out of surplus earnings, after the death of the testator, are "income," and belong to the life tenant as a part of the earnings of the original stock, and, if the funds out of which the dividends are declared have accrued or been earned before the life estate arose, the dividends will be held to be the principal and belong to the remainderman. *Goodwin v. McGaughy*, 122 N. W. 6, 9, 108 Minn. 248.

Dividends on stocks and bonds pledged as collateral security to creditor of testator in his lifetime applied on the obligations given to secure such indebtedness, could not be regarded as income of his estate, from which annuities could be paid by his testamentary trustees. *Skinner v. Taft*, 103 N. W. 702, 704, 140 Mich. 282.

Where, under a will, the stock of a certain corporation was placed in trust, "the dividends, issues, and profits thereof" to be paid to the beneficiaries, the words "dividends, issues, and profits" were interchangeable with "income," and referred to the earnings paid over by the officers of the corporation in the form of dividends, to the trustees. *In re Stevens*, 95 N. Y. Supp. 297, 305, 46 Misc. Rep. 623.

A railroad corporation chartered to take over the properties of another corporation and to provide for its liabilities issued bonds providing that the interest thereon should be payable out of the net earnings and income of the railroad company applicable to such purpose, when ascertained and fixed as provided in the mortgage securing the bonds. The mortgage provided that the fund available for interest was to be ascertained by deducting from the gross earnings and income of the railroad company all costs of repairs, renewals, etc., and reasonable betterments to the railroad equipment and property, and certain other items of expense and charges. Held, that dividends derivable from the railroad's ownership of stock in another corporation are part of its income and enter into the computation of the fund applicable to interest on the bonds. *Central of Georgia Ry. Co. v. Central Trust Co. of New York*, 69 S. E. 708, 712, 135 Ga. 472.

#### As estate

See Estate.

#### Gift of as conveying title

While a gift of the "income" of property is usually construed to be a gift of the prop-

erty itself, it does not have that effect as a matter of law, but merely raises a presumption that such a gift was intended. *Walker v. Hill*, 60 Atl. 1017, 1019, 73 N. H. 254 (citing *McClure v. Melendy*, 44 N. H. 469, 471; *Wood v. Griffin*, 46 N. H. 230, 234; *Perkins v. Mathes*, 49 N. H. 107, 111; *Hopkins v. Keazer*, 36 Atl. 615, 89 Me. 347; *Bowen v. Payton*, 14 R. I. 257).

A will giving to testatrix's daughters during life the "income" from property created a life tenancy in the property itself and not a trust, where no trustee was named and there were no circumstances tending to show why testatrix should prefer a trust to a life tenancy. *Little v. Colman*, 66 Atl. 483, 484, 74 N. H. 215.

#### Interest

A bequest of the "interest" on \$2,000 to be paid to testatrix's son semiannually during his life, was a bequest of the "income" of the fund for life. *In re Dull's Estate*, 66 Atl. 567, 217 Pa. 358.

The word "interest," as used in an antenuptial contract providing that a wife should receive in lieu of dower, for each year she might survive her husband, the interest on a certain sum, is synonymous with "income." *Dulaney's Adm'r v. Dulaney*, 54 S. E. 40, 42, 105 Va. 429.

"The word 'income' means the gain which proceeds from property, labor, or business. When applied to a sum of money or money in public debt, it is equivalent to 'interest.'" *Dulaney's Adm'r v. Dulaney*, 54 S. E. 40, 41, 42, 105 Va. 429.

The words "interest or earnings" in a will whereby testator gave property to trustees to control and pay the interest or earnings to his children for life, with gift over to their heirs, and whereby he provided that on the death of a child leaving no living heirs the spouse of the child might, if living, receive annually a specified sum of the interest money due the deceased, and in case of the death of a child leaving no living heirs his estate, principal and interest, should be divided equally with the grandchildren, are synonymous with each other, and with the word "income" in its ordinary sense. *Ex parte Humbird*, 80 Atl. 209, 211, 114 Md. 627.

#### As legacy

See Legacy.

#### Money from sales of property

Where corporate stock was held in trust, the "income" to be paid to the beneficiaries, and the corporation went out of business and its assets were sold, that proportionate part of the price received on such sale represented by the shares of stock and items of increased amount of material, betterments, and good will of the company constituted a part of the "capital" of the trust estate, and

not "income." In *re Stevens*, 95 N. Y. Supp. 297, 312, 46 Misc. Rep. 623.

In an item of a will providing that all incomes and profits growing out of testator's real estate, no matter where situated, should be used to pay the several bequests, the words "incomes" and "profits," coupled with directions to rent and sell, clearly included proceeds of sales as well as rents in the meantime, especially in view of the testator's use in another item of the word "income," meaning proceeds. In *re Handley's Estate*, 61 Atl. 350, 352, 212 Pa. 11.

#### As net earnings or profits

"Profits" and "income" are sometimes used as synonymous terms, but, strictly speaking, "income" means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures, while "profits" generally mean the gain which is made upon any business or investment when both receipts and payment are taken into account." In *re Murphy*, 80 N. Y. Supp. 530, 533, 80 App. Div. 238 (quoting and adopting definition in *People v. Sup'rs of Niagara*, 4 Hill. [N. Y.] 20).

"Income" embraces only the net profits after deducting all necessary expenses and charges and is distinguished from annuity in that the latter is a fixed amount directed to be paid absolutely and without contingency. *Peck v. Kinney*, 143 Fed. 76, 80, 74 C. C. A. 270.

#### As property

See Property.

#### Rents

Since the term "income" may be properly defined as that which comes in to a person as payment for labor, or services rendered in some office, or as gain from lands, business, the investment of capital, etc., so much of Laws 1911, c. 658, imposing a tax on incomes, as provided that the estimated rental of residence property occupied by the owner should be considered as income, was not invalid on the theory that, as it was not income in the strict sense of the term, it could not be made such by a legislative fiat. *State ex rel. Bolens v. Frear*, 134 N. W. 673, 691, 148 Wis. 456, Ann. Cas. 1913A, 1147.

#### INCOME TAX

As special tax, see Special Tax.

#### INCOMPETENT—INCOMPETENCY

See Irrelevant, Immaterial, and Incompetent; Mentally Incompetent; Venomous Incompetent.

Determination of, see Determination.

A negligent person at a position requiring care and caution is incompetent. "In-

competency" includes want of qualification generally. *The Elton*, 131 Fed. 562, 564.

"Incompetency" of a servant for whose negligence the master may be liable is a state or condition the existence of which must be shown by other facts and circumstances, and a servant may be regarded as incompetent when he is incapacitated either by physical or intellectual deficiencies from properly performing the duties of his position. *Tucker v. Missouri & K. Telephone Co.*, 112 S. W. 6, 8, 132 Mo. App. 418.

In an action against a master for injury to a servant from the negligent employment of an incompetent foreman, an instruction that a competent man is a reliable man; that "incompetency" means want of ability suitable to the task, or want of disposition to use one's experience and abilities properly; that incompetency may exist not alone in physical or mental attributes, but in the disposition to perform duties; and that, though a foreman may be physically and mentally able to do all that is required of him, his disposition may make him an incompetent man—is not misleading and is a correct statement of the law. *Young v. Milwaukee Gaslight Co.*, 113 N. W. 59, 61, 133 Wis. 9.

Under a contract providing that, if a teacher was discharged by the school board for incompetency, he should not be entitled to compensation, "incompetency" is a relative term, denoting a want of the requisite qualifications for performing a given act or service. *Biggs v. School City of Mt. Vernon*, 90 N. E. 105, 106, 45 Ind. App. 572.

In an action for wrongful discharge from employment as a teacher in a business school, claims of the defendant that plaintiff had no knowledge or skill in teaching, had no enthusiasm or energy, took no interest in his work, and was slow and lazy, and did not solicit students for the school, and that the school ran down greatly when he was in charge of it, are all sufficiently described in the instructions by the general word "incompetent," in the absence of a request for more specific instructions. *Bagwell v. Milam*, 71 S. E. 684, 686, 9 Ga. App. 315.

The expression "incompetency," in a city charter, as a ground for removal of a city officer, is not used in the sense that the officer be ignorant of the duties of his office, and does not have ability and intelligence sufficient to perform those duties, but the word is used to convey the idea that, in the exercise of the supposed functions of his office, he assumes the authority to defy the council and to overrule and nullify its deliberate decrees rendered when exercising its lawful authority concerning matters that were confided solely to its adjudication, and, when a mayor admits in effect that he did

not feel that he was bound by the action of the common council of the city when exercised in opposition to his views, he is incompetent. *Riggins v. City of Waco*, 90 S. W. 657, 663, 40 Tex. Civ. App. 569.

Code Civ. Proc. § 2685, subd. 1, authorizing revocation of letters of administration of a person "incompetent or disqualified by law," refers to section 2661, forbidding the issuance of letters of administration to certain persons, and not to the effect of a subsequent application for letters by one having a prior right. In *re Campbell's Estate*, 107 N. Y. Supp. 591, 592, 56 Misc. Rep. 229.

The phrases "incompetent," "mentally incompetent," and "incapable," as used in article 15, c. 86, §§ 5485, 5486, Comp. Laws 1909, mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. *Shelby v. Farve*, 126 Pac. 764, 765, 33 Okl. 651.

#### **Ignorance and inexperience**

Under a statute providing that no person is entitled to serve as administrator who is adjudged to be "incompetent" by reason of improvidence or want of understanding, the court properly removed an executor who was palpably deficient in the understanding necessary to enable him to transact business, who made no sufficient effort to collect the debts due the estate, and who never read or knew the contents of affidavits attached to his report, and who was ignorant of his personal business relations with the decedent, whose estate he was administering. In *re Courtney's Estate*, 79 Pac. 317, 318, 31 Mont. 625.

#### **As unreliable**

"Incompetency" of a servant connotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those required to associate with him in the general employment, and one who does not know the meaning of orders used on a railroad as to the movement of trains is incompetent to act as a conductor of a train, where he will be called on to act on such orders in moving his train. *Still v. San Francisco & N. W. Ry. Co.*, 98 Pac. 672, 674, 154 Cal. 559, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177.

#### **As unsuitable**

"Incompetency" in a servant may exist in the disposition with which he performs his duties, although he is physically and mentally able to do all work required of him. *Warren v. Harlan & Hollingsworth Corporation* (Del.) 84 Atl. 215, 220.

"Incompetency" of a servant, for which the master is responsible in case a fellow servant is injured in consequence thereof, is want of ability suitable to the work, either as regards natural qualities or experience or deficiency of disposition to use one's ability and experience properly. *Hamann v. Milwaukee Bridge Co.*, 106 N. W. 1081, 1084, 127 Wis. 550, 7 Ann. Cas. 458.

#### **INCOMPETENT EVIDENCE**

Under Code Civ. Proc. § 1881, prohibiting the examination of a husband or wife without the consent of the other as to any communication made by one to the other during marriage, all communications so made during marriage are, unless consent is shown, absolutely "incompetent" when offered to be shown by testimony of one of the spouses. *Humphrey v. Pope*, 82 Pac. 223, 225, 1 Cal. App. 374.

#### **INCOMPLETE**

In a statute making a place where articles in a raw, unfinished, or incomplete state are converted into a new, improved, or different form a manufacturing establishment, the word "incomplete" refers to a state or condition not yet attained and means not fully fashioned to meet some design. Factory Act (Laws 1903, c. 356) § 7, provides that an establishment wherein any natural products or other articles, in a raw, incomplete, or unfinished condition, are converted into a new improved or different form, is a manufacturing establishment, within the act. Held, that an establishment wherein railroad iron, old stoves, waste and scrap iron of every description, is cut into lengths, known as grade No. 1, grade No. 2 and busheling scrap, by machines known as alligator shears, operated by power, to meet standing specifications of mills which purchase the product, is a manufacturing establishment within the act. *Caspar v. Lewin*, 109 Pac. 657, 658, 82 Kan. 604.

#### **INCONGRUOUS**

"Incongruous" denotes that kind of absence of harmony or suitableness of which the taste and experience of men take cognizance." *State v. Great Western Coffee & Tea Co.*, 71 S. W. 1011, 1013, 171 Mo. 634, 94 Am. St. Rep. 802.

#### **INCONSISTENT—INCONSISTENCY**

##### **INCONSISTENT CAUSES OF ACTION**

Under Rev. St. 1899, § 593, providing that a plaintiff may unite in the same petition several causes of action arising out of injuries to the person, in an action sounding in damages for an injury caused by the negligence of defendant's servants, the plaintiff may state in one count, as constituting his one cause of action, as many acts of negligence not inconsistent with each other as he

deems proper, provided either one makes out his case or all together do so, and in such case, if there is evidence to sustain each and every charge of negligence, the plaintiff has a right to go to the country on each, but, where in such case the acts of negligence charged are inconsistent with each other (that is, if both cannot be true, if the proof of one disproves the other), the plaintiff may be required by motion, even on the eve of trial, to elect on which he will stand. A petition in an action for the death of plaintiff's husband, which states in one count, a cause of action under section 2864 for the negligence of defendant's servant in running a car over decedent, and a cause of action under section 2865 for negligence of defendant's foreman under whom decedent was working, in failing to give warning of the approach of the car, does not state "inconsistent causes of action." *Jordan v. St. Louis Transit Co.*, 101 S. W. 11, 12, 202 Mo. 418.

Under Code Civ. Proc. § 484, permitting certain causes of action to be joined in the same complaint, but providing that they must be consistent with each other, a cause of action on the breach of a contract is not properly united with a cause of action for rescission on the ground of fraud, for plaintiff reaffirms the contract and sues for its breach and disaffirms the contract, and sues for its rescission on the ground of fraud, the two causes of action are not "consistent" with each other. *Lomb v. Richard*, 91 N. Y. Supp. 881, 882, 45 Misc. Rep. 129.

#### INCONSISTENT DEFENSES

"Defenses are not 'inconsistent' unless one of them is necessarily false." In an action to recover commissions under a contract which provided that, in case of delinquency and difficulty in the collection of any purchaser's note, 10 per cent. of the note should be charged against the commissions, a defense on the ground of nonpayment of a note and the incurrance of extra expense in its collection is not inconsistent with a defense of limitations, nor with the defense of settlement, nor with the defense that the sale in question was made under a different contract. *Irwin v. Buffalo Pitts Co.*, 81 Pac. 849, 851, 39 Wash. 346.

Where, in an action by an administrator on a note, defendant pleaded that decedent agreed to give him the note if he would pay interest on \$2,000 as long as decedent lived, and furnish him such care as he needed for life, which defendant did, and also that the services, board, and entertainment furnished were reasonably worth \$1,500, which sum defendant pleaded as a counterclaim against the note, were not objectionable as "inconsistent defenses" under Civ. Code. Prac. § 113, authorizing a defendant to set up as many defenses legal and equitable as he may have. *Tapp's Adm'r v. Poindexter* (Ky.) 128 S. W. 594, 595.

#### INCONSISTENT WITH

The words "inconsistent with," as used in an instruction that, if a witness had been shown to have made before the grand jury statements which were inconsistent with and contradictory to the statements made on the trial, it would be for the jury to say whether or not his credibility had been destroyed, being used in connection with the words "contradictory to" by the conjunction "and," are evidently used in the sense of opposed to or "contradictory with," and were not intended to convey the idea that mere inconsistency would be a sufficient reason for rejecting the testimony. *O'Dell v. State*, 47 S. E. 577, 578, 120 Ga. 152.

#### INCONTESTABLE

See Continuous Force.

"Incontestable" means not contestable, not to be disputed, that which cannot be called in question or controverted, incontrovertible, indisputable (Webst. Dict.). As used in a life insurance policy which provides that after two years from its date it shall be incontestable, the word must of necessity include every defense which could otherwise be made to the policy, except those specifically excluded by the subsequent language, and will preclude the insurer from forfeiting the policy on the ground that insured had made fraudulent representations as to the state of his health. *Kansas Mut. Life Ins. Co. v. Whitehead*, 93 S. W. 609, 610, 123 Ky. 21, 13 Ann. Cas. 301.

The term "inconsistent," as used in a provision making a policy incontestable after three years, is of great breadth, and covers all grounds for contest not specially excepted. *Mutual Reserve Fund Life Ass'n v. Austin*, 142 Fed. 398, 401, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064.

#### INCONVENIENCE

See Great Inconvenience; Personal Inconvenience; Physical Inconvenience.

An inconvenience which controls the construction of a statute must be an inconvenience of such a kind as to force the right to find a reasonable interpretation in lieu of one which is unreasonable. That a number of indictments against the same defendant, charging him with using the mails to defraud, are by order of the court tried together by the same jury, does not affect the right under Rev. St. U. S. § 819, to three peremptory challenges for each indictment, for such an inconvenience as will arise from such a construction of the statute is of such an inferior class that to attempt to determine whether Congress had it in mind is necessarily a matter of pure speculation. *Betts v. United States*, 132 Fed. 228, 237, 65 C. C. A. 452.

The word "inconvenience," as applied to the measure of damages for personal injuries, implies what is incident to physical discomfort. It is something that results naturally from physical pain, and doubtless also from mental suffering, and the terms "mental and physical suffering" comprehend "inconvenience." *Texas Traction Co. v. Hanson (Tex.)* 124 S. W. 494, 496.

The word "inconvenience," as used in an instruction that the jury "may consider whether or not such injury will result in inconvenience or risk to plaintiff's general health or life," implies what is incidental to physical discomfort and something that results naturally from physical pain and mental suffering. *Texas & N. O. Ry. Co. v. McGraw*, 95 S. W. 82, 86, 43 Tex. Civ. App. 247.

The word "annoyances," though used in a kindred sense with the word "inconveniences," in an instruction in condemnation proceedings, authorizing the jury in determining the amount of damages to consider the annoyances and inconveniences resulting from the appropriation, was an injudicious expression, as it ordinarily relates to injuries for which no damages can be recovered, because the amount is so uncertain, speculative, and indefinite. Where, in condemnation proceedings, the jury might naturally have been misled by an instruction to consider "inconveniences and annoyances," in determining the amount of damages, in addition to the reduction in value of the land not taken, and the appraisers appointed by the court assessed the damages at \$150, and the jury awarded \$800, there should be a retrial, as it cannot be said that the error in the instruction did not contribute to the result. *Toledo & C. I. Ry. Co. v. Wagner*, 85 N. E. 1025, 1026, 171 Ind. 185.

## INCORPORATE

### INCORPORATED CHURCH

The term "incorporated church" is defined by chapter 723, Laws N. Y. 1895, § 2, as "a religious corporation created to enable its members to meet for divine worship, or other religious observances," and the Protestant Episcopal Church Missionary Society for Seamen in the City and Port of New York, a corporation for the maintenance of churches for seamen, is a "religious corporation," within the exemption of legacies to such corporations from any transfer tax. In *re Prall's Estate*, 79 N. Y. Supp. 971, 973, 78 App. Div. 301.

### INCORPORATED CITY OR TOWN

Const. art. 7, § 3, provides for an annual state tax of such an amount, not to exceed 20 cents on the \$100 valuation, as, with other available school funds, will be sufficient to support the public free schools for not less than six months in each year, and that the Legislature may provide for the formation

of school districts in counties and may authorize an additional annual ad valorem tax within such districts for school purposes upon vote of the taxpayers, not to exceed in any one year 20 cents on the \$100 valuation, but that the limitation upon the amount of district tax shall not apply to incorporated cities or towns constituting separate and independent school districts. Held, that an independent school district, incorporated for school purposes only, and embracing an incorporated town and rural territory, is not an "incorporated city or town" within the Constitution, and hence not exempted from the restriction as to taxation therein, and, where it had previously voted a tax to the full amount permitted by the Constitution, it had exhausted its power to tax for school purposes, and an election held to determine whether an additional school tax should be levied was void. *Jenkins v. De Witt (Tex.)* 115 S. W. 610, 612.

### INCORPORATED COMPANY

Any incorporated company, see Any.

### INCORPORATED SOCIETY

As religious society, see Religious Society.

### INCORPORATED TOWN

As town, see Town.

"Incorporated towns," within the meaning of the dispensary act for Lee county (Acts 1902, p. 222), providing for the establishment of dispensaries in towns and county, includes a city located in the county and embraces every incorporated town or city within the county. *City of Smithville v. Dispensary Com'rs of Lee County*, 54 S. E. 539, 125 Ga. 559.

### INCORPORATED VILLAGE

Laws 1901, p. 272, § 2, as amended by Laws 1909, p. 323, requiring the county clerk to ascertain the rates per cent. required as to the property in the respective "towns, townships, districts, incorporated cities, and villages" in his county, and providing that where the aggregate of all the taxes, exclusive of state, village, and levee taxes, certified to be extended against any property in any part of any taxing district or municipality, shall exceed 3 per cent. of the assessed valuation, the rate of tax levy shall be reduced in a specified way, requires the clerk to exclude town taxes of an incorporated town before figuring the reduction of the rate referred to, and he cannot reduce such town taxes, for the words "incorporated villages," as used in the act, include incorporated towns, and the words "town" and "township" as used in the act are synonymous. *Town of Cicero v. Haas*, 91 N. E. 574, 576, 244 Ill. 351 (citing 8 Words and Phrases, p. 7028).



**INCORPORATED WITHIN THE COMMONWEALTH**

The case of a bill by executors for instructions, alleging that Bowdoin College was a corporation created by the commonwealth of Massachusetts by act of 1794, and that it was an educational and charitable institution, which should be exempt from taxation under St. 1891, c. 425, having involved the question whether a legacy given by a resident of such commonwealth to such college in Maine was exempt from taxation under such statute, the decision therein, holding a tax was due, necessarily decided that the college was not an institution "incorporated within this commonwealth," within the meaning of the statute, and so is decisive of the question in a subsequent case, to which the college is a party, as it was not in the first case. *Batt v. Treasurer and Receiver General*, 95 N. E. 784, 785, 209 Mass. 319.

**INCORPORATION**

The title of Pub. Acts 1909, No. 279, entitled "An act to provide for the incorporation of cities," etc., is broad enough to include provisions authorizing the revision of existing charters of cities, since the framing and adoption of a charter of a city in toto is within the meaning of the word "incorporation," and since a revision of a charter already adopted is likewise within that meaning, on the principle that the greater includes the less. *Common Council of City of Jackson v. Harrington*, 125 N. W. 383, 384, 160 Mich. 550.

**INCORPOREAL****INCORPOREAL HEREDITAMENT**

A "water course" consists of bed, banks, and water. The right of an appropriator of the water of a stream, for the purpose of irrigation, to have the water flow in the river to the head of its ditch is an "incorporeal hereditament" appurtenant to the ditch and coextensive with the owner's right to the ditch itself. *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 13, 14, 81 C. C. A. 207 (citing *Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co.*, 60 Cal. 408; *Ang. Water Courses*, § 4; *Oregon Const. Co. v. Allen Ditch Co.*, 69 Pac. 455, 458, 41 Or. 209, 215, 93 Am. St. Rep. 701; *Wyatt v. Larimer & Weld Irr. Co.*, 33 Pac. 144, 18 Colo. 298, 36 Am. St. Rep. 280; *Wiley v. Decker*, 73 Pac. 210, 225, 11 Wyo. 496, 100 Am. St. Rep. 939; *Smith v. Denniff*, 60 Pac. 398, 24 Mont. 20, 81 Am. St. Rep. 408; *Conant v. Deep Creek & Curlew Val. Irr. Co.*, 66 Pac. 188, 23 Utah, 627, 90 Am. St. Rep. 721; *Simmons v. Winters*, 27 Pac. 7, 21 Or. 35, 28 Am. St. Rep. 727; *Hindman v. Rizer*, 27 Pac. 13, 21 Or. 112; *Bear Lake & River Waterworks & Irrigation Co. v. Ogden City*, 33 Pac. 135, 8 Utah, 494; *Tucker v. Jones*, 19 Pac. 571, 8 Mont. 225; *Sweetland v. Olson*,

27 Pac. 339, 11 Mont. 27; *Cave v. Crafts*, 53 Cal. 135).

**As land or property**

See Land; Real Property.

**Particular hereditaments**

Easement as, see Easement.

Franchise as, see Franchise.

**INCORPOREAL RIGHT**

Office as, see Office.

**INCORPOREAL THING**

"Incorporeal things" are such as are not manifest to the senses, and which are conceived only by the understanding, such as the rights of inheritance, servitudes, and obligations. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

**INCORRIGIBLE**

The words "Incorrigible children," as used in Act No. 82, p. 134, 1906, defining the power of the district courts, the criminal district courts, and city courts, with reference to the care, treatment, and control of dependent, neglected, "incorrigible," and delinquent children, under the age of 16 years, mean children who are charged by their parents or guardians as being unmanageable. *In re Parker*, 43 South. 54, 55, 118 La. 471.

**INCREASE**

See Natural Increase.

Any increase, see Any.

The words "increase of all property," as used in an inheritance tax law, providing "that said tax shall be levied and collected upon the 'increase of all property' arising between the date of death and the date of the decree of distribution," include as well augmentation in value as multiplication in kind. *In re Touhy's Estate*, 90 Pac. 170, 173, 35 Mont. 431.

Const. art. 12, § 11, prohibiting an increase of corporate stock and bonded indebtedness except at a meeting called upon 60 days' notice, being a restriction on the inherent right to freely contract, its meaning will not be unnecessarily extended. *McKee v. Title Insurance & Trust Co.*, 113 Pac. 140, 146, 159 Cal. 206.

A mere classification of the capital stock of a corporation into preferred and common shares, without an increase or decrease in the number, is not an increasing or diminishing of its capital stock, within Civ. Code, § 362, which provides that a corporation may not increase or diminish such stock without complying with the special provisions of the Code applicable thereto, and Civ. Code, § 359, which provides the manner in which the capital stock of a corporation may be increased or diminished. *California Telephone*

& Light Co. v. Jordan, 126 Pac. 598, 601, 19 Cal. App. 536.

#### **Augment or aggravate synonymous**

The term "increase" is the synonym of "augment" or "aggravate." Mathew v. Wabash R. Co., 78 S. W. 271, 272, 115 Mo. App. 468.

#### **Of animals**

The words "increase thereof," in a chattel mortgage of "ewe sheep and their increase," and "two year old wether sheep," do not include the yearly clip of wool, but the offspring only. *Libert v. Unfried*, 91 Pac. 776-778, 47 Wash. 186.

#### **Of hazard or risk**

The mere fact of the commencement of proceedings by a mortgagee to foreclose a mortgage on property covered by a fire policy does not, as a matter of law, substantially "increase the risk" within a stipulation in the policy that it shall be void if the risk be increased by any means within the knowledge of insured. *Liverpool & London & Globe Ins. Co. v. Lavine*, 59 South. 336, 338, 5 Ala. App. 392.

"Increased hazard" provided against in fire policies refers to changes in conditions in or upon the insured premises, and does not include dangerous conditions on adjacent premises. Whether there has been an increase in the hazard with reference to insured premises must be determined by a comparison with the conditions existing at the time the policy was written. Where a fire policy provided that it should be void if the hazard was increased by any act within the control or knowledge of the insured, such clause did not include insured's failure to communicate information relating to an increase of hazard, through means of which he had knowledge, though not within his control, consisting of an attempt on the part of others to burn an adjoining building. Where a fire policy provided for forfeiture if the hazard was increased by any means within the control or knowledge of the insured, the increased hazard referred to included only such as resulted from physical changes in the insured property. *Hartford Fire Ins. Co. v. Dorroh (Tex.)* 183 S. W. 465, 468.

#### **Of rate of fare**

The erroneous treating by a street railroad of its system of three-cent fares for school children as abrogated by Public Utility Law (P. L. 1911, c. 195) § 18, amounts to an "increase of rate of fare" in existence when the statute became effective, within section 17h, conferring on the Board of Public Utility Commissioners power "to hear and determine whether the said increase charge or alteration is just and reasonable," with which determination the court cannot interfere, except, as provided by section 38, where it clearly appears that there was no evidence

before the board to support reasonably its order, or that it was without the jurisdiction of the board. *Public Service R. Co. v. Board of Public Utility Com'rs*, 80 Atl. 27, 28, 81 N. J. Law, 363.

#### **Of salary or compensation**

When a county clerk of Imperial county was elected, that was a county of the thirty-sixth class, and his salary was fixed at \$2,200 a year, which under the express provisions of Pol. Code, § 4290, was in full compensation for all services rendered by him, his deputies and assistants. In 1909 that county was transferred to class 36½, and by Pol. Code, § 4265a, the salary of the county clerk was fixed at \$2,400 a year, with provision for one deputy at \$900 a year. Held, that the provision for the appointment of a deputy constituted an increase of salary within Const. art. 11, § 9, providing that the compensation of county officers shall not be increased during their term of office, and hence a deputy appointed by such county clerk had no claim against the county for her salary. *Elder v. Garey*, 127 Pac. 826, 827, 19 Cal. App. 775.

County Government Act, § 215, provided that the salary paid to a county recorder should be in full compensation for all services, and that all deputies should be paid by him out of his salary; and Pol. Code, § 4261, as amended by St. 1909, c. 422, provided that in certain counties the recorder should receive a fixed salary and be allowed two deputies at a salary to be paid from a fund. Held, that where a recorder's term of office began January 1, 1907, the amendment allowing two deputies to be paid by the county was an "increase in compensation," within the constitution that the compensation of county officers shall not be increased during their term of office. Where the statute provides a fixed salary for the officer and for a certain number of deputies, all payable out of the county treasury, an increase in the salary of such deputies, or a provision for extra deputies, is not within the constitutional prohibition against increasing the salary of county officers after their election, since the state has undertaken to pay the officer and the expenses of running the office. Under the constitutional prohibition against increasing the salary of county officers, where the statute allows a lump sum to cover their compensation and expenses, such sum cannot be increased during their term. *Hanson v. Underhill*, 107 Pac. 1016, 1017, 12 Cal. App. 545.

#### **INCREASE IN VALUE**

As profit, see Profit.

#### **INCREDIBLE**

To declare testimony of a fact "incredible," it must be so in conflict with the uniform course of nature or with fully estab-

lished physical facts that no reasonably intelligent man could give it credence. *Salchert v. Reing*, 115 N. W. 132, 134, 135 Wis. 194 (citing *Beyer v. St. Paul Fire & Marine Ins. Co.*, 88 N. W. 57, 112 Wis. 138; *Hirte v. Eastern Wisconsin R. & Light Co.*, 106 N. W. 1068, 127 Wis. 230; *Peat v. Chicago, M. & St. P. Ry. Co.*, 107 N. W. 355, 128 Wis. 86).

## INCRIMINATION

Exemption from self-incrimination as privilege, see *Privileges and Immunities*.

## INCUMBENT

The word "incumbent" is defined by section 164, p. 312, P. L. 1898, referring to persons against whom proceedings may be taken to contest an election, as the person whom the canvassers declare elected, and the court is without jurisdiction of a contest where the proceedings are initiated by the person originally declared elected, although his certificate of election has been subsequently revoked. *Darling v. Murphy*, 57 Atl. 263, 264, 70 N. J. Law, 435.

"There is a difference between the 'right of incumbency' and the 'term of office.' If one who is in office becomes ineligible to hold it longer, as that he moves out of the district, his term of office does not thereby expire, although his right of incumbency ceases. His successor is elected or appointed to fill out his unexpired term." *Palmer v. Commonwealth*, 92 S. W. 588, 589, 122 Ky. 693.

The "incumbent" within Rev. St. 1899, § 381, subd. 7, providing that an elective office shall become vacant upon the refusal or neglect of the incumbent to take his oath or to give or renew his official bond or deposit his oath, is the person last elected to the office, and must, before entering upon its duties, take the oath and give a bond, and the section does not refer to a refusal or neglect caused by death. Rev. St. 1899, § 381, subd. 1, provides that an elective office shall become vacant upon the death of the incumbent. After a person had been elected a justice of the peace and had filed his oath and bond, but before the commencement of the term for which he was elected, and before his bond was approved, he died. Held, that the person already holding the office was the "incumbent" within the meaning of the section, and the death of the other did not create a vacancy. *Ballantyne v. Bower*, 99 Pac. 869, 872, 17 Wyo. 356, 17 Ann. Cas. 82.

A statute providing that "every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: First, the death of the incumbent. \* \* \* Sixth, his refusal or neglect to take his oath of office or to give or renew his official bond"—

the word "incumbent" means the person in possession of the office performing its functions, and not the person who has been elected to the office, but not yet qualified. *State ex rel. Vanderveer v. Gormley*, 102 Pac. 435, 436, 53 Wash. 543.

One performing the duties of clerk of the district court under an appointment by the court on the death of the incumbent is not an "incumbent" of the office within the rule permitting an incumbent to hold over on failure of his successor to qualify, and the appointee of the board of supervisors is entitled to the office without reference to the time he qualifies. *State v. Brown*, 123 N. W. 779, 781, 144 Iowa, 739.

Under Pol. Code, § 996, providing that "an office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent \* \* \*"—one who has been elected to an office, but who fails to qualify by filing the bond, is in the sense of the statute the "incumbent," though he never was in possession of nor performed any duty in connection with the office. *Campbell v. Board of Sup'rs of Santa Clara County*, 93 Pac. 1061, 1063, 7 Cal. App. 155.

## INCUMBER—INCUMBRANCE

A "street" is a public way, from side to side and end to end, so that any private use which in any degree hinders or prevents its free use as a public way to its full extent is an "obstruction" or "incumbrance" within the meaning of the law. *Lacey v. City of Oskaloosa*, 121 N. W. 542, 544, 143 Iowa, 704, 31 L. R. A. (N. S.) 853.

### INCUMBRANCE (On Title)

See *Covenant against Incumbrances*; *Free from Incumbrance*; *Present Incumbrance*.

All incumbrances of record, see *All*.

"Incumbrances" are of two kinds, those that affect the title, and those which affect only the physical condition of the property; a mortgage or other lien affecting the title, while a right of way affects the physical condition of the property. *Van Ness v. Royal Phosphate Co.*, 53 South. 381, 383, 60 Fla. 284, 30 L. R. A. (N. S.) 833, Ann. Cas. 1912C, 647.

A paramount outstanding title is an "incumbrance" within the meaning of a covenant against incumbrances. *Morris v. Short* (Tex.) 151 S. W. 633, 638.

An "incumbrance" is a burden on land which depreciates its value, as a lien, easement, or servitude, and includes "any right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the conveyance of the title." *Howell v. Northampton R. Co.*, 60 Atl. 793, 211 Pa. 284 (quot-

ing and adopting definition in *Batley v. Foerderer*, 29 Atl. 868, 162 Pa. 460).

An "incumbrance," within the meaning of a covenant against incumbrances, includes every right to or interest in the land, consistent with the passing of a fee, which diminishes the value of the land. *Simons v. Diamond Match Co.*, 123 N. W. 1132, 1133, 159 Mich. 241.

An "incumbrance," within the terms of a contract for the sale of land free from all incumbrances, includes any right to or interest in the land to the diminution of its value, though consistent with the passage of the fee, or any adverse right or privilege which curtails the full and exclusive enjoyment of the land. *Friendly v. Ruff*, 120 Pac. 745, 746, 61 Or. 42.

A mere "incumbrance" on real estate, which may readily be removed and discharged out of the purchase money, is not a bar to specific execution of a contract for the sale and conveyance thereof. *Armstrong v. Maryland Coal Co.*, 69 S. E. 195, 204, 67 W. Va. 589.

Civ. Code, § 1114, provides that the term "incumbrance" includes taxes, assessments, and all liens upon real property. *Hollywood Lumber Co. v. Love*, 100 Pac. 698, 699, 155 Cal. 270.

A contract for the sale of real estate, free from all incumbrances, ordinarily refers to incumbrances defined by Civ. Code, § 1114, declaring that the term "incumbrances," includes taxes, assessments, and liens, and a purchaser intending to make the term include an incumbrance affecting only the physical condition of the property, must have the agreement so declare. *Sisk v. Caswell*, 112 Pac. 185, 190, 14 Cal. App. 377.

A contract for the sale of real estate "clear of all 'incumbrances,'" is breached when at the time of the execution of the contract there is an ordinance providing for the widening of a street on which the real estate abutted, though such ordinance may have been invalid, and was subsequently set aside. *Graybill v. Ruhl*, 74 Atl. 239, 240, 225 Pa. 417.

An agreement by an owner of lots abutting on a street to give the city five feet for widening the street, on condition that the work should be done during that year, does not constitute an "incumbrance" within a covenant against incumbrances in a deed executed two years thereafter. *Fleet v. Walt*, 66 Atl. 1031, 1032, 80 Vt. 177.

Plaintiff contracted to convey to defendant certain real estate, with full covenants of warranty, conveying the absolute fee, free from all incumbrances, except as previously stated. It subsequently appeared that the supports and foundation of the supports of the roof of a shed on the premises rested on a 7-inch space of adjoining land; but plain-

tiff tendered, in addition to the deed, a release by the owner of such adjoining property so long as plaintiff's building stood. Held, that such release complied with plaintiff's agreement to convey a title free from all incumbrances; the overlap being a mere encroachment on adjoining premises, and not an "incumbrance" on the property conveyed. *Eastman v. Horne*, 125 N. Y. Supp. 553, 554, 141 App. Div. 12.

Covenants against incumbrances in a deed conveying no part of the adjacent streets are breached by a release, previously executed by the grantor, releasing a railway from liability for damages resulting to the land from its operation on an adjacent street; the release constituting an "incumbrance," defined as any right to or interest in land which may subsist in third persons to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. *Tuskegee Land & Security Co. v. Birmingham Realty Co.*, 49 South. 378, 382, 161 Ala. 542, 23 L. R. A. (N. S.) 992 (citing 4 Words and Phrases, pp. 3519, 3520).

Where there is a physical burden on real estate which is visible, the presumption, in the absence of an express agreement, is that the burden is not an "incumbrance," within a covenant against incumbrances. Where, at the time of the execution of a contract for the sale and purchase of real estate and the payment of a part of the price, a drainage ditch existed on the land, sufficient to run water through it, and it appeared that the value of the land retained by the vendor and his grantees rested largely on the fact that they could be given the benefit of the irrigation by an extension of the ditch on the land, the law would presume, in the absence of an express agreement to the contrary, that the ditch was not an incumbrance, within the contract against incumbrances, and a deed reserving irrigation rights in the ditch merely complied with the contract. *Sisk v. Caswell*, 112 Pac. 185, 190, 14 Cal. App. 377.

In the original Seminole Agreement of December 16, 1897 (Act July 1, 1898, c. 542, 30 Stat. 567), providing that all contracts for incumbrance of any part of any allotment prior to patent shall be void, an "incumbrance" is a right or interest in land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by conveyance. *Stout v. Simpson*, 124 Pac. 754, 756, 34 Okl. 129.

Section 15 of the act of July 1, 1902, providing that lands allotted to members and freedmen of the Choctaw and Chickasaw Nations shall not be "affected" or "incumbered" by any deed, debt, or obligation, of any character, contracted prior to the time at which said land may be alienated, means that there shall be no burden on the title or charge against such allotment, and that the same

shall in no event become liable for any debt or obligation contracted prior to the removal of restrictions. In *re Davis' Estate*, 122 Pac. 547, 551, 32 Okl. 209.

#### Building and other restrictions

Where there were building restrictions on land which was subject to the reserved right of way for and the right to construct and maintain pipes and ditches for irrigation purposes, the land was not "free and clear of all 'incumbrances'" within a contract to sell the land. *Tandy v. Waesch*, 97 Pac. 69, 70, 154 Cal. 108.

Building restrictions in grants of real estate are "incumbrances" on the title. *Whelan v. Rossiter*, 82 Pac. 1082, 1083, 1 Cal. App. 701 (citing *Reynolds v. Cleary*, 16 N. Y. Supp. 421, 61 Hun, 592; *Wetmore v. Bruce*, 23 N. E. 303, 118 N. Y. 319; *Kramer v. Carter*, 136 Mass. 504; *Jeffries v. Jeffries*, 117 Mass. 184; *Van Schalck v. Lese*, 66 N. Y. Supp. 64, 31 Misc. Rep. 610).

Any right existing in another to use the land, or whereby the use of the owner is restricted, is an "incumbrance." A provision in a deed forming part of the grantor's chain of title, prohibiting the erection of certain kinds of buildings on the lot after ten years, and requiring any building erected thereon not to be nearer the street than adjoining buildings, is an "incumbrance." *Williams v. Hewitt*, 106 Pac. 496, 497, 57 Wash. 62, 135 Am. St. Rep. 971 (quoting and adopting definition in *Wetmore v. Bruce*, 23 N. E. 303, 118 N. Y. 319).

An "incumbrance" is a right to or interest in land which may subsist in another to the diminution of the value of the land or consistent with the power to pass the fee by conveyance. It may consist of a right in another to use the land, or anything which restricts the use of the land by the owner. A covenant in a deed that the grantee will not carry on or permit to be carried on, on the premises conveyed, any noxious, offensive, or dangerous trade or business, runs with the land and is restrictive, and constitutes an "incumbrance" thereon. A restrictive covenant in a deed, preventing the use of the land conveyed for any lawful purpose, is an "incumbrance." *Dieterlen v. Miller*, 99 N. Y. Supp. 699, 701, 114 App. Div. 40 (citing *Campbell v. Seaman*, 63 N. Y. 577, 20 Am. Rep. 567; *Clement v. Burtis*, 24 N. E. 1013, 121 N. Y. 708; *Ray v. Adams*, 60 N. Y. Supp. 663, 44 App. Div. 173; *Wetmore v. Bruce*, 23 N. E. 303, 118 N. Y. 319; *Forster v. Scott*, 32 N. E. 976, 136 N. Y. 582, 18 L. R. A. 543; *Kountze v. Helmuth*, 22 N. Y. Supp. 204, 67 Hun, 348; *Id.*, 35 N. E. 656, 140 N. Y. 432; *Rowland v. Miller*, 34 N. E. 765, 139 N. Y. 93, 22 L. R. A. 182).

Civ. Code, § 1113, provides that the use of the word "grant" in a conveyance shall imply a covenant that the estate is free

from incumbrances, at the time of the execution of the conveyance. Section 1114 provides that the term "incumbrances" includes taxes, assessments, and all liens upon realty. Held that, aside from the statutory definition, an "incumbrance," as used in the phrase "covenant against incumbrances," is any right or interest in land which may subsist in third persons to the diminution of the value of the estate to the grantee, but consistently with the passing of the fee, and both within such definition and under the statute a restrictive covenant against the use of firearms on the premises was an "incumbrance"; the word "includes" being ordinarily a word of enlargement and not of restriction. *Fraser v. Bentel*, 119 Pac. 509, 511, 161 Cal. 390, Ann. Cas. 1913B, 1062.

#### Contract to sell and convey

Revision 1874, p. 637, § 5, authorized a married woman to bind herself by contract in the same manner and to the same extent as though she were unmarried, with certain exceptions; but section 14 provided that nothing contained in the act should enable any married woman to execute any conveyance of her land, or any instrument "incumbering" the same, without her husband joining. P. L. 1898, p. 670, § 39, provides that no estate or interest of a feme covert in any lands shall pass by her deed or conveyance without a previous acknowledgment in a prescribed form, and that every deed or instrument of the nature or description set forth in section 21, which includes agreements for sale, executed and acknowledged as theretofore, should be effectual to convey or affect the property thereby intended to be conveyed or affected. Held, that a married woman's agreement to convey, not acknowledged, does not "incumber" the lands within section 14. *Wolff v. Meyer*, 66 Atl. 959, 960, 75 N. J. Law, 181.

#### Dower

An "incumbrance" is not always a lien, although a lien is always an incumbrance. Thus dower, though not a lien, but an estate, is an incumbrance, in that it incumbers the title. *Wilson v. Wilson*, 105 N. Y. Supp. 151, 153, 120 App. Div. 581.

An outstanding dower interest is an "incumbrance" within a deed containing a special warranty against all claims, and a warranty in the terms "grant, bargain, and sell," which, under the direct provisions of Kirby's Dig. § 731, import that the grantor is seized of an indefeasible estate in fee simple free from incumbrances. *Seldon v. Dudley E. Jones Co.*, 85 S. W. 778, 779, 74 Ark. 348.

An inchoate right of dower is an "incumbrance" on land within St. 1898, § 3186, authorizing the holder of an incumbrance to bring an action to test the validity of the claim of another to the land. *Huntzicker v. Crocker*, 115 N. W. 340, 341, 135 Wis. 38,

15 Ann. Cas. 444 (citing *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453).

#### Easement

An easement acquired by the city for a street over a city lot, in condemnation proceedings, the street not having been opened, is an "incumbrance" upon the land, within the terms of a representation by the owner to his real estate broker that he is possessed of a good marketable title free from all incumbrances and adverse liens and interests. *Smith v. Mellen*, 133 N. W. 566, 568, 116 Minn. 198.

Where an easement and right of way have been granted by Congress, or are provided, for by the state Legislature, over public lands belonging to the government or the state, as the case may be, the existence of such easements does not constitute a breach of covenant against "incumbrances" in subsequent conveyances of said land. *Newmyer v. Roush*, 120 Pac. 464, 466, 21 Idaho, 106, Ann. Cas. 1913D, 433.

#### Eminent domain

Defendant agreed to convey to plaintiff certain described real estate, free and clear of all incumbrances, and that if the title was not good, and could not be made good within 30 days of the date of the delivery of the abstract, it should be optional with the purchaser whether the title should pass subject to any defect that might be found, or that the earnest money should be refunded. After the abstract was furnished, plaintiff discovered that a railway corporation had begun proceedings to condemn a right of way through the property and had filed a lis pendens. Held, that such proceedings constituted a defect in the title, warranting plaintiff in refusing the same and in recovering the earnest money. Irrespective of the technical definition of the word "incumbrance," the language of the contract is plain and specific, and the condemnation proceedings came within the scope of the term. *Miller v. Calvin Phillips & Co.*, 87 Pac. 264, 265, 44 Wash. 226.

#### Highway

A public highway is not an "incumbrance," within the meaning of that term as used in covenants against incumbrances. *Kidder v. Childs*, 114 N. Y. Supp. 561, 563, 130 App. Div. 259 (dissenting opinion, citing *Whitbeck v. Cook* [N. Y.] 15 Johns. 483, 8 Am. Dec. 272; *Huyck v. Andrews*, 20 N. E. 581, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432).

Where a public highway has been constructed and opened and used by the public, and is of such general character as to give notice of its use, across a tract of land, it is not such an "incumbrance" as will constitute a breach of a covenant of warranty, and the purchaser of such land is presumed to have had in mind the existence of such easement,

and that the parties in making such contract did not intend to include the same in the contract or conveyance. *Newmyer v. Roush*, 120 Pac. 464, 466, 21 Idaho, 106, Ann. Cas. 1913D, 433.

#### Improvement work

Under Comp. Laws 1897, § 4019, which divides property for the purpose of taxation into two classes, real estate and personal property, and declares the former to include "improvements," which are defined to include all buildings, structures, fixtures, and fences erected upon or affixed to the land, whether title has been acquired to the land or not, improvements upon an unpatented mining claim become, upon their sale for taxes, so associated with the realty as to constitute an "incumbrance" thereon, within the meaning of C. L. 2304, allowing the holder of an incumbrance to perform the annual labor, so as to prevent relocation. *McVeigh v. Vieg*, 117 Pac. 857, 859, 16 N. M. 453.

#### Lease

A lease is an "incumbrance," within the meaning of that term as used in a covenant against incumbrances. *Crawford v. McDonald*, 106 S. W. 206, 208, 84 Ark. 415.

"An 'incumbrance,' within the meaning of a covenant against incumbrances, includes any right or interest in the land which may subsist in the third person to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance. Hence an outstanding lease is an incumbrance." *Brass v. Vandecar*, 96 N. W. 1035, 1036, 70 Neb. 35 (quoting and adopting definition in *Fritz v. Pusey*, 18 N. W. 94, 31 Minn. 368).

An outstanding lease for a period of years is an "incumbrance," within the meaning of a deed warranting against incumbrances. *La Rue v. Parmele*, 103 N. W. 304, 305, 73 Neb. 663.

A lease for five years of premises contracted to be sold is such an "incumbrance" as justifies vendee in refusing to perform. *Foland v. Italian Savings Bank of City of New York*, 108 N. Y. Supp. 57, 58, 123 App. Div. 598.

Where a grantee in a grant, bargain, and sale deed had, at the time of the grant, knowledge of a lease on the property, and that rent was receipted for the term on the margin of the lease, and requested and obtained an assignment of the lease to himself, such lease was not a breach of the implied covenant against incumbrances, though under the direct provisions of the Code a lease is an "incumbrance," and is within the covenants implied from the word "grant" in a conveyance of an estate in fee simple. *Mann v. Montgomery*, 92 Pac. 875, 876, 6 Cal. App. 646.

A promise to pay rent for demised premises is not an "incumbrance" of community

real property within a statute providing that the husband shall not sell, convey, or incumber the community real property unless the wife joins in the deed or instrument evidencing the conveyance or incumbrance. *Monroe v. Stayt*, 107 Pac. 517, 518, 57 Wash. 592, 30 L. R. A. (N. S.) 1102.

#### **License**

An instrument giving a person the right to construct a drainage ditch through the land of the person executing the instrument, being without consideration and not acknowledged and recorded, was a mere license, revocable at the will of the licensor and his grantee, and not a covenant running with the land, and did not constitute an "incumbrance" thereon, which would prevent the conveyance of a fee-simple title by the grantor. *Williams v. Beatty*, 122 S. W. 323, 326, 139 Mo. App. 167.

#### **Lien distinguished**

The term "incumbrance," as used in a covenant for title, is more comprehensive than "lien," including liens and any other burden resting either on the real estate itself, or on its title, which tends to lessen its value, or interfere with its free enjoyment. *First Church of Christ Scientists of New Albany v. Cox*, 94 N. E. 1048, 1049, 47 Ind. App. 536.

#### **Mechanic's Lien**

A claim of a lumber company for lumber used in constructing a house on mortgaged premises cannot be deemed an "incumbrance," within a clause of the mortgage authorizing the mortgagee to pay incumbrances, in the absence of anything to show when the lumber was purchased, or by whom, or when the house was completed, or that any steps were taken or contemplated by the lumber company to assert a lien. *Provident Mut. Bldg. & Loan Ass'n v. Shaffer*, 83 Pac. 274, 275, 2 Cal. App. 216.

#### **Mineral or timber privilege**

A covenant in a deed that the premises are free from all taxes, tax titles, or certificates, judgments, mechanics' liens, and incumbrances of any kind whatsoever, is sufficiently broad to warrant an action at law, wherein the declaration alleges that the lands conveyed were not free and discharged from all liens and incumbrances, but were subject to a right in a certain named company to enjoy the benefit of the oil and asphalt rights for a period of 10 years from a certain date. *Flood v. Graham*, 54 South. 456, 457, 61 Fla. 207, Ann. Cas. 1912D, 1137.

*Burns' Ann. St.* 1908, § 7852, provides that no lands of any married woman shall be liable for the debts of her husband, but, with the profits therefrom, shall be her separate property as fully as if she were unmarried, provided that she shall have no power to incumber or convey the lands except by deed in which her husband shall join. Section

7853 provides that a married woman may take and hold property by conveyance, gift, devise, or descent, and it shall be her separate property, together with all the rents, issues, income, and profits thereof, and under her control the same as if unmarried. Held, that a written contract whereby a married woman granted the exclusive right to explore land for gas and oil for five years, with the privilege of renewal for five years, and as much longer as gas and oil might be found in paying quantities, was not an "incumbrance" or conveyance within section 7852, and was valid, though her husband did not join therein. *Kokomo Natural Gas & Oil Co. v. Matlock*, 97 N. E. 787, 788, 177 Ind. 225, 39 L. R. A. (N. S.) 675.

An "incumbrance" is every right to or interest in land granted, to the diminution of the value, but consistent with the passing of the fee by the conveyance, and it is only necessary that it confer upon its owner some interest in or right to some profit or lawful use of the land, and any burden which diminishes the full measure of enjoyment of the land, or renders it less useful or less salable, is an incumbrance, though the entire fee passed by the conveyance, and an outstanding right in a third party to extract rosin from pine timber conveyed is an incumbrance, and, if not excepted from a deed with full covenants and warranties, covering the timber or lands upon which it grows, will constitute an actionable breach. *Brodie v. New England Mortg. Sec. Co.*, 51 South. 861, 862, 166 Ala. 170.

A deed conveyed land and covenanted that it was free from all incumbrances. There was at the time a written contract conveying the principal part of the timber on the land and allowing the grantee until a future date to remove it. It was agreed that the timber cut and banked off part of the land, under the contract, should go to the vendors, and that all other timber and the remaining notes for the purchase price thereof should go to the purchaser of the land. The notes for the purchase price of the lumber were afterwards transferred to the purchaser without further consideration than those mentioned in the deed, were accepted by it, and afterwards collected as they became due. The vendors also agreed to have the timber contract reformed to embrace an omitted clause. Held, that the timber notes were assigned to the purchaser, and the agreement to reform the contract was made and accepted as an entire satisfaction of the deed so far as it was affected by the timber contract, so that such contract was not an "incumbrance" within the meaning of the covenants in the deed. *Soudan Planting Co. v. Stevenson*, 128 S. W. 574, 579, 94 Ark. 599.

#### **Mortgage or deed of trust**

"Incumbrance by mortgage" means that there must be some valid existing obligation

to support the mortgage, which may be contingent until default in the payment of the debt secured. A mortgage on a vessel to secure a debt of the mortgagor is a present "incumbrance" by a chattel mortgage, within the meaning of a provision of a policy of insurance on such vessel making it void, in case of such incumbrance, so long as the debt secured is outstanding, although it is not in default. *Glichrist Transp. Co. v. Phenix Ins. Co.*, 170 Fed. 279, 282, 283, 95 C. C. A. 475.

"Incumbrances" are of two kinds, viz.: (1) such as affect the title; and (2) those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road, or a right of way, of the latter. Where incumbrances of the former class exist, the covenant against incumbrances under all the authorities is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. *Van Ness v. Royal Phosphate Co.*, 53 South. 381, 383, 60 Fla. 284, 30 L. R. A. (N. S.) 833, Ann. Cas. 1912C, 647 (quoting *Memmert v. McKeen*, 4 Atl. 542, 112 Pa. 315).

An insurance policy, providing that if the property should become incumbered the policy would be void, will not be rendered invalid by mortgage not a valid lien on the property. Where insured executed a mortgage to secure a note payable more than a year after date for rent to become due under a lease, to begin five years in the future, and the insured's property is destroyed by fire before the commencement of the term, the mortgage is not an "incumbrance" within the policy. *Rowland v. Home Ins. Co. of New York*, 108 Pac. 118, 82 Kan. 220, 136 Am. St. Rep. 104.

An unrecorded mortgage is an "incumbrance" within the provisions of a fire policy making it void in case of an incumbrance by mortgage. *Rhea v. Planters' Mut. Ins. Co.*, 90 S. W. 850, 77 Ark. 57.

A purchaser in a contract for the sale of land subject to a mortgage securing a debt past due need not accept a deed subject to such mortgage on which foreclosure has been begun and may recover a partial payment and the expense of examining the title. *Wacht v. Hart*, 105 N. Y. Supp. 78, 80, 120 App. Div. 189.

Under Civ. Code § 1114, defining an "incumbrance" as including taxes, assessments, and all liens upon real property, a deed of trust is not an incumbrance, within Code Civ. Proc. § 1475, declaring that, in the case of subsisting incumbrances on the homestead of a decedent, the claim secured thereby must be presented and allowed as other claims. *Weber v. McCleverty*, 86 Pac. 706, 708, 149 Cal. 316.

### **Mortgage paid, but not discharged**

An apparent mortgage, although extinguished by payment, is an "incumbrance," sufficient as a defense in a suit on a note which contains a condition that the same will not be paid until the "incumbrance is removed" from the land; but it is not an incumbrance within a warranty deed. *Hoyt v. Swift*, 13 Vt. 129, 131, 37 Am. Dec. 586; *Judevine v. Pennock*, 15 Vt. 683, 685.

### **Party wall**

Under Code, §§ 2994-3003, giving an adjoining owner the right, without the consent of the other, to erect a party wall, one-half on the premises of such other, a party wall does not constitute an "incumbrance" for which a lessee making use of the wall, and thereby obligating himself to the adjoining owner to make compensation for a share of the expense thereof, may recover of lessor. *Percival v. Colonial Inv. Co.*, 115 N. W. 941, 942, 140 Iowa, 275, 24 L. R. A. (N. S.) 293.

### **Special assessments**

An incumbrance is any right to or interest in land which may subsist in third person to the diminution in value of the land, though consistent with the passing of the fee by deed or conveyance. But a mere possibility of establishing a right to or interest in land is not within the definition. A covenant in a deed against incumbrances does not include a charge for street improvement, which has been made, though the lien thereof has not attached. *Cemansky v. Fitch*, 96 N. W. 754, 756, 121 Iowa, 186.

Where, by virtue of a statute regulating drainage assessments, a ditch assessment was a lien on land conveyed at the time of the execution of the contract of sale and deed, such assessment constituted a breach of warranty against "incumbrance." *Pierse v. Bronnenberg*, 81 N. E. 739, 82 N. E. 126, 127, 40 Ind. App. 662.

Where the owners of a tenement house on November 1, 1906, contracted to convey the same free from all incumbrances and violations of the tenement house act (Laws 1901, p. 889, c. 334), and on May 25th had been served with notice to install a water meter, which was installed by the water department on October 8th, but the cost was not certified until November 1st, nor the bill certified to the comptroller until December 13, 1906, the assessment therefor was not a lien on the premises, when conveyed on December 11th, the words "lien or incumbrance" being used to cover only a charge against the property after it has been ascertained or determined. *Feder v. Rosenthal*, 116 N. Y. Supp. 2, 4, 62 Misc. Rep. 610.

A lot which would ultimately be liable for the cost of improvements already made upon the street on which it abutted was sold with covenants of warranty against liens and



incumbrances. At that time no assessment for this improvement had been made, but a year later it was made under Acts 1901, c. 231, § 4, which provides that the assessment for benefits shall not become a lien on the property until its adoption by the common council. Held, that the vendor was not liable under his warranty for the cost of these improvements, as there was no lien at the time of the sale, and there was no "incumbrance" within the meaning of the covenant against incumbrances, as the land was not then burdened and the Legislature by fixing the time when the lien attached must have intended that the purchaser where conveyances were made prior to that date should bear the cost of the improvement. *First Church of Christ Scientists of New Albany v. Cox*, 94 N. E. 1048, 1049, 47 Ind. App. 536.

#### Taxes

Taxes on real estate for 1893, which had been assessed, levied, and warranted to the collector of taxes, became a lien on the land prior to February 14, 1894, within a deed executed on that date containing a warranty against "incumbrances." *Patterson v. Cappon*, 102 N. W. 1083, 1084, 125 Wis. 198.

From the use of the words "grant" and "convey" in a deed the law implies a covenant that at the time of such conveyance the land is free from incumbrances, and taxes are included in the term "incumbrances" as here used. *Bullitt v. Coryell*, 85 S. W. 482, 483, 33 Tex. Civ. App. 42.

Under Comp. Laws 1897, § 4019, providing that the term "real estate" shall include mines and minerals and also improvements, and defining the others to be all structures and fixtures erected, on land, whether title has been acquired to said land or not, Laws 1899, c. 60, providing that a tax on mining claims shall be a tax on the net product and the surface improvements only, improvements upon a mining claim become upon a sale therefor for taxes so associated with the realty as to constitute an "incumbrance" thereon within Comp. Laws 1897, § 2304, allowing the holder of an incumbrance to perform the annual labor so as to prevent relocation. *McVeigh v. Veig*, 117 Pac. 857, 859, 16 N. M. 453.

#### As valid incumbrance

The recital in a deed that it is subject to all "incumbrances," without more, does not estop the grantee from pleading the invalidity of any such "incumbrance"; it means no more than subject to all "valid incumbrances." *Carter v. Cemansky*, 102 N. W. 438, 439, 126 Iowa, 506.

#### Vendor's lien

Where a fire policy stipulating that it should be void on the interest of insured becoming other than unincumbered was with consent of the insurer, subject to its conditions, assigned to a purchaser whose deed of

the property retained a vendor's lien, of which lien the insurer had no notice, such lien constituted an "incumbrance," and avoided the policy. *Wright v. Hartford Fire Ins. Co.*, 118 S. W. 191, 192, 54 Tex. Civ. App. 6.

A contract for the sale of land stipulating for a good and sufficient warranty deed cannot be specifically enforced at the suit of the vendor where, at the time he offered to convey, the land was subject to vendor's lien notes in a large amount, such lien being an "incumbrance" under Rev. St. 1895, arts. 633, 634, providing that the word "grant" in a conveyance imports a warranty against incumbrances. *Roos v. Thigpen* (Tex.) 140 S. W. 1180, 1183.

#### As voluntary incumbrance

The word "incumbrances," within Comp. Laws 1897, § 2304, allowing the holder of an incumbrance on a mining claim to perform annual labor to prevent relocation, is not confined to voluntary liens, nor liens at all, but includes any burden or land depreciative of its value, such as affect the title, and such, also, as affect the property's physical condition. *McVeigh v. Veig*, 117 Pac. 857, 860, 16 N. M. 453.

#### Widows' statutory interest

The widow's statutory interest is not an "incumbrance" or lien within a devise of real estate free from any lien or incumbrance. *Rice v. Rice* (Iowa) 119 N. W. 714, 716.

#### INCUMBRANCE IN GOOD FAITH

See Good Faith.

#### INCUMBRANCER

As owner, see Owner.

An "incumbrancer" is one who has a legal claim against an estate. A judgment is an incumbrance, and the holder thereof is an incumbrancer. *De Voe v. Rundle*, 74 Pac. 836, 837, 33 Wash. 604.

A transferee of a negotiable promissory note, payment of which is secured by a deed of trust, whereby the title to the property and power of sale in case of default is vested in a third party as trustee, is not an "incumbrancer" to whom power of sale is given within the meaning of Civ. Code, § 858, providing that "where a power to sell real property is given to a mortgagee or other incumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded," and so such transferee, though the assignment of the note to him has not been recorded, may upon the maker's default demand a sale of the trust property to satisfy the indebtedness. *Stockwell v. Barnum*, 94 Pac. 400, 401, 7 Cal. App. 413.

# INCUR

See Contracted or Incurred.

The inhibition in Act Cong. March 3, 1901 (31 Stat. 1093, c. 846), providing that no indebtedness shall be "contracted or incurred" by counties prior to the time of collecting county taxes in the calendar year next succeeding the opening of the territory of Oklahoma, excepting where authorized by the Secretary of the Interior, does not relate only to contractual obligations. The word "contracted" includes all of one class, and the word "incurred" includes another class. The word "incurred" is defined as to become liable or subject to; to render liable or subject to. Men contract debts; they incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law. "Incur" means something beyond contracts, something not embraced in the word "debt." It has been held to mean "to become liable for," "brought on himself," "brought on, occasioned, or caused." Hence the word "incurred" means more, and embraces a different class of liabilities or obligations from those "contracted." It means the indebtedness imposed by salaries of county officers and other required and necessary expenses. *Bank of Indian Territory v. Eckles*, 91 Pac. 695, 697, 79 Okl. 159 (citing Webster's Dict.; *Black's Law Dict.*; *Scott v. Tyler* [N. Y.] 14 Barb. 202; *Flanagan v. Baltimore & O. R. Co.*, 50 N. W. 60, 83 Iowa, 639; *Beekman v. Van Dolsen*, 24 N. Y. Supp. 414, 70 Hun, 288; *Deyo v. Stewart* [N. Y.] 4 Denio, 101; *Ashe v. Young*, 3 S. W. 454, 68 Tex. 123).

In a memorandum that a note is left as collateral security for all liabilities incurred by a certain person, while in strict grammatical construction the word "incurred" is used in the past tense, and strictly speaking was limited to such indebtedness as existed at the time of the delivery of the contract, yet such limited significance will not be placed on the language, but construing it according to its evident intention, it is held to constitute the security a continuing obligation for debts created after its delivery. *In re McElheny*, 86 N. Y. Supp. 326, 330, 91 App. Div. 131.

As used in Const. art. 1, § 12, as amended November 6, 1888, providing that property otherwise exempt shall be liable for any debt incurred to any laborer or servant for labor or service rendered, the word "incurred" means the same as though it read "subsequently incurred." *Brown v. Hughes*, 94 N. W. 438, 439, 89 Minn. 150.

Under Const. art. 11, § 18, providing that no school district shall incur any debt for any purpose exceeding in any year the income provided for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, any assumption by a school district,

not included in a high school district, of a pro rata of bonded indebtedness originally created by such high school districts, as a condition of annexation thereto, is, as to such school district, the "incurring" of such an indebtedness or liability. *People ex rel. Taxpayers of Excelsior School Dist. v. Hanford Union High School Dist.*, 84 Pac. 193-195, 148 Cal. 705.

Gen. Laws 1909, c. 135, § 12, requires the town sergeant of each town annually in April to make a list of the keepers of dogs in the town, and return such list to the town clerk on or before May 1st, for which service he shall receive from the town treasury 20 cents for each dog listed, and section 13 provides for the killing of nonlicensed dogs and for the payment of a fee of \$2 out of the town treasury for each dog killed and buried. Held, that a city's liability for the salary of chief of police and town sergeant, and for the fees of the sergeant as dog lister, under such provision, constituted an "ordinary current expense" of the town, which, if, with other like expenses, it was within the town's limit of current revenues and such special taxes as it might legally and in good faith levy therefor, was not the "incurring of indebtedness" in excess of the limit fixed by Acts 1895, c. 1428; and hence the fact that the town's debt limit was exceeded was no defense to an action to enforce liability for such services. *Trainor v. Lee*, 83 Atl. 847, 850, 34 R. I. 345.

## INCURRING RISK

In actions arising out of noncontractual relations, the term "incurring risk" is synonymous with "contributory negligence." *Cleveland, C. & St. L. Ry. Co. v. Lynn*, 95 N. E. 577, 582, 177 Ind. 311.

## INDEBTED—INDEBTEDNESS

See Evidence of Indebtedness; Existing Indebtedness; Highest Previous Indebtedness; Municipal Indebtedness; Mutually Indebted; Necessary Indebtedness; Present Indebtedness; Previous Indebtedness; Voluntary Indebtedness.

Any indebtedness, see Any.

Indebtedness due under policy or otherwise, see Otherwise.

Other evidence of indebtedness see Other.

Other Indebtedness, see Other.

Stock as debt, see Stock (In Corporation Law).

See, also, Debt.

"Indebtedness" means the state of being indebted; a sum due; debts collectively. *Commonwealth v. Morton*, 140 S. W. 685, 686, 145 Ky. 521.

The word "indebted" means "being in debt"; "having incurred a debt"; "owing; with 'to' before the person to whom the debt

is due." *Miller v. George*, 9 S. E. 659, 660, 30 S. C. 526 (quoting and adopting the definition in *Worcester Dict.*).

"Indebtedness," or debt, is whatever one owes, or in a purely technical sense is that for which an action of debt will lie; a sum of money due by certain and express agreement. It is not a contract, though it may be the result of a contract. *Hornbeck v. State ex rel. Davidson*, 71 N. E. 916, 917, 33 Ind. App. 609.

The word "indebted," in the statute providing that the lessor's right of pledge includes, not only the effects of the principal lessee or tenant, but those of the undertenants, so far as the latter are indebted to the principal lessee at the time when the proprietor chooses to exercise his right means "owing" at the time of the lessor's provisional seizure of the effects of the subtenant. Such right of pledge cannot be extended by implication to future rents. The measure of the lessor's pledge is the sum of rents that have accrued to date of seizure, although the same may not then be exigible under the terms of the sublease. The statutory right of pledge of the lessor on the effects of the sublessee cannot be affected by the circumstance that the sublessee has given to the principal lessee negotiable notes for the rents accruing from month to month, and that said notes are outstanding in third hands. *Tulane Improvement Co. v. W. B. Green Photo Supply Co.*, 50 South. 601, 602, 124 La. 619.

A person who has stolen money from another, is "indebted" to him within Code Pub. Gen. Laws, art. 9, § 36, providing that it is necessary to the claim of an attachment that the defendant is bona fide indebted to plaintiff in the sum stated in the affidavit over and above all discounts, etc.; defendant under such circumstances being under a quasi contractual obligation to return the funds so wrongfully taken. *Downs v. City of Baltimore*, 76 Atl. 861, 865, 111 Md. 674, 41 L. R. A. (N. S.) 255, 19 Ann. Cas. 644.

A complaint to recover money loaned, alleging the facts as to how the indebtedness arose and specifying the amount thereof, and that no part of the indebtedness has been paid, and that there is now due, owing, and payable by defendant on account of such indebtedness a specified sum, with interest, sufficiently alleges nonpayment. The word "indebtedness" is not here used as it has sometimes been in the body of a pleading, in which the courts have said that it was a conclusion of law. As it is here used, it refers to the sum which it is alleged had been loaned. *Samuels v. Larrimore*, 104 Pac. 1001, 1002, 11 Cal. App. 337.

A contract of guaranty in one paragraph provided that the "indebtedness" guaranteed was not to exceed \$7,000, and in another paragraph the guarantors agreed to pay interest and attorney's fees if the debt was sued

on or placed in attorney's hands for collection, but it was not stated that the agreement for interest and attorney's fees was intended to create liability in addition to the \$7,000. Held, that the contract, being ambiguous, would be construed in favor of the guarantors, and the word "indebtedness" would be held to include such interest and fees, the entire amount not to exceed \$7,000. *Hill Mercantile Co. v. Rotan Grocery Co.* (Tex.) 127 S. W. 1080, 1082.

Under Rev. St. 1899, § 2803, providing that one seeking a lien must file a statement within 90 days after the indebtedness shall have accrued, the "indebtedness" is to be deemed as having accrued at the date of the furnishing of the last item originally included in the account and not at the date of the last item which remains unpaid. "A man is in debt when the labor he hires is performed or completed or when the material he purchases is fully furnished and is unpaid for, and his indebtedness accrues at such period." *Big Horn Lumber Co. v. Davis*, 84 Pac. 900, 904, 14 Wyo. 455, 7 Ann. Cas. 940 (quoting and adopting definition in *Bolen Coal Co. v. Ryan*, 48 Mo. App. 512).

The term "indebtedness" is a wide one, and must be construed in every case in accordance with its context. Const. art. 10, § 12, providing that no county shall be allowed to become indebted to an amount exceeding, in any year, the income and revenue provided for such year, permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created, but prohibits the anticipation of the revenues of any future years. Where one, without any public letting, written contract, or appropriation, as required by Rev. St. 1899, c. 84, builds a bridge for the county, and the county court issues a warrant for what it conceived to be the reasonable value thereof, the warrant does not constitute a valid indebtedness. *Trask v. Livingston County*, 109 S. W. 656, 659, 210 Mo. 582, 37 L. R. A. (N. S.) 1045.

A policy provided that if any subsequent premium was not paid, and the policy was not surrendered, the insurance, after repayment of any "indebtedness," would be extended without request or demand for a term specified in an accompanying table. A premium note provided that in settlement of any claim or benefit under the policy before the note should become fully paid the amount thereof should be deducted from the amount otherwise payable by the company. Held, that the term "indebtedness," as used in such nonforfeiture provision, did not include premium notes. *New York Life Ins. Co. v. Van Meter's Adm'r*, 121 S. W. 438, 440, 137 Ky. 4, 136 Am. St. Rep. 282.

Where a policy of insurance provides for the payment of a certain sum upon the death of the insured, less any indebtedness

due the company, the "indebtedness" is obviously any actual or real indebtedness that the insured or beneficiary may be liable to the company for when the policy matures, and hence no deduction can be made for deferred premiums, which are neither due nor earned at the time of death. *National Life Ass'n of Hartford v. Berkeley*, 34 S. E. 469, 97 Va. 571.

Laws 1892, c. 690, § 88, provide that when a life insurance policy which has been in force for three years lapses for nonpayment of premium, the reserve on the policy after deducting any indebtedness of the insured on account of any premium due, etc., shall be applied, either to continue the policy in force at its full amount so long as it will do so, or to purchase whatever amount of paid-up insurance it will. Defendant issued a policy for \$5,000 to plaintiff's testator, which provided, in accordance with the statute, that the policy could not be forfeited after it had continued in force for three years, but if premiums subsequently due were not paid, the policy would continue for the full amount for the time stated in the table of the policy, "provided there was no indebtedness against the policy," or the insured, on demand and surrender of policy, would be entitled to paid-up insurance to the amount the premiums paid would purchase. The testator paid the premiums in cash for three years, and gave his note for the fourth premium. The note provided that, unless the interest and premiums were paid, the policy would become forfeited, except as to surrender value, and that in settlement of any claim or benefit under the policy before it was paid, the amount thereof should be deducted. The insured died about eight years after the giving of the note, having paid no part of it except the interest for the first year, nor any further premiums on the policy. Held, that the word "indebtedness," used in the phrase "provided there is no indebtedness against the policy" appearing in the table guaranteeing the continuance of the policy, included any indebtedness against the insured in favor of the insurer, the same as when used in the statute, and that the time the plaintiff's testator was entitled to have the policy continued was to be determined by the amount of premiums he had paid, less the amount of the premium note; and, since the time for which this sum would continue the policy had expired before his death, plaintiff was not entitled to the full amount of the policy, but only the amount of paid-up insurance to which he was entitled under the terms of the policy. *Taylor v. New York Life Ins. Co.*, 90 N. E. 964, 966, 197 N. Y. 324.

Where the by-laws of a beneficial association defined a member in good financial standing, entitled to share in death benefits, as one who was not "indebted" to a sub-

ordinate court for fines or assessments or anything else that may be charged against him as dues to an amount equal to six months' dues, the beneficiary of a member was not entitled to recover benefits where he was indebted to an amount exceeding six months' dues, though, in order to make such indebtedness, he was charged with a dollar for lottery tickets issued by the society in connection with a fair, for which he had failed to account. *Kelly v. Court R. F. Phelan*, No. 122, *Foresters of America*, 60 Atl. 1022, 1023, 78 Conn. 40.

#### Of county

A claim for commissions under a contract by which a county listed its school land with a broker for sale for a commission made payable out of the county funds is not a "debt" within Const. art. 11, § 7, forbidding the creation of a debt unless provision is made at the time for its payment, where the claim becomes due in the current year, and the county has ability by taxation to raise the fund for its payment. *Foard County v. Sandifer*, 151 S. W. 523, 524, 105 Tex. 420; *Sandifer v. Foard County (Tex.)* 134 S. W. 823, 824.

Under L. O. L. § 6320, authorizing the county court to levy a special tax which shall be set apart as a road fund to be used in the building and improving of public roads and bridges, 50 per cent. to be apportioned to several road districts and the remaining 50 per cent. to be applied to roads as the county court may direct, and in view of section 6366, providing that the county courts of several counties may, in their discretion, apply any moneys in the county treasury toward the expenses of bridges of a county road—a contract for the erection of a bridge, where the necessary funds have been raised by special tax and appropriated therefor, does not create an "indebtedness" within Const. art. 11, § 10, providing that no county shall incur any debts or liabilities which shall singly or in the aggregate exceed the sum of \$5,000. *Bowers v. Neil*, 128 Pac. 433, 436, 64 Or. 104.

#### Debt due or to become due

An assignment of an insurance policy as collateral security for "indebtedness" covers only a present indebtedness at the time of the assignment, and not indebtedness to be thereafter created. In *re De Haven's Estate*, 84 Atl. 676, 677, 236 Pa. 146.

"The term 'indebted' means that a complete and absolute liability exists—complete and absolute to the extent that ultimate payment must be made—but it does not necessarily mean that such liability has matured, or that an indebtedness is immediately payable. 'Indebtedness' includes as well obligations which are yet to become due as those which are already matured. So to allege merely that one is indebted, without

any statement of facts showing a present right to enforce payment, does not disclose any legal liability, because there may be an existing indebtedness without any liability for present payment." *Provident Mut. Building-Loan Ass'n v. Davis*, 76 Pac. 1034, 1035, 143 Cal. 253.

#### Loans to insured

A life policy provided that, if there should be any indebtedness on account of the policy at the time of default in the payment of any premium, the value of the several options of settlement stated in the policy would be correspondingly reduced, and also that the insurer would upon insured's application loan, on the sole security of the policy, 25 per cent. of any or all of the premiums thereunder as they became due, such loans to bear simple interest, but that, in event of insured's death before the expiration of the cumulation period and while the policy was in force, the loan should be void and that the policy should, upon default of payment of premium, be no longer in force unless continued. Insured borrowed on the policy 25 per cent. of the premiums as they became due. Held, that such loans were "indebtedness" on account of the policy within the meaning of the policy, and if it subsequently lapsed for default of payment of a premium, the value of the option of continued insurance would be reduced by the amount of the loans, with interest. *Black v. Franklin Life Ins. Co.*, 67 S. E. 79, 81, 133 Ga. 859.

#### Of municipality

"Indebtedness" is a state of being in debt, and a "debt" is defined to be that which one person is bound to pay to another, or an obligation. It is that which is due by express agreement and its definition is not affected by the manner or condition upon which it is to be paid. The purpose of Const. N. Y. art. 8, § 10, limiting the indebtedness of municipalities to a specified per cent. of the assessed valuation of the real estate is to prevent municipalities from improvidently contracting debts for other than ordinary current expenses of administration and to restrict their borrowing capacity, and the provision must be read in its broadest sense, which will give effect to it. *Levy v. McClellan*, 89 N. E. 569, 574, 196 N. Y. 178.

Const. § 157, provides that no county, city, town, taxing district, or other municipality may become "indebted," to an amount exceeding in any year the income provided for that year, without the assent of the voters at an election. "An obligation payable in future is no less a debt within the meaning of this provision than if payable at once." *Ramsey v. City of Shelbyville*, 83 S. W. 116, 117, 119 Ky. 180, 68 L. R. A. 300.

Under Const. § 157, prohibiting cities from incurring indebtedness, without the voters' assent, in any one year exceeding the

amount of income and revenue provided for that year, "indebtedness" means a liability voluntarily incurred by the city by express contract, which it is bound to pay in money, including known and fixed liabilities, such as official salaries, etc. *Overall v. City of Madisonville*, 102 S. W. 278-282, 125 Ky. 684, 12 L. R. A. (N. S.) 433.

Where a city, having reached its full debt limit, passed an ordinance for the levy of a 1 per cent. tax for 15 years, for the payment of water bonds to be issued, and provided for the issuance of such bonds, for the payment of which the tax so levied and the income from the waterworks was pledged, the ordinance constituted an increase of the city's debt limit, in violation of Const. art. 9, § 12, providing that no municipal corporation shall become indebted in the aggregate exceeding 5 per cent. of the value of its taxable property, etc., and was therefore void. *Village of East Moline v. Pope*, 79 N. E. 587, 588, 224 Ill. 386 (citing *City of Springfield v. Edwards*, 84 Ill. 626; *Law v. People ex rel. Huck*, 87 Ill. 385; *Howell v. City of Peoria*, 90 Ill. 104; *Culbertson v. City of Fulton*, 18 N. E. 781, 127 Ill. 30; *Prince v. City of Quincy*, 21 N. E. 768, 123 Ill. 443; *City of Chicago v. McDonald*, 52 N. E. 982, 176 Ill. 404).

The word "debt" has a well-recognized meaning in law, distinguished from liability for damages. Liability of a city for injury due to failure to keep its streets in repair is not a "debt," within Const. art. 10, §§ 11, 12, limiting the rate of taxes in cities of the third class and prohibiting them to incur in one year an indebtedness in excess of the revenue to be derived from the taxes for that year. Those sections apply only to indebtedness arising ex contractu. *Conner v. City of Nevada*, 86 S. W. 256, 257, 188 Mo. 148, 107 Am. St. Rep. 314 (citing 13 Cyc. p. 393 et seq.; *Smith, Mun. Corp.* §§ 4-6; *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Dill. Mun. Corp.* [4th Ed.] § 996 et seq.).

A contract providing for the construction of a courthouse and jail, and the payment of an annual rental, pursuant to Laws 1897, p. 256, c. 32, art. 8, § 2, providing for the construction of courthouses and jails on the annual rental plan, etc., does not create an "indebtedness," within Act Cong. July 30, 1886, c. 818, § 4 (24 Stat. 171), providing that no political or municipal corporation in any of the territories of the United States shall become indebted for any purpose including existing indebtedness exceeding a specified sum. *Giles v. Dennison*, 78 Pac. 174, 178, 15 Okl. 55.

Act Aug. 14, 1909 (Laws 1909, p. 534), providing for annexation to Atlanta of the town of Oakland City, and that Atlanta shall assume the indebtedness of such town and

all its property, does not cause the incurring of a new debt in violation of Civ. Code 1895, § 5897, providing that municipal corporations shall not "incur any debt" until provision therefor shall have been made by the municipal government. *White v. City of Atlanta*, 68 S. E. 103, 104, 134 Ga. 532.

The issuance of obligations by a municipality payable out of particular fund creates an indebtedness in the constitutional sense, if the fund is an existing, established income belonging to the municipality. An obligation to pay with an income of property already owned by a city is not different from an obligation to pay with any other funds, so far as the question whether the transaction amounts to a debt is concerned. *Schnell v. City of Rock Island*, 83 N. E. 462, 464, 232 Ill. 89, 14 L. R. A. (N. S.) 874.

A note given by a city, payable within the year of its execution, is not a "debt," within a constitutional provision that no debt shall be created by a city, unless provision be made for a sinking fund therefor. *City of Cleburne v. Gutta Percha & Rubber Mfg. Co. (Tex.)* 127 S. W. 1072, 1073.

Where a city took proceedings to improve a street, the cost to be paid, two-thirds from assessments on abutting property and one-third by city bonds, that a part of the assessments levied were uncollectible did not require that the city foresee such event, and treat the uncollectible portion as a "debt," within Const. art. 11, § 5, providing that no debt shall ever be created by any city, unless at the same time provision is made to assess and annually collect a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent. *City of Beaumont v. Masterson (Tex.)* 142 S. W. 984, 987.

The purpose of Const. art. 8, § 10, limiting the indebtedness of municipalities to a specified per cent. of the assessed valuation of the real estate, is to prevent municipalities from improvidently contracting debts for other than ordinary current expenses of administration, and to restrict their borrowing capacity, and the provision must be read in its broadest sense which will give effect to it, and the word "indebtedness" in the Constitution must be defined as a state of being in debt, and a "debt" as that which is due by express agreement, unaffected by the manner or condition on which it is to be paid. *Levy v. McClellan*, 89 N. E. 569, 574, 196 N. Y. 178.

#### Same—Contracts for future service

A contract between a city and a water company, obligating the city to pay a yearly amount for water service for a period of 20 years, did not create a "debt" as to undue installments, within the constitutional provision prohibiting the incurring of debts beyond a certain limit. *Columbia Ave. Sav-*

*ings Fund, Safe Deposit, Title & Trust Co. v. Dawson*, 130 Fed. 152, 172.

A municipality may legally contract for the future supply of water at an annual rental, though the aggregate of the rentals will exceed the statutory limitation of indebtedness, being a contract for future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise, not being a "debt" within the meaning of the limitation. *City of Joseph v. Joseph Waterworks Co.*, 111 Pac. 864, 865, 57 Or. 588.

The word "debt," when used in a popular sense, means that which is due from one person to another, whether money, goods, or service; but the word "debt," within Const. art. 10, § 12, providing that no county, city, town, etc., shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding 5 per cent. of the value of the taxable property therein, etc., must be restricted to mean a promise by the municipality, grounded in a valid consideration to pay to some person a sum of money now due and payable, or to become due and payable at a future day. A city, purchasing the waterworks of a company supplying it and its inhabitants with water, and paying therefor a specified sum in cash, and agreeing to pay an additional sum in equal semiannual installments, secured by revenues arising from water service to private consumers, does not become indebted to the company within the Constitution. *State ex rel. Smith v. City of Neosho*, 101 S. W. 99, 107, 203 Mo. 40.

A contract by which a city agrees to pay a company for furnishing light at a certain amount monthly, in valid warrants, creates an "indebtedness," within a charter provision limiting its indebtedness to a certain amount. *Brockway v. City of Roseburg*, 79 Pac. 335, 336, 46 Or. 77.

The relation between a city and the owner of an existing telephone franchise being quasi contractual for the performance of a service, an ordinance modifying the terms of the franchise for the purpose of securing more effective service in competition with the owner of another franchise is not invalid, as releasing an "indebtedness" or "liability" to the municipality, in violation of Const. § 52. *Louisville Home Tel. Co. v. City of Louisville*, 113 S. W. 855, 856, 860, 130 Ky. 611.

A contract obligating a town to pay annual hydrant rentals to fall due in subsequent years does not constitute an "indebtedness then legally incurred," within Rev. St. 1898, § 672, providing that, whenever the county board shall form a new town from parts of a town already organized, it shall determine what portion of the indebtedness then legally incurred by the old town shall be chargeable

to the portions detached to form the new town, which shall pay the proportion so declared chargeable. *Town of Vaughn v. Town of Montreal*, 102 N. W. 561, 124 Wis. 302.

#### Same—Bonded indebtedness

A "bond" is not an "indebtedness," but is only the evidence or representation of an indebtedness. *City of Los Angeles v. Teed*, 44 Pac. 580, 582, 112 Cal. 319.

City bonds issued for the purchase of waterworks, and payable out of the general fund, are not part of the "indebtedness" for general and municipal purposes, but constitute a portion of the 5 per cent. additional "indebtedness" allowed by the Constitution for water, light, and sewer purposes, although the city at the time of their issue had not reached the 5 per cent. limit of general indebtedness. *Dean v. City of Walla Walla*, 92 Pac. 895, 48 Wash. 75, 150.

"Debt" is that which is due from one person to another; that which one person is bound to pay or perform to another. It is a specified sum of money which is due from one person to another, and denotes, not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment. The issue of bonds under *Priv. Laws 1903*, p. 440, c. 196, providing that they should be paid from the income of city waterworks, and that none of the city's funds raised by taxation should be applied to their payment, was not the contracting of a "debt" by the city, within the meaning of *Const. N. C. art. 7, § 7*, which declares that no city shall contract any "debt," etc., except on vote of its citizens, *Brockenbrough v. Board of Waters Com'rs of City of Charlotte*, 48 S. E. 28, 31, 134 N. C. 1 (quoting and adopting *Black, Law Dict. 337*; *State v. Hawes*, 112 Ind. 323, 14 N. E. 87).

Under *Const. § 158*, which prohibits cities of the fourth class from incurring any debt in excess of 5 per cent. of the assessed value of the property therein, estimated by the last assessment, an indebtedness of the school board for its graded school districts is not a part of the "indebtedness" of a city of the fourth class, so as to preclude the issue of bonds voted at an election to an amount within the constitutional limitation of debt. *Rash v. City of Madisonville*, 146 S. W. 386, 388, 148 Ky. 154.

*Const. Iowa, art. 11, § 3*, provides that no municipal corporation shall become indebted in any manner or for any purpose to an amount in the aggregate exceeding 5 per cent. of the value of the taxable property within such corporation, to be ascertained by the last state and county tax lists previous to the incurring of such "indebtedness." A city, indebted beyond such limit, passed an ordinance authorizing the issue of negotiable bonds to be sold by the city, and the proceeds

used in the construction of a waterworks plant to be owned by the city. The bonds were to be payable at recited times, and to bear interest payable semiannually, and were secured by a mortgage on the water plant. The ordinance levied a sinking fund tax of two mills yearly, until the cost of the plant should be paid, and subjected the proceeds of such tax to the payment of principal and interest, and further provides that there should be levied every year after the construction of the works a water tax of five mills, or so much thereof as might be necessary, together with the net proceeds of the water rents, to pay the cost of maintenance, etc., and to pay any of the purchase price or cost of constructing said works, or bonds or mortgages issued therefor, or interest thereon, which should not be paid from the proceeds of the two mill tax. Any surplus arising from such water tax or water rentals was pledged to the payment of the bonds, and it was provided that no part of the sum, principal or interest, should be paid out of any fund levied or tax other than so provided. Held, that such bonds would create an indebtedness of the city within the meaning of the constitutional provision, and that the city was without power to issue the same. *City of Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 324, 56 C. C. A. 219, 59 L. R. A. 604.

An ordinance provided that a certain firm should construct waterworks, to be completed within six months, issue bonds therefor to the amount of \$100,000, mortgage the plant to secure \$80,000 of such bonds, and, when completed, lease the works to the city for 20 years, and assign the lease to the mortgagee or a trustee for the benefit of the bondholders; that the city should take possession of the plant, and pay as rental thereon, annually, \$7,000 during each of the first four years, \$9,000 during each of the next six years, and \$10,000 during each of the last ten years; that all sums so paid in excess of the interest on the original cost might, at time of payment, be at once applied on the bonds, all surplus on the sale of bonds, after paying the \$80,000 and interest, to apply on payment of the principal sums named in said bonds, to the end that the city should only pay, as rentals, the original cost of the plant, \$80,000, and interest; and that, on payment of said sums in the manner provided, the plant should become the property of the city. Held, that such ordinance created an "indebtedness," within *Const. art. 11, § 3*, as amended in 1874, forbidding municipalities from becoming "indebted in any manner or for any purpose" to any amount, including existing indebtedness, in the aggregate exceeding 5 per cent. on the value of the taxable property therein, etc. *Earles v. Wells*, 68 N. W. 964, 967, 94 Wis. 285, 59 Am. St. Rep. 886.

**Of state**

Indebtedness of the state, evidenced by funded debt bonds issued as authorized by St. 1869-70, p. 646, c. 444, under authority of a vote of the people of the state at a general election, is not an "indebtedness of the state," within Const. art. 16, § 1, prohibiting the Legislature from creating debts which shall singly or in the aggregate, with any previous debts or liabilities, exceed the sum of \$300,000, etc. *Bickerdike v. State*, 78 Pac. 270, 276, 144 Cal. 681.

The issuance of a state warrant, where the money is already in the treasury or the tax levy has already been made, with provision for its collection, does not create an "indebtedness" within Const. art. 10, § 29, providing that no bond or evidence of indebtedness of the state shall be valid unless the same shall have indorsed thereon a certificate signed by the Auditor and Attorney General, showing that the bond or evidence of indebtedness is issued pursuant to law, and is within the debt limit. *Bryan v. Meneff*, 95 Pac. 471, 473, 21 Okl. 1.

The words "debt" and "liability," as used in Const. art. 8, § 1, forbidding the Legislature to create any debt or liability, singly or in the aggregate, exceeding 1½ per cent. of the assessed value of taxable property in the state, are not employed in a technical sense, but have special reference to the basic legislative authority on which a state contract must rest, and in which alone a state debt must find its sanction. *Lewis v. Brady*, 104 Pac. 900, 901, 17 Idaho, 251, 28 L. R. A. (N. S.) 149.

**Of town**

A contract obligating a town to pay annual hydrant rentals to fall due in subsequent years does not constitute an "indebtedness then legally incurred," within the meaning of Rev. St. 1898, § 672, providing that, whenever the county board shall form a new town from parts of a town already organized, it shall determine what portion of the indebtedness then legally incurred by the old town shall be chargeable to the portions detached to form the new town, which shall pay the proportion so declared chargeable. *Town of Vaughn v. Town of Montreal*, 102 N. W. 561, 124 Wis. 302.

**INDEBTEDNESS INCURRED**

As damage, see *Damage—Damages*.

**INDECENCY**

"Indecency," within Pen. Code 1895, § 390, making it a misdemeanor for any person to practice open lewdness or any notorious act of public indecency tending to debauch the morals, has a somewhat narrower meaning than it has in ordinary popular speech, but is broader in meaning than the phrase "exposure of the person," and a public indecency may be committed without any

improper exposure of the human body. *Redd v. State*, 67 S. E. 709, 7 Ga. App. 575.

**INDECENT**

The term "indecent" is a common word, which may be assumed to be understood in the common meaning by an ordinary jury without definition. *Commonwealth v. Buckley*, 86 N. E. 910, 911, 200 Mass. 346, 22 L. R. A. (N. S.) 225, 128 Am. St. Rep. 425.

Worcester defines "indecent" as something unbecoming; unfit for the eyes or ears. The Century Dictionary defines it as that which is obscene or grossly vulgar; unbecoming; unseemly; violating propriety of language, behavior, etc. The Imperial Dictionary defines it as that which is unbecoming in language, actions, or manners. In the federal court it has been said that the term signifies "more than indelicate and less than immodest"—that it means something unfit for the eye or ear. The word "indecent," as used in Pen. Code, § 317, directed at any one who should give or have in his possession any obscene, lewd, lascivious, filthy, "indecent," or disgusting book, pamphlet, newspaper, etc., was used in a limited sense, and falls within the maxim of "noscitur a sociis." In this sense it is directed at things that are lewd, lascivious, and salacious or obscene, and an attack on the confessional, saying: "The open door to hell is the confessional box. It is hell's gate; the mainspring of lust. It is the cesspool, the recipient, the reservoir of lust, of vile thought and communication, adultery, the birthplace of sexual criminality, with men's wives and young girls, and the convent is earth's terminus and hell. The lake of fire is the dumping ground. It is the criminal college; the mother of prostitution; the author of pauperism. From it emanates poison to society, homes, our schools and government"—and more language to the same effect, while unjustifiable, and reprehensible, and libelous, was not "indecent," within the meaning of this statute; the remedy being by proceedings under the statute for libel. *People v. Eastman*, 81 N. E. 459, 460, 188 N. Y. 478, 11 Ann. Cas. 302.

**INDECENT ASSAULT**

The acts constituting "indecent assault," under Laws 1905, p. 181, c. 94, § 1 (Rev. St. § 1656), are such as the common sense of society would regard as immodest, immoral, and indecent, and the statute is not void for not defining the acts constituting the offense. *Dekelt v. People*, 99 Pac. 330, 44 Colo. 525.

**INDECENT EXPOSURE**

"The words 'indecent exposure' clearly imply that the act is either in the actual presence and sight of others, or is in such a place or under such circumstances that the exhibition is liable to be seen by others, and is presumably made for that purpose,



or with reckless and criminal disregard of the decencies of life." *State v. Martin*, 101 N. W. 637, 638, 125 Iowa, 715.

### INDECENT LIBERTIES

An indictment for the crime of taking indecent liberties with or on the person of a female child under the age of consent is not defective because it does not state the particular acts which constitute the alleged indecent liberties. The term "indecent liberties," when used with reference to a woman, old or young, is self-defining; and it would be as unnecessary and as indecent to allege the defendant's particular acts as it would be, if he were charged with rape, or carnally knowing or abusing a female child under the age of consent, to set forth the evidence in the indictment. The term, when used with reference to a female child under the age of consent, is the legal equivalent of an assault or attempt on her person. *State v. Kunz*, 97 N. W. 131, 132, 90 Minn. 526 (citing *State v. West*, 40 N. W. 249, 39 Minn. 321).

### INDECENT PUBLICATIONS

In Rev. St. § 3893, as amended which declares unmailable "every obscene, lewd, or lascivious book, pamphlet \* \* \* or other publication of an indecent character," the words "indecent character" qualify only the words "other publication," and taken with them include any publication that is obscene, lewd, or lascivious, and, in an indictment for its violation by mailing of a letter, it is not essential that the letter be described as of an indecent character, in addition to describing it as obscene, lewd, and lascivious. *Rinker v. United States*, 151 Fed. 755, 758, 81 C. O. A. 379.

Under Pen. Code, § 317, providing that a person who sells, gives away, or shows, etc., any obscene, etc., indecent, or disgusting book, magazine, etc., or any written or printed matter of an indecent character, etc., is guilty of a misdemeanor, a publication in a newspaper attacking the confession of the Roman Catholic church in an unjustifiable and reprehensible manner is not an "indecent" publication. *People v. Eastman*, 81 N. E. 459, 460, 188 N. Y. 478, 11 Ann. Cas. 302.

### INDECENTLY ACTING

"Indecently acting," as used in Pen. Code 1895, § 418, relating to the disturbance of public worship, embraces all improper conduct which disturbs a congregation lawfully assembled for divine worship. If a person were to use an oath in church during the progress of the service, so as to distract the attention of any member of the congregation, his conduct would be "indecent" within the statute. *Folds v. State*, 51 S. E. 305, 307, 123 Ga. 167.

Talking outside of a church where a congregation was lawfully assembled for divine

services, which the evidence failed to show was sufficiently loud to disturb such congregation or any member thereof, was not "indecently acting," within Pen. Code, § 418, providing that any person who shall by cursing or using profane or obscene language, or by being intoxicated or otherwise "indecently acting," interrupt or in any manner disturb a religious congregation, shall be guilty of a misdemeanor. *Taylor v. State*, 57 S. E. 1049, 1 Ga. App. 539.

### INDEFINITE POSTPONEMENT

An "indefinite postponement" of the question before a deliberative body means the suppression of the question, and is equivalent to a negative vote. *Wood v. Inhabitants of Milton*, 84 N. E. 332, 333, 197 Mass. 531.

### INDEMNIFY

To "indemnify" means, according to Cent. Dict., to "secure against loss, to save harmless, to make good, to reimburse." A sheriff accepted a bond to indemnify him against liability for damages sustained by a levy on personal property. The sheriff could not recover on a bond for attorney's fees, incurred in defending an action for conversion of the property levied on, until such fee had been actually paid by him. *Cousins v. Paxton & Gallagher Co.*, 98 N. W. 277, 278, 122 Iowa, 465.

"The use of the word 'indemnify' shows the object and nature of the contract. It was to reimburse or make whole the assured against loss on account of such liability. There can be no reimbursement where there has been no loss." *Finley v. United States Casualty Co.*, 83 S. W. 2, 4, 113 Tenn. 592, 3 Ann. Cas. 962 (quoting *Frye v. Bath Gas & Electric Co.*, 54 Atl. 395, 97 Me. 241, 59 L. R. A. 444, 94 Am. St. Rep. 500).

Where defendant accident insurance company agreed to "indemnify" the insured against loss from common-law or statutory liability for damages on account of bodily injuries caused by the negligence of the insured, it only agreed to reimburse insured for such losses as it was compelled to pay, so that, insured never having been compelled to pay a judgment against it because of insolvency, there was no liability on the part of the insurer to pay the same. *Burke v. London Guarantee & Accident Co.*, 93 N. Y. Supp. 652, 653, 47 Misc. Rep. 171.

### INDEMNITY

"Indemnity" consists in the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit. *R. P. Williams & Co. v. United States Fidelity & Guaranty Co.*, 75 S. E. 1067, 1071, 11 Ga. App. 635.

"Indemnity" is defined as an engagement to make good loss that may be sustained." *Shaw v. Equitable Mut. Acc. Ass'n*, 99 N. W. 672, 673, 5 Neb. (Unof.) 584 (quoting and adopting definition in *Weller v. Eames*, 15 Minn. 467 [Gil. 383], 2 Am. Rep. 150).

"Indemnity" is that which is given to a person to prevent his suffering damage. *Ordinary of State v. Connolly*, 72 Atl. 363, 364, 75 N. J. Eq. 521, 138 Am. St. Rep. 577.

"Indemnity" means reimbursement, making good, recompense for loss or injury. *Rogers v. Shawnee Fire Ins. Co. of Topeka, Kan.*, 111 S. W. 592, 593, 132 Mo. App. 275.

A stipulation in a note to pay ten per cent. for attorney's fees, is a contract of "indemnity," and not a penalty. *Brown v. Gatewood (Tex.)* 150 S. W. 950, 954.

The difference between a contract of "indemnity" and a contract to pay a legal liability of another is that on the contract of indemnity an action cannot be brought and a recovery had until the liability is discharged, while upon the other the cause of action is complete when the liability attaches. *Poe v. Philadelphia Casualty Co.*, 84 Atl. 476, 479, 118 Md. 347.

Civ. Code, § 1959, defines "indemnity" as a contract by which one agrees to save another from a legal consequence of the conduct of one of the parties or of some other person. Section 1965, subd. 4, provides that the person indemnifying is bound on request of the person indemnified to defend actions brought against the person indemnified, and subdivision 5 provides that, if after request the person indemnifying neglects to defend the person indemnified, a recovery against the person indemnifying suffered by him in good faith is conclusive in his favor against the person indemnifying. Held, that the statute applies to one indemnifying against liability of bail in a criminal action, and where persons indemnifying the surety on a bail bond, after notice to them and demand that they appear and defend an action on the bond brought against the surety failed to do so, such indemnifiers in an action on their indemnity bond by the surety on the bail bond could not set up the defense that the surety on the bail bond was released from liability because the person for whom the bail bond was given had been released from the immediate custody of the officer. *Western Surety Co. v. Kelley*, 131 N. W. 808, 810, 27 S. D. 465.

A contract of "indemnity" executed by a contractor for the erection of a public schoolhouse with his surety is an original undertaking to make good a future loss or damage, and no action lies on such a contract until after a loss or damage had been sustained, and there is no obligation to pay any part of a debt due to a third person, and therefore no personal warranty within

Code Proc. art. 379. *Bain v. Arthur*, 55 South. 743, 129 La. 143.

Certificates of deposit, delivered in execution of a provision in a charter party for a deposit in guaranty of insurance, which declare the object of the deposit to be "to indemnify you in case of loss of the cargo," etc., constitute an agreement to indemnify against the loss of the cargo, and not an agreement of insurance, and such loss would be the value of the cargo at its destination less the cost of delivery there, and, where this amount is greater than the fund on deposit the entire fund is applicable to the "indemnity." *Leonard v. Bosch*, 68 Atl. 56, 73 N. J. Eq. 438.

A provision, in a note sued on, for payment of 10 per cent. attorney's fees in case of collection by attorney, is a contract of "indemnity," so that, where the holder had not agreed with his attorneys on the amount to be paid for their services in collecting the note, he was limited to a recovery under such provision of the reasonable value of their services. *Texas Land & Loan Co. v. Robertson*, 85 S. W. 1020, 1021, 38 Tex. Civ. App. 521.

The "fine" contemplated in Rev. St. 1898, §§ 3495, 3496, providing that, if one is guilty of civil contempt, the court shall impose a fine, or imprisonment, or both, and that if an actual loss or injury has been produced the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine, was not intended to cover only the "indemnity" to the injured party, but the provisions "clearly warrant the imposition of a fine or imprisonment, or both, in cases where no actual loss or injury is shown; that in case of actual loss or injury resulting from the alleged misconduct, instead of imposing a fine, a sum is to be ordered paid to him to indemnify for such loss or injury; and when a fine is imposed it is in the nature of a penalty." *Emerson v. Huss*, 106 N. W. 518, 522, 127 Wis. 215.

An undertaking given by defendant on conviction for failure to support his wife and children, pursuant to Greater New York Charter (Laws 1897, p. 239, c. 378) § 685 et seq., which calls for the payment of a weekly sum for one year thereafter for the support of defendant's wife and children, is intended to provide for "indemnity" only; and, where no public money has been disbursed on their behalf, no recovery can be had under it as a penalty to punish wrongdoing. *Goetting v. Normoyle*, 103 N. Y. Supp. 881, 882, 119 App. Div. 143.

A life insurance policy is not a contract of "indemnity," but is a contract to pay money upon the death of the assured, in consideration of certain payments made during life. *Wayland v. Western Life In-*

demnity Co., 148 S. W. 626, 630, 166 Mo. App. 221; *Reed v. Provident Sav. Life Assur. Soc.*, 82 N. E. 734, 736, 190 N. Y. 111.

A life insurance policy is not merely a contract of "indemnity." It is a contract to pay to the beneficiary a sum certain in the event of death. *Keckley v. Coshocton Glass Co.*, 99 N. E. 299, 300, 86 Ohio St. 213, Ann. Cas. 1913D, 607.

"Insurance" is a contract by which one party, in consideration of a price paid adequate to the risk, becomes security to the other that he may not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them. The ingredients of the contract are the consideration, the risk, and the indemnity. The "consideration" is the premium for the insurer's undertaking; the "risk," the perils or contingencies against which the assured is protected; and the "indemnity," the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils or contingencies specified. *Physicians' Defense Co. v. Cooper*, 199 Fed. 576, 578, 118 C. C. A. 50.

## INDENTURE

An allegation that a demise was by "indenture" implies a seal. *Morrill v. Baggott*, 57 Ill. App. 530, 532.

## INDEPENDENCE

### INDEPENDENT ADVICE

By force of the rule of independent advice, if a person upon whom another has in fact come to be dependent accepts a gift from such dependent person of all of her or his estate, a court of equity, moved by the apparent improvidence of such gift, casts upon the donee the burden of showing that the donor had the benefit of proper independent advice. Proper "independent advice" in this connection means showing that the donor had the benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction. *Post v. Hagan*, 65 Atl. 1026, 1027, 71 N. J. Eq. 234, 124 Am. St. Rep. 997.

### INDEPENDENT AGREEMENT

"Whether a given stipulation is to be deemed a 'condition precedent,' a 'condition subsequent,' or an 'independent agreement' is purely a question of intent; and the intention must be determined by considering, not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act re-

quired and the subject-matter to which it relates." *Skowhegan Water Co. v. Skowhegan Village Corp.*, 66 Atl. 714, 716, 102 Me. 323.

### INDEPENDENT BODY

Where a body of independent voters entertain the same political views, and desire to nominate a complete ticket of candidates favorable to those views, the persons executing the certificates are to be regarded as one and the same "independent body," and are entitled to have their candidates for various offices under one title and emblem on the official ballot. *In re Wise*, 95 N. Y. Supp. 843, 108 App. Div. 52.

### INDEPENDENT CONTEMPT

A proceeding in a divorce suit to compel defendant husband to pay delinquent alimony is not a proceeding for an "independent contempt," within Rem. & Bal. Code, § 1054, and hence need not be prosecuted in the name of the state. *McGill v. McGill*, 121 Pac. 469, 67 Wash. 303.

### INDEPENDENT CONTRACT

Contract distinguished from separate contracts, see Contract.

### INDEPENDENT CONTRACTOR

An "independent contractor" is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work. *Chicago, R. I. & P. Ry. Co. v. Bennett*, 128 Pac. 705, 706, 36 Okl. 358 (quoting 4 Words and Phrases, p. 3542); *Pottorff v. Fidelity Coal Mining Co.*, 122 Pac. 120, 122, 86 Kan. 774; *Harmon v. Ferguson Contracting Co.*, 74 S. E. 632, 634, 159 N. C. 22; *Johnson v. Carolina, C. & O. R. Co.*, 72 S. E. 1057, 1058, 157 N. C. 382; *Francis v. Johnson*, 101 N. W. 878, 879, 127 Iowa, 391 (citing *Humpton v. Unterkircher*, 66 N. W. 776, 97 Iowa, 509; *Hughbanks v. Boston Inv. Co.*, 60 N. W. 640, 92 Iowa, 267; *Overhouser v. American Cereal Co.*, 92 N. W. 74, 118 Iowa, 417); *Alabama Western R. Co. v. Talley-Bates Const. Co.*, 50 South. 341, 344, 162 Ala. 396; *Pearson v. M. M. Potter Co.*, 101 Pac. 681, 682, 10 Cal. App. 245; *Alexander v. R. A. Sherman's Sons Co.*, 85 Atl. 514, 515, 86 Conn. 292.

An "independent contractor" is one who renders services in the course of his occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *McGrath v. City of St. Louis*, 114 S. W. 611, 617, 215 Mo. 191; *O'Hara v. Laclede Gaslight Co.*, 110 S. W. 642, 643, 131 Mo. App. 428 (quoting and adopting definition in *Crenshaw v. Ullman*, 20 S. W. 1078, 113 Mo. 639); *Stephenville, N. & S. T. Ry. Co. v. Couch*, 121 S. W. 189, 190, 56 Tex. Civ. App. 336.

An "independent contractor" is one who is independent of his employer in the doing of his work, and may work when and how he prefers. *Messmer v. Bell & Coggeshall Co.*, 117 S. W. 346, 348, 133 Ky. 19, 19 Ann. Cas. 1.

An "independent contractor" is one who carries on an independent business, and in the line of his business is employed to do a job of work, and in doing it does not act under the directions and control of his employer, but determines for himself in what manner the work shall be done. *Keys v. Second Baptist Church*, 59 Atl. 446, 447, 99 Me. 308.

An "independent contractor" is one who in rendering service represents the will of his employer only as to results, and not as to the means of doing the work; the test being whether the employer reserved control over him as to the manner of doing the work. *Kipp v. Oyster*, 114 S. W. 538, 540, 133 Mo. App. 711.

"An 'independent contractor' is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished." *Green v. Soule*, 78 Pac. 337, 339, 145 Cal. 96.

For one to be an "independent contractor" he must be free from the control of his employer, and free to do the work he is employed to do in his own way without directions, orders, let, or hindrance from his employer, being responsible to him only for the result. *Moore & Savage v. Kopplin* (Tex.) 135 S. W. 1033, 1039.

An "independent contractor" is one who contracts to perform services for another independent of the employer in all that pertains to the execution of the work, and who is subordinate to the employer only in effecting a result in accordance with the employer's designs. *Patton-Worsham Drug Co. v. Drennon* (Tex.) 123 S. W. 705, 708 (citing definition in *Cooley*, Torts [3d Ed.] 1098).

"One who, as an independent business, undertakes to do specific jobs of work, without submitting himself to control as to the petty details, is an 'independent contractor.'" *Carlson v. Stocking*, 65 N. W. 58, 59, 91 Wis. 432.

"An 'independent contractor' may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work." *St. Louis, I. M. & S. Ry. Co. v. Gillihan*, 92 S. W. 793, 77 Ark. 551.

The test oftenest resorted to as to whether one is an employé or an "independent contractor" is the ascertainment of whether the employé represents the master as to the

result of the work or only as to the means. If only as to the result, and in the employment of the means he acts entirely independent of the master, he must be regarded as an "independent contractor." *Overhouser v. American Cereal Co.*, 92 N. W. 74, 75, 118 Iowa, 417.

An "independent contractor" is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result shall be accomplished, but only as to the result, and the test of the relationship is the right of control by the employer. *Glover v. Richardson & Elmer Co.*, 116 Pac. 861, 863, 64 Wash. 403.

One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him, without being subject to the order of the employer in respect to the details of the work, is an "independent contractor," and not a servant. *Linguist v. Hodges*, 94 N. E. 94, 99, 248 Ill. 491; *Id.*, 152 Ill. App. 491.

One contracting to do certain work according to plans and specifications prepared by the contractee, but who exercises full control as to the method of doing the work, save that it must be up to a certain standard, is an "independent contractor," for whose actions the contractee is not liable, though he exercises some supervision over the work to see that it is done according to contract. *Denny v. City of Burlington*, 70 S. E. 1085, 1086, 155 N. C. 33.

One employed under an entire contract for a gross sum to do a specified thing, and who is not subject to the direction of his employer, is an "independent contractor." Where the person employed by defendant to plow a field was not hired to plow any specific number of acres at the rate per acre fixed upon, but could quit when he chose, and defendant could terminate the employment at any time, the plower was not an independent contractor. *Cockran v. Rice*, 128 N. W. 583, 585, 26 S. D. 393, Ann. Cas. 1913B, 570.

An "independent contractor" is one who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in regard to the details, and where a contract for the erection of a building provided that the contractor should deliver a completed work, was to furnish and did furnish his own assistants, was not subject to the direction of the company for whom it was built as to the details, and the company

never in fact sought to direct the work or control or select his assistants, he was an "independent contractor" rather than an agent; other facts in regard to the contract being consistent with either relation. *Edmundson v. Cocoa-Cola Co. (Tex.)* 150 S. W. 273, 274.

Taking the expression "an independent contractor," within the popular understanding which the words import, it is wholly descriptive. The expression serves merely to point out one of a class, and, when so used, it may be conceded that no words of definition are needed. But in the law of negligence the expression is used, not merely in a descriptive sense, but as well to designate a relationship, in the presence of which, when established, the law undertakes to prescribe distinctive rights and liabilities. It is for the court, then, as a matter of law, to define the relationship, and for the jury to make finding of the fact as to its existence. *Overhouser v. American Cereal Co.*, 105 N. W. 113-115, 128 Iowa, 580.

The relation of master and servant does not exist between an employer and the servants of an "independent contractor," who is defined to be one who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work. *Mason & Hoge Co. v. Highland (Ky.)* 116 S. W. 320, 322.

Instructions were held to have properly defined an "independent contractor" as follows: "Where one employs a mechanic or other person to perform a piece of work, and does not undertake to direct how or in what manner it is to be done, but vests in the mechanic power to perform the work as he pleases and in his own way, without direction, restraint, or control of the superior or master, the employer is not responsible for the employé's negligence, if he be negligent." "If one renders service in the course of an occupation, representing the will of his employer only as to the results of his work, and not as to the means by which it is accomplished, it is an independent employment." *Karl v. Juniata County*, 56 Atl. 78, 80, 206 Pa. 633.

"Generally speaking an 'independent contractor' is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the 'results' of his work, and not as to the means whereby it is to be accomplished. The word 'results,' however, is used in this connection in the sense of a production or product of some sort, and not of a service. \* \* \* A reservation by the employer of the right by himself or his agent to supervise

the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation." A contractor with a city for the construction of a street improvement is an independent contractor, though the city engineer has the right to superintend the work, and discharge incompetent employes of the contractor; and an employé of the contractor is not a servant of the city, so as to render it liable for an injury received by him while at work in a dangerous place. *Engler v. City of Seattle*, 82 Pac. 136, 138, 40 Wash. 72 (citing *Casement v. Brown*, 13 Sup. Ct. 672, 148 U. S. 622, 37 L. Ed. 582; *Rogers v. Florence R. Co.*, 9 S. E. 1059, 31 S. C. 378; *City of Erie v. Caulkins*, 85 Pa. 247, 27 Am. Rep. 644; *Kelly v. Mayor, etc., of City of New York*, 11 N. Y. 432).

Generally speaking, an "independent contractor" is one who, in rendering service, exercises an independent employment or occupation, and represents his employer only as to the results of the work, and not as to the means by which it is to be accomplished. The word "results," however, is used in this connection in the sense of a production or product of some sort, and not of a service. Where a contract for work on a building reserves to the owner no more right of supervision and control, through its architect of the work, than to see that it is done in accordance with the requirements of the contract, it involves no control over the method of doing the work, so that the contractor is an independent contractor. *Smith v. Humphreyville*, 104 S. W. 495, 496, 47 Tex. Civ. App. 140

An "independent contractor," within the rule as to liability for torts committed by such contractor, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. In every case the question is: Had the defendant the right to control in the given particular the conduct of the person doing the wrong? Does he reserve to himself the essential powers of a master? The true test to determine whether one who renders service to another does so as a contractor is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. On this question the contract under which the work has been done is conclusive in every case, reference being had, of course, to surrounding circumstances. A reservation by the employer of the right to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation. *Anderson v.*

Tug River Coal & Coke Co., 53 S. E. 713, 715, 59 W. Va. 301.

An "independent contractor" is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified. Defendant made a contract with F. by which he was to cut and remove certain trees, and agreed to furnish him a locomotive, logging cars, horses, etc., and pay him a certain price per 1,000 for all timber logged. F. was to have full and complete control over the cutting, getting out, and shipping of the lumber, and the contract expressly provided that he was to do the work as an independent contractor. Held, that the contract, if made in good faith, and not for the mere purpose of avoiding responsibility, constituted F. an "independent contractor." *Young v. Fosgurg Lumber Co.*, 60 S. E. 654, 656, 147 N. C. 26 (quoting and adopting the definition in *Pollock, Torts*, 78; *Barrows, Neg.* 160).

An "independent contractor" is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work. A construction company, under contract to construct a railroad bed, let a contract for grading a part of the road to a contractor, who sublet a part of it to a third person under a contract requiring the work to be performed under the supervision of the engineer of the construction company, who was empowered to discharge employes of the third person, and to notify him to increase the force of men, if necessary, and authorizing the contractor to cancel the contract, and requiring the third person to save the contractor harmless from all damages that might be caused to the third person during the prosecution of the work, and giving the option to the contractor to pay directly to the laborers employed by the third person the wages due them. Held, that the contract between the contractor and the third person did not create the relation of master and servant, but the third person was an independent contractor, and his employes could not, on receiving injuries, sue the contractor therefor. *Good v. Johnson*, 88 Pac. 439, 440, 88 Colo. 440, 8 L. R. A. (N. S.) 896 (quoting and adopting definition in *Powell v. Virginia Const. Co.*, 13 S. W. 691, 88 Tenn. 692, 17 Am. St. Rep. 925, and citing *Humpton v. Unterkircher*, 66 N. W. 776, 97 Iowa, 509; 1 *Thompson, Comm. Neg.* § 622; 1 *Shearm. & Redf. Neg.* (5th Ed.) § 164 et seq.).

An "independent contractor" is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. One who had some little experience, but no regular vocation, in breaking horses, and who

agreed, as the result of a casual solicitation of employment, to break a horse, he taking the horse and driving the same during the daytime, but returning it to the owner's stable at night, was not, as a matter of law, an independent contractor. *Mullich v. Broucker*, 97 S. W. 549, 551, 119 Mo. App. 332 (citing *Gayle v. Missouri Car & Foundry Co.*, 76 S. W. 992, 177 Mo. loc. cit. 446).

"An 'independent contractor' is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means by which it is accomplished." Where a railroad company induced the sheriff of a county to appoint a deputy to be stationed at a railroad yard, and the company paid the deputy by monthly checks to the sheriff, who assigned them to the deputy, and the services actually performed by the deputy were for the private benefit of the company, and the deputy, while ejecting trespassers from the company's land, shot one of them, the liability of the company for the act of the deputy was for the jury. *Texas & N. O. R. Co. v. Parsons (Tex.)* 109 S. W. 240, 246 (citing in support of definition *Jensen v. Barbour*, 39 Pac. 906, 15 Mont. 582).

"An 'independent contractor' is one who renders a service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." A corporation, which constructed a hotel, hired and discharged its employes at will, pursued its own methods, and was not subject to the control of the employers, except as to the results of the work, was clearly an independent contractor. *Scharff v. Southern Illinois Const. Co.*, 92 S. W. 126, 129, 115 Mo. App. 157.

A man who owned a team, wagons, and a plow, with which he worked by the day for different employers as he could obtain work, earning usually from \$9 to \$15 per week, and working alone when he could not find work for his team, was not an "independent contractor," but a "wage-earner," within the meaning of *Bankr. Act* July 1, 1898, c. 541, § 4, cl. "b," and was not subject to be adjudged an involuntary bankrupt. *In re Yoder*, 127 Fed. 894, 895.

One who contracts to sink a well at an agreed price per foot if he procures a supply of water and not to be paid if he fails to do so, using his own materials and machinery, and furnishing his own labor, is an "independent contractor." *Westover v. Hoover*, 129 N. W. 285, 286, 88 Neb. 201.

As affecting liability for injury to a hod carrier, one employed by the owner to construct the brickwork in a building according to an architect's plans and specifications was an "independent contractor," where he employed the labor and his compensation was

based on the number of brick laid, though the owner paid the workmen direct, and representatives of the owner frequently inspected the building in controlling the carpenters who were employed by the owner by the day. *Bellamy v. F. A. Ames Co.*, 130 S. W. 980, 982, 140 Ky. 98.

While the grantee of a license in a public street ordinarily is not protected by the doctrine of "independent contractor," yet, if the injury is one which bears no causal connection with the license, the defense of independent contractor may be successfully interposed. *Peoria, B. & C. Traction Co. v. O'Connor*, 149 Ill. App. 598, 602.

Defendant, the lessee of a building, desiring alterations, procured plans which were approved by the city building bureau, and a permit was granted thereon to the contractor. The contract stipulated that the contractor should provide all materials and perform all work required by the drawings and specifications prepared by the architects. The contract provided that the work should be done under the direction of the architects acting as counsel for the lessees, etc.; that the decision of the architects as to the true intent of the drawings and specifications should be final; and that the contractor should bear all loss or damage from accidents which might occur to neighboring property or persons during the progress of the work, whether from accidents or carelessness on his part or on the part of his representatives, until possession was taken by the owner. Held, that the contractor was an "independent contractor," and that the lessee not having interfered with the work either by itself or its architect, was not liable for the death of a servant of a subcontractor caused by the collapse of a building due to the negligent manner in which the work was performed. *United Gas Improvement Co. v. Larsen*, 182 Fed. 620, 621, 105 C. C. A. 486.

Where charterers of a steamship regularly employed stevedores for unloading cargoes and paid them a regular contract price by the ton, with extra charge for tiering above the ordinary height, and the work was done by the men of the stevedores under the supervision of a foreman employed by them, the stevedores were "independent contractors," though the charterers' clerk was present to keep track of the work and give directions where to put the cargo. *Vogemann v. American Dock & Trust Co.*, 115 N. Y. Supp. 741, 743, 131 App. Div. 218.

One contracting with a competent person exercising an independent employment to do a piece of work not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to danger, according to the contractor's own methods, and without being subject to control, except as to the result of the work, is not answerable for the wrong of the contractor or

his servants in the prosecution of the work. One who contracts to do a specific piece of work, furnish his own assistants in executing the work, either entirely in accordance with his own ideas or in accordance with the plan previously given him, and without being subject to the orders of the one for whom the work is done as to the details of the work, is an "independent contractor" and not a servant. *Peters v. St. Louis & S. F. R. Co.*, 131 S. W. 917, 921, 150 Mo. App. 721.

Contractors employed to construct a railway bridge, furnishing the necessary labor and materials, and receiving a fixed percentage of the actual costs as their compensation, are "independent contractors," for whose negligence, and for whose foreman's negligence, whereby one of their employes was injured, the railway company was not liable. *Campbell v. Jones*, 110 Pac. 1083, 1084, 60 Wash. 265.

Defendant was in plaintiff's employ under a contract by which he agreed to do such editorial work for plaintiff as it might request of him, and to devote his whole time during plaintiff's regular office hours to the work. Plaintiff was to be the sole owner of the copyrights on all articles prepared by defendant under the contract, and he prepared manuscript for two legal treatises, taking the matter from plaintiff's publications and preparing it with the aid of plaintiff's library, stenographers, typewriters, and using plaintiff's supplies, fixtures, and appliances in his work. Under the contract, his compensation was based upon the number of pages of his contributions accepted by plaintiff. Plaintiff refused to accept and pay for the two treatises. Held, that defendant was not an "independent contractor," even if not in the ordinary sense a servant. *Edward Thompson Co. v. Clark*, 109 N. Y. Supp. 700, 702.

An employment will be considered independent when the contractor renders service in the course of his occupation representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished, but when the work is done by the means contemplated by the contract of employment, and the contractor performs the same strictly as directed by the employer, the latter cannot escape liability for the employe's negligence by a plea that the employe was an "independent contractor." *Drennon v. Patton-Worsham Drug Co.* (Tex.) 109 S. W. 218, 219.

Where defendant operated a lath mill through a contract with T., by which T. was to receive 75 cents per 1,000 lath produced, and was to employ other men, whom defendant was to pay out of the 75 cents per 1,000, T. to receive the balance, if any, and plaintiff was employed by T. to work in the mill, T. was not an "independent contractor," but an agent of defendant, acting in its behalf, and the relation of master and servant exist-

ed between plaintiff and defendant. *Barclay v. Puget Sound Lumber Co.*, 93 Pac. 430, 431, 48 Wash. 241, 16 L. R. A. (N. S.) 140.

If contractors acted under defendant's direction in repairing her sidewalk, they were not independent contractors, so as to relieve her from liability for their negligence; an "independent contractor" being one employed to perform work, the details of which are completely within his control. *Kampmann v. Rothwell*, 107 S. W. 120, 122.

A contract between a railroad company and railroad contractors for the reduction of grades and taking out of curves on a section of the road provided that the contractors were to furnish the requisite laborers, tools, engines, and machinery, which labor, tools etc., were to be furnished and the work to be done to the satisfaction of the railroad company's engineer; that the engineer could make any alteration deemed necessary in the plan of the work, and should decide on the quality and quantity of the work done; that no part of the contract should be transferred without his consent, and that the contractors should discharge any person at his direction; that if it appeared to the engineer that the work would not be completed within the specified time, he could employ additional laborers and charge the amount paid them to the contractors; and that the railroad company should furnish necessary rails, switches, etc., for temporary track, without charge. Held, that under the contract the relation of the railroad contractors to the railroad company was that of "independent contractors." *Louisville & N. R. Co. v. Cheatham*, 100 S. W. 902, 905, 118 Tenn. 160 (citing *Rogers v. Florence R. Co.*, 9 S. E. 1059, 31 S. C. 378; 3 Elliott, R. R. § 1063; *Powell v. Virginia Const. Co.*, 13 S. W. 692, 88 Tenn. 695, 17 Am. St. Rep. 925; *Thomp. Neg.* 909).

One contracting to cut for another his timber into saw logs, and deliver the logs over tram roads built at his own expense, to load a specified number of feet per day for each working day, to cut the timber in workmanlike manner, to pay for any delays, resulting from a failure to securely load the logs, etc., for a specified sum per M. feet, for merchantable logs, cut, hauled, and delivered, is an "independent contractor," within the definition that an independent contractor is one who undertakes to produce a given result, but so that, in the actual execution of the work, he is not under the order or control of persons for whom he does it, and he uses his own discretion in things not specified. *Gay v. Roanoke R. & Lumber Co.*, 62 S. E. 436, 438, 148 N. C. 336.

Defendant is not liable for the negligence of the driver of a truck of a firm of contractors engaged exclusively in the trucking business for defendant—the firm being paid by the month, according to the number of trucks employed, a certain amount for each kind of

truck, extra trucks needed being furnished at a certain amount per day, all the equipment for the business being owned by the contractors, all workmen engaged in hauling being paid by the contractors, and they and their foreman being the only persons exercising the power to employ or discharge such workmen; and this, though defendant's shipping clerk gave directions as to where goods should be taken, and skids on the side of the truck bore defendant's name. *Cohen v. Western Electric Co.*, 99 N. Y. Supp. 525, 526, 50 Misc. Rep. 660.

A cotton compress company was an "independent contractor," where it provided its own platform, its own machinery, its own employes, and determined for itself the manner and time of preparing the cotton it was pressing for shipment. *Arthur v. Texas & P. Ry. Co.*, 139 Fed. 127, 132, 71 C. C. A. 391.

Property owners working on a city street in front of their properties under an ordinance are not "independent contractors," over whom the municipal authorities have no control. *Meyers v. City of Philadelphia*, 66 Atl. 251, 252, 217 Pa. 159, 10 L. R. A. (N. S.) 678.

A company having a contract to erect and remove signs on defendant's building, selecting its own time, tools, and employes to remove a sign without consulting defendant, was an "independent contractor"; and hence defendant is not liable for injury to a pedestrian caused by any negligence of the company's employe, who, while removing a sign, fell from a ladder upon a pedestrian on the sidewalk below. *Press v. Penny*, 114 S. W. 74, 76, 134 Mo. App. 121.

#### **Servant distinguished**

See Servant.

#### **INDEPENDENT COVENANT**

See Dependent Covenant.

Whether a covenant is "dependent" or "independent" depends on the intention of the parties. Where a covenant goes only to a part of the consideration on both sides, and a breach may be compensated for any damages, it is generally considered independent. *Lincoln Trust Co. v. Nathan*, 74 S. W. 1007, 1010, 175 Mo. 32.

In determining whether covenants in a contract are dependent or independent, the intention of the parties must govern, to be determined according to the ordinary rules of construction. Where a breach of a covenant in a contract may be fully compensated by payment of damages, it will be held an "independent covenant," but, if it cannot be so compensated, it is dependent, and performance is a condition precedent which must be shown before recovery can be had upon the contract. *Daly v. City of Carthage*, 128 S. W. 265, 267, 143 Mo. App. 564.



**INDEPENDENT EXECUTOR**

"An 'independent executor' is something unique in his character. While he takes charge of and administers the estate of his administrator without action of the county court in relation to the settlement of his estate, and may do every act which an executor administering an estate under the control of the court may do, with such order, he is uncontrolled, uninformed, unchecked, and untrammelled by orders of the court directing, informing, or commanding what he shall do in the management and administration of the estate. He is an executor at large, exercising his own judgment and discretion, acting and doing what he pleases, unless brought to account for his actions by some one interested in the estate or affected by the way it is being administered." *Altgelt v. Merwitz*, 83 S. W. 891, 894, 37 Tex. Civ. App. 397.

**INDEPENDENT INTERVENING CAUSE**

"The 'independent intervening cause' that will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probate result of the original act or omission, and produces a different result that could not have been reasonably anticipated." *Brubaker v. Kansas City Electric Light Co.*, 110 S. W. 12, 15, 130 Mo. App. 439 (quoting and adopting definition in *Union Pac. R. Co. v. Callaghan*, 56 Fed. 993, 6 C. C. A. 210).

**INDEPENDENT OF A HUSBAND**

The words "independent of a husband," whether express or implied, in the terms of a gift, mean no more than that the court will not permit the marital power of the husband to be used to prevent the enjoyment of property given to the wife according to the terms of the gift. *Castree v. Shotwell*, 68 Atl. 774, 775, 73 N. J. Eq. 590.

**INDEPENDENTLY OF ALL OTHER CAUSES**

Where death results from disease which follows as a natural, though not as a necessary, consequence of an accidental physical injury, the death is within the terms of an accident policy insuring one against bodily injuries sustained through external means, "Independently of all other causes"; the death being the proximate result of the injury, and not of the disease as an independent cause. *French v. Fidelity & Casualty Co. of New York*, 115 N. W. 869, 874, 135 Wis. 259, 17 L. R. A. (N. S.) 1011.

**INDETERMINATE****INDETERMINATE INTENTION**

"An indeterminate or floating intention" to return to a residence from which one moves does not include a case of intention to return upon the occurrence of some event

which may be reasonably anticipated, as when the health of a relative has been restored. *McDowell v. Friedman Bros. Shoe Co.*, 115 S. W. 1028, 1033, 135 Mo. App. 276.

**INDETERMINATE PERMIT**

An "indeterminate permit" is a perpetual exclusive privilege within the scope of the grant, subject to the code of conditions and limitations. *Calumet Service Co. v. City of Chilton*, 135 N. W. 131, 140, 148 Wis. 334.

Public utility law (Laws 1907, § 1797m77) provides that any public utility organized as a corporation under the laws of the state operating under an existing license or franchise shall, on taking certain steps and surrendering such license or franchise, receive by operation of law in lieu thereof an "indeterminate permit" as provided in the act, and that the filing by such company of its declaration surrendering the previous license or franchise shall be deemed a waiver of the right to insist upon the fulfillment of any contract theretofore entered into relating to rates, charges, or service regulated by the public utility act. Held, that the scope of the privilege springing into existence by operation of law by surrender of a franchise under the act is the same as that of the one surrendered, divorced, however, from all the old conditions, and conditioned only upon the provisions of the public utility act. *City of La Crosse v. La Crosse Gas & Electric Co.*, 130 N. W. 530, 538, 145 Wis. 408.

**INDIA****INDIA RUBBER**

Manufactures of, see *Manufactures—Manufactured Articles*.

The term "india rubber," in *Tariff Act* July 24, 1897, c. 11, 2, *Free List*, par. 579, has a commercial meaning that includes nearly a hundred varieties of inspissated vegetable gums, among them balata, which are used in the manufacture of what are commonly known as "rubber goods." *Earle Bros. v. United States*, 153 Fed. 773.

**INDIAN**

See *Pueblo Indians*.

As citizen, see *Citizen*.

Indians receiving rations and annuities, see *Receive*.

The word "Indian" describes a person of Indian blood, while the word "citizen" describes a political status. Consequently the fact that an Indian is a citizen will not remove him from the purview of Act of June 28, 1906, relating to Osage Indians and prohibiting the giving of liquor to them. *Mosier v. United States*, 198 Fed. 54, 57, 117 C. C. A. 162.

The term "Indians," within Act Cong. March 3, 1883, c. 241, § 9, 23 Stat. 385, provid-

ing that Indians committing certain crimes within the limits of an Indian reservation shall be subject to the same laws and be tried in the same courts and be subject to the same penalties as all other persons committing such crimes within the exclusive jurisdiction of the United States, refers only to Indians sustaining tribal relations and does not deprive the state courts of jurisdiction over crimes committed by Indians who either have never sustained or have severed all tribal relations. *State v. Howard*, 74 Pac. 382, 384, 33 Wash. 250.

Act 1899, p. 194, c. 117, § 1, provided that nothing in this, or any other, act shall prevent any Indian residing in this state from taking fish at any time, for the use of himself and family. Sess. Laws 1905, p. 343, c. 170, § 4, provides it shall be unlawful to take or fish for salmon except with hook and line between the hours of 6 o'clock p. m. Saturday and 6 o'clock a. m. Monday of each week. Held, that the term "Indian" included only Indians not citizens; and hence the statute of 1899 does not exempt any citizen from the operation of the statute of 1905, and the two taken together are not in violation of section 12, art. 1, of the state Constitution, guarantying equal privileges to all citizens. *State v. Lewis*, 88 Pac. 940, 941, 45 Wash. 475, 122 Am. St. Rep. 934.

The test of the right of persons of Indian blood to be enrolled and share in land is fixed by Indian Treaty April 29, 1868, 15 Stat. 635, setting apart territory to Indians of the Sioux Nation and such other friendly tribes or individual Indians as the Nation may be willing to admit, and depends on the existence of membership in the Nation, in the absence of any statute intrusting to any governmental official the power to enter names on the rolls of the Nation or to strike names from the rolls. *Sully v. United States*, 195 Fed. 113, 124.

The Puyallup Indian reservation having been abandoned, the lands allotted to the Indians in severalty, and the tribe having abandoned its tribal organization, laws, habits, and customs, and the only parcel of reservation land retained by the government being such as was used for school purposes, a homicide committed by one of such Indians on another within the territory previously embraced in the reservation was not within the act of Congress providing that the state court shall have no jurisdiction of the person of the accused or of the offense committed by one "Indian" against another on an Indian reservation. An Indian without tribal relations within a reservation can have no greater rights than an Indian with the same status residing without the reservation. *State v. Smokalem*, 79 Pac. 603, 604, 37 Wash. 91.

#### Mixed blood

A white man without any Indian blood, who marries a full-blooded Indian woman

according to Indian custom, and who resides with his wife on reservations, is not entitled to the benefit of Act March 2, 1889, c. 405, 25 Stat. 888, authorizing persons "in whole or in part of Indian blood," who are entitled to the allotment of land under any law of Congress, to prosecute any suit in relation to their rights thereto. *Drapeau v. United States*, 195 Fed. 130, 131.

A person born of an Indian mother and a white father who is a citizen of the United States, taking his civil status from his father, is nevertheless an "Indian of mixed blood," within the statute prohibiting the sale of liquor to any Indian whatsoever, or to a mixed blood Indian, being more than a one-eighth Indian. *State v. Nicolls*, 112 Pac. 269, 270, 61 Wash. 142, Ann. Cas. 1912B, 1088.

Where defendant was a mixed blood Indian, who for many years had been enrolled as a member of the Stockbridge and Munsee Tribe in Wisconsin, had been recognized as such by the tribe and by the government, and as such was enrolled and became an allottee of land, and for many years lived within the limits of the reservation under the care of an Indian agent and policed by Indian police, he was an "Indian" within Penal Code (Act March 4, 1909, c. 321) § 328, conferring jurisdiction on the federal courts of certain crimes committed by one Indian against another within the limits of an Indian reservation, though his father was a white man and his mother a part-blood Indian who had never been enrolled. *United States v. Gardner*, 189 Fed. 690, 692.

An Indian woman of the half-blood was born on the Sioux reservation and exercised what she believed to be her right to go on the reservation because of her Indian Yankton Al blood, and she constantly associated and affiliated with the Sioux tribes. She married a white man; but, according to the custom of the tribes of the Sioux Nation, she remained the head of the family, and the right to tribal property was determined by her nationality. Her children were born into such Indian tribes, and she and her descendants were actual residents on the reservation and associated and affiliated with the tribes of the Nation prior to Act March 2, 1889, c. 405, 25 Stat. 888, setting apart a permanent reservation for the Indians "receiving rations and annuities." Held, that she and her descendants were within the Treaty of April 29, 1868, 15 Stat. 635, setting apart land for Indians of the several tribes of the Sioux Nation and such other friendly tribes or individual Indians as from time to time they adopted with the consent of the United States, the words "receiving rations and annuities" in the act of 1889 not being intended to be interpreted in the light of future regulations requiring rolls to be made up and approved by an officer of the United States in the Indian Department, and she and her

descendants were entitled to be considered "Indians" of the Rosebud reservation, within Act March 3, 1899, c. 450, 30 Stat. 1362. *Sully v. United States*, 195 Fed. 113, 125.

Under Comp. Laws 1897, § 5391, making it an offense to sell liquor to any "Indian" or "person of Indian descent," it is an offense to sell liquor to one whose mother was an Indian, though his father was a white man. *People v. Gebhard*, 115 N. W. 54, 55, 151 Mich. 192 (citing *Campau v. Dewey*, 9 Mich. 381).

"By the agreement confirmed in this act, the Sioux Nation gave up a large amount of territory, and the rights conferred on the nation or on individuals were in consideration thereof. The persons entitled to such rights are the persons who, at the time of the agreement, constituted the Sioux Nation and were lawful members thereof. The question, therefore, whether any particular person is or is not an 'Indian,' within the meaning of this agreement, is to be determined, in my opinion, not by the common law, but by the laws or usages of the tribe." Complainant was a woman of five-sixteenths Sioux Indian blood on her mother's side, recognized as a member of a Sioux Tribe since her birth. On February 10, 1890, at the time of the taking effect of Act March 2, 1889, c. 405, 25 Stat. 892, by which a portion of the Great Sioux reservation was ceded to the government, she was residing with her husband and children on lands on the ceded part of such reservation. Within a year thereafter she filed her election to take an allotment of such lands, as permitted by section 13 of the act, but her claim was rejected by the Land Department, on the ground that she was not an Indian, within the meaning of the act, and a trust patent to the land was issued to another member of the tribe, who had later settled thereon. Complainant and her children were enrolled on the census, annuity, per capita, and issue rolls of her tribe, and had received rations, annuities, and per capita payments, the same as all other Indians thereof, and two of her brothers signed the acceptance of the act as members of such tribe. Held, that she was an "Indian," within the meaning of the act, and the head of a family, according to laws and usages of her tribe, her husband being a white man, and as such was entitled to the allotment and to a cancellation of the patent therefor issued to defendant. *Waldron v. United States*, 143 Fed. 413, 418, 419, (quoting and adopting Senate Ex. Doc. No. 59, p. 109, 53d Cong.).

#### Mongolian

The word "Indian," as used in Civ. Code, § 328, providing that all persons of sufficient capacity to understand the obligations of an oath are competent witnesses, with the exception of Indians and negroes, who appear incapable of receiving just impressions, etc.,

does not include the Japanese. *Pumphrey v. State*, 122 N. W. 19, 20, 84 Neb. 636, 23 L. R. A. (N. S.) 1023, 18 Ann. Cas. 979.

#### INDIAN COUNTRY

The words, "Indian country," as used in Rev. St. U. S. § 2139, as amended and reenacted by Act July 23, 1892, c. 234, 27 Stat. 260, forbidding the introduction of intoxicating liquors into such country, do not, standing alone, embrace territory in which, at the time, the Indian title had been extinguished, and over which, with its inhabitants, the jurisdiction of the state, for all purposes of government, was full and complete. *Dick v. United States*, 28 Sup. Ct. 399, 400, 208 U. S. 340, 52 L. Ed. 520.

The term "Indian country," as used in Act Cong. June 30, 1834, providing that all that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana or the territory of Arkansas, and that part of the United States east of the Mississippi river and within any state to which the Indian title had not been extinguished, should be deemed to be "Indian country," includes all the land so described so long as the Indians retain their original title to the soil, and ceases only when the Indians lose that title, in the absence of any different provision by treaty or act of Congress. *United States v. Celestine*, 30 Sup. Ct. 93, 94, 215 U. S. 278, 54 L. Ed. 195 (quoting *Bates v. Clark*, 95 U. S. 204, 209, 24 L. Ed. 471, 473).

The definition of "Indian country" in Act Jan. 30, 1897, c. 109, forbidding the sale of liquor to Indians or its introduction into the Indian country, as including "any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States," would seem to justify the construction that Congress was of the opinion that, had it been omitted, Indians residing upon allotted lands would not have been within the provisions of the act. *United States v. Kiya*, 126 Fed. 879, 882.

The provision of Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, which makes it a criminal offense to introduce liquor into the Indian country, is a police regulation, and can be enforced only as to land within the exclusive territorial jurisdiction of the United States; and an indictment thereunder will not lie for taking liquor upon land within a state which was allotted in severalty to an Indian under Act Feb. 8, 1887, c. 119, prior to Act May 8, 1906, c. 2348, and which is held in trust by the United States, such land being no longer "Indian country," the effect of the allotment having been to make it, as well as the allottee, subject to the jurisdiction and laws of the state, and to exclude therefrom the police powers

of the United States, which have no relation to the protection of its title to, or rights in, the land as trustee. *United States v. Sutton*, 165 Fed. 253, 255.

As to Pueblo Indians holding their lands under unconditional patents, it was not within the power of Congress, in admitting New Mexico as a state, to declare such lands "Indian country," or to reserve to the federal government the power to regulate the liquor traffic with such Indians; the latter being a part of the police power, which necessarily went to the state upon its admission. *United States v. Sandoval*, 198 Fed. 539, 549.

The right of way through the Flathead Indian reservation granted to the Northern Pacific Railway Company by Act July 2, 1864 (13 Stat. 365, 367, c. 217) § 2, the Indian title to which was extinguished without reservation by the agreement of September 2, 1882, is not "Indian country" within the meaning of Act Jan. 30, 1897 (29 Stat. 506, c. 109), making it an offense for any person to introduce intoxicating liquors into the Indian country, "which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States." *Clairmont v. United States*, 32 Sup. Ct. 787, 788, 225 U. S. 551, 56 L. Ed. 1201.

Since the allotment of lands in severalty to all of the Indians on the Uintah Indian reservation in Utah, subject to the provisions of Act Feb. 8, 1887, c. 119, and the restoration of the remainder of the lands of the reservation to the public domain, no part of such lands is "Indian country," within the meaning of Act Jan. 30, 1897, c. 109; and a prosecution cannot be maintained thereunder for introducing liquor thereon, even on a portion which was subsequently reserved by executive order for agency and school purposes. *U. S. v. Boss*, 160 Fed. 132, 134.

### INDIAN RESERVATION

As public land, see Public Land.

Cr. Code U. S. § 328 (Act March 4, 1909, c. 321), provides that all Indians committing assaults or other crimes against other Indians within the boundary of any state and within the limits of any Indian reservation, shall be subject to the same laws and penalties as persons committing any of such crimes within the exclusive jurisdiction of the United States. The Tuscarora Indians, on the Tuscarora reservation, in Niagara county, were never settled thereon by the United States government, but acquired it by purchase. Relator, a Tuscarora Indian, after conviction and imprisonment for assault in the first degree on another Indian of the same tribe on such reservation, brought habeas corpus on the ground that his offense

was within the exclusive jurisdiction of the United States courts. Held, that the Tuscarora reservation was not an "Indian reservation," which within the meaning of the statute is a part of the public domain set apart either by act of Congress, by treaty, or by executive order for the use and occupation of Indians, and hence the Tuscarora reservation was within the sovereignty and jurisdiction of the state of New York. *People ex rel. Cusick v. Daly*, 138 N. Y. Supp. 817, 818, 78 Misc. Rep. 657.

### INDIAN TRIBE

Member of Indian tribe, see Member.

A settlement of Pueblo Indians do not constitute an "Indian tribe," within the purview of the federal statutes against selling liquors to Indians. *United States v. Sandoval*, 198 Fed. 539, 548.

An "Indian tribe" within the state, recognized as such by the United States government, is to be considered as a separate community of people, capable of managing its own affairs, including the domestic relations. *Ortley v. Ross*, 110 N. W. 982, 983, 78 Neb. 339 (citing and adopting definition in *Earl v. Godley*, 44 N. W. 254, 42 Minn. 361, 7 L. R. A. 125, 18 Am. St. Rep. 517).

### INDIANS BY DESCENT

Under Comp. Laws 1897, § 5391, making it an offense to sell liquor to any "Indian" or "person of Indian descent," it is an offense to sell liquor to one whose mother was an Indian, though his father was a white man. *People v. Gebhard*, 115 N. W. 54, 55, 151 Mich. 192 (citing *Campau v. Dewey*, 9 Mich. 381).

The term "Indians by descent," as used in Indian treaties, includes full-blooded Indians as well as those of mixed blood. *Campau v. Dewey*, 9 Mich. 381, 435.

## INDICATE

### INDICATION

Mere indications, however strong, are not sufficient to answer the requirements of the statute, which requires as one of the essential conditions of the making of a valid mining location a discovery of mineral within the limits of the claim. An "indication," in this sense means that which merely points to or tends to prove. *Charlton v. Kelly*, 2 Alaska, 532, 544.

### INDICATIVE

"Indicative" means giving a suggestion of something, and prima facie means at first view, so that the expression means nothing more than that, at first view, flight suggests guilt. *State v. Richards*, 102 N. W. 439, 441, 126 Iowa, 497.

## INDICIA OF A MORTGAGE

The "indicia of a mortgage" are the admissions of the parties that the grantor, after the execution of the deed, absolute in form, owes the consideration thereof to the grantee as a debt, the gross inadequacy of the consideration, the retention of the possession by the grantor without payment of rent, and negotiations between the parties for a loan, and the parties not considering the quality or value of the land at the making of the deed; but such "indicia of a mortgage" do not prevent the consideration of other evidence bearing on the question of the intent of the parties at the time of the making of the deed, and such other evidence may overcome the weight to be given to such indicia. *Fridley v. Somerville*, 54 S. E. 502, 504, 60 W. Va. 272.

## INDICT

### INDICTABLE NUISANCE

B. & C. Comp. § 1930, punishing any person committing any act which grossly injures the person of another, or which grossly disturbs the public peace or health, or openly outrages the public decency and is injurious to public morals, not otherwise made punishable, covers offenses against the public peace, health, and morals not otherwise made punishable, known at common law as "indictable nuisance"; and at common law whatever tends to corrupt society is an offense against good morals, and is punishable as a nuisance, and such offense need not be a continuous one, but may consist of a single act, and it may not affect the public at large, but only such as come in contact with it. *State v. Waymire*, 97 Pac. 46, 47, 52 Or. 281, 21 L. R. A. (N. S.) 56, 132 Am. St. Rep. 699.

### INDICTMENT

See, also, Present—Presented—Presentation.

The object of an "indictment" is to inform the accused of the offense with which he stands charged, in order that he may intelligently prepare such defense as he has to meet the accusation of the commonwealth. *Stout v. Commonwealth*, 94 S. W. 15, 16, 123 Ky. 184, 13 Ann. Cas. 547.

An "indictment" is a basis of a prosecution, and its office, among other things, is to inform accused of the charge against him. *Essary v. State*, 111 S. W. 927, 930, 53 Tex. Cr. R. 596.

The word "indictment," in Rev. St. 1890, §§ 2708, 2709, authorizing the state to appeal only where an indictment is quashed or is adjudged insufficient, or where judgment thereon is arrested, is used in its common-law meaning; and hence the state cannot appeal from a judgment sustaining a demurrer to counts in an information charging a

misdemeanor. *State v. Ross*, 94 S. W. 842, 843, 119 Mo. App. 401.

### Accusation by grand jury

An "indictment" is a presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party charged may be punished. *United States v. London*, 176 Fed. 976, 979.

At common law an "indictment" was an accusation at the suit of the sovereign, based on the oath of 12 men of the county where the offense was committed. In *re McNaught*, 99 Pac. 241, 243, 1 Okl. Cr. 528.

The word "indictment," as used in the Constitution, providing that no person shall be prosecuted for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, has a well-defined meaning, and must be accepted with the meaning attached to it at common law, where it is defined as an accusation at the suit of the king (or state) by the oaths of 12 men (at least not more than 23) of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true. The common-law definition has been modified in this state by section 28, art. 2, of the Constitution, which declares that hereafter a grand jury shall consist of 12 men, any 9 of whom concurring may find an indictment. *State v. Anderson*, 90 S. W. 95, 98, 191 Mo. 134 (quoting *Ex parte Slater*, 72 Mo. 102; 5 Bac. Abr. pp. 48, 52).

An "indictment" at common law was an accusation at the suit of the sovereign, based on the oath of 12 men of the county wherein the offense was committed. The form usually prescribed for the commencement of an indictment was, after stating the venue, as follows: "The jurors for our lady the queen upon their oath present," etc. The form of indictment prescribed by the legislative assembly of Oregon omits a recital of the oath of the grand jurors, but before the grand jury can enter upon the discharge of its duties an oath is required to be administered to the jurors, the form of which is also ordained in the statute. It would seem that an indictment complying with the form recommended by the legislative assembly, though omitting a recital therein of the oath of the grand jurors, would be sufficient. *State v. Guglielmo*, 79 Pac. 577, 578, 46 Or. 250, 69 L. R. A. 466, 7 Ann. Cas. 976.

Under Snyder's Comp. Laws 1909, § 6674, an "indictment" is defined as "an accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense." *Ex parte Show*, 113 Pac. 1062, 1066, 4 Okl. Cr. 416.

Pen. Code, § 917, defines "indictment" as an accusation in writing, presented by the

grand jury to a competent court, charging a person with a public offense. Section 758 declares that an accusation must be delivered by the foreman of the grand jury to the district attorney. An accusation of a public officer for offenses in office, brought merely for the purpose of removing him from office, was not an "indictment," and therefore not objectionable because it contained more than one offense. In re Burleigh, 78 Pac. 242, 243, 145 Cal. 35.

#### Accusation

Accusation distinguished, see Accuse—Accused—Accusation.

An "indictment" is but an accusatory paper, and on motion to dismiss, irregularities in the proceedings before the grand jury cannot be reviewed, except as expressly provided by statute. *People v. Hatch*, 109 Pac. 1097, 1100, 13 Cal. App. 521.

#### Affidavit

Rev. Laws 1905, § 5409, providing for the certification of important and doubtful questions arising upon demurrer to an indictment, or during the trial thereon, to the Supreme Court for its opinion, does not apply to questions raised by objections to the sufficiency of an affidavit in contempt proceedings. An affidavit which is made the basis of contempt proceedings in the district court is not an "indictment," within Rev. Laws 1905, § 5409, providing for the certification of important and doubtful questions arising on demurrer to an indictment, or during the trial thereon, to the Supreme Court, and the court is without authority to include it therein by construction. *State v. Smith*, 133 N. W. 614, 615, 116 Minn. 228.

#### Essentials

To constitute a valid "indictment" for an infamous crime in a federal court, it must have been publicly presented in open court, all the grand jurors being present and answering to their names, the indictment then being delivered by the foreman to the clerk of the court, and the fact entered of record. *Renigar v. United States*, 172 Fed. 646, 97 C. C. A. 172, 26 L. R. A. (N. S.) 683, 19 Ann. Cas. 1117.

#### Same—Conclusion

"The conclusion of an 'indictment' was an essential part of the indictment at common law, and such has been the uniform rule in this state." *State v. Gleason*, 72 S. W. 676, 677, 172 Mo. 259 (citing *State v. Pemberton*, 30 Mo. 376; *Ex parte Slater*, 72 Mo. 102; *State v. Meyers*, 12 S. W. 516, 99 Mo. 107; *State v. Rector*, 23 S. W. 1078, 126 Mo. loc. cit. 341).

#### Charge or presentment

"The term 'presentment' in its stricter meaning is an accusation of the grand jury sua sponte, or, as Judge Story puts it, 'an accusation made ex mero motu,' as distin-

guished from an 'indictment,' which was a written accusation preferred to the grand jury and presented upon oath at the instance of the government." A "presentment" was regarded as the basis of an "indictment." The distinction does not now often practically appear, inasmuch as the grand jury is rarely the origin of accusation, as was its prototype. A "presentment" is a report made by a grand jury of their own motion, either on their own knowledge or on evidence before them, concerning some wrongdoing, and presented to the court, usually as a basis for an "indictment," or the finding and setting forth of charges in an "indictment." "Presentment," in a larger sense of the term, includes every proceeding of a grand jury. Code Cr. Proc. § 280, provides that the grand jury must inquire into the case of every person imprisoned in the jail on a criminal charge, and not indicted; (2) into the condition and management of the public prisons in the county; and (3) into the willful and corrupt misconduct in office of public officers. Section 261 gives them free access to public prisons and the examination of public records. While there is no specific provision for a report as the result of an inquiry, section 250, in referring to the preservation of the minutes of the proceedings of the grand jury, uses the term "presentment" in contradistinction to "indictment." Held, that the grand jury may, in the exercise of its inquisitorial powers, make a presentment in the nature of a report, although an indictment cannot or does not follow it, and such report need not be stricken out because it incidentally designates some public official as responsible for omissions or commissions. *Jones v. People*, 92 N. Y. Supp. 275, 276, 101 App. Div. 55 (quoting and adopting definitions in *Stand. Dict.*, *Bish. Cr. Proc.* § 137, and *Hockhelmer on the Law of Crime and Criminal Proceedings*; citing *Thayer's Preliminary Treatise on Evidence in Common Law*, *Green's Short History of the English People*, 111, and *Ency. Brit.* "Jury"; quoting *Stubbs*; *Bl. Comm.* c. 21).

The provision of the Bill of Rights that prosecutions shall be by indictment or information was intended to secure the citizen against prosecution by private citizen, or by any authority, other than a grand jury or a district attorney; "indictment" as used meaning a presentment by a grand jury, and "information" meaning a presentment by a district attorney or other officer constituted by law to exercise the functions which at common law in 1805 were exercised by the law officer of the crown. *State v. Boasberg*, 50 South. 162, 165, 124 La. 289.

#### Complaint

"The terms 'information' and 'indictment,' as used in the Constitution, are to be understood in their common-law sense; that

is, a criminal charge which at common law is presented by the Attorney General, or, if that office is vacant, then by the Solicitor General of England, and in Missouri by the prosecuting attorneys of the respective counties, who exercise the same powers as are exercised by the Attorney General or Solicitor General of England—that is, the power to present informations under their official oaths." A complaint informing the court of the violation of the injunction is not an information or indictment, and a judgment rendered thereon is not appealable, under Rev. St. 1899, § 2696. *State ex rel. Chicago, B. & Q. R. Co. v. Bland*, 88 S. W. 28, 31, 189 Mo. 197, 3 Ann. Cas. 1044 (quoting *State v. Kyle*, 65 S. W. 763, 166 Mo. 287, 56 L. R. A. 115; *Ex parte Slater*, 72 Mo. 102; *State v. Kelm*, 79 Mo. 515).

A complaint, duly verified, charging a person with an offense, being regarded in Texas as equivalent to an affidavit, a Governor's warrant in extradition proceedings, reciting that the accused stands charged by "complaint and information" with the crime of embezzlement, constitutes a sufficient compliance with Rev. St. U. S. § 5278, requiring that warrants recite that "accused 'stands charged by indictment or affidavit.'" *Ex parte Chentham*, 95 S. W. 1077, 1078, 50 Tex. Cr. R. 51 (citing *Ex parte White*, 46 S. W. 639, 39 Tex. Cr. R. 497; *Ex parte Morgan*, 20 Fed. 308).

#### Information

The word "indictment," as used in Rev. St. 1899, §§ 2708, 2709, authorizing the state to appeal only where an indictment is quashed, or is adjudged insufficient, or where judgment thereon is arrested, is used in its common-law meaning, and the sections do not authorize the state to appeal from a judgment sustaining a demurrer to counts in an information charging a misdemeanor. *State v. Ross*, 94 S. W. 842, 843, 119 Mo. App. 401.

Under Rev. St. 1899, § 2709, authorizing an appeal by the state when an "indictment" is quashed or adjudged insufficient upon demurrer, no appeal lies from a judgment discharging defendant upon demurrer to an information, although sections 2476, 2482, as amended, authorize the prosecution of both felonies and misdemeanors by indictment and information, and provide that proceedings upon an information shall be governed by the law and practice applicable to trials upon indictment. *State v. Adams*, 91 S. W. 946, 947, 193 Mo. 196.

An "indictment" is distinguished from an "information" in the source from which it emanates; an indictment coming from a grand jury, while an information proceeds from the Attorney General or prosecuting attorney of the county in which the crime was committed. *State v. Minor*, 92 S. W. 466, 467, 193 Mo. 597.

At common law an "information" is defined to be a complaint or accusation exhibited against a person for some criminal offense, committed immediately against the king or against a private person; an "indictment" being an accusation preferred by the oath of 12 men, while an information is only the allegation of the officer who exhibits it. An information would lie at common law for all misdemeanors, but not for a felony; it having been the policy under such law that no person shall be put on trial for a capital offense or any other crime known or understood as an offense under said law, occasioning a total forfeiture of the offender's lands or goods, or both, except by indictment. *Evans v. Willis*, 97 Pac. 1047, 1048, 22 Okl. 310, 19 L. R. A. (N. S.) 1050, 18 Ann. Cas. 258.

An "indictment" means a presentment by the grand jury, while an "information" is a presentment by a district attorney or other officer constituted by law to exercise the functions which at common law in 1805 were exercised by the law officers of the crown. *State v. Boasberg*, 50 South. 162, 165, 124 La. 289.

#### INDIGENT

The term "indigent" is commonly used to refer to one's financial ability, and ordinarily indicates one who is destitute of means of comfortable subsistence so as to be in want. *Weeks v. Mansfield*, 80 Atl. 784, 786, 84 Conn. 544.

#### INDIGENT PENSIONER

As pauper, see Pauper.

#### INDIGNITY

See Gross Indignity; Personal Indignity.

For the wife, during almost all the time she lived with her husband, to be in the habit of quarrelling with him and abusing him in the presence of others, and accusing him in the presence of others of brutal conduct towards herself, and repeating such charges to persons in the neighborhood, amounts to "indignities" authorizing divorce. *Clark v. Clark*, 128 S. W. 218, 220, 143 Mo. App. 350.

#### INDIRECT—INDIRECTLY

St. 1906, p. 527, c. 463, part 2, § 57, providing that a railroad corporation, except as authorized by the general court or the act, shall not "directly or indirectly subscribe for, take, or hold the stock or bonds of or guarantee the bonds or dividends of any other corporation," prevents a railroad corporation from obtaining without legislative permission any kind of proprietary interest in the stock or bonds of other corporations; the words "subscribe for, take, or hold" intending

to include legal ownership of every kind, and the word "indirectly" covering other modes of holding than by taking or holding the legal title, and the words together covering every kind of proprietary interest in the stock or bonds referred to. *Attorney General v. New York, N. H. & H. R. Co.*, 84 N. E. 737, 742, 198 Mass. 413.

### INDIRECT CONTEMPT

See, also, Constructive Contempt.

An "indirect contempt" is one offered elsewhere than in the presence of the court, and which tends to degrade or weaken its authority, or in some manner to impede the due administration of justice. *Ex parte Clark*, 106 S. W. 990, 997, 208 Mo. 121, 15 L. R. A. (N. S.) 389.

An "indirect contempt" is one committed not in the presence of the court. To constitute an indirect contempt, the authority of the court must have been assailed in some way tending to its prejudice, or to a harmful interference with the administration of justice. *Rucker v. State*, 85 N. E. 356, 358, 170 Ind. 635 (citing *McConnell v. State*, 46 Ind. 298; *Worland v. State*, 82 Ind. 49, 57; *Cheadle v. State*, 11 N. E. 426, 110 Ind. 301, 313, 59 Am. Rep. 199; *State v. Rockwood*, 159 Ind. 94, 64 N. E. 592).

If the contempt is "indirect," that is, not in the immediate view or presence of the court or judge at chambers, before the court can acquire jurisdiction to punish it, an affidavit must be presented setting forth the facts constituting the contempt, and thereupon the court must hear proof. *State ex rel. Breen v. District Court of Silver Bow County*, 85 Pac. 870, 871, 34 Mont. 107.

An attempt by a party to a suit to improperly influence jurors then in attendance on the court, during the recess and away from the courthouse, constitutes an "indirect contempt" within Code Civ. Proc. § 2170, subd. 9, providing that any other unlawful interference with the process or proceedings of a court than the acts previously specified will constitute a contempt. *State ex rel. Webb v. District Court of Second Judicial Dist.*, 95 Pac. 593, 37 Mont. 191, 15 Ann. Cas. 743.

### INDIRECT EVIDENCE

"Indirect evidence" consists of inferences and presumptions. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect, and a presumption is a deduction which the law expressly directs to be made from particular facts. *Lake County v. Neilon*, 74 Pac. 212, 214, 44 Or. 14.

Evidence is "indirect," as well as direct, consisting of inferences and presumptions, and it is code law that upon the trial of the case evidence may be given of any facts from which the facts in issue are presumed or are

logically inferable; and the jury, by the exercise of their judgment or reason, warranted by the consideration of the usual propensities or passions of men, may make such deductions or draw such inferences from the facts proven as will establish the ultimate fact or facts in issue. Code Civ. Proc. §§ 1826, 1831, 1832, 1870, subdiv. 15, and sections 1957-1960. Evidence of acts of parties to an alleged conspiracy on the part of defendant and other parties named to undertake a criminal action may be established, without proof that the parties made and actually agreed to undertake such action. *People v. Donnolly*, 77 Pac. 177, 179, 143 Cal. 394.

"The term 'evidence' includes, not only that offered on the part of the government, but that also offered for the defense. \* \* \* 'Direct evidence' is that which immediately points to the question at issue. It is positive in its character. It often depends upon the credibility and intelligence of the witnesses who testify to a knowledge of the facts. It may also be documentary in character. 'Indirect' or 'circumstantial' evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed, and from which the jury may infer the fact. 'Direct' and 'circumstantial' evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is 'direct.' 'Circumstantial evidence' is composed of facts which raise a logical inference as to the existence of the fact in issue." *United States v. Greene*, 146 Fed. 803, 824.

### INDIRECT PURCHASE

Under the statute prohibiting an administrator from purchasing, directly or indirectly, the property of the estate, procuring another to purchase for him is an "indirect purchase," and is precisely what the statute prohibits. *Hoffman v. Harrington*, 28 Mich. 90, 95.

### INDISPENSABLE

See Shall be Indispensable.

### INDISPENSABLE PARTY

An "indispensable party" is one who has such an interest in the subject-matter of the controversy that a final decree cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. *Rogers v. Penobscot Mining Co.*, 154 Fed. 606, 610, 616, 83 C. C. A. 380 (citing Rev. St. §§ 737, 738; Equity Rule 47; *Chadbourn v. Coe*, 51 Fed. 479, 480, 481, 2 C. C. A. 327; *Shields v. Barrow*, 17 How. [58 U. S.] 130, 139, 15 L. Ed. 158; *Ribon v. Chicago, R. I. & P. R. Co.*, 16 Wall. [83 U. S.] 446, 450, 21 L. Ed. 367; *Colron v. Millaudon*, 19 How. [60 U. S.] 113, 15 L. Ed. 575; *Williams v. Bankhead*, 19 Wall.



[86 U. S.] 563, 22 L. Ed. 184; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *Alexander v. Horner*, 1 McCrary, 634, 1 Fed. Cas. 366; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, 1 Sawy. 685, 6 Fed. Cas. 72; *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 82 Fed. 124, 126, 27 C. C. A. 73, 75; *Wood v. Dummer*, 3 Mason, 308, 30 Fed. Cas. 435; *O'Neill v. Wolcott Mining Co.*, 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. [N. S.] 200).

"Indispensable parties" to proceedings in equity are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Landran v. Jordan*, 25 App. D. C. 291, 300.

There is a class of persons who are not only termed necessary parties, but who are "indispensable" parties, to wit, persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. A suit in equity against a corporation organized to build and operate a logging road for the sole purpose of carrying logs to the mill of a lumber company, and without which it could not operate its mill, to enjoin the construction of such road, the right to relief being based largely upon contracts between complainant and the lumber company and complainant and defendant, which were parts of the same transaction, is one in which the lumber company is directly and vitally interested and to which it is an indispensable party. *Arkansas South-eastern R. Co. v. Union Sawmill Co.*, 154 Fed. 304, 311, 83 C. C. A. 224.

"Indispensable parties" are those having an interest in the controversy of such a nature that final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. A joint trustee is an "indispensable party." *Caylor v. Cooper*, 165 Fed. 757, 764 (citing 1 *Rose's Code Fed. Proc.* § 817b, p. 744; *Shields v. Barrow*, 17 How. [58 U. S.] 130, 15 L. Ed. 160; *Donovan v. Camplon*, 85 Fed. 71, 29 C. C. A. 30).

The right of a claimant to use the waters of a natural stream for beneficial purposes, where the same has been acquired by compliance with the law governing the appropriation of water in the arid region, is several, and it may be protected from interference by any one or all of the other several claimants of similar rights, and all of such several

claimants are not "indispensable parties," in the sense that without their presence the court may not grant any relief. *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233, 235.

Under Rev. Laws Mass. c. 111, §§ 112, 113, which provide that, when proceedings are commenced by a landowner for the assessment of damages where land is taken for public use, a mortgagee may join as a petitioner, and if he does not he must be served with notice and permitted to join, and that the interest of the mortgagee shall be first satisfied before any part of the damages is paid to the mortgagor, a mortgagee is an "indispensable party" petitioner in such a proceeding in a federal court, and where he is a citizen of the same state as defendant the court is without jurisdiction. *Adams v. Woburn*, 174 Fed. 192, 194.

#### Necessary and proper party distinguished

See Necessary Parties.

### INDIVIDUAL

Gifts for charitable purposes, though gifts for the benefit of individuals, are not "gifts to individuals," within an instruction in a will directing payment of inheritance taxes on legacies to individuals. Such gifts are not gifts to the individuals, but to the class. *Kingsbury v. Bazeley*, 70 Atl. 916, 917, 75 N. H. 13, 139 Am. St. Rep. 664, 20 Ann. Cas. 1355.

#### Corporation

Though Bankr. Act July 1, 1898, c. 541, § 1, subd. 18, defines the term "officer" as used in the act as including trustees, a trustee in bankruptcy does not occupy an "office" in the sense in which that term is used in the law, which prohibits an alien from being a public officer, since his duties are not general or permanent, and therefore an alien is not disqualified from acting as a trustee in bankruptcy. Section 45 of this act provides that individuals who are competent to perform the duties of a trustee and who reside or have an "office" in the judicial district within which they are appointed may act as trustees. "Individual" is a very broad term, and is sufficient to include an alien. In re *Coe*, 154 Fed. 162, 163 (citing *Matter of Hathaway*, 71 N. Y. 238; *U. S. v. Germaine*, 99 U. S. 508, 25 L. Ed. 482; *Auffmordt v. Hedden*, 11 Sup. Ct. 103, 137 U. S. 310, 34 L. Ed. 674).

The word "individual," as used in General Order in Bankruptcy No. 6 (89 Fed. v., 32 C. C. A. ix), prescribing the procedure in case two or more petitions shall be filed against the same individual in different districts, and in case of two or more cases against a partnership in different districts, is used in the sense and is descriptive of a single person incapable of division, and in-

cludes a corporation. In re United Button Co., 132 Fed. 378, 381.

General Bankruptcy Order 6 provides that, in case two or more petitions shall be filed against the same "individual" in different districts, the first hearing shall be had in the district in which the debtor has his domicile, etc. Held, that the word "individual," as so used, was equivalent to "person," and as such included a corporation. In re United Button Co., 137 Fed. 668, 672.

#### State board of health

Medical Practice Act, §§ 9, 10, providing for the recovery of a penalty for the use of the state board of health against persons practicing medicine without a license, are not in violation of Const. art. 4, § 22, prohibiting the General Assembly by local or special law from granting to any "corporation," "association," or "individual" any special or exclusive privilege, immunity, or franchise, for, as the state board of health is a branch of the state executive department and its members officers of the state, the board is neither a corporation, association, nor individual within such constitutional provision. *People v. Dunn*, 99 N. E. 577, 578, 255 Ill. 289.

#### INDIVIDUAL AND CORPORATE CAPACITY

Where, in a proceeding for the sale of a corporation's property, the judgment of sale recited that it was made by agreement of all the stockholders "both in their 'individual and corporate capacity,'" it should be construed to mean that the corporation entered its appearance and was bound by the order of sale. *McNeill v. Thompson* (Ky.) 84 S. W. 1145, 1146.

#### INDIVIDUAL BANKER

See, also, Private Banker.

Persons doing a banking business under the authority of the superintendent of banking are sometimes termed "individual bankers." In re Samuel Wilde's Sons, 123 Fed. 562, 567.

The term "individual banker" has been construed to mean a person who, having complied with the statutory requirements, has received authority from the banking department to engage in the business of banking, subject to its inspection, supervision, and to the burdens imposed, and the term "private bankers" has been construed to mean persons or firms engaged in banking without having any special privileges or authority from the state. The term "individual banker," as used in the statutes of Montana, declaring guilty of a felony every officer or agent of a bank and every "individual banker," teller, or clerk of an individual banker, who receives deposits, knowing that such bank or association or banker is insolvent, means one other than a private banker, and the statute does not authorize

the conviction of a private banker. *Ex parte Wisner*, 92 Pac. 958, 959, 36 Mont. 298.

#### INDIVIDUAL DAMAGE

In an action against a township for injury to and killing of sheep by dogs, evidence that all the ewes and lambs in the flock, were damaged generally by being maimed, chased, and overheated by the dogs, and that each individual lamb was damaged in one of the ways mentioned, was sufficient to show "individual damage" required by Burns' Ann. St. 1908, § 3268, in the absence of any testimony that the flock as such was damaged. *Wea Tp., Tippecanoe County, v. Cloyd*, 91 N. E. 959, 961, 46 Ind. App. 49.

#### INDIVIDUAL LIBERTY

However comprehensive the term "individual liberty" is, and however broad the claim that every one may employ his time in a lawful undertaking as may best serve his own interests, still the liberty referred to is a relative term, and at most means liberty regulated by just and impartial laws, while all sorts of reasonable restrictions are imposed on the actions of men for the common welfare and good of society. *City of Butte v. Paltrovich*, 75 Pac. 521, 522, 30 Mont. 18, 104 Am. St. Rep. 698.

#### INDIVIDUALLY RESPONSIBLE

As used in the constitutional provision that the officer of an insolvent bank receiving deposits shall be "individually responsible" for such deposits, the words "individually responsible" do not raise the implication that such officers shall not be made criminally liable; therefore the Legislature may make him liable both civilly and criminally. *State v. Oleson*, 76 Pac. 686, 35 Wash. 149.

#### INDIVISIBLE CONTRACT

An "indivisible contract" of sale is one in which, by its terms, the price for a portion of the goods is not fixed or cannot be ascertained, and is the opposite of a "divisible contract" of sale, defined in Laws 1907, c. 99, § 76, as a contract of sale in which, by its terms, the price for portions of the goods is fixed or ascertainable by computation, though, as provided by section 9, the contract price may be fixed by the course of dealing between the parties. *Boyd v. Second Hand Supply Co.* (Ariz.) 123 Pac. 619, 620.

#### INDORSE—INDORSEMENT

See Previous Indorsements Guaranteed.  
See, also, Assignment.

The word "indorsement" applies to such written entries as may be made on the back of notes, checks, etc., and may transfer title to the paper on which it is made. *Hendrick v. Daniel*, 46 S. E. 438, 439, 119 Ga. 358.

The word "indorsement" has a known legal signification, and implies a transfer by a writing upon the instrument. The word "assign" has no such signification, but implies that the assignment was made upon a separate instrument. A finding that, prior to the maturity of certain notes, said notes were "assigned in writing" to defendant, was not a finding that the holder "indorsed" the notes. It was held in another case than an averment in a complaint that a note was "assigned in writing" was not equivalent to an averment that it was indorsed. *Williams v. Osbon*, 75 Ind. 280, 283 (citing *Cooper v. Drouillard* [Ind.] 5 Blackf. 152; *Kern v. Hazlerigg*, 11 Ind. 443, 71 Am. Dec. 360; *Keller v. Williams*, 49 Ind. 504).

Where a payee of a negotiable note writes his name on the back, such writing constitutes an "indorsement." *Hendrix v. Bauhard Bros.*, 75 S. E. 588, 592, 138 Ga. 473, 75 S. E. 588, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, 688.

"The ordinary meaning of the term 'indorsement' is something written on the back of an instrument, like a deed or note;" but a memorandum written on the back of a promissory note at the time of the execution, which limits its consideration, affects its operation, and was intended to be a part of the contract, must be regarded as a substantive part of the note at its execution, and is put in issue by verified denial of the execution of the note. *Kurth v. Farmers' & Merchants' State Bank*, 94 Pac. 798, 800, 77 Kan. 475, 15 L. R. A. (N. S.) 612, 127 Am. St. Rep. 428.

Under Hurd's Rev. St. 1905, c. 120, § 207, authorizing assignment of tax certificates by indorsement, the word "indorsement" means the writing of the name of the holder on the back of the certificate. *Larson v. Glos*, 85 N. E. 926, 928, 235 Ill. 584; *Jones v. Same*, 80 N. E. 282, 236 Ill. 178.

An indictment is "indorsed" when the words "A true bill" are written on the indictment and signed by the foreman, and the names of the witnesses examined before the grand jury are written thereon. *Shivers v. Territory*, 74 Pac. 899, 901, 13 Okl. 466.

The word "indorse," in telegrams authorizing one to "indorse" a second note, is not used in its strictly technical sense, but authorizes the placing of the names on the back of the note, before it is delivered, in the same way in which they stood on the note which was to be renewed, where it appeared that the senders indorsed a note, and, on the note becoming due, telegraphed authority to indorse a second note. *State Bank & Trust Co. of Los Angeles v. Evans*, 84 N. E. 329, 331, 198 Mass. 11.

The use of the word "indorse" or "indorsement" in negotiations leading up to the signing of a note will not always suffice to

prove that a person who was neither payee nor indorsee, but whose signature appears on the back of the note, was an indorser. Such words are often used in a nontechnical sense, merely to designate a person who writes his name on the back of an instrument, or the act of signing an instrument in that way. Such an indorsement the law regards as creating the liability of maker, if the person indorsing was neither a payee nor an indorsee of the note, and it was signed by him before delivery to the payee. Instances might, however, occur wherein the circumstances surrounding the transaction would tend to show that the words were used in their strict legal sense. *Oexner v. Loehr*, 93 S. W. 333, 334, 117 Mo. App. 698.

The holder of a negotiable note is presumed to be such bona fide and for value, under the express provisions of Civ. Code 1910, § 4288, and under the express provisions of section 4279 an ordinary "indorsement" constitutes a contract of the indorser to pay the money, if the parties primarily liable fail to pay it according to the terms of the instrument; and a plea to a suit by an indorsee against the maker of a note, alleging that such indorsee took the note with the express understanding with the payee, who indorsed it in blank, that if the maker failed to pay it at maturity the indorser would pay it, and alleging that the maker had paid out a certain sum on a garnishment judgment based on a judgment against the payee as indorser, stated no defense. *First Nat. Bank of Etowah v. Messer*, 71 S. E. 148, 149, 136 Ga. 226.

An instrument acknowledging receipt of an automobile chassis to be delivered only on return of the receipt properly indorsed was not negotiable, a "negotiable instrument" being a written promise or request for the payment of money to order or to bearer, the word "indorsed" as there used not being as if used with reference to commercial paper. *Manny v. Wilson*, 122 N. Y. Supp. 16, 18, 137 App. Div. 140.

An "indorsed note" implies an agreement between the payee or owner and the indorser that the holder will present the note to the maker for payment at its maturity and notify the indorser if it is dishonored, and the indorser agrees to pay it if this is done and not otherwise. *Brittain v. Murphy*, 94 S. W. 303, 304, 118 Mo. App. 235.

#### As guaranty

The material difference between "guaranty" and "indorsement" of a note as referable to the original payee is as to the extent of liability when measured by the diligence due from the creditor, in order to charge the guarantor or indorser; both being agreements to pay the note. *Walcott v. Carpenter* (Tex.) 132 S. W. 981, 982.

Where the president of a bank declined to discount certain corporate notes unless

their payment was guaranteed by the personal indorsement of two of the officers of the corporation, the word "indorsement" was not used in a technical sense, but only to mean that the bank demanded the security or guaranty of such officers. *Keyser v. Warfield*, 63 Atl. 217, 218, 103 Md. 161.

A writing on the back of a note by its payee, guaranteeing its payment at maturity, and waiving a notice of nonpayment and demand, is an "indorsement," making the person to whom it was transferred an indorsee under the law merchant. *Mullen v. Jones*, 112 N. W. 1048, 102 Minn. 72.

Where in an action on a note and on a written guaranty executed by defendant, the note and a guaranty thereof by N. to plaintiff were filed with the declaration, defendant was thereby advised as to the cause of action; and hence the fact that the declaration alleged that N. "indorsed" the note and that the proof showed that he "guaranteed" payment of the note was not a material variance. *Booth v. Irving Nat. Exch. Bank*, 82 Atl. 652, 655, 116 Md. 668.

**As an independent contract**

"The 'indorsement' of a note is a new contract. The indorser engages that the note shall be paid according to its tenor; that is, upon proper presentment, demand, and notice. He engages that it is genuine, and the legal obligation that it purports to be, and that he has title to it, and a right to indorse it." *Ferguson v. Staples*, 19 Atl. 158, 159, 82 Me. 159, 17 Am. St. Rep. 470 (citing *Story, Prom. Notes*, § 135; *Daniel, Neg. Inst.* § 669; *State Bank v. Fearing*, 16 Pick. [33 Mass.] 533, 28 Am. Dec. 265; *Prescott Bank v. Caverly*, 7 Gray [73 Mass.] 217, 66 Am. Dec. 473).

The "indorsement" of a bill or note is not merely a transfer, but it is a new contract, by which the indorser engages that the bill or note is a genuine and valid instrument, and will be accepted or paid as the case may be; this engagement being conditioned upon presentment of demand and notice. *Hawkins v. Shields*, 57 South. 4, 5, 100 Miss. 739.

**Indorsement on face of instrument**

The ordinary mode of "indorsing" a negotiable instrument is to write the name of the indorser upon the back of the paper; but, where the payee writes his name on the face of the note under the maker's signature, the effect is a transfer of title of the note to the transferee, and the payee becomes liable as an indorser. *First Nat. Bank of Etowah v. Messer*, 71 S. E. 148, 149, 136 Ga. 226.

**As memorandum**

See Memorandum.

**As written instrument**

See Written Instrument.

**INDORSEE**

See Joint Indorsees.

As purchaser for value, see Purchaser for Value.

The meaning of the word "indorsee" in Act Dec. 9, 1893, amending the act of 1889, by providing that it shall extend to cases where any suit is instituted or defended by indorsee, assignee, transferee, or by personal representative of a deceased person, is ascertainable by reference to its etymology and applies to holders of notes, checks, etc., transferred by indorsement. *Hendrick v. Daniel*, 46 S. E. 438, 439, 119 Ga. 358.

**INDORSEE IN DUE COURSE**

Under Civ. Code, § 2199, which declares that an "indorsee in due course" is one who, in good faith, in the ordinary course of business and for value, before its apparent maturity, and without knowledge of dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer, a purchaser of two overdue notes containing a clause showing that they were secured by a chattel mortgage to the payee, of even date, who, at the same time, takes an assignment of such mortgage, showing that seven other notes were given as a part of the same transaction, and which provides that if default should be made in payment of the notes, or any part thereof, when due, the whole amount secured by the mortgage should become due and payable, acquires none of them before maturity, but is affected with notice as to defenses against all the notes, though on their face some of them are not then due. *Rowe v. Scott*, 132 N. W. 695, 696, 28 S. D. 145.

As expressly defined by Civ. Code, § 4034, "an 'indorsee in due course' is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer." Under section 4035, providing that no defense can be maintained against the holder of a negotiable instrument in due course, except that of payment, and under section 4034, the fact that a purchaser of a check takes it under circumstances which would put a reasonably prudent man upon inquiry, does not prevent him from being a holder in due course, unless the circumstances are such as to show bad faith. *Harrington v. Butte & Boston Min. Co.*, 83 Pac. 467, 469, 33 Mont. 330, 114 Am. St. Rep. 821.

**INDORSEMENT FOR COLLECTION**

An indorsement on a draft by a bank to whom it is made payable, as follows: "Pay to any bank or banker or order"—is an "indorsement for collection," and not a transfer of the title of the draft. *Bank of In-*

dian Territory v. First Nat. Bank, 83 S. W. 537, 538, 109 Mo. App. 665.

### INDORSEMENT IN BLANK

The term "indorsement" in Revisal 1905, § 2151, providing that an instrument is payable to bearer when the only or last indorsement is an "indorsement in blank," applies only to negotiable instruments, and a blank indorsement on a nonnegotiable note does not thereby make the instrument negotiable. *Johnson v. Lassiter*, 71 S. E. 23, 24, 155 N. C. 47.

A written assignment on the back of a promissory note payable to the order of the payee, signed by such payee, is the equivalent of a "blank indorsement" to transfer title to the note free from equities, either under the law merchant or Comp. St. Neb. 1901, § 3380, which makes a note negotiable by indorsement where payable "to any person or order or to any person or assigns." *Leahy v. Haworth*, 141 Fed. 850, 861, 73 C. C. A. 84, 4 L. R. A. (N. S.) 657.

### INDORSER

See Accommodation Indorser; Subsequent Indorser.

While the word "indorser" has an ordinary, legal, and technical meaning, its use in designating a person who signs a negotiable paper will not conclude the parties, and that the person is bound by a different obligation may be shown. *Peters v. Nolan Coal Co.*, 56 S. E. 733, 736, 61 W. Va. 392, 9 L. R. A. (N. S.) 989 (quoting and adopting definitions in *Miller v. Clendenin*, 26 S. E. 512, 42 W. Va. 416).

The term "indorser," as used in the provision of the Constitution relating to promissory notes, means a person who has entered into a contract of indorsement, as distinguished from contracts of a different class, as a contract of guaranty. An entry on a conditional contract of sale in these words, "For value received," we hereby guarantee the payment of the within conditional purchase contract and waive presentation, demand, protest, notice, and nonpayment, and notice of protest," is not a transfer of the contract, nor an indorsement. *Andrews v. John Church Co.*, 58 S. E. 130, 133, 1 Ga. App. 560.

While the word "indorser" is frequently used in a popular way to designate a maker who subscribes his name on the back of a note, as well as an indorser in the technical sense of the term, yet when the parties to the contract testifying that the indorsement was an accommodation one only, appear to be intelligent business men knowing the technical import of the term, the trial court may infer that the term was understandingly used. *Heaton v. Dickson*, 133 S. W. 159, 161, 153 Mo. App. 312.

The use of the word "indorser" or "indorsement," in a conversation between the parties anterior to the signing of the instrument, is not decisive of the obligation of the party who signed across the back, for both words are used popularly to designate a maker who subscribes his name on the back of a note, as well as an indorser in the technical sense of the term. *Oexner v. Loehr*, 80 S. W. 690, 691, 106 Mo. App. 412.

The words "indorse" and "indorser" have a popular as well as a technical meaning; hence from the circumstance that they, and they alone, were used in a conversation in which a person was asked and consented to put his name on the back of a note for the purpose of increasing its commercial value, it does not necessarily follow that the person signed as indorser merely, and not as surety. *Redden v. Lambert*, 36 South. 668, 669, 112 La. 740.

The transferror of a nonnegotiable written contract does not, by signing his name on the back of it, make himself liable as "maker," "guarantor," or "indorser," within Rem. & Bal. Code § 6250, providing that the discounting of commercial paper, where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan for the purpose of the chapter relating to usury. *Thomson v. Koch*, 113 Pac. 1110, 1111, 1112, 62 Wash. 438.

A third person, signing a note on the face thereof, and placing the word "indorser" after his name, is not an "indorser" known to the law merchant, and is therefore not entitled to demand or protest or notice of nonpayment. His liability is either that of a maker or guarantor. *Herrick v. Edwards*, 81 S. W. 466, 467, 106 Mo. App. 633.

The negotiable instruments law provides that a person placing his signature upon an instrument, otherwise than as maker, drawer, or acceptor, is deemed to be an "indorser," unless he clearly indicated by appropriate words his intention to be bound in some other capacity. *Wolstenholme v. Smith*, 97 Pac. 329, 330, 34 Utah, 300; *National Exch. Bank v. Lubrano*, 68 Atl. 944, 945, 29 R. I. 64 (citing *McLean v. Bryer*, 54 Atl. 373, 24 R. I. 599; *Downey v. O'Keefe*, 59 Atl. 929, 26 R. I. 571; *Deahy v. Choquet*, 67 Atl. 421, 28 R. I. 338, 14 L. R. A. [N. S.] 847).

Negotiable Instruments Law, art. 1, § 3, provides that the person primarily liable on an instrument is the person who, by the terms thereof, is absolutely required to pay the same, and that all other parties are secondarily liable. Article 6, § 71, provides that a person placing his signature on an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates his intention to be bound in some other capacity. Article 8, § 97, provides that, where a negotiable in-

strument has been dishonored, if notice of dishonor is not given to an indorser, he shall be discharged. Held, that persons who placed their signatures on the back of a note before delivery for the accommodation of the maker were "indorsers," and were discharged by failure to give notice of dishonor unless waived. *Deahy v. Choquet*, 67 Atl. 421, 422, 28 R. I. 338.

Negotiable Instruments Law, § 114, providing that a person not otherwise a party to an instrument, who places thereon his signature in blank before delivery, is liable as an indorser in accordance with prescribed rules, changes the rule that a person who puts his name on the back of bills or notes before delivery is presumably a second indorser and not liable to the payee, and such an indorser is presumed to be liable in accordance with the express language of the statute. *Haddock, Blanchard & Co. v. Haddock*, 85 N. E. 682, 685, 192 N. Y. 499, 19 L. R. A. (N. S.) 136.

Under the Negotiable Instruments Law, § 63, providing that one placing his signature on an instrument otherwise than as maker, drawer, or acceptor is deemed an indorser unless he indicates his intention to be bound in some other capacity, one placing his name on the back of a note before it is delivered to the payee, without indicating any intention to be bound in any other capacity than as indorser, is an "indorser." *First Nat. Bank v. Bickel*, 137 S. W. 790, 791, 143 Ky. 754.

Defendant deposited with complainant bank notes indorsed by defendant to secure indebtedness to the bank. On maturity of the notes the bank urged defendant for payment, and defendant urged the maker. To secure an extension of time, the maker deposited collateral with defendant, who in turn procured an extension. Later the maker gave defendant a check on another bank, which defendant indorsed and sent to complainant for application of the proceeds to the notes. The check was returned to complainant for want of funds. Held, that defendant was an "indorser" of the check, within Negotiable Instruments Law, § 63, and as such entitled to discharge, in default of notice of dishonor, within sections 71, 83, 84, 89, 102. *American Nat. Bank v. National Fertilizer Co.*, 143 S. W. 597, 600, 125 Tenn. 328.

Negotiable Instruments Law, §§ 63, 64, abrogates the rule laid down in *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256, and subjects a person not otherwise a party to a promissory note who places his signature thereon in blank before delivery, to the liability of "indorser" in favor of the payee and subsequent parties. *Gibbs v. Guaraglia*, 67 Atl. 81, 82, 75 N. J. Law, 168 (citing *Wilson v. Hendee*, 66 Atl. 413, 415, 74 N. J. Law, 640).

"An 'indorser' of a negotiable instrument is one who undertakes to be responsible

to the holder of the paper for the amount thereof, if the latter shall, at maturity, make legal demand of the payer, and, in default of payment, give proper notice thereof to the indorser." By force of the Ohio statute establishing a law uniform with the laws of other states on negotiable instruments, a person placing his name in blank on the back of a promissory note, before or at the time of delivery, is an "indorser," and cannot be held in any other capacity. As such he is entitled, in order to render him liable, to notice of demand upon those who are primarily liable, and, failing such demand and due notice to him, he is discharged. *Rockfield v. First Nat. Bank of Springfield*, 83 N. E. 392, 394, 77 Ohio St. 311, 14 L. R. A. (N. S.) 842.

By the express provisions of Revisal 1905, §§ 2212, 2213, 2219, 2239, one indorsing a note in blank before delivery, without indicating his intention to be bound otherwise, is an "indorser," who, not being given notice of nonpayment and dishonor, is discharged. *J. W. Perry Co. v. Taylor Bros.*, 62 S. E. 423, 148 N. C. 362.

#### As creditor

See Creditor.

#### Maker distinguished

The testimony of a witness who signed his name on the back of a note executed by another that the payee told the maker that he could obtain the loan if he could get two indorsers, and that the witness should be one of the indorsers, and that witness signed with another as indorser, was admissible to show that the witness assumed the liability of indorser only; the word "indorser," when used alone, having a technical meaning, and is distinguished from the word "maker." *Woodsville Guaranty Sav. Bank v. Rogers*, 83 Atl. 537, 538, 86 Vt. 121.

### INDUBITABLE

In the case of *Cullmans v. Lindsay*, 6 Atl. 332, 114 Pa. 166, Mr. Justice Clark said: "The parol evidence, however, which will be effective to reform a written instrument in such a case, must, it is said, be clear, precise and 'indubitable'; that is to say, it must carry clear conviction to the minds of the jurors that the witnesses are credible, that the facts are distinctly remembered and are truly and accurately stated—and to the mind of the court that, if the facts alleged are true, the matters in issue are definitely and distinctly established." *Spencer v. Colt*, 89 Pa. 314; *Honesdale Glass Co. v. Storms*, 17 Atl. 347, 125 Pa. 268; *Tritt v. Crotzer*, 13 Pa. 451. The lower court in the instant case charged that: "The evidence must be indubitable. 'Indubitable' means without doubt. That does not mean without any doubt. It means a doubt which rises from the evidence, which is reasonable, and would cause an

honest mind to hesitate before arriving at a conclusion." Held not error. *Robinson v. Powell*, 59 Atl. 1078, 1082, 210 Pa. 232.

"Indubitable proof," in a rule that the standard of proof in suits to reform written instruments is clear, precise, and indubitable, is evidence that is not only found to be credible, but of such weight and directness as to make out the facts alleged beyond a reasonable doubt. *Highlands v. Philadelphia & R. R. Co.*, 58 Atl. 560, 562, 209 Pa. 286.

An "indubitable title" is one open to no possible objection, however trivial. *Jackson v. Creek*, 94 N. E. 416, 421, 47 Ind. App. 541.

## INDUCE

To "induce" means to persuade, to coax, to prevail on, to move by persuasion or influence. In a prosecution for assault to rape, instructions requiring the state to establish beyond a reasonable doubt that defendant did lay or put his hands on prosecutrix's person, with the intent to "induce" her thereby to submit against her will to sexual intercourse with him, and that he intended to have sexual intercourse with her at the time he laid or put his hands on her person, etc., were fatally defective; the acts hypothesized being consistent with an intent on the defendant's part merely to coax prosecutrix to submit to sexual intercourse. "To 'induce' her to submit to sexual intercourse with him means only to persuade, coax her, to submit to sexual intercourse with him, and this falls far short of an intention to have carnal knowledge of her person 'forcibly against her will.'" *Rahke v. State*, 81 N. E. 584, 586, 168 Ind. 615.

Under St. 1898, § 4423, providing that any one who shall "obtain" money under false pretenses shall be punished, an indictment alleging that defendant by false pretenses "induced" the county to pay him a certain sum, is sufficient, since the word "induced," in its ordinary acceptation means the same as the word "obtained." *State v. Brown*, 127 N. W. 956, 957, 143 Wis. 405.

Where defendant was present, encouraging, assisting, and advising another in killing decedent, the law presumes that defendant's presence, etc., "induced" the commission of the act. *Bast v. Commonwealth*, 99 S. W. 978, 980, 124 Ky. 747.

The information for obtaining money by false pretenses, alleging merely that the prosecuting witness "was induced" to pay defendant a certain sum, and not that defendant was actually paid said sum, is insufficient. *State v. Johnston*, 134 S. W. 38, 39, 154 Mo. App. 265.

## INDUCE TO SUPPOSE

The word "convince," as used in an instruction as to the necessity of sufficient evidence to convince accused of apparent dan-

ger to excuse a homicide, was too strong a word; the phrase "induce to suppose" expressing the right meaning. *People v. Williams*, 88 N. E. 1053, 1056, 240 Ill. 633.

## INDUCEMENT

Matter of inducement in pleading is the statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. *Armello v. Whitman*, 106 S. W. 1113, 1114, 127 Mo. App. 698 (quoting *Bouv. Law Dict.*; citing 22 Cyc. p. 498).

### In libel and slander

An "inducement" is a statement of facts out of which the charge arises, or which is necessary or useful to make the charge intelligible, or, in other words, it is intended to state facts whereby the libel or slander is rendered intelligible, and is shown to contain an injurious imputation. *Penry v. Dozier*, 49 South. 909, 913, 161 Ala. 292.

## INDUCTION

Self-induction and resistance distinguished, see *Self-Induction and Resistance*.

## INDUSTRIAL

### INDUSTRIAL INSURANCE

"Industrial insurance" means small policies issued in consideration of weekly payments in contradistinction to the ordinary insurance, where premiums are payable annually, semiannually, or quarterly. *Russell v. Prudential Ins. Co.*, 68 N. E. 252, 253, 176 N. Y. 178, 98 Am. St. Rep. 656.

An insurance policy which, by its terms, expired one year after issuance, unless renewed, and provided for the payment of weekly indemnity in cases of accident or injury arising from violent or external means, and a stipulated payment in case of death from those causes, is an industrial or accident policy, instead of a life policy; and so, in an action on such policy, the inhibitions of *Rem. & Bal. Code*, §§ 6155, 6159, respectively, providing that no policy of life or endowment insurance, except policies of "industrial insurance," shall be issued, unless it provides that the policy and application shall constitute the entire contract, and that every policy, except industrial or those calling for premiums monthly or oftener, shall have attached thereto a correct copy of the application, and, unless so attached, it shall not be considered a part of the policy or be received in evidence, do not apply so as to exclude evidence of insured's assignment of his wages for the payment of monthly premiums, though such assignment was not made part of the application. *Pride v. Continental Casualty Co.*, 125 Pac. 787, 788, 69 Wash. 428.

### INDUSTRIAL SCHOOL

"Our 'industrial school' is not a place of punishment, nor is it in any sense a pris-

on, no more so than our public schools, upon which the law requires and enforces an attendance. It is a place of education, reformation, refinement, and culture. It is a beneficent provision for the uplift of boys, who by reason of their surroundings and conditions, are deprived of an education and moral training, which are so essential to their well-being and good citizenship," and a commitment to the industrial school is not a severer punishment than a fine, so as to require the infliction of the fine as the lesser penalty. *Roberts v. State*, 118 N. W. 574, 576, 82 Neb. 651 (quoting and adopting definition in *Leiby v. State*, 113 N. W. 125, 79 Neb. 485).

## INDUSTRY

Other industry, see Other.

## INEBRIATE

The term "inebriates," as used in Laws 1907, p. 387, c. 288, creating a hospital for inebriates, includes every species of chronic inebriety that is habitual drunkenness; hence an inebriate, as defined by the act, is an habitual drunkard. *Leavitt v. City of Morris*, 117 N. W. 393, 396, 105 Minn. 170, 17 L. R. A. (N. S.) 984, 15 Ann. Cas. 961.

## INEBRIETY

See, also, Intoxicated—Intoxication.

Though one may be said to be under the influence of liquor, he is not necessarily intoxicated, this being far short of "intoxication" which is the synonym of "inebriety" and "drunkenness"; the word "intoxicated" being synonymous with "drunk," and "drunk" being defined in the Standard Dictionary as to have lost the normal control of one's bodily and mental faculties. *Freeburg v. State*, 138 N. W. 143, 144, 92 Neb. 346, Ann. Cas. 1913E, 1101 (citing 4 Words and Phrases, pp. 3734, 3735).

## INELIGIBLE

The term "ineligible," in respect to elections to office, as used in the Constitution and Code 1907, § 1467, declaring persons who are ineligible to hold office, refers to the time of election, and not to the time fixed for entering upon the office. *Finklea v. Farish*, 49 South. 366, 368, 160 Ala. 230.

Under Laws 1879, p. 243, § 10, declaring a county treasurer "ineligible" to office for more than two consecutive terms, an appointment to complete the term of another is not an election to office for a term, and such appointment and holding for ten months thereunder does not make one "ineligible" to be elected for the office for the two consecutive terms immediately following the term during which he was so appointed. *Dodson v. Bowlby*, 110 N. W. 698, 700, 78 Neb. 190.

## INEQUITABLE

### INEQUITABLE CONDUCT

"Inequitable conduct," as applied to cases on contract calling for reformation, consists in doing acts, or omitting things, or the making of representations, tending naturally to deceive as to the true interpretation of the contract, which the court finds to be unconscionable. *American Fruit Product Co. v. Barrett & Barrett*, 128 N. W. 1009, 1011, 113 Minn. 22.

## INEVITABLE

Dangerous conditions of the work or business which can be obliterated by the use of practical devices, well known and in general use, are not "inevitable." *Barney v. Quaker Oats Co.*, 82 Atl. 113, 126, 85 Vt. 372.

### INEVITABLE ACCIDENT

See, also, Vis Major.

An accident is inevitable if the person in connection with whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another; and in such a case, the essential element of legal duty being wanting, the person cannot be held negligent. *Roanoke Ry. & Electric Co. v. Sterrett*, 62 S. E. 385, 387, 108 Va. 533, 19 L. R. A. (N. S.) 316, 128 Am. St. Rep. 971.

An accident is "inevitable" if the person by whom it occurs neither has nor is legally bound to have sufficient power to avoid it or prevent its injuring another. *Waters-Pierce Oil Co. v. Snell*, 106 S. W. 170, 174, 47 Tex. Civ. App. 413 (quoting *Shear. & R. Neg.* 6).

Under the employers' liability act, where the jury would have been justified from plaintiff's testimony in referring plaintiff's injury to inevitable accident (that is, accident which prudence on the part of defendant, or those employees standing in places of responsibility in respect to plaintiff, could not have anticipated), or they might have referred it to the negligence of plaintiff's coemployé, who was a fellow servant, there was nothing to take the case to the jury, and a general charge for defendant was proper. *Walton v. Tennessee Coal, Iron & R. Co.*, 52 South. 328, 166 Ala. 538.

To sustain the defense of "inevitable accident" in a suit for collision, the defendant has the burden of proof, and must show either what was the cause of the accident, and that the result of that cause was inevitable, or he must show all the possible causes and with regard to every one of such possible causes that the result could not have been avoided. *The Edmund Moran*, 180 Fed. 700, 701, 104 C. C. A. 552.

The breaking of mooring posts on a pier during a strong wind and while the



pler was being used by an unusually large steamer cannot be deemed an "inevitable accident," where inadequate provisions to avoid the accident were taken. *Coxe Bros. & Co. v. Cunard S. S. Co., Limited*, 174 Fed. 166, 173 (citing *The Louisiana*, 3 Wall. [70 U. S.] 164, 173, 174, 18 L. Ed. 85; *The Mabey*, 14 Wall. [81 U. S.] 204, 215, 20 L. Ed. 881).

Rev. Civ. Code 1870, art. 2754, makes carriers liable for loss of goods carried unless they can prove that such loss was occasioned by "accidental and uncontrollable events." The court says that it seems these words were used in the same sense as "cas fortuit," "force majeure," or "fortuitous event," as defined in Code of 1825, which was that which happens by a cause or force which we cannot resist and the force majeure or "superior force" is an accident which human prudence can neither foresee nor prevent. These various phrases are held to be the equivalent of the common-law phrase "the act of God," and the holding is that a carrier is liable unless he can show that the loss was occasioned by an "act of God," as used in that sense. The words are also the equivalent of "inevitable accident," by which, according to Story on Bailments, "is meant any accident produced by any physical cause which is irresistible, such as loss by lightning or storms, by perils of the seas, by an inundation or earthquake, or by sudden death or illness. By 'irresistible force' is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable." The words "accident per se" mean an unforeseen and unexpected event, and the word "uncontrollable" further qualifies the event as one which cannot be restrained or prevented. *Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 38 South. 873, 874, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

#### Degree of care required

An "inevitable accident" is something that human skill and foresight could not, in the exercise of ordinary prudence, have provided against. *The Drumcraig*, 133 Fed. 804 (citing *The Pennsylvania*, 24 How. [65 U. S.] 307, 16 L. Ed. 699).

An accident which could not be prevented by the exercise of ordinary care and prudence is an "inevitable accident," for which no recovery of damages can be had. *Gismondi v. People's Ry. Co. (Del.)* 83 Atl. 136, 138, 2 Boyce, 577.

An accident, which with the exercise of proper care could have been anticipated and provided against, is not "inevitable." *Bleakley v. City of New York*, 139 Fed. 807, 808.

In the admiralty law the phrase "inevitable accident" has a comprehensive meaning, and it is not necessary that the accident should be the result of a *vis major*.

If no negligence can be imputed to either vessel in a collision, there is a presumption that they were navigating in a lawful manner and the accident may be said to be inevitable; the test being whether the collision could have been prevented by the exercise of ordinary care, caution, and maritime skill. *The Jumna*, 149 Fed. 171, 172, 79 C. C. A. 119.

"Inevitable accident," as applied to navigation, means that the parties charged with fault have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident. "Inevitable accident," which will exonerate a vessel from liability for a collision, or for a destruction of property, does not mean an accident which was unavoidable under any circumstances, but one which could not be prevented by the exercise of ordinary care, caution, and maritime skill. *The Blackheath*, 154 Fed. 758, 759 (citing *The Mabey*, 14 Wall. [81 U. S.] 204, 20 L. Ed. 881).

The term "inevitable accident," as applied to a collision, means "a collision which occurs when both parties have endeavored by every means in their power with due care and caution and a proper display of nautical skill to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together." *New York & Oriental S. S. Co. v. New York, N. H. & H. R. Co.*, 143 Fed. 991, 993 (quoting *The Mabey & Cooper*, 14 Wall. [81 U. S.] 204, 215, 20 L. Ed. 881).

#### Unavoidable accident synonymous

See Unavoidable Accident.

#### INEVITABLE NECESSITY

The "inevitable necessity" which authorizes a departure from a rule adopted to determine the line of a boundary of land means an impossibility of locating the lines in accordance with the rule. "Inevitable necessity" is therefore not an exception to the rule, but a limitation upon it. *Davis v. Commonwealth Land & Lumber Co.*, 141 Fed. 740, 755.

## INFAMOUS

#### INFAMOUS CRIME

Const. U. S. Amend. 5, provides that for an infamous offense one shall not be required to answer unless on the presentment or indictment of a grand jury. Held, that an offense is "infamous" if it involves imprisonment for more than one year with or without hard labor, and that a "crime" within such provisions is not necessarily an infamous offense, but includes every offense of a serious or atrocious character, involving the possible infliction of long terms of imprisonment,

which offenses must be tried by a jury. *Low v. United States*, 169 Fed. 86, 89, 94 C. C. A. 1.

**Determined by kind of punishment—Death or imprisonment in penitentiary**

"A crime which might have been punished by imprisonment in a penitentiary is an 'infamous crime,' even if the sentence actually pronounced is of a small fine only." *The Paquette Habana*, 20 Sup. Ct. 290, 175 U. S. 677, 682, 44 L. Ed. 320.

An "infamous crime" is one the punishment for which may be confinement in the penitentiary, with or without hard labor. *United States v. J. Lindsay Wells Co.*, 186 Fed. 248, 249.

The significance of the term "infamous crime" was for many years defined by statute (*Rev. St. N. Y.* [1st Ed.] pt. 4, c. 1, tit. 7, § 31), which declared that wherever the term "infamous crime" should be used in any statute it shall be construed as including every offense punishable with death or by imprisonment in a state prison, and no other. That a husband was convicted of a misdemeanor and fined \$50 did not make him incompetent to administer on the estate of his deceased wife under Code Civ. Proc. N. Y. § 2661, providing that letters of administration shall not be granted a person convicted of an infamous crime. In *re O'Hara*, 113 N. Y. Supp. 281, 282, 60 Misc. Rep. 269.

**Same—Imprisonment for term of years**

Under Acts 1838, p. 981, c. 8, § 8, providing that every person who shall be sentenced under any provision of the act to imprisonment for life, or for a term of one year or more, for any offense, shall forever thereafter be incapable of being elected to any office of honor, trust, or profit in the state, and of acting as a freeman therein, and of giving testimony as a witness before any tribunal in the state, unless such conviction be reversed, an offense punishable by imprisonment for one year or more, only, is an "infamous crime," within Const. art. 1, § 7, providing that no person shall be held to answer for a capital or other infamous crime, unless on presentment or indictment by a grand jury, etc. *State v. Nichols*, 60 Atl. 763, 768, 27 R. I. 69.

**Determined by nature of crime**

An "infamous crime" at common law was regarded as comprehending treason, felony, and the crimes falsi. *United States v. Sims*, 161 Fed. 1008, 1012 (citing *Sylvester v. State*, 71 Ala. 25).

A crime may be "infamous" within Const. U. S. Amend. 5, providing that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, without being a felony, and there is no general definition in the federal statutes separating and de-

fining felonies and misdemeanors. When a statute therefore creates an offense and does not define it to be either a felony or a misdemeanor, recourse must be had to the common law to determine what it is, and, though the word tests are obsolete, an offense is held to be a felony which was such when those tests were operative. *Hume v. United States*, 118 Fed. 689, 698, 55 C. C. A. 407.

**Assault and battery**

Assault and battery is not an "infamous crime," where the punishment may be no more than a nominal fine as well as imprisonment for a term of years. The grade of the offense must be determined by the evidence adduced rather than by the fact alleged. *State v. Cram*, 24 Atl. 853, 854, 84 Me. 271.

**Conspiracy**

Conspiracy to defraud the United States being punishable by imprisonment in the penitentiary is an infamous crime within Const. U. S. Amend. 5, providing that no person shall be held for infamous crime except on a presentment or indictment by a grand jury. *United States v. London*, 176 Fed. 976, 977.

**Larceny**

Petit larceny, though a misdemeanor as provided by *Rev. St.* 1909, § 4925, belongs to the class of crimes known as crimes falsi; and, since the person convicted is disqualified to serve as a juror or from voting at any election or holding any office of trust, honor, or profit as provided by section 4631, it is an "infamous crime" within section 2370, providing for a divorce on the ground that the defendant has been convicted of an infamous crime without the knowledge of the plaintiff at the time of the marriage. *Hartwig v. Hartwig*, 142 S. W. 797, 799, 160 Mo. App. 284.

Const. art. 2, § 8, provides that no person shall be held to answer for a criminal offense unless on indictment, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary. *Hurd's Rev. St.* 1908, c. 38, div. 2, § 7, provides that every person convicted of the crime of larceny, etc., shall be deemed infamous and shall forever thereafter be rendered incapable of holding office, voting, serving as juror, etc. Held, in view of the course of legislation concerning larceny, which at all times has recognized larceny as infamous, though the punishment was changed and a distinction made between petit and grand larceny, that petit larceny was an "infamous" crime under section 7, for which additional punishment was provided, and must be prosecuted by indictment, and not by information. The fact that courts have assumed jurisdiction for many years without question of prosecutions for petit larceny on information will not make a prosecution so

brought lawful, where by the plain terms of Hurd's Rev. St. 1908, c. 38, div. 2, § 7, petit larceny is an infamous crime, which must be prosecuted by indictment. *People v. Russell*, 91 N. E. 1075, 245 Ill. 268.

#### **Overcharge for prosecuting pension claim--**

One convicted of making an overcharge for prosecuting a pension claim, in violation of Act Cong. June 27, 1890, c. 634, § 4, 26 Stat. 183, and subject to imprisonment in the discretion of the court, has not been convicted of a "crime rendering him infamous according to law," within Code Pub. Gen. Laws, art. 93, § 51, making one convicted of a "crime rendering him infamous according to law" disqualified from acting as executor, though it be assumed that in the contemplation of the federal jurisdiction the offense be deemed an infamous one. *Garitee v. Bond*, 62 Atl. 631, 633, 102 Md. 379, 111 Am. St. Rep. 385, 5 Ann. Cas. 915.

#### **Rape**

Rape being a crime punishable by imprisonment for a term of years at hard labor is an "infamous crime," within U. S. Const. Amend. 5, requiring one charged with an infamous crime to be tried on a presentment or indictment of a grand jury. *Garnsey v. State*, 112 Pac. 24, 30, 4 Okl. Cr. 547, 38 L. R. A. (N. S.) 600.

#### **Violation of excise laws**

It could hardly be said that a person who had been convicted, upon indictment, of a violation of the excise law, that being a misdemeanor, was convicted of an "infamous crime." The statute (Code Civ. Proc. § 2661) declaring that letters of administration shall not be granted to a person convicted of an "infamous crime" contemplates the conviction of some crime of a serious nature. Were that not so it would have left out the word "infamous" and would have provided that a person who had been convicted of "crime" would be disqualified from being appointed administrator. "The signification of the term 'infamous crime,' wherever that expression occurs in our statutes, is absolutely fixed. \* \* \* It is there declared that 'whenever the term "infamous crime" is used in any statute it shall be construed as including every offense punishable with death, or by imprisonment in a state prison, and no other.'" In *re Greene's Estate*, 96 N. Y. Supp. 98, 101, 48 Misc. Rep. 31 (citing *O'Brien v. Neubert* [N. Y.] 3 Dem. Sur. 156).

#### **Violation of liquor laws**

"An 'infamous crime' is that which works infamy in the person who has committed it." The illegal transportation of intoxicating liquors in violation of Rev. St. c. 27, § 31, as amended by Acts 1891, c. 132, § 2, authorizing a punishment for a term of not less than one year, is an "infamous

crime." *Butler v. Wentworth*, 24 Atl. 456, 457, 84 Me. 25, 17 L. R. A. 764.

#### **INFAMOUS PUNISHMENT**

Fine or imprisonment in the county jail constitutes "infamous punishment." *Earley v. Winn*, 109 N. W. 633, 640, 129 Wis. 291.

"For more than a century imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America." An order of a police magistrate directing that a person shall serve a term in the chain gang was a sentence to infamous punishment, where the members of the chain gang wore the typical striped clothing of the penitentiary convict, with iron manacles riveted on their legs which could only be removed by the use of the cold chisel, the irons on each leg connected by chains, and their progress to and from work was public, and from dawn to dark, with brief intermissions, they toiled on the public roads and before the public eye. *Jamison v. Wimblish*, 130 Fed. 351, 355 (quoting *Ex parte Wilson*, 5 Sup. Ct. 935, 114 U. S. 417, 29 L. Ed. 89).

#### **INFANT**

As person, see Natural Person; Person.

#### **INFANTICIDE**

To constitute "infanticide" the child must have been totally expelled alive from its mother's body, must have lived in an independent existence after such expulsion, and its death must have been caused by violence, inflicted upon it by some other person after the commencement of its independent existence. *Cordes v. State*, 112 S. W. 943, 945, 54 Tex. Cr. R. 204.

#### **INFECTION**

"Infection," as used in an accident policy, providing that, where loss is occasioned or contributed to in any way by erysipelas, blood poisoning, or infection, then in cases designated the amount payable shall be one-fourth of the amount which otherwise would be payable, relates to external injuries, and does not include internal inflammations, where pus is formed by the presence of pus germs. *Continental Casualty Co. v. Colvin*, 95 Pac. 565, 570, 77 Kan. 561.

#### **INFECTIOUS DISEASE**

In an action against a railroad for damages to a shipment of hogs through wrongful exposure by defendant to cholera or other disease during transportation, an instruction was not objectionable as assuming as a matter of law that cholera is an "infectious disease." The admitted fact that the disease readily transmits itself excuses the use of the word "infectious" in describing that charac-

teristic. It is true lexicographers and scientific persons observed a well-defined difference in the meanings of the words "contagious" and "infectious"; but courts should be slow to predicate error on such technical distinction. Evidently the word "infectious" was employed in the petition and instructions to express the property of transmissibility in the disease or diseases to which the hogs were wrongfully exposed and of which they died, and in this general sense its use was proper. *Council v. St. Louis & S. F. R. Co.*, 100 S. W. 57, 61, 123 Mo. App. 432.

### INFECTIOUS SUBSTANCE

"Infectious substances" ordinarily mean substances that are in their nature infectious and that are generally recognized as such. Death caused by a poisonous germ received into the body through the bite of a dog is not a case of contact with poisonous or "infectious substances" without the accident benefits of an insurance policy. Such bite is an accident and should be classed under the "accident provisions" of the policy. *Farner v. Massachusetts Mut. Acc. Ass'n*, 67 Atl. 927, 928, 219 Pa. 71, 123 Am. St. Rep. 621.

### INFER

See Contract Inferred from Facts.

### INFERENCE

An "inference" can only be drawn from facts. *International & G. N. R. Co. v. Vallejo*, 113 S. W. 4, 6, 102 Tex. 70.

An "inference," as applied to the submission of questions of fact to the jury, must be based upon proven facts and cannot be based upon other inferences or presumptions. *Miller v. Northern Pac. Ry. Co.*, 118 N. W. 344, 346, 18 N. D. 19, 19 Ann. Cas. 1215.

An "inference" is a deduction which the reason of the jury makes from the facts proved without an express direction of law to that effect. *Keen v. Keen*, 90 Pac. 147, 149, 49 Or. 362, 10 L. R. A. (N. S.) 504, 14 Ann. Cas. 45 (citing *B. & C. Comp. § 783*); *Lake County v. Nellon*, 74 Pac. 212, 214, 44 Or. 14.

"'Inference' is a deduction or conclusion from facts or propositions known to be true. When the facts themselves are directly attested, the jury may deduce or infer or presume from them the truth or falsity of the main proposition." An inference of fact can be found by a jury only from other facts proven. A jury, instead of basing their verdict upon a fact proved, based it upon a probability. A probability is not a proven fact, and hence the inference drawn from it cannot be properly based upon it. *Seavey v. Laughlin*, 57 Atl. 796, 797, 98 Me. 517 (quoting *Gates v. Hughes*, 44 Wis. 336).

An "inference," within Code Civ. Proc. § 1963, subd. 40, which provides a presumption of survivorship of persons perishing in

the same calamity, unless particular circumstances are shown from which it can be inferred which of the persons survived, is not limited to the definition prescribed by Code Civ. Proc. § 1958, as a deduction which the reason of the jury makes from the facts found without an express direction of law to that effect, but should be construed to mean a conclusion drawn by reason from premises established by proof, a deduction or conclusion from facts or propositions known to be true, under section 1960, declaring that an inference must be founded on a fact legally proved, or on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. *Grand Lodge A. O. U. W. of Washington v. Miller*, 96 Pac. 22, 23, 8 Cal. App. 25.

A passenger of another railroad company required to pass over the depot platform of defendant railroad company was injured by stepping into an uncovered water hole in the platform. The defendant was in the exclusive control of the platform and water holes used for watering its trains, an extra number of which had been watered during the day before the accident. The weather was cold, and the employes were busy and had frequent occasion to uncover the holes and no other person had any authority to open them. The employes opening the holes were instructed not to leave them uncovered. Held that, though negligence will not be presumed, an inference within Rev. Codes, §§ 7956, 7957, 7959, declaring that an "inference" is one kind of indirect evidence, and a deduction, which the jury makes from the facts proved and must be founded on a fact legally proved, and on such a deduction from that fact as is warranted by a consideration of the usual propensities, that the employes omitted to re-cover the hole was justified, authorizing a recovery against the latter company. *Jenkins v. Northern Pac. Ry. Co.*, 119 Pac. 794, 795, 44 Mont. 295.

Under Code Civ. Proc. §§ 1868, 1870 (15), 1958, 1960, declaring that evidence must be relevant to the question in dispute, and authorizing the giving of evidence on the trial of any of the facts from which the fact in issue is logically inferable, and defining "inference" as a deduction which the reason of the jury makes from the facts proved, it is within the discretion of the court to permit inquiry into collateral facts directly connected with the fact in dispute, and, unless the evidence admitted is without any weight in determining the issue, the ruling of the court in receiving it will not be reversed. *Moody v. Peirano*, 88 Pac. 380, 382, 4 Cal. App. 411.

### Presumption distinguished

The fundamental characteristic of a "presumption," as distinguished from an "in-

ference," is that the former affects the duty of producing further testimony, not merely the weight of that already produced. *Bower v. Bower*, 74 Atl. 522, 525, 78 N. J. Law, 387.

An "inference" is nothing more than a permissible deduction from the evidence, while a "presumption" is compulsory, and cannot be disregarded by the jury. *Territory v. Lucero*, 120 Pac. 304, 305, 16 N. M. 652, 39 L. R. A. (N. S.) 58.

#### **Supposition distinguished**

"Inference," in legal parlance, as respects evidence, is a very different thing from "supposition." The former is a deduction from proven facts, while the latter requires no such premise for its justification. Courts and juries, in dealing with the inquiry whether a party has discharged his burden of proof, cannot pronounce on mere supposition that the burden has been met, but can only establish the ultimate fact from others justifying such inference. *Miller-Brent Lumber Co. v. Douglas*, 52 South. 414, 415, 167 Ala. 286 (citing 4 Words and Phrases, p. 3579; 8 Words and Phrases, p. 6807).

### **INFERIOR**

The word "inferior" is defined by Webster as meaning less important or less valuable. In an action for breach of warranty of seed wheat, plaintiff alleged that defendant warranted the wheat to be "White Australian," but that it was actually wheat of an inferior variety and produced a crop of hay "inferior" to that which would have been grown had the wheat been of the variety warranted, whereby plaintiff was damaged. Held, that the complaint sufficiently alleged that the crop produced was of less value than the crop that would have been produced if the wheat had been as warranted. *Moody v. Peirano* (Cal.) 84 Pac. 783.

Const. art. 7, § 51, provides that in all cases of contest of election for any county, township, or municipal office, an appeal shall lie at the instance of the party aggrieved from any "inferior" board, council, or tribunal to the circuit court. Held, that the use of the word "inferior" indicated that a right of appeal to the circuit court was guaranteed only from "any inferior board, council, or tribunal" which the Legislature might create or empower to determine such contests. *Sumpter v. Duffie*, 97 S. W. 435, 80 Ark. 369.

### **INFERIOR COURT OF RECORD**

As Hurd's Rev. St. 1899, c. 37, § 240, limits the jurisdiction of city courts to the cities in which the courts are established, such courts are "inferior courts of record" within chapter 53, § 5, providing that judges of inferior courts of record in towns and cities shall receive, in lieu of all other fees, perquisites, and benefits, in cities and towns

having a population of more than 5,000 inhabitants, \$1,500, to be paid out of the city treasury. *Wolf v. Hope*, 70 N. E. 1082, 1087, 210 Ill. 50.

### **INFERIOR COURTS**

#### **Board of supervisors**

The board of supervisors of a county, though exercising judicial functions, is not an inferior court within Const. art. 6, § 5, providing that the superior court shall have appellate jurisdiction in cases arising in justices' and other inferior courts, as the term "inferior courts" are courts established for the administration of justice, charged with the exercise of judicial power as a substantive duty, but with limited jurisdiction usually confined to the limits of the city or town for which they are mainly created, and police, municipal, and recorders' courts are examples of inferior courts within the Constitution. *Chinn v. Superior Court of San Joaquin County*, 105 Pac. 580, 581, 156 Cal. 478.

St. 1893, p. 174, c. 147, providing for an appeal to the superior court from the decision of the board of supervisors in proceedings for establishment of reclamation districts is in conflict with Const. art. 6, § 5, limiting the appellate jurisdiction of the superior court to cases arising in justices and other inferior courts, for the board of supervisors, though exercising quasi judicial functions, is not an inferior court. *Inglin v. Hoppin*, 105 Pac. 582, 585, 156 Cal. 483.

#### **Court-martial**

A court-martial is not an inferior court within Const. § 86, giving the Supreme Court general superintending control over all inferior courts, it belonging to the executive department of the government, the inferior courts referred to being the courts enumerated in section 85 which belong to the judicial department. *State v. Nichols*, 119 N. W. 632, 634, 18 N. D. 233, 20 L. R. A. (N. S.) 413.

#### **Justice of the peace**

A "city justice of the peace" provided for by Code Civ. Proc. § 103, does not come within the category of "inferior courts" specified in the Constitution, which the Legislature may establish in any incorporated city or town or city and county. *Graham v. City of Fresno*, 91 Pac. 147, 149, 151 Cal. 465.

#### **Probate court**

The probate court is an "inferior court" within Const. art. 6, § 8, giving the circuit courts power to issue writ of mandamus to control "inferior courts," as well as within article 6, § 3, giving the Supreme Court a general superintending control over "inferior courts"; the term meaning lower courts, and the circuit court has jurisdiction to issue mandamus to the probate court. *Mitchell v. Bay Probate Judge*, 119 N. W. 916, 917, 155 Mich. 550.

The probate court is an "inferior court" within Const. art. 6, § 8, giving the circuit courts power to issue the writ of certiorari necessary to give them general control over "inferior courts," as much as within article 6, § 3, giving the Supreme Court a general superintending control over "inferior courts." *Mitchell v. Bay Probate Judge*, 119 N. W. 916, 917, 155 Mich. 550.

A "city recorder's court" comes within the "inferior courts" specified in the Constitution which the Legislature may establish in any incorporated city or town or city and county. *Graham v. City of Fresno*, 91 Pac. 147, 149, 151 Cal. 465.

### INFERIOR LOCAL COURTS

Laws 1897, c. 36, provided that the board of claims was thereby continued to be known as the Court of Claims, and that the commissioners should be known as judges of the Court of Claims, defined its jurisdiction, and authorized it to establish rules of practice, vacate and modify judgments, and grant new trials as well as to appoint court officers and adopt an official seal, and provided that its determination should be a judgment to be entered of record, and authorized appeals therefrom to the Appellate Division, and another provision (Code Civ. Proc. § 264) gave it jurisdiction to hear all private claims against the state, the purpose of the statute as shown by Code Civ. Proc. §§ 263-281, and Judiciary Law (Consol. Laws 1909, c. 30) § 2, being to have the proceedings and practice therein conform as nearly as possible to the highest courts of record. Const. art. 6, § 18, prohibits an inferior local court from being created as a court of record. Held, that the Legislature acted within its constitutional powers in creating the Court of Claims as a court of record; it not being an inferior local court within Const. art. 6, § 18. *People ex rel. Swift v. Luce*, 133 N. Y. Supp. 9, 13, 74 Misc. Rep. 551.

### INFIDELITY

Accusation of, as cruelty, see Cruelty.

### INFIRM

The statute which provides that depositions of witnesses may at the request of defendant be taken when the witness is aged or infirm has no reference to a woman who has been confined in childbirth, and such fact would not render her "infirm." *Davis v. State*, 141 S. W. 264, 267, 64 Tex. Cr. R. 8.

### INFIRMITY

See Bodily Infirmary; Notice of Infirmary.

### INFLAMMABLE

A fluid is "inflammable," within the meaning of Gen. St. 1902, § 4579, making it an offense to keep for sale any fluid for

illuminating purposes inflammable at a less temperature than that fixed by the statute, where, upon ignition of the liquid or its vapor by the application of fire, the process of burning or combustion, if not checked or interrupted by some outside influence, continues until the fluid is consumed. *State v. Boylan*, 65 Atl. 595-597, 79 Conn. 463.

### INFLAMMABLE LIQUID

Kerosene is not an "inflammable liquid" within the meaning of a policy of insurance. *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26, 29.

### INFLICT—INFLICTION

An instruction that "by the term 'accident' is meant the infliction of the alleged injury to plaintiff's horse at the time and place in question" is not objectionable as implying an actual wrong from the use of the word "infliction." *Kortendick v. Town of Waterford*, 125 N. W. 945, 947, 142 Wis. 413.

### INFLUENCE

See Immediate Influence; Sectarian Influence; Undue Influence.

### INFLUENCE OF LIQUOR

See Under the Influence of Liquor.

### INFLUENCE OF PASSION

See Under the Immediate Influence of Sudden Passion.

### INFORM

As aware, see Aware.

### INFORMALITY

Entering judgment against garnishee without a prior order to him to make payment, in contravention of Ann. St. 1906, §§ 3439, 3440, 3452, is not a mere "informality" in entering judgment, for which section 672 provides judgments shall not be reversed. *Walkeen Lewis Millinery Co. v. Johnson*, 109 S. W. 847, 849, 130 Mo. App. 325.

### INFORMATION

See Current Information; Denial of Knowledge or Information.

"Information" is defined as knowledge acquired, derived, or inculcated, as by observation, or by reading or study, or in conversation. *Metcalf v. Mutual Fire Ins. Co.*, 112 N. W. 22, 24, 132 Wis. 67 (quoting and adopting definition in Stand. Dict. p. 924).

"Information" implies lack of knowledge. As, for instance, where one says he is informed of a thing, he knows he is informed of it, but he does not know it exists—he does not know his information is true, but he impliedly affirms that he does not know.

State v. Simpson, 118 S. W. 1187, 1188, 136 Mo. App. 664.

Under the Code authorizing a denial on information and belief by an allegation that the pleader has not the knowledge or information on which to base a belief, an allegation that as to plaintiff's corporate existence, the indorsement of the note sued on to it, and as to its being the owner and holder thereof, defendant cannot obtain sufficient information on which to base a belief, and hence denies such allegation, was insufficient; the words "knowledge" and "information" not being synonymous. Welles v. Colorado Nat. Life Assur. Co., 113 Pac. 524, 525, 49 Colo. 508.

Kirby's Dig. § 6200, provides that after the jury has retired for deliberation, if there is a disagreement as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into the court where the "information required" shall be given, in the presence of or after notice to the parties or their counsel, does not authorize the jury to reopen the case and interrogate witnesses on new matter, but merely to gain information as to what the testimony previously given really was, so as to settle disagreements among themselves as to what the witnesses had said; hence it is error for the court to permit the introduction of new matter by means of an examination of a witness by members of the jury. St. Louis, I. M. & S. Ry. Co. v. Bennett (Ark.) 87 S. W. 1197 (concurring opinion of Hill, C. J.).

A complaint preferred on behalf of the state in a civil action is usually termed an "information." People v. McCallan, 105 N. Y. Supp. 844, 54 Misc. Rep. 130.

Where the Attorney General appeared in chancery as an officer of the crown to call the court's attention to a matter relating to a charity, where the trustees had improperly sold or leased the property or misapplied the property, the pleading was called an "information." MacKenzie v. Trustees of Presbytery of Jersey City, 61 Atl. 1027, 1040, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

Where a suit is brought by the Attorney General to enforce a public trust, the primary pleading is not a complaint, but an "information," and the officer bringing it is an informant. If he sues at the relation of others, they are relators, and the proceeding is called an "information ex relatione." MacKenzie v. Trustees of Presbytery of Jersey City, 61 Atl. 1027, 1040, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

Where a suit in the Court of Chancery is brought by the Attorney General by petition, the petition is called an "information." Fraser v. Fraser, 75 Atl. 979, 980, 77 N. J. Eq.

205 (citing Daniell, Ch. Pl. & Prac. p. 1 et seq.).

### INFORMATION (In Criminal Law)

At common law an "information" was a surmise or suggestion upon record, made on behalf of the sovereign to a court of criminal jurisdiction, charging a person with the commission of a misdemeanor. They were of two kinds: First, such as were merely at the suit of the king; second, such as were partly at the suit of the king and partly at the suit of the party. In distinguishing the two kinds of informations exhibited in the name of the king, Blackstone describes them as those which are truly and properly his own suits, and filed ex officio by his own immediate officer, the Attorney General, and those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer. and these are filed by the king's coroner and attorney in the Court of King's Bench. The objects of the king's own prosecutions, filed ex officio by his own Attorney General, were properly such enormous misdemeanors as peculiarly tended to disturb or endanger his government, or to molest or affront him in the discharge of his royal functions. The objects of the other species of informations filed by the master of the crown office upon the complaint or relation of a private subject are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of any atrocious kind, not peculiarly tending to disturb the government, but which, on account of their magnitude or pernicious example, deserve the most public animadversion. State v. Guglielmo, 79 Pac. 577, 579, 46 Or. 250, 69 L. R. A. 466, 7 Ann. Cas. 976 (quoting and adopting the definition in 4 Black. Comm. 308).

The office of an "information" is not only to give the court jurisdiction to issue the warrant, but is the pleading by the state, informing defendant of what offense he is charged. Snapp v. State, 103 Pac. 553, 2 Okl. Cr. 515.

An "information" is not a "writ" or "process." It is an accusation upon which writs and processes issue. The clause of the Constitution providing that the style of all writs and processes shall be "the state of Oklahoma" does not require an information to begin with these words. It is sufficient if it appears from the record of a case that the prosecution was carried on in the name and by the authority of the state. But as a matter of good pleading it is well for indictments and informations to begin with these words. Caples v. State, 104 Pac. 493, 494, 497, 3 Okl. Cr. 72, 26 L. R. A. (N. S.) 1033 (citing 8 Words and Phrases, p. 7531).

An "information," defined by Code Cr. Proc. § 145, as an allegation made to a magistrate that a person has been guilty of

some designated crime, performs the same function as an indictment in a court of record, and must set forth facts to establish the crime, not with the exactness of an indictment, but with sufficient preciseness to inform the magistrate that a designated crime has been committed, and it should allege the time, place, person, and other circumstances that constitute the crime. *People v. Wacke*, 137 N. Y. Supp. 652, 653, 77 Misc. Rep. 196.

#### **Affidavit, signature, and verification**

An "information," as defined in the Oregon statute modifying the grand jury system, is the complaint made by the district attorney, and, as the district attorney in Oregon is not required to secure leave of court before he can file an information, it need not be specially verified by his oath. *State v. Guglielmo*, 80 Pac. 103, 104, 46 Or. 250, 69 L. R. A. 466, 7 Ann. Cas. 976.

"Originally an 'information' was a criminal proceeding at the suit of the king without a previous indictment or presentment by a grand jury. It could be preferred only by a responsible public officer when duly supported by affidavit, was limited to misdemeanors, and was a substitute for an indictment. In this sense it is unknown to the law of this state. By the Revised Statutes it was called a complaint relating to a criminal offense. 3 R. S. 706, marg. p. By the Code of Criminal Procedure it is defined as 'the allegation made to a magistrate that a person has been guilty of some designated crime.' Code Cr. Proc. § 145. The statute does not expressly provide that it is to be sworn to, nor even that it must be in writing, although the word 'allegation' from the analogy of other judicial proceedings points to that formality. There is some confusion in the authorities as to what an 'information' really is, for the term is frequently used to designate the deposition or affidavit upon which a criminal warrant is issued. The statute itself is not free from doubt upon the subject. An affidavit taken before a magistrate may be full enough to perform the function both of an information and a deposition. This is true when it sets forth facts sufficient to authorize a warrant without further evidence; but, when more proof is required and it is necessary to subpoena witnesses and take their depositions, an information is essential. Its office is that of a complaint, as the Revised Statutes called it. Depositions are the authority for the warrant, as the magistrate must be satisfied 'therefrom,' which refers to the depositions only." From all the analogies of the law, both civil and criminal, the information is intended to be made upon oath, though it is not specifically required. *People ex rel. Livingston v. Wyatt*, 79 N. E. 330, 332, 333, 186 N. Y. 383, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972.

#### **By whom filed**

In England, at common law, an information was an accusation of a criminal character exhibited against a person by the Attorney General or the Solicitor General, and under his oath of office. In the United States, in the absence of statutes changing its character, it is filed by the officer whatever his title, who exercises the function of prosecuting attorney for the county. In *re McNaught*, 99 Pac. 241, 253, 1 Okl. Cr. 528.

Bishop says, in section 144: "In our states the criminal information should be deemed to be such, and such only, as in England is presented by the attorney or solicitor general. This part of the English common law has plainly become the common law with us. And as with us the powers which in England are exercised by the attorney general and solicitor general are largely distributed among our district attorneys, the latter officers would seem to be entitled under our common law to prosecute by information as a right adhering to their office and without leave of court." *Ex parte McNaught*, 100 Pac. 27, 30, 1 Okl. Cr. 260 (citing *State v. Kelm*, 79 Mo. 515; *Wharton's Crim. Pl. & Prac.* [8th Ed.] § 87).

An "information" is defined to be a written accusation of crime preferred by the district attorney or other public prosecuting officer without the intervention of a grand jury. *Ex parte Show*, 113 Pac. 1062, 1066, 4 Okl. Cr. 416.

#### **As complaint**

At common law, an "information" is defined to be a complaint or accusation exhibited against a person for some criminal offense committed immediately against the king or against a private person, being merely an allegation of the officer who exhibits it. *Evans v. Willis*, 97 Pac. 1047, 1048, 22 Okl. 310, 19 L. R. A. (N. S.) 1050, 18 Ann. Cas. 258.

#### **Complaint in inferior courts**

Code Cr. Proc. § 148, provides that an information is the foundation of the jurisdiction of a magistrate in preliminary proceedings, and an "information" is defined by section 145 as being "the allegation made to a magistrate that a person has been guilty of some designated crime." Section 148 declares that, when an information is laid before a magistrate of the commission of a crime, he must examine the informant or prosecutor, and any witnesses he may produce, on oath, and take their depositions. Held, that an information charging that John Doe and Richard Roe willfully, etc., conspiring to interfere with and injure the property and business of a certain railroad company and construction company, did solicit and urge deponent not to work for D. or for the contracting company or the railroad company, stating that they would injure deponent's credit as a contractor if he proceeded with



such work, and that they would pay deponent to quit said work, was fatally defective for failure to designate the commission of any crime, and was therefore insufficient to confer jurisdiction on the magistrate. *People ex rel. Sampson v. Dunning*, 98 N. Y. Supp. 1067, 1069, 113 App. Div. 35.

An "information" is the allegation made to a magistrate that a person has been guilty of some designated crime, under the express provisions of Code Cr. Proc. § 145, and is the foundation for the jurisdiction of the magistrate, the office of a "warrant" being merely to bring the person charged before the magistrate; and where an information before a police justice alleged that plaintiff had for nine days without legal excuse not caused her child to attend upon instruction as required by law, and that she had not presented to the school authorities proof by affidavit that she was unable to compel the child to so attend, as required by Compulsory Education Law (Laws 1909, c. 409) § 537, subsec. 4 (Consol. Laws, 1910, c. 16, § 635, subsec. 4), the offense so stated was the only one the justice had power to try under the information, and the fact that the warrant stated that plaintiff had failed for nine days "to send the said child to school as provided in the compulsory educational law" would not render the officer laying the information and procuring the warrant liable for malicious prosecution for having the arrest made for failure to send the child to school without probable cause, on the theory that he knew that the mother had sent the child to school each day, but that it had been excluded because of the mother's refusal to permit its vaccination, the uncontroverted testimony clearly establishing a violation of section 537, subsec. 4, of the compulsory education law, the offense charged in the information. *Shappee v. Curtis*, 127 N. Y. Supp. 33, 35, 142 App. Div. 155.

#### Indictment distinguished

Indictment, as including, see Indictment.

An "information" is distinguished from an "indictment" and the source from which they emanate; an indictment coming from a grand jury, while an information proceeds from the Attorney General or prosecuting attorney of the county in which the crime was committed. *State v. Minor*, 92 S. W. 466, 467, 193 Mo. 597.

At common law an "information" is defined to be a complaint or accusation exhibited against a person for some criminal offense, committed immediately against the king or against a private person; an "indictment" being an accusation preferred by the oath of 12 men, and an information is only the allegation of the officer who exhibits it. An information would lie at common law for all misdemeanors, but not for a felony; it having been the policy under such law that no person shall be put on trial for a capital offense or any other crime known or under-

stood as an offense under said law occasioning a total forfeiture of the offender's lands or goods or both, except by indictment. *Evans v. Willis*, 97 Pac. 1047, 1048, 22 Okl. 310, 19 L. R. A. (N. S.) 1050, 18 Ann. Cas. 258.

Bill of Rights providing that prosecutions shall be by indictment or information, was intended to secure the citizen against prosecution by a private citizen or by any authority other than a grand jury or a district attorney; "indictment" meaning a presentment by a grand jury, and "information" a presentment by a district attorney or other officer constituted by law to exercise the functions which at common law in 1805 were exercised by the law officer of the crown. *State v. Boasberg*, 50 South. 162, 165, 124 La. 289.

#### As process

See Process.

#### As writ

See Writ.

### INFORMATION IN THE NATURE OF QUO WARRANTO

Quo warranto as including, see Quo Warranto.

An "information in the nature of quo warranto" was originally criminal in form and purpose; the object of the proceeding being not merely to oust but to fine the usurper. In the process of time the fine fell to a nominal amount, and its imposition was finally discontinued in England, though the practice still prevails in some of the American states. Therefore through a gradual process of evolution the procedure by information became essentially civil in character. *State ex rel. Jackson v. Anheuser-Busch Brewing Ass'n*, 90 Pac. 777, 778, 76 Kan. 184.

Proceeding by "information in the nature of quo warranto" was never more than incidentally criminal; its main purpose in its early history having been, and its only one in recent times being, to try title to office. *Territory ex rel. Hubbell v. Armijo*, 89 Pac. 267, 268, 14 N. M. 205.

The "information" was a criminal proceeding in which, if the issue was found against the defendant, in addition to a judgment of ouster, a fine could be imposed. *Meehan v. Bachelder*, 59 Atl. 620, 621, 73 N. H. 113, 6 Ann. Cas. 462.

"Information in the nature of quo warranto" is the remedy or proceeding where the state inquires into the legality of the claim which a party asserts to an office or franchise, and to oust him from its enjoyment if the claim be not well founded, or to have the same declared forfeited and recover it, if, having once been rightfully possessed and enjoyed, it has become forfeited for misuser or nonuser. *Moody v. Lowrimore*, 86 S. W. 400, 402, 74 Ark. 421 (quoting and adopting definition in 2 Spell. Extr. Rem. § 1765).

An "information in the nature of a quo warranto" is a civil remedy when used for the protection of private rights. *People v. Healy*, 82 N. E. 599, 602, 230 Ill. 280, 15 L. R. A. (N. S.) 603.

An "information" at the instance of the Attorney General in the "nature of quo warranto" to forfeit the license of a foreign corporation and the charter of domestic corporations for misuser is a civil proceeding. *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 1007, 218 Mo. 1.

Originally proceedings in the "nature of quo warranto" partook of the character of criminal proceedings. *State v. Des Moines City Ry. Co.*, 109 N. W. 867, 870, 135 Iowa, 694.

The ancient writ of "quo warranto" was in the nature of a writ of right, invocable by the king against persons claiming or usurping an office or liberty, to inquire by what authority they asserted right thereto, and the judgment was conclusive even as against the crown, while a proceeding by "information in the nature of quo warranto" is properly a criminal prosecution instituted not only to fine the usurper, but to oust him from the office, franchise, or liberty. *State v. Sengstacken*, 122 Pac. 292, 295, 61 Or. 455.

An information in the nature of quo warranto is the substitute for the ancient writ of quo warranto, and in its origin was essentially a criminal prosecution to punish encroachments upon the royal prerogative, and it still retains that character to the extent that the proceedings are criminal in form for the purpose of punishing the usurper and ousting him from enjoying the franchise. *People v. Gartenstein*, 94 N. E. 128, 129, 248 Ill. 546.

"Mandamus" cannot be rightfully invoked to settle a doubtful claim to an office, or to have the title to an office adjudicated upon as between adverse claimants, but "information in the nature of a quo warranto" affords the proper remedy. Where the relator holds a prima facie and uncontested title to the office or his title has been adjudicated upon and finally established by a competent tribunal, a writ of "mandamus" may be issued to put him in possession of the office as well as of the books, papers, and other property pertaining to it. *Hoy v. State*, 81 N. E. 509, 512, 168 Ind. 506, 11 Ann. Cas. 944 (citing *Mannix v. State ex rel. Mitchell*, 17 N. E. 565, 115 Ind. 245).

A petition to determine the legality of the organization of a school district, filed by the prosecuting attorney of a county at the instance of a resident taxpayer of the district to be formed, is a proceeding "in the nature of a quo warranto, or statutory quo warranto," authorized by Rev. St. 1899, § 4457, and not a quo warranto ex officio. *State ex inf. Berkley ex rel. McCormack v. McClain*, 86 S. W. 135, 136, 187 Mo. 409.

## INFORMER

See Common Informers.

An action brought by a state official by virtue of his office for the penalty provided by the Child Labor Law is not within Practice Act, § 219, relating to suits instituted by "informers," and requiring the time of the institution of the action to be noted on the information; since the word "informer," construed with reference to the act as originally passed, means common informer, viz., one who, without being specially required by law or by virtue of his office, gives information of crimes, offenses, or misdemeanors which have been committed, in order to prosecute the offender. *Bryant v. Skillman Hardware Co.*, 69 Atl. 23, 24, 76 N. J. Law, 45 (quoting and adopting *Bouv. Law Dict.*).

## INFRINGEMENT

See Contributory Infringement.

### All or equivalent elements

The performance by a device of the same function as the device of a patent does not alone constitute "infringement," but it must also be the mechanical equivalent, performing the function in substantially the same way. *Johnson Furnace & Engineering Co. v. Western Furnace Co.*, 178 Fed. 819, 825, 102 C. C. A. 267.

### Change of form

"Infringement" is not avoided by a mere change of form or location of parts, if the same principle is used through the same mode of operation, to accomplish the same result, even though an additional beneficial result is attained through the change. *Pettibone, Mulliken & Co. v. Pennsylvania Steel Co.*, 133 Fed. 730, 734.

The splitting up or duplication of parts or additions does not avoid "infringement" when the patented device is used. If the improver uses the specific device of the prior patent, he is an infringer. *Underwood Typewriter Co. v. Typewriter Inspection Co.*, 177 Fed. 230, 238 (citing *Thomson-Houston El. Co. v. Ohio Brass Co.*, 130 Fed. 549; *Perkins Elec. Switch Co. v. Buchanan*, 129 Fed. 135).

### Degree of utility

A device securing the same result, but operating on a different principle, is not an "infringement" of a former patent. *Stitzer v. Withers*, 91 S. W. 277, 280, 122 Ky. 181 (quoting and adopting definition in opinion of *Hobson, C. J.*, on a former appeal; citing *Bridge v. Excelsior Mfg. Co.*, 105 U. S. 618, 26 L. Ed. 1190).

### Identity

To constitute an "infringement" of a patented machine, three things must be found: First, identity of result; second, iden-

tity of means; and, third, identity of operation. *American Can Co. v. Hickmott Asparagus Canning Co.*, 137 Fed. 86, 90.

#### Of copyright

The singing of a single verse and chorus of a copyrighted song, without musical accompaniment, in imitation of the voice, postures, and mannerisms of another, is not an "infringement," against which a temporary injunction will issue. *Green v. Minzensheim*, 177 Fed. 286, 288.

#### Of patent for design

In patent law, close imitation is essential to make out "infringement of a design." There may be some range of equivalency, but it is necessarily small. Similarity to the eye of the ordinary man is the test. *Williams Calk Co. v. Neverslip Mfg. Co.*, 136 Fed. 210, 217 (citing *Gorham Co. v. White*, 14 Wall. [81 U. S.] 511, 20 L. Ed. 731).

The object in a design patent is, not to identify the article as an article of trade, but to ornament it, so as to make it pleasing to the eye; and while "sameness of appearance" is identity of design, the test of infringement is not whether an ordinary purchaser might be deceived into buying one article for the other, but the sameness of appearance which constitutes "infringement" is the sameness of æsthetic effect on the eye of an ordinary observer. *Bolte & Weyer Co. v. Knight Light Co.*, 180 Fed. 412, 416, 103 C. C. A. 558.

#### Of patent for process

When an entirely new process is invented and patented revolutionizing the art, the claims will be given a broad construction, and a different apparatus and a variant use of elements may amount to infringement; but a patent for an improved process stands on different grounds, and in order to constitute infringement it must appear that all the steps of the process are substantially used. *Schmertz Wire Glass Co. v. Western Glass Co.*, 178 Fed. 973, 976.

#### Of trade mark or name

An "infringement of a trade-mark" consists in the use of the genuine upon substituted goods, or of an exact copy or reproduction of the genuine, or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead so that the goods to which the spurious trade-mark is affixed are likely to be mistaken for the genuine product; and this upon the ground that the trade-mark adopted by one is the exclusive property of its proprietor, and such use of the genuine or of such imitation of it is an invasion of his right or property. *G. W. Cole Co. v. American Cement & Oil Co.*, 130 Fed. 703, 705, 65 C. C. A. 105.

An "infringement" of a trade-mark consists in the use of the genuine upon substituted goods or an exact copy or reproduction of the genuine, or in the use of an imitation

in which the difference is colorable only, and the resemblance avails to mislead, so that the goods to which the spurious trade-mark is affixed are likely to be mistaken for the genuine product. *Sartor v. Schaden*, 101 N. W. 511, 513, 125 Iowa, 696.

"A 'trade-mark' is an arbitrary, distinctive name, symbol, or device to indicate or authenticate the origin of the product to which it is attached. An 'infringement' of such trade-mark consists in the use of the genuine upon substituted goods, or of an exact copy and reproduction of the genuine, or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead, so that the goods to which the spurious trade-mark is affixed are likely to be mistaken for the genuine product. Unfair competition is distinguishable from the infringement of a trade-mark, in this, that it does not involve the exclusive right of another to the use of the name, symbol, or device." *American Brewing Co. v. Bienville Brewery*, 153 Fed. 615, 616.

Duplicity or exact imitation is not necessary to the infringement of a trade-mark, nor is dissimilarity in size, form, and color of the label and place where it is applied conclusive, it being sufficient that the competing label contains the trade-mark of another, and that confusion or deception is likely to result, independent of the fact that the accessories are dissimilar. Infringement of a trade-mark may exist, though the method and accompaniments of its use negative the idea of imitation. *Eagle White Lead Co. v. Pflugh*, 180 Fed. 579, 583.

What is an "infringement" has thus been defined in an English text-book (Kerly, *Trade-Marks*, p. 305), which definition is copied in section 71, *Hopkins, Unfair Trade*: "'Infringement' is the use by the defendant for trading purposes in connection with goods of the kind for which plaintiff's right to exclusive use exists, not being the goods of the plaintiff of a mark identical with the plaintiff's mark, or either comprising some of its essential features or colorably resembling it so as to be calculated to cause the goods to be taken by ordinary purchasers in any market where the marks circulate for the goods of the plaintiff." The imitation of any part of a trade-mark would be technical infringement, and the imitation need not be exact or perfect. The infringement may be as to color, size, and form of the objects or packages, the color and appearance of the labels, or the words or part of the words designating the article to be sold. Any use of a key or catch word in a trade-mark in a way calculated to deceive is an "infringement." *Western Grocer Co. v. Caffarelli Bros. (Tex.)*, 108 S. W. 413, 414 (citing *Filley v. Fassett*, 44 Mo. 173, 100 Am. Dec. 275; *George v. Smith*, 52 Fed. 830; *Air-Brush Mfg. Co. v. Thayer*, 84 Fed. 640; *Colman v. Crump*, 70 N. Y. 573).

## INFRINGER

An improver on a patented device, although his improvement may be patentable of itself, is an "infringer," if he uses the specific device of the prior patent. *Underwood Type writer Co. v. Typewriter Inspection Co.*, 177 Fed. 230, 238.

## INHABITANCY—INHABITANT

See Permanent Inhabitant.

All inhabitants, see Inhabitant.

An "inhabitant" is a dweller in a place; a resident; one who dwells or resides permanently in a place; one who has a fixed and permanent abode in a place. "Residence" means a place of abode, and, within the meaning of the Alaska divorce law, it is the place where one resides—his home. *Terrill v. Terrill*, 2 Alaska, 475, 477.

In general terms one may be designated as an "inhabitant" of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. *Phillips v. City of Boston*, 67 N. E. 250, 251, 183 Mass. 314 (quoting and adopting definition in *Lyman v. Fiske*, 17 Pick. [34 Mass.] 231, 234, 28 Am. Dec. 293).

A teamster permanently employed in the quartermaster's department of the army, coming to the state, and stationed at a military post in Georgia where he was subject to the orders of the department, is not an "inhabitant" of the state in the sense in which that term is used in the statutes of Georgia in reference to road duty. *Pundt v. Pindleton*, 167 Fed. 997, 1003.

The word "inhabitants," as used in Code 1906, § 2305, authorizing the supervisors of any county to protect the game and fish in their respective counties for the use and consumption of the inhabitants, means the inhabitants of the particular county, as distinguished from the other inhabitants of the state, so as to authorize such boards to prohibit nonresidents of a county from fishing and hunting therein. *State v. Hill*, 53 South. 411, 412, 98 Miss. 142, 31 L. R. A. (N. S.) 490.

### As citizen

The word "inhabitants" in its political sense means "citizens." In *re Silkman*, 84 N. Y. Supp. 1025, 1034, 1038, 88 App. Div. 102.

The words "inhabitant," "citizen," and "resident" mean substantially the same thing, and one is an "inhabitant," "resident," or "citizen" of the place where he has his domicile or home. A man's residence is his home or habitation; where that residence is fixed, and at a particular place, and he does not entertain a present intention of removing therefrom. To constitute a domicile but two elements are necessary—the act and the intention. *Stevens v. Larwill*, 84 S.

W. 113, 118, 110 Mo. App. 140 (citing *State ex rel. Lowe v. Banta*, 71 Mo. App. 32; *Greene v. Beckwith*, 38 Mo. 384; *Johnson v. Smith*, 43 Mo. 499; *Tiller v. Abernathy*, 37 Mo. 196).

The word "inhabitant" is equivalent to the word "citizen," as used in U. S. Comp. St. 1901, p. 587, § 740, providing that when a state contains more than one district every suit not of a local nature in the circuit or district courts thereof against a single defendant, inhabitant of such state, must be brought in the district where he resides, and is used to avoid the incongruity of speaking of citizens of anything less than a state, when the word inhabitant applies to a citizen of any district in a state which was divided into more than one district. *Firestone Tire & R. Co. v. Vehicle Equipment Co.*, 155 Fed. 676, 678 (citing *Galveston, H. & S. A. R. Co. v. Gonzales*, 14 Sup. Ct. 401, 151 U. S. 496, 38 L. Ed. 248).

### Corporation

A corporation may be an "inhabitant," a "resident," or a "person," according to the sense in which the particular term is used in a statute. *People ex rel. Fleischmann Mfg. Co. v. Marenus*, 118 N. Y. Supp. 838, 839, 134 App. Div. 170.

A corporation is regarded for the purposes of taxation as an "inhabitant" of the district where its principal office is situated. *People ex rel. Fleischmann Mfg. Co. v. Marenus*, 116 N. Y. Supp. 189, 192, 62 Misc. Rep. 317.

A railroad company having large property interests in a city subject to taxation therein is an "inhabitant" within Laws 1870, p. 1161, c. 519, empowering the city of Buffalo to construct and maintain waterworks to supply the city and its inhabitants with water. *Delaware L. & W. R. Co. v. City of Buffalo*, 115 N. Y. Supp. 657, 659.

### Domicile or legal residence

The word "inhabitant" is ordinarily used to indicate a person with a fixed domicile or legal residence, and an "inhabitant" therefore is one who has an established residence at a given place. *Bechtel v. Bechtel*, 112 N. W. 883, 884, 101 Minn. 511, 12 L. R. A. (N. S.) 1100.

Though the word "inhabitant" in its general acceptance is synonymous with "domicile" or "legal residence" and in the construction of statutes words are to be given their ordinary meaning, jurisdiction in guardianship cases cannot be made to depend on a strict construction of the word in Code 1897, § 3219, providing that, on proper petition to the court, a guardian may be appointed for "any inhabitant" of the county who may be found insane. It was meant thereby to provide a means whereby the property of persons of unsound mind, living or being at the time within this state, might

be preserved and cared for. *Brown v. Lambe*, 93 N. W. 486, 488, 119 Iowa, 404.

**As elector or voter**

As used in Rev. St. 1899, § 3027, providing that on application by petition signed by one-tenth of the qualified voters of any county who shall reside outside the corporate limits of any city or town, having at the time a population of 2,500 inhabitants or more, who are qualified to vote for members of the Legislature in any county in the state, the county court shall order an election to determine whether intoxicating liquors shall be sold within the county outside the corporate limits of such city or town, the word "inhabitants" is not synonymous with "voters," and hence it does not require that cities in order to be excluded shall have 2,500 qualified voters within its limits, but 2,500 general residents are sufficient. *State ex rel. Holladay v. Rinke*, 121 S. W. 159, 163, 140 Mo. App. 645.

**As people**

See *People*.

**As person**

See *Person*.

**As residence or resident**

An "inhabitant" and "resident" mean the same thing. *Pearson v. West*, 77 S. W. 944, 945, 97 Tex. 238.

"Inhabitancy" and "residence" are synonymous terms; an "inhabitant" of a place being one who ordinarily is personally present there, not merely in itinere, but as a resident and dweller therein. *Harding v. Standard Oil Co.*, 182 Fed. 421, 425.

An "inhabitant" of a place is one who ordinarily is personally present there; not merely in itinere, but as a resident and dweller therein. *Willingham v. Swift & Co.*, 165 Fed. 223, 224 (citing *Bicycle Stepladder Co. v. Gordon*, 57 Fed. 529).

The word "resident," as used in Code Civ. Proc. § 2476, relating to the jurisdiction of the surrogate courts, is construed as equivalent to "inhabitant." It is co-ordinate with and intended to have the same meaning that ordinarily attached to the word "inhabitant." In *re Walker's Will*, 105 N. Y. Supp. 890, 892, 54 Misc. Rep. 177.

The word "resident," as used in Code Civ. Proc. § 1763, relating to the jurisdiction of divorce suits, is synonymous with "inhabitant"; residence being synonymous with inhabitancy or domicile. *Ensign v. Ensign*, 105 N. Y. Supp. 917, 921, 54 Misc. Rep. 289.

The words "inhabitant" and "resident" mean substantially the same thing, and one is an inhabitant or resident of the place where he has his domicile or home. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140.

In the law of process and attachment, "residence" and "habitation" are generally

regarded as synonymous. A "resident" and an "inhabitant" mean the same thing. A person resident is defined to be "one dwelling or having his abode in any place"; an inhabitant, "one that resides in a place." *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 259, 54 W. Va. 32 (citing *Drake, Attachm.*).

Under *Burns' Ann. St.* 1901, § 240, providing that the word "inhabitant" may be construed to mean a resident in any place, an "inhabitant" of a township, town, or city within section 8421, providing that personal property shall be assessed to the owner in the township, town, or city of which he is an inhabitant, is one whose place of abode is there, and who has no present intention of moving therefrom. *Schmoll v. Schenck*, 82 N. E. 805, 807, 40 Ind. App. 581.

As used in a statute providing that the time during which a defendant in a criminal case is "not an inhabitant of or usually resident within" the state is not to be counted in his favor, the words "inhabitant of" and "usually resident within" are synonymous. In determining the construction of these words, the court said: "We are cited to various decisions upon statutes affecting taxation and the administration of estates, in which the words 'inhabitants' and 'residents' are differentiated from 'domicile' and from each other, but none of these cases present the two words in such context as they appear in the section under construction. It may be that 'inhabitant' is often a more comprehensive term than 'resident,' but, taken together as they appear in the clause under consideration, with the modifier 'usually' before the word 'resident,' it seems to us that the term 'usually resident,' following the word 'inhabitant' in such close, immediate connection, was intended to illustrate the meaning of 'inhabitant,' and that, whatever different shades of distinction may be drawn when the words are used independently of each other in other statutes here they are synonymous. When to the noun 'resident' the adjective 'usual' is prefixed, in the sense of 'customary' or 'common,' the term becomes more clearly the synonym of 'inhabitant' as that word is defined by the courts." *State v. Snyder*, 82 S. W. 12, 22-24, 182 Mo. 462.

Under *Burns' Ann. St.* 1908, § 3136, which provides that wills may be proven in any county where the testator was an inhabitant, and section 240, which provides that the word "inhabitant" may be construed to mean a resident in any place, a complaint upon objection to the probate of a will alleging that decedent was a "resident" of the county is good against demurrer. *Ahearn v. Burk* (Ind.) 99 N. E. 1004, 1005.

In the Judiciary Act as amended and corrected, providing that the Circuit Courts of the United States shall have original cog-

nizance of suits in which there shall be a controversy between citizens of different states, but, where jurisdiction is founded only on diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant, and declaring (section 2) that any other suit of which the Circuit Courts of the United States are given jurisdiction by the preceding section may be removed to the Circuit Court for the proper district by the defendant or defendants therein, being nonresidents of that state, the words "residence" and "inhabitant" are used synonymously, and hence, where railroads incorporated in other states operated a part of their line in Iowa and were served there, they had a "residence" in Iowa, so that, other jurisdictional requisites being present, nonresidents having been injured in Iowa on such railroads could have sued originally in the federal courts sitting in that state, and therefore suits brought by them in the state courts were subject to removal. *Bogue v. Chicago, B. & Q. R. Co.*, 193 Fed. 728, 733.

#### INHABITANTS OF DISTRICT

A deed recited a consideration paid by the treasurer of school district No. 2, pursuant to which the grantor had granted, etc., unto the "inhabitants of said district No. 2," their heirs, successors, and assigns, forever, habendum to the inhabitants of such school district for school purposes so long as it should be used as such and no longer, to them, their heirs and assigns, etc. Held, that the word "inhabitants" meant the school district in its corporate capacity, and hence, on the district being abolished and the property vesting in the town by Pub. Laws 1903, c. 1101, the property passed to the town, and did not revert to the grantor's heirs. *Town of East Greenwich v. Gimmons*, 84 Atl. 1008, 1009, 34 R. I. 526.

#### INHABITED DWELLING HOUSE

Under Rev. St. § 6835, declaring it burglary for any person to forcibly break and enter any inhabited dwelling house at night with intent to commit a felony, a dwelling house which is not actually occupied by any human being is not an inhabited dwelling. *Mason v. State*, 27 Ohio Cir. Ct. R. 526, 527.

A dwelling house is inhabited, within the meaning of Rev. St. 1905, § 6835, prescribing imprisonment for life for burglariously entering an inhabited dwelling, where the family had gone for a vacation, leaving servants in charge, though when it was entered the servants may have been temporarily absent. *State v. Mason*, 77 N. E. 283, 285, 74 Ohio St 65.

A jail is an "inhabited dwelling house" within the statute of New York. *Commonwealth v. Posey*, 4 Call (8 Va.) 109, 110, 2 Am. Dec. 560.

#### INHABITED TERRITORY

"Uninhabited territory is to be found in probably every settled community in the state, and, we cannot conceive of any case of original incorporation or annexation to an existing municipality of inhabited territory that would not almost necessarily include some parcels of land not actually inhabited." The act of 1899 (St. 1899, p. 37, c. 41), providing for the annexation of uninhabited territory, and expressly stating that it shall not be construed to repeal any part of any act relating to the annexation of inhabited territory, was never designed to in any way affect any of the provisions of Act 1889 (St. 1889, p. 358, c. 247), providing that territory may be annexed to any incorporated town by the filing of a petition describing the territory desired to be annexed and a favorable vote by the inhabitants of the town and the territory to be annexed, so far as territory taken as a whole may fairly be said to be "inhabited territory." If the territory proposed to be annexed, regarded as a whole, may fairly be said to be inhabited, the proceedings must be had under the act of 1889, regardless of the number of parcels of land included therein that are uninhabited. *People v. Town of Ontario*, 84 Pac. 205-211, 148 Cal. 625.

#### INHALE—INHALATION

Under an accident policy relieving insurer from liability for injury caused by "voluntary or involuntary inhalation of gas," there can be no recovery where insured died from the effects of gas inhaled by him while in a hotel, whether the accident occurred because of his mistake or the neglect of some other person. *Porter v. Preferred Accident Ins. Co.*, 95 N. Y. Supp. 682, 683, 109 App. Div. 103.

A provision in an accident policy that the insurer should not be liable for death resulting from "inhaling of gas" refers to the intentional inhaling of gas and not to accidental asphyxiation. *Travelers' Ins. Co. v. Ayers*, 75 N. E. 506, 507, 217 Ill. 390, 2 L. R. A. (N. S.) 168.

#### INHERE

Where the question is whether an error inheres in the verdict, "Inheres" means "lost in," or "covered by," the verdict. *State v. Lorenzy*, 109 Pac. 1064, 1066, 59 Wash. 308, Ann. Cas. 1912B, 153.

#### INHERENT

The word "inherent" may mean permanently or inseparably existing in a subject but not pertaining to a subject. *Stand. Dict.*; *Worcester Dict.* In the former sense we use the word in speaking of the inherent powers of courts—powers which the Legislature did

not give and cannot take away at least without destroying the very existence of the court affected. The word "inherent," as used in the sentence, "There is no inherent right in a citizen to sell intoxicating liquors by retail,"

as used by the court in the case of *Meehan v. Board of Excise Com'rs of Jersey City*, 64 Atl. 689, 73 N. J. Law, 382, is ambiguous. In the opinion of Green, J., writing or concurring opinion, the court should have used the word "restrainable" rather than "inherent." *Meehan v. Board of Excise Com'rs of Jersey City*, 70 Atl. 363, 365, 75 N. J. Law, 557.

The word "inherent," as applied to the inherent right of the court to direct and control the conduct of attorneys or its officers, does not mean a power essential to the existence of the court and the proper exercise of those functions, but is limited to the power of the court to regulate and deal with such matters in the absence of legislation on the subject, and the right to establish the qualifications of the office of attorney rests in the police power by force of which a state is authorized to enact laws to preserve the public safety, maintain the public peace, and promote and preserve the public health and morals. In re Applicants for License, 55 S. E. 635, 637, 143 N. C. 1, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187.

#### INHERENT JURISDICTION

By the term "inherent jurisdiction" of the chancery court is meant that jurisdiction and procedure of the High Court of Chancery of England which was adopted in this state as the jurisdiction of the chancery court before the cession act. *J. W. Kelly & Co. v. Conner*, 123 S. W. 622, 627, 122 Tenn. 339, 25 L. R. A. (N. S.) 201.

#### INHERENT POWER

The "inherent powers" of a court are such as result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice. *Fuller v. State*, 57 South. 806, 807, 100 Miss. 811, 39 L. R. A. (N. S.) 242 (citing 4 Words and Phrases, p. 3605).

#### INHERENT RIGHT

See, also, Natural Right.

Inherent rights are those privileges enjoyed by the people before the adoption of the Constitution, only surrenderable by the people, or subject to limitation by fundamental law. The right in the beginning here to participate in governmental affairs by reasonable exercise of the elective franchise was "inherent" within the meaning of the fundamental declaration in the Bill of Rights. *State ex rel. McGrath v. Phelps*, 128 N. W. 1041, 1045, 144 Wis. 1, 35 L. R. A. (N. S.) 353.

#### INHERENT VICE

In an action against a carrier for injury to animals shipped, the court's definition of "inherent vice" as meaning a fault was not possessed by the ordinary of its kind was too restrictive. The carrier, in the absence of negligence, is not liable for injuries arising from or attributable to the inherent natural propensities and habits of the animals themselves, notwithstanding the fact that the ordinary of its kind may have the same inherent natural propensity or habit. *Texas Cent. R. Co. v. G. W. Hunter & Co.*, 104 S. W. 1075, 1076, 47 Tex. Civ. App. 190.

#### INHERIT

See Person Who Would Inherit as Heir.

The word "inherit" is used in law "in contradistinction to acquiring by will, but, in popular use, this distinction is often disregarded; \* \* \* to receive by transmission in any way; have imparted to or conferred upon; acquire from any source." In re *Whites Estate*, 84 Pac. 831, 832, 42 Wash. 360 (quoting Cent. Dict.).

The word "inherit," as used in article 5 of the treaty between the United States and the Swiss Confederation of November 8, 1855, providing that citizens of each and their heirs having personal property in the jurisdiction of the other shall have absolute power of disposition, and that such provision shall be applicable to the states or cantons of the other which permit foreigners to hold or inherit real estate, but in case any state or canton does not permit foreigners to hold there shall be accorded such terms as the state or canton permitted to sell such property with power to withdraw the proceeds, is not the same as the word "hold" as used in such treaty, and within the meaning of the last provision of the treaty. *Burns' Ann. St. 1908, § 3941*, providing that aliens may "take and hold" land by devise and descent only and may convey the same at any time within five years, did not permit aliens to hold real property, but merely recognized its terms by giving five years in which to dispose of it. *Lehman v. State*, 88 N. E. 365, 367, 45 Ind. App. 330.

The term "inherited," as used in Act Cong. April 26, 1906, c. 1876, § 22, providing that the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made or to whom a deed or patent has been issued for his share of the lands of the tribe to which he belongs or belonged may sell the lands inherited from such deceased Indian, is synonymous with the word "descend" as used in the Original Agreement with the Creek Nation, approved by Act Cong. March 1, 1901, c. 676, and the Supplemental Agreement approved by Act Cong. June 30, 1902, c. 1323, and covers those cases where heirs take by purchase, as well

as by inheritance strictly speaking. *Shulthis v. MacDougal*, 162 Fed. 331, 344.

"Inherited lands," as applied to the Creek Nation, within Act Cong. April 26, 1906, c. 1876, § 22, 34 Stat. 145, providing that the adult heirs of a deceased Indian of either of the Five Civilized Tribes whose selection has been made or to whom a deed or patent has been issued for his share of the lands of the tribe to which he belongs or belonged may sell the lands inherited from such deceased Indian, applies to all allotments selected by or for deceased members of the tribe in the hands of their heirs, whether such deceased members died before or after such allotments were made. *Shulthis v. MacDougal*, 162 Fed. 331, 344.

### INHERIT AS HEIRS

Testator devised certain property to defendant for life, and, on his death, to his child or children and their heirs, and, in case of defendant's death without leaving a child or children or descendants, to such person or persons as would under the laws of the state of Maryland inherit the same as the heirs of defendant had he died intestate seised of the fee. Held, that the phrase "such persons as would inherit as heirs" had the same effect as if the limitation over had been to defendant's heirs, and hence defendant acquired the fee under the rule in *Shelley's Case*. *Cook v. Councilman*, 72 Atl. 404-406, 109 Md. 622.

### INHERITANCE

See Estate of Inheritance.

"Inheritance" is defined to be a perpetuity in lands to a man and his heirs, and the property which is inherited is called the "inheritance"; but an estate for life created by deed is not an estate of inheritance. *Cummings v. Cummings*, 75 Atl. 210, 211, 76 N. J. Eq. 568.

"The word 'inheritance' is generally used to denote an estate which may descend to a man and his heirs, and includes all freehold estates, but not estates for life. It also includes the right to succeed to the estate of a person dying intestate." *Farney v. Weirich*, 103 N. Y. Supp. 38, 44, 52 Misc. Rep. 245.

#### As applicable to personalty

At common law, when one spoke of "inheritance" or inheriting, he referred to real property, title to which on the death of the ancestor vested in the heirs, and it means real property now exclusively when it is used in its legal technical meaning. Title to personal property of the ancestor did not vest in the heirs, but went to the personal representative of the decedent, viz., his administrator, and was by him administered, and distributive shares were by him apportioned among the heirs of the decedent. *Berry v. Powell*, 105 S. W. 345, 347, 47 Tex. Civ. App. 599.

A complaint in an action to foreclose a mortgage securing a bond which alleged the execution of the bond and mortgage; that the mortgagee died leaving a third person his only heir at law and next of kin, who became the owner of the mortgage by "inheritance"; that the third person died leaving a will by which he bequeathed the mortgage to his executrix, who assigned the same to plaintiff—sufficiently alleged that the third person acquired title to the bond and mortgage, and that plaintiff was the owner of the same, though the word "inheritance" more properly applies to a succession to the title to real estate by the death of the former owner. *Ward v. Branson*, 110 N. Y. Supp. 335, 336, 126 App. Div. 508.

#### As natural right

See Natural Right.

#### As privilege

See Privilege.

### INHERITANCE TAX

See Collateral Inheritance Tax; Lineal Inheritance Tax.

See, also, Succession Tax; Transfer.

While an "inheritance tax," or death duty has been recognized as a method of governmental support from very early times, it was practically unknown in England at the time of the Revolution, but has since that time been in use there, and more recently has been adopted in many of the states. *Curry v. Spencer*, 61 N. H. 624, 632, 60 Am. Rep. 337; *Magoun v. Illinois Trust & Savings Bank*, 18 Sup. Ct. 594, 170 U. S. 283, 287, 288, 42 L. Ed. 1037. The number of these statutes and the judicial ingenuity that has been displayed in supporting them attest the favorable opinion with which the political wisdom of this method of distributing the governmental burden is now regarded; but the decisions themselves, involving, as they do, consideration of the provisions of particular constitutions, are not of value in the present discussion, except as they may throw light upon the nature of the tax sought to be imposed, and the situation in view of which the convention and the people acted in 1903. All the decisions agree, as was held in effect in *Curry v. Spencer*, that an inheritance tax is not a proportional distribution of public expense upon the property of the taxing district. "Taxes of this general character are universally deemed to relate, not to property eo nomine, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property real or personal, as such because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on passing of property disassociated



from its transmission or receipt by will, or as the result of intestacy. \* \* \* Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." *Knowlton v. Moore*, 20 Sup. Ct. 747, 178 U. S. 41, 47, 56, 44 L. Ed. 969. Whether governmental taking of the property of the individual in this way is properly described as an excise, commodity, succession, or privilege tax is not material. No language of the Constitution authorizes taxation by such terms, and it would avail nothing to establish the definitive accuracy of either. The Constitution in terms authorizes what the statute attempts to effect. Under such circumstances, the discussion of questions of terminology is unnecessary and may be misleading. *Knowlton v. Moore*, 20 Sup. Ct. 747, 178 U. S. 41, 57, 44 L. Ed. 969. Such a proceeding is merely a taking for governmental purposes of a portion of the estate at the death of the owner. If the right of property previously enjoyed embraced the right to dispose of it after, or in view of, death, the authorization of such taking is a limitation upon that right. *Crocker v. Shaw*, 54 N. E. 549, 174 Mass. 266, 267; *Emmons v. Shaw*, 50 N. E. 1033, 171 Mass. 410, 413; *Minot v. Winthrop*, 38 N. E. 512, 162 Mass. 113, 124, 26 L. R. A. 259; *United States v. Perkins*, 16 Sup. Ct. 1073, 163 U. S. 625, 41 L. Ed. 287; *Thompson v. Kidder*, 65 Atl. 392, 394, 74 N. H. 89, 12 Ann. Cas. 948.

The "inheritance tax" is variously termed "succession tax," "legacy tax," and "probate duties"; but, whatever it may be termed, it is not a tax upon property but upon the right of succession thereto. *State ex rel. Foot v. Bazille*, 106 N. W. 93, 96, 97 Minn. 11, 6 L. R. A. (N. S.) 732, 7 Ann. Cas. 1056.

The tax variously called an "inheritance tax," a "legacy tax," a "transfer tax," and a "succession tax," is a "burden imposed by government on all gifts, legacies, and successions whether of real or personal property or both or any interest therein, passing to certain persons (other than those specially excepted) by will, by intestate law, or by deed or assignment made inter vivos, intended to take effect at or after the death of the grantor." In *re Morris' Estate*, 50 S. E. 682, 138 N. C. 259 (quoting and adopting definition in *Dos Passos* [2d Ed.] § 2).

An "inheritance tax" is an impost or excise on the right to pass the estate and the privilege of the devisee to take. In *re Stixrud's Estate*, 109 Pac. 343, 347, 58 Wash. 339, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912A, 850.

An inheritance tax is not on the property itself but on the right to succeed to the prop-

erty. *People v. Griffith*, 92 N. E. 313, 315, 245 Ill. 532.

An "inheritance tax" is not a tax upon property, but a "special or excise tax," within Const. § 181, authorizing a special or excise tax. *Booth's Ex'r v. Commonwealth ex rel. Jefferson County Attorney*, 113 S. W. 61, 63, 65, 130 Ky. 98, 33 L. R. A. (N. S.) 592; *Allen's Ex'rs v. McElroy*, 113 S. W. 66, 130 Ky. 111.

An "inheritance tax" is not a tax on property as such, but one on the right of succession, a tax on one for the privilege of succeeding to property. In *re Kennedy's Estate*, 108 Pac. 280, 283, 157 Cal. 517, 29 L. R. A. (N. S.) 428.

An "inheritance tax" is a tax on the right of succession, and not a tax on the property itself; the right thereto vesting in the state on the death of the prior owner. *National Safe Deposit Co. v. Stead*, 95 N. E. 973, 978, 250 Ill. 584, Ann. Cas. 1912B, 430.

"An 'inheritance tax' is not a tax upon property itself, but upon its transmission by will or descent." An "inheritance tax" is not one on property, but one on the succession. *Cahen v. Brewster*, 27 Sup. Ct. 174, 176, 203 U. S. 543-550, 51 L. Ed. 310, 8 Ann. Cas. 215 (quoting *Magoun v. Illinois Trust & Sav. Bank*, 18 Sup. Ct. 594, 170 U. S. 283, 42 L. Ed. 1037; *United States v. Perkins*, 16 Sup. Ct. 1073, 163 U. S. 625, 41 L. Ed. 287).

The "inheritance tax" levied by Laws 1903, p. 65, c. 44, is not a tax on property or property rights in any sense, but is purely an excise tax levied upon the transfer or transaction, and merely measured in amount by the amount of the property transferred. *Beals v. State*, 121 N. W. 347, 349, 139 Wis. 544.

An "inheritance tax" is an "impost, duty, or excise tax upon the privilege secured by law to devisees, legatees, grantees, heirs, and personal representatives of taking, holding, and enjoying all property, real and personal, or any interest therein, passing by will, by intestate law, or by any grant or gift made inter vivos and intended to take effect at or after the death of the grantor." It is not a tax upon property itself, but is a duty imposed upon the privilege of acquiring property by inheritance. In *re Touhy's Estate*, 90 Pac. 170, 171, 35 Mont. 431.

An "inheritance tax" is a charge on succession by inheritance or transfer by will. *McDougald v. Low*, 127 Pac. 1027, 1028, 164 Cal. 107.

The "inheritance tax" provided for by *Sanborn's St. Supp.* 1906, § 1087-1, is a tax on the right of succession, and not on property. In *re Bullen's Estate*, 128 N. W. 109, 111, 143 Wis. 512, 139 Am. St. Rep. 1114.

An "inheritance tax law" is a statute "imposing a tax on those acquiring property by inheritance or will, sometimes only taking

collateral relations and strangers, in such case commonly called collateral inheritance tax law." In re White's Estate, 84 Pac. 831, 832, 42 Wash. 360 (quoting Cent. Dict.)

An "inheritance tax" is a special, not a general, tax. *People v. Koenig*, 85 Pac. 1129, 1130, 37 Colo. 283, 11 Ann. Cas. 140.

Acts 1909, c. 479, § 20, imposing a tax on inheritances not taxed under Acts 1893, c. 174, imposing inheritance taxes, but excluding from the operation of the act property passing to father, mother, husband, wife, children and lineal descendants, imposes a tax on the passing of property to a child under the will of a parent, and is not limited to a tax on property passing by operation of law; the word "inheritance" meaning the succession to all the rights of a decedent, whether by will or by operation of law. *Knox v. Emerson*, 131 S. W. 972, 973, 123 Tenn. 409.

The word "inheritance," as used in Acts 1906, p. 173, § 1, Act No. 109, relating to inheritance taxes, should be given the same meaning and scope as its use in section 2. *Succession of Westfeldt*, 48 South. 281, 285, 122 La. 836.

## INHUMAN TREATMENT

See, also, Cruelty.

Conduct and acts by a husband toward his wife which produce reasonable apprehension of personal violence, cause mental distress and sorrow, and make cohabitation miserable, impairing, or likely to impair, the wife's health, coupled with a declaration to give away his property to a third person and leave the wife without support, is "inhuman treatment" under a statute authorizing a divorce on the ground of cruel and inhuman treatment. *Goff v. Goff*, 53 S. E. 769, 772, 60 W. Va. 9, 9 Ann. Cas. 1088.

## INIMICAL TO THE PUBLIC WELFARE

By the express declaration of Laws 1900, p. 126, c. 88, § 3, all the contracts condemned by the statute are rendered "inimical to the public welfare," and no discretion is left to the courts to determine the nature and effect of the contracts so denounced. *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 43 South. 435, 437, 90 Miss. 551 (citing *Yazoo & M. V. R. Co. v. Searles*, 37 South. 942, 85 Miss. 528, 68 L. R. A. 715).

## INITIAL

As signature, see Sign—Signature.

"Initials" are no legal part of a name." *Monroe Cattle Co. v. Becker*, 13 Sup. Ct. 217, 221, 147 U. S. 47, 37 L. Ed. 72.

## INITIAL AND MOVING CAUSE

The "initial and moving cause" is to be understood as meaning the surrounding conditions in which the negligence of defendant

operated as the efficient cause of the injurious consequences. *Winchel v. Goodyear*, 105 N. W. 824, 827, 126 Wis. 271.

## INITIAL CAUSE

"First cause," "initial cause," "efficient cause," and "proximate cause" all mean the same thing in the law of negligence. They mean the cause acting first and immediately producing the injury, or setting other causes in motion, all constituting a natural and continuous chain of events each having a close causal connection with its immediate predecessor; the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, and the person responsible for the first event having reasonable ground to expect at the moment of his act or default that a personal injury to some person might probably result therefrom. There may be pre-existing conditions or events without which the final injury could not have happened, such as the momentary shying of a horse on a defective highway, the inadvertent and non-negligent misstep of a traveler into a dangerous excavation close to the sidewalk, or the nonnegligent misstep or slip upon the floor or passage; but none of these is to be deemed a cause of the final injury any more than the mere presence of the injured person on the scene of the accident. They are not links, either initial or otherwise, in the legal chain of responsible causation, and should not be referred to as such, even though in ordinary nonlegal parlance they might broadly be termed causes. They are mere circumstances or conditions either existing, or to be expected in the natural order of things to occur at any time; and they do not enter into the chain of responsible causation. *Winchel v. Goodyear*, 105 N. W. 824, 827, 126 Wis. 271.

## INITIATE

See *Curtésy Initiate*.

To "initiate" means to commence. *Kelly Co. v. St. Paul Fire & Marine Ins. Co.*, 47 South. 742, 750, 56 Fla. 456, 16 Ann. Cas. 654 (quoting and adopting *Schroeder v. Imperial Ins. Co.*, 63 Pac. 1074, 132 Cal. 18, 84 Am. St. Rep. 17).

## INITIATION

A master, though a corporation, authorizes an assault on a new employé by old employés, and so is liable for the injury, where it is in the course of an "initiation" of the new employé against his resistance by the old employés, by laying him across a barrel and applying a paddle, in accordance with a custom which had long existed in the establishment with the knowledge and acquiescence of the master. *Medlin Milling Co. v. Boutwell* (Tex.) 122 S. W. 442, 443.

## INJUNCTION

See Continuing Injunction; Interlocutory Injunction; Mandatory Injunction; Order Granting or Continuing Injunction; Preliminary Injunction; Preventive Injunction; Special Injunction; Temporary Injunction.

Granting the injunction, see Grant.

Violation of, as civil contempt, see Civil Contempt.

Under Rev. Codes, § 4287, an injunction is a writ or order requiring a person to refrain from doing a particular act. *Roberts v. Kartzke*, 111 Pac. 1, 2, 18 Idaho, 552.

Under Rev. Codes, § 4287, an injunction is a writ requiring a person to refrain from a particular act, and is a writ to restrain such an act, and not a writ commanding a person to do a certain act. *Brinton v. Steele*, 112 Pac. 319, 320, 19 Idaho, 71.

The equitable remedy of "injunction" by judgment, as distinguished from an "injunction" by order pendente lite, depends upon the incompleteness and inadequacy of the legal remedy. If issued to restrain the breach of a contract, it is a "negative specific enforcement of that contract," and jurisdiction does not attach "unless the contract is one of a class which will be affirmatively, specifically enforced." An injunction will not lie to prevent the formation of a corporation except under the terms of a written agreement, where there are no negative covenants in the agreement to enforce; and where an "injunction" is prayed in aid of a specific performance of a contract to form a corporation which may not be had, there are no grounds for an "injunction." *Perrin v. Smith*, 119 N. Y. Supp. 990, 993, 135 App. Div. 127 (quoting and adopting definition in *Fox v. Fitzpatrick*, 82 N. E. 1103, 190 N. Y. 259).

A writ of "injunction" may be described to be a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. The most common form of injunction is that which operates as a restraint upon the party in the exercise of the real or supposed rights, and is sometimes called the remedial writ of injunction. The other form, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same. It is also said that an "injunction" is a writ issuing by the order and under the seal of a court of equity, and is of two kinds. The one is the writ remedial; for, in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction. The other species

of injunction is called the judicial writ, and issues subsequent to a decree, and is properly described as being in the nature of an execution. *Tebo v. Hazel* (Del.) 74 Atl. 841, 846 (citing 2 Story, Eq. Jur. § 861; *Eden, Inj.*).

Under B. & C. Comp. § 417, defining an injunction as an order requiring a defendant to refrain from a particular act, an interlocutory injunction operates in personam, and does not determine the merits of the case or the rights of the parties, and does not change the possession of real or personal property, the title to which is in dispute, but it merely seeks to preserve the status quo pending the trial. *Gobbi v. Dileo*, 111 Pac. 49, 51, 58 Or. 14, 34 L. R. A. (N. S.) 951.

In an order to show cause why relator, a third director of a corporation, should not be permitted to examine the corporate books, a clause staying the defendants, the other directors, from removing relator from his position as director pending the proceeding, is not an injunction within General Corporation Law (Consol. Laws, c. 23) § 305, refusing an order to show cause without notice granted, nor does it suspend the ordinary business of the corporation, but such clause not being necessary for relator's protection it is stricken from the order. *People ex rel. Stauffer v. Bonwit Bros.*, 125 N. Y. Supp. 958, 959, 69 Misc. Rep. 70.

### Mandamus distinguished

"An 'injunction' is essentially a preventive remedy; 'mandamus' a remedial one. The former is usually employed to prevent future injury; the latter to redress past grievances. The functions of an injunction are to restrain motion and to enforce inaction; those of a mandamus to set in motion and to compel action. In this sense an injunction may be regarded as a conservative remedy; mandamus as an active one. The former preserves matters in statu quo, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is therefore a positive or remedial process; the other a negative or preventive one. And since mandamus is in no sense a preventive remedy, it cannot take the place of an injunction, and will not be employed to restrain or prevent an improper interference with the rights of relators. \* \* \* 'Mandamus' and 'injunction' should not be confounded. The latter is used to prevent action, to maintain affairs in statu quo. The former is compulsory, commanding something to be done. An injunction is preventive and protective merely, and not restorative. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be corrective so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong.

\* \* \* Mandamus is, however, compulsory, and requires doing the act." *Callaghan v. McGown* (Tex.) 90 S. W. 319, 324 (quoting and adopting definition in High, Extr. Leg. Rem. [3d Ed.] § 6).

#### **As preventive remedy**

The appropriate function of a writ of "injunction" is to afford preventive relief only, and it is only to be used for the prevention of future injury actually threatened. *Atterbury v. West*, 122 S. W. 1106, 1107, 139 Mo. App. 180 (citing *Verdin v. City of St. Louis*, 33 S. W. 502, 131 Mo. loc. cit. 117).

Rev. St. § 4287, defines an "injunction" as being a writ or order requiring a person to refrain from a particular act. The writ of injunction has not the power to restrain an act already done. *Wilson v. Boise City*, 60 Pac. 84, 85, 7 Idaho, 69.

An injunction is a preventive writ which restrains motion and enforces inaction, while mandamus is a remedial writ which compels action and coerces the performance of a proper existing duty, and hence a writ whereby persons were restrained from intruding themselves on the county committee of the Democratic party, and members of the committee were restrained from attempting to include the intruders as members, is an injunction. *Ware v. Welch* (Tex.) 149 S. W. 263, 264.

"Originally injunctions were preventive only, and it is only within recent years that a mandatory injunction has sprung into existence. Preventive injunctions necessarily operate upon an unperformed and unexecuted act, and prevent a threatened, but non-existent, injury. A concrete case is presented whenever a right of the plaintiff is threatened by the defendant and the damage would be irreparable, and where protection of that right belongs to the class of cases that are cognizable in equity." *Schubach v. McDonald*, 78 S. W. 1020, 1024, 1027, 179 Mo. 163, 65 L. R. A. 136, 101 Am. St. Rep. 452.

#### **Prohibition distinguished**

While prohibition is similar to the remedy by injunction against proceedings at law, the object in each case being restraint of legal proceedings, an "injunction" is directed only to the parties litigant, and prohibition is directed to the court itself, commanding cessation of exercise of jurisdiction to which it has no legal claim. The right to prohibition implies that a wrong is about to be committed, not by the parties litigant, but by the person or court assuming to exercise judicial power, and against whom the writ is asked. *State ex rel. Terminal R. Ass'n of St. Louis v. Tracy*, 140 S. W. 888, 890, 237 Mo. 109, 37 L. R. A. (N. S.) 448.

#### **Restraining order distinguished**

An "injunction" may be distinguished from a restraining order. The term "injunction" embodies a restraint which con-

tinues, unless modified by the court, until the hearing of the cause, and then it is made either permanent or discharged; while a restraining order is but a writ to compel the parties to maintain the matter in controversy in statu quo until the question of whether or not a temporary injunction ought to issue may be determined. *Ex parte Grimes*, 94 Pac. 668, 670, 20 Okl. 446.

An ex parte order, before answer restraining defendant from doing a particular act, was an "injunction," as defined by Code Civ. Proc. § 525, and not a temporary restraining order, and was therefore subject to dissolution for plaintiff's failure to give the undertaking required by Code Civ. Proc. § 529. *Neumann v. Moretti*, 79 Pac. 512, 513, 146 Cal. 31.

#### **Restraining order synonymous**

An "injunction" is a mere restraining order, and it will be presumed that the party against whom it is granted will obey it as long as it continues in force; otherwise, if he does not regard it, as the issuance of the writ is a proper exercise of equity, he will move to dissolve it. *Ex parte Allison*, 90 S. W. 492, 494, 48 Tex. Cr. R. 634, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684 (quoting and adopting definition in *Ex parte Warfield*, 50 S. W. 934, 40 Tex. Cr. R. 420, 76 Am. St. Rep. 724).

#### **As suit**

See Suit.

#### **As special proceeding**

See Special Proceeding.

#### **Temporary restraining order distinguished**

A temporary restraining order is not "an injunction to stay proceedings upon a judgment or final order" of the county court, within Kirby's Dig. § 3998, providing that upon the dissolution of a judgment to stay proceedings upon a judgment or final order damages shall be assessed by the court. *Adcock v. Coker* (Ark.) 151 S. W. 253.

#### **As a writ of right**

Injunction is a conservatory writ, which it is within the sound legal discretion of the judge before whom a cause is pending to issue whenever it is necessary to prevent one of the parties, during the continuance of the suit, from doing some act injurious to the other party. *State ex rel. Pelletier v. Somerville*, 36 South. 864, 866, 112 La. 1091.

#### **INJUNCTION PENDENTE LITE**

An "injunction pendente lite" is a provisional remedy, granted before the hearing upon the merits, for the purpose of preventing the doing of any act whereby the rights in controversy may be materially damaged, injured, or endangered before the final decree, and its purpose is to preserve the subject in controversy until an opportunity is

afforded for a full and deliberate investigation. *Ford v. Taylor*, 140 Fed. 356, 358.

## INJURE

Otherwise injured, see *Otherwise*.

By the use of the word "injure" in a statute providing that, if any person unlawfully but not feloniously take and carry away or destroy "injure," or deface any property, real or personal, not his own, he shall be guilty of a misdemeanor and fined, etc., it would seem reasonable to suppose that the Legislature intended the extent of the injury to be the same as required at common law, and did not intend to provide a criminal offense for every act which would constitute a trespass in a civil action for damages. *Davis v. Chesapeake & O. R. Co.*, 56 S. E. 400, 402, 61 W. Va. 246, 9 L. R. A. (N. S.) 993.

If land has been overflowed or injured as the direct result of the building of a levee, that amounts to a "taking" or "injuring" within the meaning of a constitutional provision which protects private property from public use without compensation. *Meriwether v. Board of Directors of St. Francis Levee Dist.*, 165 Fed. 317, 320, 91 C. C. A. 285.

Pen. Code, § 19 (Act March 4, 1909, c. 321, 35 Stat. 1092), punishing persons conspiring to injure any citizen in the free exercise of any right or privilege secured to him by the federal Constitution and laws, covers a conspiracy to deprive a citizen of his right to vote at a congressional election and thereby injure him, within the ordinary meaning of the word "injure," and a conspiracy to deprive illiterate negro voters of their right to vote by preparing the ballots in such a way as to make it difficult to vote for their candidate for Congress is punishable. *United States v. Stone*, 188 Fed. 836, 840.

As used in Rev. St. U. S. § 5209, providing that any officer, clerk, or agent of a national bank who embezzles or misapplies any of its moneys, funds, or credits, etc., with intent to "injure or defraud" the bank, shall be guilty, etc., does not mean malice or ill will toward the association, but the terms are satisfied by proof of a general intent to injure or defraud the bank arising in contemplation of law by the willful or intentional doing of the illegal or fraudulent act. *Flickinger v. United States*, 150 Fed. 1, 11, 79 C. C. A. 515.

To "injure" may be defined "to impair, to violate, or to injure rights." The word "injure," as used in Rev. St. 1899, § 2009, providing that every person who, with intent to injure or defraud, shall falsely forge, relates to injury to property or property rights, as distinguished from injury to the person or personal rights; otherwise it is meaningless

in the connection in which it is used. An indictment, alleging that defendant with "intent to cheat and defraud" forged an instrument was good; the word "cheat" being of similar import to "injure." *State v. Harroun*, 98 S. W. 467, 470, 199 Mo. 519.

Under Const. § 242, which provides that municipal corporations, invested with the power of taking private property for public use, shall make compensation for property taken or injured before the taking or injury, a party, to whose property a reasonably apparent injury has resulted from the ditching of a county road in such a way as to discharge accumulated water upon his property in a greater quantity than the natural flow, is "injured," within the meaning of section 242, and the county is liable for the injury from the increase of burden. *Moore v. Lawrence County*, 136 S. W. 1031, 1032, 143 Ky. 448.

### As damage

While the verbs "to injure" and "to damage" are nearly synonymous, "injure" and "damage" are not always legally synonymous, as there may be *damnum absque injuria*. *Seaboard Air Line R. Co. v. Smith*, 60 S. E. 353, 354, 3 Ga. App. 644.

As applied to taking or injuring property for public use, "text-writers and adjudicated cases use the words 'damaged,' 'injured,' and 'injuriously affected' as equivalents and meaning in substance the same thing." *Tidewater Ry. Co. v. Shartzler*, 59 S. E. 407, 409, 107 Va. 562, 17 L. R. A. (N. S.) 1053.

### As defraud

In a trial for false pretenses, it was error to refuse instructions, because they involved the proposition that the defendant could not be convicted in the absence of an intent to defraud; the word "injure," as used in Code 1907, § 6920, defining false pretenses, and requiring as an element of the offense an intent "to injure or defraud," meaning the same as the word "defraud." *Hope v. State*, 59 South. 326, 327, 5 Ala. App. 123.

## INJURED IN PROPERTY

A person whose property is diminished by payment of money wrongfully induced is "injured in his property." *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 27 Sup. Ct. 65, 66, 203 U. S. 390, 51 L. Ed. 241.

A person whose property is diminished by a payment of money wrongfully induced is "injured in his property." *Wheeler-Stenzel Co. v. National Window Glass J. Ass'n.*, 152 Fed. 864, 874, 81 C. C. A. 658, 10 L. R. A. (N. S.) 972 (quoting and adopting statement in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 27 Sup. Ct. 65, 203 U. S. 390, 51 L. Ed. 241).

## INJURED PARTY

See *Injured Person*.

**INJURED PERSON**

Rev. St. 1909, §§ 2370, 2372, allowing a divorce to the "injured party," are given the same construction as Rev. St. 1845, c. 53, allowing the "innocent and injured party" a divorce; and where both parties are in fault the court will not attempt to find which is the most in fault, but will award neither the relief sought. *Barth v. Barth*, 151 S. W. 769, 771, 168 Mo. App. 423.

A shipper, who is charged by a railroad company on an interstate shipment a rate in excess of that established by the company and filed with the Interstate Commerce Commission, is injured by such unlawful rate within the meaning of the Interstate Commerce Act Feb. 4, 1887, c. 104, § 13, without regard to the question of its reasonableness, and under section 16 the Interstate Commerce Commission has power to make an award of damages therefor which may be enforced by action in a Circuit Court. *Chicago, B. & Q. R. Co. v. Feintuch*, 191 Fed. 482, 484, 112 C. C. A. 126.

Where an information for disturbing a minor's peace is filed before a justice of the peace upon the affidavit of his father, the father is the injured party, within Rev. St. 1889, § 4358, providing that in certain prosecutions before justices of the peace at the injured party's instance the costs shall be adjudged against him on defendant's acquittal. *State v. Wood*, 107 S. W. 431, 432, 128 Mo. App. 642.

Under Ballinger's Ann. Codes & St. § 4270, where the clerk of a corporation, or any other officer having charge of the book containing a record of the stockholders, refuses to allow a stockholder an opportunity to inspect the book, or refuses to exhibit any papers of the company on file, shall forfeit to the "injured party" a specified penalty. "The variety and magnitude of the corporate business of the state forbids a construction which would impose a penalty upon an officer who refused an inspection where the demand was prompted by curiosity or a desire to vex or harass the management. It would hardly be contended that every stockholder in a banking corporation has the right to inspect all the checks of its patrons, or that he may demand as of right to inspect escrow contracts or other papers kept for the accommodation of other parties. To subject the offending officer to the payment of the statutory penalty there must be a demand for an inspection of the book named in the statute, or a designated paper or papers lodged with and kept by the corporation and pertaining to its corporate business, and the party making the demand must have an interest in inspecting the paper, and there must be a refusal to comply with the demand." *Brown v. Kildea*, 108 Pac. 452, 453, 58 Wash. 184.

The terms "person injured" or "aggrieved," in statutes giving rights of action or

penalties to such persons, must be regarded as extending only to such persons as are immediately injured by the very act prohibited or by some direct and immediate or necessary and natural consequences of such act. Flour inspectors are not "persons injured," within the act of 1850, by the sale of flour required to be inspected without inspection. *Hatch v. Robinson*, 26 Vt. 737, 739.

Under V. S. 2260, the "person injured" by the sale of personal property covered by a mortgage, without the consent of the mortgagee indorsed on the mortgage may be the mortgagee or his assigns, or the vendee of the mortgagor. *Colston v. Bean*, 58 Atl. 795, 796, 77 Vt. 40.

The words "person injured," used in the proviso to the statute (Acts 1874, No. 51) requiring notice to be given to the selectmen in case of injury on the highway, refer to the person injured in the accident, and not to the person injured pecuniarily. *Eames v. Town of Brattleboro*, 54 Vt. 471, 475.

St. 1898, § 4255, gives to the administrator for the benefit of certain relatives of a deceased person a right of action whenever the death of a person shall be caused by wrongful act, such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. Held, that the words "party injured" mean the party whose death is caused, and not the relatives of the deceased. *Johnson v. City of Eau Claire*, 135 N. W. 481, 483, 149 Wis. 194.

P. S. 5842, giving to "the party injured" by the cutting of trees on the land of another without leave of the owner the right to sue for treble damages, gives it to the owner in the large and liberal sense, and a tenant for years is entitled to sue thereunder. *Guild v. Prentis*, 74 Atl. 1115, 1117, 83 Vt. 212, Ann. Cas. 1912A, 313.

Revisal 1905, § 1562, requiring the application for divorce to be made "by the party injured," means that neither spouse is entitled to a divorce where his or her marital default provoked the alleged misconduct of the other. *Page v. Page*, 76 S. E. 619, 621, 161 N. C. 170.

**INJURIA**

See *Damnum Absque Injuria*.

*Damnum* distinguished, see *Damage—Damages*.

*Wrong* synonymous, see *Wrong*.

"The 'injuria' of the Roman law, sometimes translated 'injury' and at other times 'outrage,' and which is generally understood at this time to convey the idea of legal wrong, was held to embrace many acts resulting in damage for which the law would give redress. It embraced all of those wrongs which were the result of a direct invasion of the rights of the person and the rights of

property which are enumerated in all of the commentaries on the common law, and which are so familiar to every one at this time. But it included more. An outrage was committed not only by striking with the fists or with the club or lash, but also by shouting until a crowd gathered around one, and it was an outrage or legal wrong to merely follow an honest woman or young boy or young girl; and it was declared in unequivocal terms that these illustrations were not exhaustive, but that an injury or legal wrong was committed 'by numberless other acts.' *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68, 71, 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (citing *Sandars' Just.* [Hammond's Ed.] 499, and *Poste's Inst. of Gains* [3d Ed.] 449).

### INJURIOUSLY AFFECTED

Otherwise injuriously affected, see Otherwise.

As applied to taking or injuring property for public use, "text-writers and adjudicated cases use the words 'damaged,' 'injured,' and 'injuriously affected' as being equivalents and meaning in substance the same thing." *Tidewater Ry. Co. v. Shartzer*, 59 S. E. 407, 409, 107 Va. 562, 17 L. R. A. (N. S.) 1053.

Under Rev. Codes, § 9271, requiring parties to specify the particular grounds on which instructions are objected to, etc., accused, who did not object to any of the instructions submitting murder in the first and second degrees and manslaughter, but who acquiesced in the theory that there was evidence on which a verdict of manslaughter might be predicated, may not, on appeal, complain of the conviction of manslaughter because the state's witnesses proved facts showing a willful and deliberate murder, as the substantial rights of accused were not "injuriously affected" thereby within sections 9415 and 9548, requiring the court on appeal to disregard technical errors, etc. *State v. Crean*, 114 Pac. 603, 604, 605, 608, 43 Mont. 47, Ann. Cas. 1912C. 424.

### INJURY

See Bodily Injury; Cause of Injury; Character and Circumstances of Injury; Common Injury; Consequential Injuries; Direct Injury; Error Not Causing Substantial Injury; For the Injury Done; Future Injury; Great Bodily Injury; Intentional Injury; Intent to Injure or Defraud; Internal Injuries; Irreparable Injury; Legal Injury; Malicious Injury; Mortal Injury; Necessary Injury; Pecuniary Injury; Permanent Injury; Permanent Personal Injury; Physical Injury; Place of Injury; Serious Bodily Harm or Injury; Temporary Injury; Unlawful Injury; Violent Injury; Visible Sign of Injury; Wanton In-

jury; Waste and Injury; Willful and Malicious Injury.

Cause of, see Cause.

Continuance of injury, see Continuance.

Extent of injury, see Extent.

From external, violent, and accidental means, see Accident—Accidental.

Such injury, see Such.

Willful injury, see Willful—Willfully.

The word "injury," as generally used, includes any act or omission which harms or damages another, whether it is justified or not. *Barry v. McCollom*, 70 Atl. 1035, 1036, 81 Conn. 293, 129 Am. St. Rep. 215.

"An 'injury,' is a wrong or tort." *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. 753, 781 (quoting *Bouv. Dict.*).

The word "injury" means a wrong or tort. It may arise by nonfeasance or failure to perform a legal obligation or duty. *Randolph's Adm'r v. Snyder*, 129 S. W. 562, 564, 139 Ky. 159.

It is extremely difficult to lay down any actual definition of an "injury," because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comforts of life and enjoyment of property. "Everything must be looked at from a reasonable point of view. Therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences and injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected." A nuisance which annoys the occupants of a dwelling and so renders it less valuable as a habitation is an injury to property. *Roesler & Hasslacher Chemical Co. v. Doyle*, 64 Atl. 156, 157, 159, 73 N. J. Law, 521.

Though an "injury," legally and technically speaking, signifies a wrong done to a person, or, in other words, a violation of his right, the word is not used in such technical sense in a statute providing that no action to recover damages for injury to the person, or for an injury to personal property caused by negligence, shall be brought but within one year from the date of the injury or neglect complained of, but in its more ordinary sense of the immediate hurt; its qualification by the words "to the person" and "to personal property" being made to indicate the object of the hurt rather than the subject of the legal injury. *Sharkey v. Skilton*, 77 Atl. 950, 952, 83 Conn. 503.

The word "injury," as used in Pub. St. 1901, c. 191, § 12, relative to an action for death, such section being a redraft of the provision as to damages found in *Laws 1887*, p. 454, c. 71, § 1, where the phrase was "wrongful act or neglect" instead of "injury," means the same as "wrongful act or neglect." *Yeaton v. Boston & M. R. R.*, 61 Atl. 522, 524, 73 N. H. 285.

The word "injury," in an instruction, in an action for damages sustained by reason of defendant's alleged wrongful act in prematurely discharging plaintiff from a hospital where it had contracted to treat him for his injuries, that the jury should compensate him for loss of time caused by such "injury" and allow such amount as would be a reasonable sum for medical attention and treatment, and also such an amount as would compensate him for his mental and physical suffering caused by want of proper care and medical attention, is ambiguous and may refer to the wrong done plaintiff by the failure of defendant to furnish him with medical care and treatment, or refer to the physical hurt or damage, and the charge is objectionable as allowing recovery for all the time lost on account of the injury, while the suit is not for the original injury but only for damages directly caused by the wrongful discharge from the hospital. *International & R. Co. v. Logan*, 81 S. W. 812, 813, 36 Tex. Civ. App. 279.

The word "injury," as used in Civ. Code, § 134, defining extreme cruelty as the infliction or threats of bodily "injury," means a hurt. *Ryan v. Ryan*, 84 Pac. 494, 33 Mont. 406.

St. 1898, § 4971, subd. 1, provides that all words in statutes shall be construed according to common usage. Laws 1903, p. 640, c. 397, creating a pension fund for the police department, provides, in section 8, that if any member, while performing his duty, be injured, and be found permanently disabled thereby, etc., he shall be retired, provided no such retirement shall occur unless he contracted disability while on active duty, etc. Section 9 provides that if any member shall die from an injury received in line of duty, as described in the preceding section, his widow and minor children shall receive a pension. Laws 1899, p. 640, c. 265, of which the law of 1903 was, in effect, an amendment, contained, in section 9, both the expressions, "an injury received in the line of his duty," and "or any disease contracted by reason of his occupation"; but the latter words were eliminated in the law of 1903, which substituted the words "as described in the preceding section." Held that, since common and approved usage of the word "injury" includes any hurtful effect which may be suffered by any one, the word as used in section 8 was intended to include contraction of disease, notwithstanding the change in the law, and hence the widow and minor children of a policeman dying of pneumonia contracted in performing his duties were entitled to pensions. *State ex rel. McManus v. Board of Trustees of Policemen's Pension Fund*, 119 N. W. 806, 807, 138 Wis. 133, 20 L. R. A. (N. S.) 1175.

A conviction by a jury selected from a special venire drawn under the unconstitu-

tional act of February 26, 1907, is illegal, and the judgment must be reversed, as it cannot be said that such trial is without "injury," within Code 1907, § 6264. *Walker v. State*, 54 South. 624, 171 Ala. 1.

#### Damage distinguished

There is a wide distinction between "damage" and "injury." They bear the same relation to each other as cause and effect. An injury, in its legal sense, is misconduct, and damage is the legal term applied to the loss resulting from misconduct. *Carroll v. Rye Tp.*, 101 N. W. 894, 897, 13 N. D. 453.

#### Damages synonymous

The word "damaged," in section 23 of the Customs Administrative Act of June 10, 1890, forbidding allowance of damages to imported goods in the estimation and liquidation of duties thereon, is used in the sense of impairment or "injury." *Lawder v. Stone*, 23 Sup. Ct. 79, 83, 187 U. S. 281, 47 L. Ed. 178.

In discussions of the character of damages for which a party guilty of negligence resulting in an injury is liable, the term "injury" must be understood as synonymous with damages. *Johnson v. Atlantic Coast Line R. Co.*, 53 S. E. 362, 365, 140 N. C. 574.

#### Loss distinguished

See Loss.

#### As result from unlawful act

"'Injury,' in its legal sense, means damage resulting from an unlawful act." *State v. Van Pelt*, 49 S. E. 177, 185, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495 (quoting and adopting definition in *Bohn Mfg. Co. v. Hollis*, 55 N. W. 1119, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319).

#### Waste synonymous

Greater New York Charter, § 59, provides that the board of aldermen and the officers and employees of the city are trustees of its property, funds, and effects, every taxpayer is a cestui que trust in respect to such property, and that any cotrustee or cestui que trust may prosecute any action to prevent "waste" or "injury" to any property or funds held in trust, and that all the duties imposed by law on such trustees may be enforced by the city or by any cotrustee or cestui que trust aforesaid. Held, that a taxpayer's action under such section to restrain the alleged improvident expenditure of municipal funds was similar to that prescribed by Code Civ. Proc. § 1925, and was not maintainable without proof of fraud, collusion, corruption, bad faith, or illegality, since the terms "waste" and "injury," as used in the two statutes, are identical in meaning and include only illegal, wrongful, or dishonest acts. *Hearst v. McClellan*, 92 N. Y. Supp. 484, 486, 102 App. Div. 336.



**INJURY AND MALICIOUS TRESPASS TO PROPERTY**

"Injury or malicious trespass to property" is defined by Rev. St. 1899, § 1989, to mean a wrongful, intentional, and a willful injury and is not confined to cases where the offender is actuated by an evil animus against the owner of the property or the property itself. Section 1261 making the unlawful interference with telephone lines a misdemeanor, is repealed by Laws 1901, p. 129, including telephone companies in the provisions of Rev. St. 1899, § 1957, under which the malicious injury of lines of telegraph companies is a felony. *State v. McKee*, 104 S. W. 486, 487, 126 Mo. App. 524.

**INJURY BY THE ELEMENTS**

See Elements.

**INJURY RECEIVED**

An instruction that the jury in ascertaining the damages should give plaintiff such amount as would compensate him for "the injury received," and could consider the personal injury suffered, the pain suffered, or which he might suffer in the future, the expenses for medical attendance, and that if prior to the injury he earned his living in part by manual labor and the injury, in whole or in part, incapacitated him from performing manual labor and earning his living such fact should be considered, was not objectionable as failing to allow compensation for loss of time and for the impairment of capacity to earn money in his business, and as permitting the jury to assess compensation for permanent injury only, and not for temporary injury, for the expression "injury received" fairly comprehended all injuries sustained. *Hall v. Chicago, B. & Q. Ry. Co.*, 122 N. W. 894, 896, 145 Iowa, 291.

**INJURY TO THE PERSON**

See Personal Injury.

**INJURY TO PERSON AND PROPERTY**

"Injury to person and property" means causing damage to the subject-matter of the rights, not depriving the owner of them. A conversion of property is not a "willful and malicious injury to person or property," within the meaning of Bankr. Act July 1, 1898, c. 541, § 17a2, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798, which excepts liabilities for such injuries from debts from which a bankrupt is released by a discharge. In *re Ennis & Stoppani*, 171 Fed. 755, 756, 757.

**INJURY TO PROPERTY**

"Injury to property" is defined as "an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract." *Fullerton v. Young*, 94 N. Y. Supp. 511, 512, 46 Misc. Rep.

292 (quoting Code Civ. Proc. § 3343, subd. 10).

"Injury," as used in the Flowage Act, authorizing condemnation in certain cases, was such as resulted from depriving the landowner of the ability to use his land to the best advantage in view of its location and natural adaptability, and that a limitation of the use of undeveloped water power was an injury to land, for which compensation must be made. *Swain v. Pemigewasset Power Co.*, 85 Atl. 288, 289, 76 N. H. 498.

The word "injury," in the statute relating to condemnation proceedings and providing that the commissioners appointed shall inspect the real property and consider the "injury" which the owner may sustain, etc., includes all the actual damages, capable of exact or approximate measurement, which the owner may sustain by reason of the taking of his land, and includes the expense of moving a stock of lumber at the time of the condemnation and appropriation. *Blincoe v. Choctaw, O. & W. R. Co.*, 83 Pac. 903, 907, 16 Okl. 286, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689.

The word "injury," in the statute directing commissioners, appointed in proceedings by a railroad to condemn land, to inspect the real estate and consider the "injury" which the owner may sustain by reason of the railroad, and to assess the damages which the owner will sustain by the appropriation of his land, includes not only compensation for the land actually taken, but also includes damage to the remaining land, the real measure of damages being the difference in the value of the land as a whole without the railroad over it, and the value of that remaining untaken, burdened with the dangers and inconveniences incident to the operating of the railroad; and where the running of trains over the road increases the dangers of fire to grass, grain, etc., on the adjoining lands, which formed a part of the original tract from which the right of way was taken, and adds to the inconvenience of farming the remaining land, such matters must be considered as bearing on the amount of damages sustained, as affecting the market value of the land untaken. *St. Louis, E. R. & W. R. Co. v. Oliver*, 87 Pac. 423, 424, 17 Okl. 589, 10 Ann. Cas. 748.

*Kirby's Dig.* § 6288, entitles the husband to an action for damages for the services and companionship of his wife when she is killed by the wrongful act of another. Section 6285 permits an action by the person "injured" for wrongs done to his person or property, or after his death, by his executor. Held, in a suit by an executor, to revive an action begun by his testator, under section 6288, for the killing of the latter's wife by defendant, that there was neither an injury to his "person" nor his "property," within

section 6285. *Billingsly v. St. Louis, I. M. & S. Ry. Co.*, 107 S. W. 173, 174, 84 Ark. 617, 120 Am. St. Rep. 95.

#### **Burning timber**

The negligent burning of timber on land is an injury to real property within the meaning of Revisal 1905, § 419, providing that actions for injuries to real property must be tried in the county in which the subject of the action or some part thereof is situated, notwithstanding Act 1905, c. 367, amending such section (Code, § 192), and providing that actions against railroads may be tried in the county where plaintiff resided at the time the cause of action arose. *Perry v. Seaboard Air Line Ry. Co.*, 68 S. E. 1060, 1061, 153 N. C. 117.

#### **Conversion**

Federal Bankruptcy Act July 1, 1898, c. 541, § 9, 30 Stat. 549, provides that a bankrupt shall not be exempt from arrest upon civil process upon a claim from which his discharge would not be a release, and section 17, subd. 2, provides that a discharge in bankruptcy shall not release him from liability for "willful and malicious injuries to the person or property of another." Held, that the intentional conversion and sale of a client's corporate stock by a broker constituted an "injury to property" within section 17, so that the broker's discharge in bankruptcy would not release him from liability for such conversion, and hence he was not exempted from arrest; the term "injury to property" including any legal taking and detention thereof from the owner. *Kavanaugh v. McIntyre*, 133 N. Y. Supp. 679, 680, 74 Misc. Rep. 222.

#### **False return of service of summons**

The Municipal Court of the City of New York has jurisdiction of an action for damages against an attorney for having falsely returned service of summons to plaintiff, upon which there was judgment and execution against the plaintiff, as for an "injury to property," which, as to the jurisdiction of the court has been held to mean every invasion of one's property rights by actionable wrong. *Main Electric Co. v. Cohen*, 129 N. Y. Supp. 66, 67, 72 Misc. Rep. 30.

#### **Fraud**

Fraud belongs to the class of injuries denominated "injuries to property." Damages claimed for waste of land, and for deceit also in the sale of personalty, must in each instance be held to arise out of an injury to property with or without force, and can be united therefore in the same complaint, under Rev. St. § 2647, enumerating several classes of actions, one of which comprises causes arising out of injuries to property, and declaring that causes belonging to the same class may be united. *Gilbert v. Loberg*, 53 N. W. 500, 501, 83 Wis. 189.

"Materially false and fraudulent representations which induce another to part with his property constitute an act causing 'injury to property.'" In *re Harper*, 175 Fed. 412, 420.

"Injury to property" is not limited to a direct corporeal damage or wrong done to specific property, as distinguished from an infringement of the rights of property, but includes a case where one person obtains property of another by means of fraud. Where one practices fraud and deceit whereby another is induced to accept property in settlement of a debt much greater in amount than the value of the property, and injury to property is committed and not an injury to the person, and the statute of limitations with reference to actions for injury to property applies. *Crawford v. Crawford*, 67 S. E. 673, 676, 134 Ga. 114, 19 Ann. Cas. 932 (quoting *Cleveland v. Barrows* [N. Y.] 59 Barb. 364).

#### **Malicious attachment**

Malicious attachment is an "injury to property," not to the person, so as to pass to a trustee in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 70a, subds. 5, 6, 30 Stat. 565, vesting in a trustee in bankruptcy all the property which, prior to the filing of the petition, the bankrupt could by any means have transferred, and all rights of action arising upon contracts, or for the unlawful taking or detention of, or injury to, his property, and Rev. Laws 1905, § 4502, providing that all causes of action other than those out of injuries to the person, whether arising on contract or not, survive to the personal representatives. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 117 N. W. 926, 928, 105 Minn. 491, 21 L. R. A. (N. S.) 727.

#### **Obstruction of highway**

The obstruction of a highway is not an "injury to property" of a town, within Rev. St. § 819, authorizing the supervisors of each town to see that all injuries to property of the town are prosecuted for. *Town of Woodman v. Bohan*, 64 N. W. 323, 91 Wis. 36.

#### **Wrongful filing of notice of mechanic's lien**

An action to recover for delay of work on a building, and consequent loss of rent, by reason of the wrongful causing of a notice of mechanic's lien to be filed against the property, is one for "an injury to property," jurisdiction of which is conferred on the Municipal Court by Municipal Court Act; "injury to property" being defined by Code Civ. Proc. § 3343 (10), to be "an actionable act, whereby the estate of another is lessened, other than a personal injury or the breach of a contract." *Ghiglione v. Friedman*, 100 N. Y. Supp. 1024, 115 App. Div. 606.

## INJUSTICE

Under Const. 1890, § 178, authorizing the Legislature to alter, amend, or appeal any charter of incorporation, whenever, in its opinion, it is for the public interest to do so, provided that no injustice be done to the stockholders, the right of a building and loan association to charge usurious interest, even if expressly given by its charter, taken when the Constitution was in force, could be taken away; every usury law being of public interest, and such a change not being an "injustice" to the stockholders, within the meaning of the Constitution. *Mississippi Building & Loan Ass'n v. McElveen*, 56 South. 187, 189, 100 Miss. 16.

## INLAID LINOLEUM

Plank linoleum, made by running upon the burlap foundation paste of two colors in stripes of equal width, a process differing from that employed in making inlaid linoleum, is, under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 337, dutiable as "linoleum \* \* \* figured or plain," rather than as "inlaid linoleum." *United States v. Scott & West*, 164 Fed. 285, 286, 287.

## INLAND

### INLAND BILL OF EXCHANGE

Under Rev. Laws 1902, c. 73, § 143, defining a "bill of exchange" as an unconditional order requiring drawee to pay a certain sum in money, and section 146, making an inland bill of exchange one which is drawn and payable within the state, and permitting holder to treat a bill as an "inland bill" unless the contrary appears on its face, a writing, signed by a contractor, directing the owner to pay to another a certain sum and deduct it from any amount due him on final payment, was improperly treated as an inland bill. *Buttrick Lumber Co. v. Collins*, 89 N. E. 138, 139, 202 Mass. 413.

### INLAND NAVIGATION

"What the expression 'inland navigation' means must be ascertained from the geography of our own country, and the commerce carried on by vessels on its waters. Lake Erie is inland, and a voyage from Buffalo to Detroit is, in my judgment, 'inland navigation.'" *Moore v. American Transp. Co.*, 24 How. 41, 16 L. Ed. 674.

Navigation of Long Island Sound is not "inland navigation," within the meaning of Acts Cong. March 3, 1851, providing that the provisions of the act relating to the limitation of liability of owners of vessels shall not apply to owners of vessels used in inland navigation. *Wallace v. Providence & S. S. S. Co.*, 14 Fed. 56, 58.

### INLAND TRANSPORTATION

Cost of inland transportation, see Cost.

## INLAND WATERS

The phrase "inland waters," as used in a policy of marine insurance on a houseboat, expressly limiting the risk to loss or disaster occurring while the boat is within inland waters, does not include the waters of the Atlantic Ocean off Coney Island. *Fulton v. President, etc., of Insurance Co. of North America*, 127 Fed. 413, 414.

## INMATE

Act Feb. 8, 1911 (St. 1911, p. 9) § 1, provides that any person who shall procure a female inmate of a house of prostitution, or shall procure for a female person a place in such house or as an inmate therein, shall be guilty of pandering. Held, that the word "Inmate" means one who occupies or lodges in a place with others, or any occupant, even if alone, so that the act must be construed as requiring the procuring of a place in a house of prostitution for one who actually becomes an inmate thereof, and where defendant had agreed to let one of a number of designated rooms in such a house to a prostitute when it was ready for occupancy, but the room was never put in condition, and was never occupied by her, the offense was not complete. *People v. Matsicura*, 124 Pac. 882, 883, 19 Cal. App. 75.

## INN

See New Inn.

See, also, Hotel.

An "inn" is a house of entertainment for travelers. *Hill v. Memphis Hotel Co.*, 136 S. W. 997, 998, 124 Tenn. 376.

An "inn" is a house for the entertainment of travelers and passengers in which lodging and necessities are provided for them and for their horses and attendants. The guest must be a traveler. *Crapo v. Rockwell*, 94 N. Y. Supp. 1122, 1124, 48 Misc. Rep. 1 (citing Bacon's Abr. "Inns," B).

An "inn" is a place for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. *Johnson v. Chadbourn Finance Co.*, 94 N. W. 874, 875, 89 Minn. 310, 99 Am. St. Rep. 571.

The legal definition of an "inn" is "a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied, at a reasonable charge, with meals, their lodgings, and such service and attention as are necessarily incident to the use of the house as a temporary home." *Alsberg v. Lucerne Hotel Co.*, 92 N. Y. Supp. 851, 852, 46 Misc. Rep. 617 (quoting and adopting definition in *Cromwell*

v. Stephens [N. Y.] 3 Abb. Prac. [N. S.] 26; Matter of Brewster, 80 N. Y. Supp. 666, 39 Misc. Rep. 689).

While an "inn" or tavern is something more than a place where liquor is sold, it cannot be questioned that the most striking feature of the license to keep an inn or tavern under the "Inns and Tavern Act" is the right it gives to sell spirituous liquors. *Conover v. Gregson*, 60 Atl. 31, 32, 72 N. J. Law, 103.

An "inn" has been properly defined as a public house of entertainment for all those who choose to visit it. It is this publicly holding a place out as one where all transient persons who may choose to come will be received as guests for compensation that is made the principal distinction between a hotel and a boarding house in many well-considered decisions. Where a person entered into a contract with the "proprietors of the Imperial Hotel," who were doing a general hotel business during the summer at a summer resort, by which such person was to stop there at a reduced rate, no definite time being fixed, the relation of innkeeper and guest was created, so as to render the hotel liable as insurer for the loss of money and jewelry stolen from a trunk in such person's room during her temporary absence. *Holstein v. Phillips & Sims*, 59 S. E. 1037, 1039, 146 N. C. 366, 14 L. R. A. (N. S.) 475, 14 Ann. Cas. 323.

The supplying of guests with meals is not one of the essential requisites of an "inn," in order to charge the proprietor thereof with the liability of a keeper of a common inn. Where defendant held out his house as a hotel in which furnished rooms were rented for a single night or longer time and in the regular course of business rented his rooms without special contract to all applicants in fit condition to be received, and kept an office and a register, the house was an "inn or public hotel," though no meals were served. *Nelson v. Johnson*, 116 N. W. 828, 829, 104 Minn. 440, 17 L. R. A. (N. S.) 1259.

#### **Boarding house distinguished**

The term "inn" was formerly defined to mean a house where a traveler is furnished with everything he has occasion for while on his way, and, though such definition has been somewhat modified by the progress of time, an inn, when unlicensed, is distinguished from a "boarding house," in that the guest of the latter is under an express contract, at a certain rate and for a specified time, and the keeper of the boarding house may select his guests and fix full terms; while the inn is for the entertainment of all who come lawfully and pay regularly. *Birmingham Ry., Light & Power Co. v. Drennen*, 57 South. 876, 882, 175 Ala. 338.

"An 'inn' is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an ade-

quate price for the entertainment, while the keeper of a boarding house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode." *Humburd v. Crawford*, 105 N. W. 330, 331, 128 Iowa, 743 (quoting and adopting *Schouler*, Ballm. p. 253).

A "boarding house" is not, in common parlance or legal meaning, every private house where one or more boarders are kept occasionally only and on special consideration, but it is a quasi public house where boarders are generally and habitually kept and which is held out and known as a place of entertainment of that kind. A boarding house is not an "inn," the distinction being that a boarder is received into the house by voluntary contract, whereas an innkeeper, in the absence of any reasonable or lawful excuse, is bound to receive a guest when he presents himself. The distinction between a boarding house and an inn is that in a boarding house the boarder is under an express contract at a certain rate for a certain period of time, while in an inn there is no express agreement; the guest, being on his way, is entertained from day to day according to his business, upon an implied contract. *Horace Waters & Co. v. Gerard*, 94 N. Y. Supp. 702, 705, 106 App. Div. 431, (dissenting opinion of O'Brien, P. J., citing *Cady v. McDowell* [N. Y.] 1 Lans. 486).

The fact that a house is open for the public, that those who patronize it come to it on the invitation which is extended to the general public, and without previous agreement for accommodation, and without any previous agreement as to the duration of their stay, marks the important distinction between a hotel or an "inn" and a "boarding house." If meals are served to whoever comes at a uniform price, such fact is sufficient to show that the proprietor is keeping a public eating house. *Humburd v. Crawford*, 105 N. W. 330, 331, 128 Iowa, 743.

#### **Hotel and tavern synonymous**

There is no legal distinction between an "inn" or "tavern" and a "hotel," but, if there be such, there is no practical difference between them, such as would render regulations imposed by Act April 13, 1906, § 4, commonly known as the "Bishops' Law" (P. L. 1906, p. 203), subjecting inns and taverns and hotels to the restrictions mentioned in the section, unless such inns and taverns have at least ten spare rooms and beds for the accommodation of boarders, transients, and travelers, necessary and appropriate in the case of small hotels and not in the case of such inns and taverns. The section, therefore, means that all inns, taverns, and hotels, unless they have at least ten spare rooms and beds for the accommodation of boarders, transients, and travelers, are subject to the

restrictions. *Meehan v. Board of Excise Com'rs of Jersey City*, 70 Atl. 363, 365, 75 N. J. Law, 557.

The difference between "inn" and "hotel" is not very great. The terms have come to be regarded as synonymous, as said by Wandell in *Law of Inns and Hotels*, p. 15. "The inn is a house in which a traveler is furnished with everything for which he has occasion while on the way. A traveler may remain as long as he pleases in the inn, or he may leave it in a short time. It is an inn as long as he remains in the inn and makes no contract for any length of time. A hotel, as generally understood, looks to more permanent guests." The text-writer above cited says that hotel, strictly speaking, means a house in which travelers and other casual guests are provided with lodging but not with food. This is not the general understanding in this country. *Steward v. Denechud*, 45 South. 561, 564, 120 La. 720.

The word "hotel" is synonymous with the word "inn" as a place for the accommodation of travelers with food and lodging. *Juddell Co. v. Goldfield Realty Co.*, 108 Pac. 455, 457, 32 Nev. 351.

The charge of a complaint that accused "did keep and manage the Big Meadow Hotel, a house of public resort, in a disorderly manner," is a sufficient charge, at least against collateral attack of the judgment by habeas corpus, of the offense denounced by Comp. Laws, § 4920, of keeping an "inn" in a disorderly manner, as it must be assumed that a "hotel" is an "inn." *Ex parte Breckenridge*, 118 Pac. 687, 34 Nev. 275.

### INNKEEPER

Anciently it was the law that an "innkeeper" was one who held himself out as ready to receive all travelers and entertain them with both lodging and food, and perhaps feed and stable their horses, or, as the old expression ran, provide entertainment "for man and beast." Changes in the modes of travel, and the custom of furnishing food and lodging separately, have relaxed the definition of an innkeeper, and it may be held that a hotel where any traveler is given lodging is an inn nowadays, even though the guests take their meals elsewhere. *Horton v. Terminal Hotel & Arcade Co.*, 89 S. W. 363, 364, 114 Mo. App. 357 (citing *Commonwealth v. Wetherbee*, 101 Mass. 214).

An "innkeeper" is one who publicly professes that he keeps an inn, and that he will receive therein all travelers promising to pay an adequate price and coming in a condition fit to be received. *Hill v. Memphis Hotel Co.*, 136 S. W. 997, 998, 124 Tenn. 376.

An "innkeeper" is one who maintains a house for the entertainment of strangers for reasonable compensation, and to secure this compensation he is given a lien on the property of his guests within the inn,

and for such property he is liable under a liability much like that of a common carrier. So long as he has room, he must receive all who may apply and are fit persons, without discrimination. To say that he buys and sells articles of food and drink is only true in a limited sense, as such articles are not bought to be sold, nor are they sold again, as in ordinary commerce, but are bought to be served as food and drink, and the price includes rent, service, heat, light, etc., and hence an innkeeper is not a trader or a person engaged in commercial pursuits. *Toxaway Hotel Co. v. J. L. Smathers & Co.*, 30 Sup. Ct. 263, 264, 216 U. S. 439, 54 L. Ed. 558.

An "innkeeper," is one who regularly keeps open a public house for lodging and entertaining transient comers, on the general expectation of his suitable recompense. If one keeps an inn and also, separate from the inn, keeps a bathhouse where persons bathing in the sea change their garments and leave their clothes, he is not chargeable as an "innkeeper" for property stolen from the bathhouse. *Walpert v. Bohan*, 55 S. E. 181, 182, 126 Ga. 531, 6 L. R. A. (N. S.) 828, 115 Am. St. Rep. 114, 8 Ann. Cas. 89 (quoting and adopting definition in *Schouler, Bailments*, §§ 279, 303, and citing *Minor v. Staples*, 71 Me. 316, 36 Am. Rep. 318).

Where a dining room in a hotel building to all appearances is maintained in connection with the furnishing of lodging and by the same proprietor, and such proprietor does not advise guests to the contrary, and derives patronage from the fact that the dining room is seemingly appurtenant, a guest has the right to assume that such proprietor is an innkeeper. Defendant furnishing lodging to transient guests, though not meals, will be held to be under the full common-law responsibility of an innkeeper. *Metzler v. Terminal Hotel Co.*, 115 S. W. 1037, 1038, 135 Mo. App. 410.

### INNER COURT

Under Tenement House Act (Laws 1901, p. 889, c. 334, § 2, subd. 3), defining an "inner court" to be one not extending to the street or yard, courts sunken 7½ feet below the surface of the street and yard, and inclosed on all sides to the yard and street level, must be treated as "inner courts." *People ex rel. Cohen v. Butler*, 109 N. Y. Supp. 900, 905, 125 App. Div. 384.

### INNOCENCE

See *Presumption of Innocence*.

"Innocence" cannot be asserted of an action which violated existing law, as ignorance of the law will not excuse, though a law which attempts to punish a citizen for an action, to wit, an act which when done was in violation of no existing law, will not be a proper exercise of legislative power.

Shevlin-Carpenter Co. v. Minnesota, 30 Sup. Ct. 663, 666, 218 U. S. 57, 54 L. Ed. 930 (quoting *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648).

### INNOCENT AGENT

A person is an "innocent agent" in the commission of a crime when he commits it, moved by another person, yet incurs no legal guilt because either not endowed with mental capacity or not knowing the inculpat- ing facts. *State v. Bailey*, 60 S. E. 785, 787, 63 W. Va. 668 (quoting and adopting the definition in *Bish. New Cr. Law*, § 310).

### INNOCENT FIRE

Where a fire insurance policy contained an exception that the company would not be liable for loss caused by explosion of any kind unless fire ensued, and in that event for the damages by fire only, a loss occurring solely from an explosion, not by a preceding fire, or an explosion which occurred from the contact of escaping natural gas with a lighted match, are within the exceptions of the policy: the rule being that the ignition of the explosive substance must be caused by an actual combustion involuntarily or illegally started, which is called a negligent or unlawful fire, and not a harmless combustion such as a lighted match, burning gas jets, or a lighted cigar, which are called "innocent fires." *Stephens v. Fire Ass'n of Philadelphia*, 123 S. W. 63, 66, 139 Mo. App. 369.

### INNOCENT HOLDER FOR VALUE

See, also, *Holder For Value*; *Holder in Due Course*.

The indorsee before maturity of a note as security to a debt created concurrently with the indorsement and delivery of the note, and consideration thereof in good faith, without notice of infirmities, is an "innocent holder for value." *Second Nat. Bank of Bucyrus, Ohio, v. Werner*, 126 N. W. 100, 102, 19 N. D. 485.

### INNOCENT PURCHASER

To constitute one an "innocent purchaser" of land, there must be a valuable consideration, absence of notice of adverse claims, and good faith. *Houston Oil Co. of Texas v. Hayden*, 135 S. W. 1149, 1152, 104 Tex. 175.

To constitute an innocent purchaser, there must be a purchase without notice, actual or constructive, of an outstanding claim, and there must have been payment of a valuable consideration, though it need not be full and adequate. *Downs v. Stevenson*, 119 S. W. 315, 317, 56 Tex. Civ. App. 211.

A purchaser at an execution sale is not an "innocent purchaser," as against one who holds a senior recorded title, even though the conveyance was made by the grantor to defraud creditors, where the grantee was not shown to have been involved in the fraud. *Matador Land & Cattle Co. v. Cooper*, 87 S. W. 235, 236, 39 Tex. Civ. App. 99.

Where, at the time of a conveyance to plaintiff, the deed was of record under which his vendor claimed title, embodying a contract obligating the vendor to convey the land to defendant's vendor, plaintiff was not entitled to protection as an "innocent purchaser" against defendant, whose deed was older, though unrecorded until after plaintiff acquired its title. *Houston Ice & Brewing Co. v. Henson (Tex.)* 93 S. W. 713, 714.

Where plaintiff's husband purchased real estate in trust for her, and in violation of the trust sold it to S., in consideration of a pre- existing debt which had been discharged in bankruptcy, and, prior to the sale to S., an agent of plaintiff's husband contracted to sell the land to M. Bros., in pursuance of which a draft for the purchase money had been given to the agent, and was sent by him, with a deed to be signed by the husband, to a certain bank, the draft to be delivered when the deed was signed, and S. executed a deed to M. Bros., but before the draft had been paid they had notice, in time to have stopped payment, of a suit brought by the wife to recover the land as her own, but they made no effort to do so, M. Bros. were not "innocent purchasers." *Sparks v. Taylor (Tex.)* 87 S. W. 740, 741.

Where testator, a nonresident, died, leaving land in Texas, and, after his will had been probated in the state of his residence, administration was taken out on his estate in Texas, and, after proof of a copy of his will, the land in controversy, of which he had the apparent legal title when he died, was appraised in its entirety and ordered sold, without recognition or mention of any outstanding interest, for the payment of debts, the administrator's deed to the purchaser, though a quitclaim, was sufficient to sustain a plea that the purchaser was an "innocent purchaser without notice," that the land was community property, and that a portion thereof belonged to the distributees of testator's deceased wife. *Nelson v. Bridge*, 87 S. W. 885, 887, 39 Tex. Civ. App. 283.

### INNOCENT WOMAN

An "innocent woman," within the meaning of *Revisal 1905*, § 3354, punishing the seduction under promise of marriage of any "innocent and virtuous woman," means "that, although there may have been a marriage contract, yet if the prosecutrix yielded on account of lust, or from any other motive than of the promise of marriage, she would not be innocent." *State v. Whitley*, 53 S. E. 820, 821, 141 N. C. 823.

### INNOVATE—INNOVATION

"Innovate" means to change or alter by introducing something new, to remodel, to revolutionize. "Innovation" means a change in customs, something new; contrary to es-

established customs, manners, or rights. *Kemper v. State*, 138 S. W. 1025, 1041, 63 Tex. Cr. R. 1.

## INNUENDO

"Innuendo" means nothing more than the words "id est," "scilicet," "meaning," or "aforesaid," as explanatory of a matter sufficiently expressed before. It is in the nature of a *prædict*. *Atchley v. State*, 120 S. W. 1010, 56 Tex. Cr. R. 569.

The office of an "innuendo" is to explain the words of a libel and to give them their true meaning, but it may not be used to introduce new matter or enlarge or add to the sense declared on, or impute to them a meaning not justified by the publication, either when taken alone or in connection with the inducement and colloquium. *Weeks v. News Pub. Co.*, 83 Atl. 162, 164, 117 Md. 126.

"The office of an 'innuendo' is to define the defamatory meaning which the plaintiff seeks to put upon the words complained of, to show how they come to have the defamatory meaning claimed for them, and also to show how they relate to plaintiff whenever that is not clear from the face of them. But an innuendo must not introduce new matter or enlarge the natural meaning of words. It must not put upon them a construction which they will not bear. It cannot alter or extend the sense of defamatory words or make that certain which is in fact uncertain." *Moss v. Harwood*, 46 S. E. 385, 386, 102 Va. 386 (quoting and adopting the definition in *Newell, Sland. & L.* [2d Ed.] p. 619).

When words of an alleged defamatory publication are capable of more than one meaning, it is the office of the "innuendo" to explain or point out the sense in which it is claimed they were used. If they are capable of being used in the sense charged in the innuendo, the question whether or not they were so used is for the jury, for, notwithstanding whether they are capable of that construction is a question of law, whether that was the sense in which they were used is a question of fact. *Richardson v. Thorpe*, 63 Atl. 580, 73 N. H. 532.

An "innuendo" is only explanatory of the subject-matter sufficiently expressed before, and it can be only explanatory thereof, and cannot extend the sense of the words beyond their own meaning unless something is put on the record for it to explain, nor can it make a thing certain which is in fact uncertain, nor enlarge or restrict the meaning of words, nor introduce new matter. *Perry v. Dozier*, 49 South. 909, 913, 161 Ala. 292.

A cause of action for libel is shown when the circumstances alleged point to plaintiff as the person concerning whom the libelous statements are made, though his name is not mentioned, and the petition must

allege facts from which it can be reasonably inferred that plaintiff was the person intended to be libeled, and the averment or innuendo that plaintiff was the one referred to will not make the petition sufficient, unless the facts alleged are such that the truth of the innuendo can be reasonably inferred therefrom. Defamatory words must refer to some ascertained and ascertainable person, and, where the words used contain no reflection upon any particular individual, no averment or innuendo, which is but an inference or reasoning, can make them defamatory. *Harris v. Santa Fé Townsite Co.* (Tex.) 125 S. W. 77, 78.

### Averting facts

An "innuendo" is not the statement of a fact, but an inference. *Krone v. Block*, 129 S. W. 43, 44, 144 Mo. App. 575.

An "innuendo" is to explain the meaning of the alleged libelous matters, and it cannot be looked to, to supply extrinsic facts necessary, in connection with the alleged libelous publication, to constitute a cause of action. *McNamara v. Goldan*, 87 N. E. 440, 442, 194 N. Y. 315.

### Connecting colloquia and particular words laid

In actions for defamation, the office of an "innuendo" is to connect words not in themselves actionable with some precedent facts formally averred which explain their meaning and render them actionable. *Hamilton v. Lowery*, 71 N. E. 54, 55, 33 Ind. App. 184.

### Enlarging or extending meaning of words

In an action for slander, an "innuendo" can be used to explain the sense in which the words were used and to apply them, but not to enlarge the charge. *Maerlender v. Porter*, 99 N. Y. Supp. 533, 535, 114 App. Div. 180 (citing *Fleischmann v. Bennett*, 87 N. Y. 231; *Gibson v. Sun Printing & Publishing Ass'n*, 76 N. Y. Supp. 197, 71 App. Div. 566).

An "innuendo" averment is one which explains the meaning of another averment, and, since it changes no fact alleged, it does not admit of being sustained by evidence. An "innuendo" is an interpretative parenthesis thrown into quoted matter to explain an obscure term. It cannot add to an averment or enlarge the sense of expressions in the pleading beyond their usual acceptation and meaning. *Rubio v. State*, 95 S. W. 120, 121, 50 Tex. Cr. R. 177 (citing 2 Bish. Cr. Proc. § 793; 2 Whart. Crimes, § 660).

An "innuendo" in a declaration in a libel suit is only a word of explanation, the office of which is to interpret the meaning of alleged libelous language used in the light of the circumstances alleged to explain it; and it cannot enlarge the meaning of words nor attribute to them a meaning which they will

not bear. *Gordon v. Journal Pub. Co.*, 69 Atl. 742, 744, 81 Vt. 237.

**Introducing new matter**

The purpose of an "innuendo" is to define the defamatory meaning which plaintiff attaches to the defamatory words complained of, and to show how they come to have that meaning and how they relate to plaintiff; but it cannot be used to introduce new matter or to enlarge the actual meaning of the words, and thereby give to the language a construction which it will not bear. It is not the office of an innuendo to make averments but to apply the words or explain their meaning. A publication stating that "Mr. Crooked R. gets it in the neck" is a libel of R. individually and cannot be enlarged by innuendo so as to constitute a libel of a corporation of which R. is manager, in the absence of an allegation that R. and the corporation are one and the same person, or that people generally understood the corporation to be meant when R. is referred to, in the connection in which the libel is published. *Midland Pub. Co. v. Implement Trade Journal Co.*, 83 S. W. 298, 301, 108 Mo. App. 223 (citing *Naulty v. Bulletin Co.*, 55 Atl. 862, 206 Pa. 128; *Bundy v. Hart*, 46 Mo. 460, 2 Am. St. Rep. 525).

It is an elementary rule of pleading that whatever is alleged must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is "innuendo." An innuendo may serve as an explanation to point a meaning where there is precedent matter expressed or necessarily understood or known, but never to establish a new charge. Where a published article is libelous, the innuendo may be regarded as surplusage. *State v. Clifford*, 52 S. E. 864, 865, 58 W. Va. 681 (quoting and adopting *State v. Aler*, 20 S. E. 585, 39 W. Va. 540 [syl. pars. 2, 3]).

**INOOPPORTUNE**

"'Inopportune' means unseasonable in time or at the wrong time." In an action for injuries sustained through the negligence of defendant's employes, an instruction, "If the jury believe, from the evidence, that a flagman of the defendant improperly and inopportune signaled the plaintiff's team," etc., was not misleading because of omission of the words "carelessly" and "negligently." *Pennsylvania Co. v. Sloan*, 17 N. E. 37, 39, 41, 125 Ill. 72, 8 Am. St. Rep. 337.

**INQUEST**

See *Coroner's Inquest*; *Grand Inquest*. As criminal proceeding, see *Criminal Proceeding*.

**INQUIRE AND REPORT**

The words "inquire and report" have long been used in England and in this coun-

try as a formula for a reference to a master in chancery to obtain and report information to the court. *Austin v. Ahearne*, 61 N. Y. 6, 12.

A corporation whose business is to guarantee, indorse, secure payment of debts and obligations, insure fidelity of persons and concerns holding positions of trust, and through guaranteed attorneys furnish direct to subscribers of a quarterly publication, and not through the company, the commercial standing of merchants and other persons is engaged in the business of inquiring into and reporting on the credit and standing of persons engaged in business within Ky. St. 1909, § 4224 (*Russell's St.* § 6157), requiring persons or concerns so engaged to secure a license. *United States Fidelity & Guaranty Co. v. Commonwealth*, 118 S. W. 1000, 1001, 133 Ky. 740.

**INQUIRE INTO THE CIRCUMSTANCES**

The phrase "inquire into the circumstances," as used in Code Civ. Proc. § 2471a, providing that, if the demand of any public officer for the books and papers pertaining to the office is refused, he may make complaint to any justice of the Supreme Court of the district, or to the county judge, and declaring that at the time of the return of the order to show cause, or at any time to which the matter may be adjourned, on proof of the due service of the order, a justice or judge to whom the application is made shall proceed to inquire into the circumstances, means that when an issue of fact is raised by the affidavit interposed in objection to the application it is the duty of the court to take evidence relative to that issue, and to decide it in one way or the other; for to "inquire into the circumstances" imports a judicial investigation of the question of fact. In *re Gill*, 88 N. Y. Supp. 466, 467, 95 App. Div. 174.

**INQUIRY**

See *Judicial Inquiry*; *Reasonable Inquiry*; *Writ of Inquiry*.

**INQUISITION**

The word "inquisition" is defined by Webster to be "the act of inquiring; inquiry; examination; investigation." *Carver v. Louthain*, 38 Ind. 530, 547.

"Inquisition" or "office found," as relating to a trial for or declaration of forfeiture, etc., have no relation to the ordinary common-law trial by jury, and the jury there summoned was not the common-law jury before whom a citizen has a right to demand a trial where his peace or his rights were in question. Blackstone defines "inquisition" or "office found" to be "an inquiry made by the King's officer, his sheriff, coroner, or escheator, virtute officii, or by writ to them



sent for that purpose, or by commissioners specially appointed, concerning any matter that entitled the King to the possession of lands or tenements, goods, or chattels. This is done by a jury of no determinate number, being either 12, or less, or more. \* \* \* These inquests of office were devised by law, as an authentic means to give the King his right by solemn matter of record, without which he, in general, can neither take nor part from anything. For it is a part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury." It was a procedure peculiarly adapted for the King's use, and the important thing about it was that a record might be made and entered whereon the King could base his right to possess himself of the lands, goods, and chattels of his subject; and, as it respects lands, the office found put him into immediate possession, without the necessity of a formal re-entry. Although its frequent use was for the determination of attainder, escheats, and breaches of conditions annexed to grants, and the like, the record was not conclusive, and the subject was yet entitled to a trial suitable at common law for the final determination of his rights. A good illustration is found in escheats. "The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the Court of Chancery, but was really a proceeding at common law; and, if it resulted in favor of the King, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse, in the nature of a plea or defense to the King's claim, and not in the nature of an original suit. \* \* \* The inquest of office was a proceeding in rem; when there was a proper office found for the King, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the King's favor." *United States v. Oregon & C. R. Co.*, 186 Fed. 861, 926 (quoting 3 Blackstone, 258, 259; *Hamilton v. Brown*, 16 Sup. Ct. 585, 587, 161 U. S. 256, 263, 40 L. Ed. 691).

#### INQUISITION BEFORE GRAND JURY

As criminal case or cause, see Criminal Case or Cause.

#### INSANE—INSANITY

See General Insanity; Legal Insanity; Medical Insanity; Moral Insanity; Partial Insanity; Suicide, Sane or Insane; Temporary Insanity.

Commitment of insane as special proceeding, see Special Proceeding.

See, also, Delusion; Dementia; Irresistible Impulse; Lucid Interval; Lunacy; Monomania; Paranoia; Simple Melancholia.

"Insanity" is a diseased or abnormal condition which manifests itself in eccentricities of conduct, speech, or appearance; that is to say, in the doing or saying of things which attract attention, because, judged by the common standard, they are deviations from that which is regular and usual. *State v. Lyons*, 37 South. 890, 898, 113 La. 959.

A person is insane when he or she is not possessed of mind and reason equal to a full and clear understanding of his or her act in making a contract. *Barlow v. Strange*, 48 S. E. 344, 345, 120 Ga. 1015 (citing *Frizzell v. Reed*, 77 Ga. 724).

In many statutes, of which that of Michigan and Wisconsin are instances, the term "insanity," considered in its technical sense, is separated from its equivalent as regards the ability of the sufferer to care for himself or his property, leaving no ground to claim that mental unsoundness—meaning insanity, strictly so called—is essential to the appointment of a guardian. In *re Streiff*, 97 N. W. 189, 191, 119 Wis. 566, 100 Am. St. Rep. 903.

"No perversion of the moral affections and propensities, unless accompanied by such delusion as indicates the subversion of the will and reason, is to be regarded as constituting 'insanity' in law. Thus moral insanity, or the perversion of the moral feelings, is in itself insufficient to invalidate the civil act, or excuse the criminal act, of its subject." Where defendant charged with bigamy testified that he knew it was legally wrong to marry a second time without divorce, but that he had been told by God that it was not wrong, and a physician testified that defendant was religiously or emotionally insane, and did not believe he was able to distinguish right and wrong with regard to the crime charged, and defendant's jailer did not think him crazy, but thought him "nutty" on the subject of religion, the evidence all dealt with moral insanity and did not affect the defendant's legal liability, and the jury were justified in finding him guilty. *Harrison v. State*, 69 S. W. 500, 501, 44 Tex. Cr. R. 164.

Mere frenzy, or ungovernable passion, however furious, is not "insanity," within the meaning of the criminal law. *State v. Cook*, 72 S. E. 1025, 1027, 69 W. Va. 717.

"Etymologically 'insanity' signifies unsoundness. Lexically it signifies unsoundness of mind, or derangement of the intellect." In *re American Board of Com'rs for Foreign Missions*, 66 Atl. 215, 221, 102 Me. 72 (quoting and adopting definition in *Johnson v. Maine & N. B. Ins. Co.*, 22 Atl. 108, 83 Me. 186).

"'Insanity' is indicated by proof of acts, declarations, and conduct inconsistent with the character and previous habits of the person." A marked change in a person's

habits and thoughts is evidence of mental unsoundness, and proof that a woman had changed from a generous, dainty, refined, and intelligent woman of good business capacity into one of untidy habits and penurious with loss of memory and business capacity was proof indicating insanity. *Knapp v. St. Louis Trust Co.*, 98 S. W. 70, 78, 199 Mo. 640.

The term "insane persons," as used in the statutes making the state liable for the support of such persons, and providing that the words "insane person" shall include every idiot, non compos, lunatic, and insane and distracted person, does not embrace persons committed to the School for Feeble-Minded, and the state is not liable for their support. *Chaplin v. City of Lowell*, 80 N. E. 618, 619, 194 Mass. 486.

One mentally incapable of understanding and acting rationally in the affairs of life and in the management of his property is an "insane person" within Kirby's Dig. § 7095, providing that lands of insane persons may be redeemed from tax sales within two years after the expiration of the disability. *Pulaski County v. Hill*, 134 S. W. 973, 976, 97 Ark. 450.

The term "insane person," in Rev. St. 1899, § 3702, providing that, for the purpose of the chapter relating to insane persons, the words "insane persons" or the words "persons of insane mind" shall be construed to mean either an idiot or lunatic or a person of unsound mind, and incapable of managing his own affairs, does not make any distinction between irresponsible persons, persons of unsound mind, or idiots and raving maniacs. In re *Crouse*, 120 S. W. 666, 670, 140 Mo. App. 545.

Under Rev. St. § 4971, subd. 7, declaring that the words "insane persons" shall be construed to include every idiot, non compos, lunatic, and distracted person, and section 4069 providing that no person shall be examined as a witness in respect to any transaction or communication by him personally with a person then insane, in any civil action in which the opposite party claims under such insane person, where, in foreclosure proceedings by an assignee of a mortgage, it appeared that the assignor, for some months before the trial, was afflicted with softening of the brain, and constantly grew worse, that his disease was incurable, that within two weeks before the trial he fell into a comatose state, and remained unconscious for 16 hours, and that he was clearly incapable of testifying on the trial, or giving a coherent statement of past events, he was insane, within the meaning of the statute, and testimony by the mortgagor, as to transactions with him which were adverse to the assignees, was inadmissible. *Whitney v. Traynor*, 42 N. W. 267, 269, 74 Wis. 289.

### All degrees and kinds of insanity

Where a life policy contains a condition that if the insured dies by his own hand or commits suicide, whether sane or insane, the word "insane" implies every degree of unsoundness of mind, and the liability of the insurer is not affected by the degree of the insanity. *Seltzinger v. Modern Woodmen of America*, 68 N. E. 478, 480, 204 Ill. 58.

The word "insane," as used in Gen. St. 1901, c. 99, providing a procedure for a judicial determination as to the sanity of a person and as to whether he should be confined in the state hospital for the "insane," applies to any degree of mental derangement from temporary nervous excitement to acute insanity. Ex parte *Wright*, 89 Pac. 678, 679, 74 Kan. 406.

P. L. 1847, p. 29, Nixon's Dig. 1868, p. 522, and Revision 1877, p. 607, § 40, contain the following definition of "insanity": "The terms 'lunatic, insane,' as used in this act include every species of insanity and extend to all deranged persons and to all of unsound minds other than idiots." In re *Lang*, 71 Atl. 47, 48, 77 N. J. Law, 207.

### As disease of brain or mind

A disease as including, see Disease.

An instruction, in an action on behalf of an insane person, that one is deemed to be insane when unable to transact the ordinary affairs of life, understand their nature and effect, and exercise his will respecting them, is not objectionable, on the theory that one might not be able to transact ordinary affairs of life, and yet be sane, and that the charge did not show that mental ability was meant. *Kaack v. Stanton*, 112 S. W. 702, 705, 51 Tex. Civ. App. 495.

On a trial for a homicide, in which insanity was relied on as a defense, it was proper to charge that "insanity" was a mental disease, that it did not mean eccentricity or peculiar action of the brain, but meant a departure caused by a disease of the brain, and that mere temporary mania did not constitute insanity. *Braham v. State*, 38 South. 919, 922, 143 Ala. 28.

"Insanity," to relieve from criminal responsibility, must be caused by or result from disease or lesion of the brain. *Porter v. State*, 37 South. 81, 83, 140 Ala. 87 (citing *Gunter v. State*, 3 South. 600, 83 Ala. 109).

Insanity in the question in an examination for life insurance as to whether insured's father had "insanity or other hereditary disease" refers to a disordered mind from a diseased or defective brain, and not necessarily to a mere temporary mental disturbance during a weakened condition from typhoid fever. *Iowa Life Ins. Co. v. Haughton*, 87 N. E. 702, 704, 46 Ind. App. 467.

Where instructions when taken together made the test of insanity as to whether or

not accused did or did not know the nature or result of the act he was doing, or, if he did know, that he did not know that he was doing wrong, a charge that insanity is produced by a diseased condition of the mind was not misleading, though insanity is itself a diseased condition of the mind. *Smith v. State*, 117 S. W. 966, 968, 55 Tex. Cr. R. 563.

### **Epilepsy**

Under Code, § 1434, providing that the term "insanity" includes every species of insanity or mental derangement, and that the term "idiot" is restricted to persons foolish from birth, supposed to be naturally without mind, a person who at nine years of age became affected with epilepsy, and gradually lost her mind, was insane. *Speedling v. Worth County*, 26 N. W. 50, 51, 68 Iowa, 152.

Proof of epilepsy does not necessarily directly establish insanity, as epilepsy is not as a matter of fact or law insanity, though evidence thereof may bear on the mental condition of the afflicted person to the extent of establishing insanity. *Oborn v. State*, 126 N. W. 737, 747, 143 Wis. 249, 31 L. R. A. (N. S.) 966.

### **Incapacity to distinguish between right and wrong**

The term "insanity" means such an abnormal condition of mind as renders the afflicted one incapable of distinguishing between right and wrong in a given instance, and rendering him unconscious of the punishable character of his act. A person is not immune from punishment for a wrongful act, if, at the time of perpetrating it, he has capacity to distinguish between right and wrong and is conscious of the wrongfulness of his conduct. *Oborn v. State*, 126 N. W. 737, 745, 143 Wis. 249, 31 L. R. A. (N. S.) 966.

"Insanity" may be either total or partial in its character. It may be either permanent or temporary in duration. Where insanity of a permanent character is once established by the evidence, it is presumed to continue until the contrary is proven satisfactorily; but if the insanity be of a temporary character no such presumption arises. To exempt a person from responsibility for crime the insanity must be of such a character as either to deprive him of the capacity to distinguish between right and wrong in respect to the particular act committed, or to deprive him of sufficient will power to choose whether he would do the act or refrain from it. So long as a person has capacity to distinguish between right and wrong in the particular act, and has will power to do it or not to do it, he will be held criminally responsible, even though the mind is subject to hallucinations, melancholy, exhilaration, or is otherwise affected from

the use of cocaine, intoxicants, or any other cause. *State v. Jack* (Del.) 58 Atl. 833, 834, 4 Pennewill, 470.

"Insanity," as recognized in our criminal law, is declared to be such disease and deranged condition of the mental faculty as to render the person incapable of distinguishing between right and wrong, in relation to the particular act with which he is charged. *Marceau v. Travelers' Ins. Co.*, 35 Pac. 856, 857, 101 Cal. 338 (adopting definitions in *Hoin's Case*, 62 Cal. 120, 45 Am. Rep. 651).

"Insane," as used in P. L. 1906, p. 722, § 13, providing for the commitment to an asylum of insane criminals until restored to reason, as applied to one convicted of murder and sentenced to death, does not include all persons mentally deranged but is limited to the common-law test of capacity to distinguish right from wrong, so that if a person sentenced for a crime is capable of understanding the nature and object of proceedings against him, and rightfully comprehends his own condition in reference to such proceedings, and may conduct his defense in a rational manner, he is sane for the purpose of undergoing punishment, though on some other subjects his mind may be deranged and unsound. *In re Lang*, 71 Atl. 47, 48, 77 N. J. Law, 207.

"Insanity" is a physical disease, located in the brain, which disease so perverts and deranges one of the mental or moral faculties as to render the person suffering therefrom incapable of distinguishing right from wrong in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the laws of God and society." *State v. Porter*, 111 S. W. 529, 531, 213 Mo. 43, 127 Am. St. Rep. 589.

A person may be to some degree of unsound mind, or laboring under some delusion or be a monomaniac, and still be fully capable of appreciating the wrongfulness of taking human life; but insanity as a defense must be such that defendant at the time he committed the act did not and could not know the nature and wrongfulness of his act. *People v. Ashland*, 128 Pac. 798, 804, 20 Cal. App. 168.

The ability to distinguish between right and wrong in relation to a particular act about to be committed is the general test of criminal responsibility. The only exception so far recognized, as to one who has reason sufficient to distinguish between right and wrong as to the act about to be committed, is where such act is connected with a peculiar delusion under which the prisoner is laboring, and where, in consequence of such delusion and without criminal intent, the will is overmastered. Intermittent "insanity," caused by physical weakness or nervous disorders, is no excuse or justification for crime, unless

it appears that at the time of the act committed the defendant was incapable of adjudging the quality of the act and of knowing whether it was right or wrong. *Carter v. State*, 58 S. E. 532-535, 2 Ga. App. 254.

If one has an irresistible impulse to commit crime, and does not know the nature and quality of the act, he is "insane." If he does know the nature and quality of the act and does know right from wrong, he is not insane. *Thomas v. State*, 116 S. W. 600, 603, 55 Tex. Cr. App. 293.

Insanity, whatever its form, to be an excuse for crime, must be the result of mental unsoundness, leaving one without sufficient reason to know what he is doing or to know right from wrong, or without sufficient will power to govern his actions by reason of an insane impulse which he cannot control or resist. *Banks v. Commonwealth*, 141 S. W. 380, 385, 145 Ky. 800.

In order for defendant in a murder case to establish the defense of insanity, he must prove by a preponderance of the evidence that at the time the act was done he did not realize either that it was morally or criminally wrong. *State v. Hyde*, 73 S. E. 180, 181, 90 S. C. 296.

"Insanity" is a physical disease, located in the brain, which disease so perverts and deranges one or more of the mental and moral faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong, in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the laws of God and society. Insanity is either partial or general. Total insanity always excuses. Partial insanity does not always excuse. One may be partially insane, and yet be responsible for his criminal acts. The law does not excuse unless the derangement is so great that it actually renders the person incapable at the time of its commission of distinguishing between right and wrong, in reference to the particular act charged and proven against him." *State v. Paulsgrove*, 101 S. W. 27, 29, 203 Mo. 193.

"Insanity," in a legal sense, so as to be available as a defense to crime, must be such that defendant, when the act was committed, was not conscious of its wrongful nature. *People v. Willard*, 89 Pac. 124, 129, 150 Cal. 543.

#### **Incapacity to have criminal intent**

Mr. Bishop defines "insanity" as follows: "Insanity in the criminal law is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining, in the particular instance, the criminal intent which constitutes one of the elements of every crime." Where the question was whether defendant at the time he committed an act was sane, the instructions

should give the appropriate sections of the statute, at the same time defining insanity in accordance with Bishop's definition as supplemented by this court's comment in the Peel Case, or in equivalent language. In the Peel Case it is said: "Criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime. If there is no intent, there is no crime." *State v. Keerl*, 75 Pac. 362, 366, 29 Mont. 508, 101 Am. St. Rep. 579 (quoting 1 Bishop, Cr. Law, § 381, subd. 2; *State v. Peel*, 59 Pac. 169, 23 Mont. 358, 75 Am. St. Rep. 529).

"Insanity" is a disease of the mind rendering it incapable of entertaining or preventing its entertaining in a particular instance, the criminal intent constituting an element of the crime charged, and where accused had not sufficient reason to be able to judge the consequences of his act or where he was so far deprived of volition or self-control by the overwhelming violence of mental disease that he was not capable of voluntary action, and was not able to judge right from wrong, he was not responsible for the act committed. *State v. Leahey*, 120 Pac. 234, 239, 44 Mont. 354.

#### **Irrationality synonymous**

See Irrationality—Irrational.

#### **INSANE DELUSION**

See, also, Delusion.

A belief which a rational person may hold, however erroneous, is not an "insane delusion." *Hutchinson v. Hutchinson*, 95 N. E. 143, 146, 250 Ill. 170.

There is no such thing as an "insane delusion" founded on facts; if the idea entertained has for a basis anything substantial, it is not a delusion. *Fulton v. Freeland*, 118 S. W. 12, 19, 219 Mo. 494, 131 Am. St. Rep. 576.

An "insane delusion" exists when a person conceives the existence of something fanciful and extravagant, something having no foundation in reason or fact, and is dominated and controlled by such imagination, and therefore acts as he would not otherwise have acted. *Riddle v. Gibson*, 29 App. D. C. 237, 249.

A belief grounded on evidence, however slight, necessarily involves the exercise of the mental faculties of perception and reason; and in such cases, no matter how imperfect the reasoning process may be, or however erroneous the conclusion reached, it is not an "insane delusion." *Taylor v. McClintock*, 112 S. W. 405, 414, 87 Ark. 243 (citing 4 Words and Phrases, p. 3644).

"An 'insane delusion' does not mean a mistaken conclusion from a given state of facts, nor a mistaken belief as to the existence of facts. An erroneous conclusion of a sane person may arise from incorrect reasoning, or from a deduction from information

which he supposed to be correct." A misconception as to a particular matter is not an insane delusion when it does not spring up spontaneously from a disordered intellect. *Bohler v. Hicks*, 48 S. E. 308, 308, 120 Ga. 800.

An instruction that the true test of the absence or presence of insanity is the absence or presence of delusions, and that an "insane delusion" is insanity whether it is partial or general, and an insane delusion, which may be partial insanity, must be mental and not moral (that is, it must not arise from degradation or passion, for that is moral insanity), and that it is necessary that there be actual delusion, and that the acts should be immediately connected with the delusion, is not erroneous, where the court otherwise instructed that the term "insanity," as used in the special plea and issue of insanity made by the defendant, means such perverted condition of the mental and moral faculties as to render the person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, and that the term "insanity" is broad enough to include every species of mental aberration or disease of the mind. *Schissler v. State*, 99 N. W. 593, 599, 122 Wis. 365.

An "insane delusion" is an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or at least impossible under the circumstances of the individual. It is never the result of reasoning and reflection; it is not generated by them and cannot be dispelled by them; and hence it is not to be confounded with an opinion, however fantastic the latter may be. *Conner v. Skaggs*, 111 S. W. 1132, 1135, 213 Mo. 334.

There may be an "insane delusion," although the belief entertained is not, in the nature of things, a physical impossibility; but if such belief is entertained against all evidence and probability, and after argument to the contrary, it affords grounds for inferring that the person entertaining it labors under an "insane delusion." *Medill v. Snyder*, 58 Pac. 962, 964, 61 Kan. 15, 78 Am. St. Rep. 307.

An "insane delusion," which will render the sufferer incapable of making a will, is difficult to define with exact precision. It has been said that a delusion is a belief in a state or condition of things, the existence of which no rational person would believe, and again it has been defined as a spontaneous conception and acceptance as a fact of that which has no real existence except in imagination, and persistent adherence to it against all evidence. Another court defines it as a conception that originated spontaneously in the mind, without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation

in reality, and springing from a diseased or morbid condition of the mind. Another court says that if, without evidence of any kind, a testator imagines or conceives something to exist which does not exist in fact, and which no rational person would, in the absence of evidence, believe to exist, he is afflicted with an "insane delusion." Another definition is to the effect that a person conceiving something extravagant to exist which has no existence whatever except in his heated imagination, and who is incapable of being permanently reasoned out of that conception, is under an "insane delusion." It has also been defined as a belief in supposed facts which have no existence except in the person's perverted imagination, and which are against all evidence and probability, accompanied by conduct based on the assumption of the existence of those facts. Whatever form of words is chosen to express the meaning of insane delusion, it is clear, under all of the authorities, that it must be such an aberration as indicates an unsound or deranged condition of the mental faculties, as distinguished from a mere belief in the existence or non-existence of certain supposed facts or phenomena based upon some sort of evidence. A belief which results from a process of reasoning from evidence, however imperfect the process may be, or illogical the conclusion, is not an insane delusion. If the court is able to understand how a person, situated as the testator was, might have believed all that the evidence shows that he did believe, and still have been in the full possession of his senses, then an insane delusion is not established. *Owen v. Crumbaugh*, 81 N. E. 1044, 1051, 223 Ill. 380, 119 Am. St. Rep. 442, 10 Ann. Cas. 606 (citing *In re Forman's Will* [N. Y.] 54 Barb. 274; *Prather v. McClelland*, 13 S. W. 543, 76 Tex. 574; *Schneider v. Manning*, 12 N. E. 267, 121 Ill. 376; *Smith v. Smith*, 25 Atl. 11, 48 N. J. Eq. 566; *Rush v. Megee*, 36 Ind. 69; *Philadelphia Trust, etc., Co. v. Drinkhouse*, 17 Phila. 23; *Potter v. Jones*, 25 Pac. 769, 20 Or. 239, 12 L. R. A. 161; *Middleditch v. Williams*, 17 Atl. 826, 45 N. J. Eq. 726, 4 L. R. A. 738; *Mullins v. Cottrell*, 41 Miss. 291; *Benoist v. Murrin*, 58 Mo. 307; *Stanton v. Wetherwax* [N. Y.] 16 Barb. 259; *In re Shaw's Will* [N. Y.] 2 Redf. Sur. 107; *In re White*, 24 N. E. 935, 121 N. Y. 406; *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Martin v. Thayer*, 16 S. E. 489, 37 W. Va. 38; *Wait v. Westfall*, 68 N. E. 271, 161 Ind. 648).

A "delusion" indicative of an unsoundness of mind is a belief in something impossible in the nature of things, or in the circumstances surrounding the person under investigation, and which refuses to yield to evidence or to reason; or, if not a belief in something impossible in the circumstances of the case, if it is entertained against all evidence, probability, and argument to the contrary, it affords ground for inferring that the

person labors under an "insane delusion." *Lang v. Lang* (Iowa) 135 N. W. 604, 606.

#### **Belief in spiritualism**

Mere belief in spiritualism does not ipso facto constitute an "insane delusion," rendering the believer wanting in testamentary capacity. *Steinkuehler v. Wempner*, 81 N. E. 482, 486, 169 Ind. 154, 15 L. R. A. (N. S.) 673.

Testator's belief in spiritualism, using the term "belief" to mean a conviction founded upon evidence, however unsatisfactory, is not an "insane delusion," although the mind might become insane with spiritualism as its monomania. *Raison v. Raison*, 146 S. W. 400, 401, 148 Ky. 116.

An "insane delusion" consists in the belief of facts which no rational person would have believed. A mere belief in spiritualism is no evidence of monomania or "insane delusion." An insane delusion which will render the sufferer incapable of making a will is difficult to define with exact precision. A delusion is said to be a belief in a state or condition of things, the existence of which no rational person would believe. A delusion has also been defined as a "spontaneous conception and acceptance as a fact of that which has no real existence except in imagination, and persistent adherence to it against all evidence." Again, the same definition, in substance, is given as follows: "A conception that originated spontaneously in the mind, without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality, and springing from a diseased or morbid condition of the mind." Another form of definition, conveying substantially the same meaning, is: "If, without evidence of any kind, a testator imagines or conceives something to exist which does not exist in fact, and which no rational person would, in the absence of evidence, believe to exist, he is afflicted with an insane delusion." "Whenever a person conceives something extravagant to exist, which has no existence whatever but in his heated imagination, and is incapable of being permanently reasoned out of that conception, he is under an insane delusion in a peculiar, half-technical sense of the term." A person who believes supposed facts, which have no existence except in his perverted imagination, and which are against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, is, so far as they are concerned, under an insane delusion. In setting out these various definitions, we do not do so with the purpose of giving our approval to each of them, but merely to show the different forms of expression that courts have used to express the legal conception of an insane delusion. Whatever form of words are chosen to express the legal meaning of an insane delusion, it is clear, under all of the

authorities, that it must be such an aberration as indicates an unsound or deranged condition of the mental faculties, as distinguished from a mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence. A belief which results from a process of reasoning from evidence, however imperfect the process may be or illogical the conclusion, is not an insane delusion. *Owen v. Crumbaugh*, 81 N. E. 1044, 1045, 1051, 1052, 228 Ill. 380, 119 Am. St. Rep. 442, 10 Ann. Cas. 606 (citing *In re Forman's Will* [N. Y.] 54 Barb. 274; *Prather v. McClelland*, 13 S. W. 543, 76 Tex. 574; *Schneider v. Manning*, 12 N. E. 267, 121 Ill. 376; *Smith v. Smith*, 25 Atl. 11, 48 N. J. Eq. 566; *Rush v. Megee*, 36 Ind. 69; *Philadelphia Trust, etc., Co. v. Drinkhouse*, 17 Phila. 23; *Potter v. Jones*, 25 Pac. 769, 20 Or. 239, 12 L. R. A. 161; *Middleditch v. Williams*, 17 Atl. 826, 45 N. J. Eq. 726, 4 L. R. A. 738; *Mullins v. Cottrell*, 41 Miss. 291; *Benoist v. Murrin*, 58 Mo. 307; *Stanton v. Wetherwax* [N. Y.] 16 Barb. 259; *In re Shaw's Will* [N. Y.] 2 Redf. Sur. 107; *In re White*, 24 N. E. 935, 121 N. Y. 406).

#### **As affecting testamentary capacity**

On the probate of a will, the court defined "insane delusion" as a belief in a state of facts that did not exist, and which no rational person would believe, and refused to charge that an "insane delusion" is a false belief, arising spontaneously in the mind of a person, and founded on no evidence or reason, and persistently adhered to against all evidence, reason, or argument. Held, that the definition given substantially agrees with definitions previously approved by the Supreme Court, and that the refusal of the requested instruction was not error. *Lanham v. Lanham* (Tex.) 146 S. W. 635, 640.

"Insane delusion" consists in the belief of facts which no rational person would have believed. Unreasonable prejudice against relatives is not ordinarily a ground for invalidating a will, but a will may be set aside where the testator's aversion is the result of an insane delusion and his conduct cannot be explained on any other ground." Hence a testator's prejudice against a son who had become alienated from the rest of the family did not amount to an insane delusion, where the testator's will as first made devised one-fourth of the remainder of his property to his son. *Schmidt v. Schmidt*, 66 N. E. 371, 374, 201 Ill. 191 (quoting and adopting definition in *Nicewander v. Nicewander*, 37 N. E. 698, 151 Ill. 156).

The meaning of "insane delusions," in its legal sense, is a belief in things impossible or a belief in things possible, but so improbable under the surrounding circumstances that no man of sound mind could give them credence. To avoid a will on the ground of delusion of the testator, the delusion must be an insane delusion, and the

will must be a product of it. *Johnson v. Johnson*, 65 Atl. 918, 919, 105 Md. 81, 121 Am. St. Rep. 570.

A belief does not amount to an insane delusion unless it appears that the belief is wholly without any basis whatever, and the testator has obstinately persisted in it against all arguments which may have been employed to dissuade him. If there are any facts, however little evidential force they may possess, upon which the testator in reason may have based his belief, it will not be an "insane delusion." *Stull v. Stull*, 96 N. W. 196, 202, 1 Neb. (Unof.) 389 (quoting and adopting definition in *Underhill, Law of Wills*, p. 126).

According to V. S. 7, the term "insane persons" includes every idiot, non compos, lunatic, and distracted person. A person who is adjudged a non compos and placed under guardianship as such is thereby rendered prima facie incapable of making a will while the adjudication remains in force. In *re Cowdry's Will*, 60 Atl. 141, 77 Vt. 359, 3 Ann. Cas. 70.

"An 'insane delusion' is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason." The fact that testator's regard for his children was lessened by the fact that one of them had sympathized with and aided testator's wife in certain family difficulties, and that his son had refused to repay a sum of money which testator had loaned him, constituted no indication that testator entertained an insane delusion against his children. *Bauchens v. Davis*, 82 N. E. 365, 366, 229 Ill. 557 (quoting and adopting definition in *Scott v. Scott*, 72 N. E. 708, 212 Ill. 597).

Where a person imagines something extravagant to exist which really has no existence, and he is incapable of being reasoned out of his false belief, he is in that respect insane, and if his "delusion" relates to his child, and he imagines that the child is not his, when there is no foundation for such conception, and is incapable of being reasoned out of the same, he is possessed of an "insane delusion" as to his child, and, if his will is found to be the fruit of such false conception and disinherits the child, the jury may find against the paper writing purporting to be the will, though it may develop that he was rational on other subjects and capable of transacting ordinary business. *Buford v. Gruber*, 122 S. W. 717, 721, 223 Mo. 231 (quoting 2 Words and Phrases, p. 1971 et seq.).

In determining the question of testamentary capacity, the law takes cognizance only of such delusions as are insane delusions, such a delusion being a spontaneous

conception and acceptance of that as a fact which has no existence except in the imagination, and which is persistently believed in against all evidence and all probability, and an apprehension by testatrix that food brought to her by her daughters was poisoned did not amount to an insane delusion where the testatrix ate such food in company with other persons upon requiring them first to eat. *Friedersdorf v. Lacy*, 90 N. E. 766, 768, 173 Ind. 429.

An "insane delusion" which will render one incapable of making a will consists in a belief in a state or condition of things in the existence of which no rational person would believe, so that a person who believes supposed facts which have no existence except in his perverted imagination, and which are against all evidence and probability, and conducts himself, however logically, on the assumption of their existence, is under an "insane delusion." It does not, however, include a belief which results from a process of reasoning from evidence, however imperfect the process or illogical the conclusion. An insane delusion must involve proof that testator believed certain things concerning a person having a reasonable claim on his bounty, that he had no evidence on which to base such belief, that it was false and was adhered to after the falsity had been shown by reasonable evidence, and that the things testator believed were such that no person of sound mind would believe, that testator refused to yield such irrational belief in the face of such reasonable evidence as would convince an ordinarily sound and healthy mind, and that the existence of the delusion was present in testator's mind and exercised a controlling influence over him when he made his will. Where testator has some actual grounds for the belief which he has concerning one having a reasonable claim on his bounty, though regarded by others as wholly insufficient, the mere misapprehension of the facts or unreasonable or extravagant conclusions drawn therefrom are insufficient to establish the existence of the delusion sufficient to invalidate his will. *Snell v. Weldon*, 90 N. E. 1061, 1070, 243 Ill. 496.

An undue prejudice by testator based on some reason is not an "insane delusion." In *re Clapham's Estate*, 103 N. W. 61, 62, 73 Neb. 492.

An "insane delusion" is a belief in something which no sane person would or could believe, something in the nature of things impossible, or which has no foundation in fact. An insane delusion is a belief induced by insanity. To invalidate a will on the ground that testator labored under an insane delusion, it must appear that he was subject to a delusion as to the facts within his own observation, in the existence of which he actually believed, which a rational man, from the use of his senses, would have known

not to exist. To invalidate a will; a delusion on the part of the testator must have been, not only the inducing cause of it, but also an existing one at the time the will was made. *Knapp v. St. Louis Trust Co.*, 98 S. W. 70, 78, 199 Mo. 640 (citing *Rood, Wills*, § 132; *Wharton v. Stille*, 1 Med. Jur. p. 85).

In the absence of a showing of a continued affection on the part of a father for his son, suddenly interrupted without known cause, the father's opinion that the son had no regard for him, and was waiting for him to die in order to obtain a share of his property, could not be said to be the result of an "insane delusion." *Bean v. Bean*, 108 N. W. 369, 371, 144 Mich. 599.

### INSANE PERSON

See Insane—Insanity; Lunatic; Monomaniac.

As pauper, see Pauper.

### INSANE PERSON AT LARGE

Under Kirby's Dig. § 4049, providing that insane persons at large and not in the care of some discreet person shall be arrested by any peace officer and taken before a magistrate of the county, an insane passenger ejected from a railroad train and placed in the station in the custody of the railroad station agent was a passenger, and not an "insane person at large" within such section. *St. Louis, I. M. & S. Ry. Co. v. Woodruff*, 115 S. W. 953, 956, 89 Ark. 9.

### INSANITY PROCEEDING

As civil case, see Civil Action—Case—Suit—Etc.

### INSANITY SO ADJUDGED BY THE COURTS

The words "insanity so adjudged by the courts," as used in the by-laws of a fraternal benefit society, providing that, whenever any member shall become permanently and totally disabled from pursuing the ordinary vocations of life, he shall be entitled to receive a part of his certificate, and declaring that the term "total disability" means "insanity so adjudged by the courts," mean that degree of insanity which would authorize an adjudication of the insured's mental status by the courts, sufficiently authorized to inquire into such matters, and, to recover on a certificate on the ground of insanity, it must be such degree of insanity as would authorize an adjudication of insured's mental status by the proper courts. *Knipp v. United Ben. Ass'n* (Tex. Civ. App.) 101 S. W. 273, 274, 45 Tex. Civ. App. 357.

### INSECURE

The word "insecure," as used in *Willson's Rev. & Ann. St. 1903*, c. 56, § 1, providing that a nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission in any way renders other

persons insecure in life or in the use of property, means not secure, not confident of safety or permanence, distrustful, suspicious, apprehensive of danger or loss. *Territory v. Long Bell Lumber Co.*, 99 Pac. 911, 920, 22 Okl. 890.

### INSIDE AND OUTSIDE REPAIRS

All inside and outside repairs, see All.

### INSIDIOUS MACHINATIONS

A purchase of stock by a director and owner of three-fourths of the entire capital stock, who was also administrator general of the company, and engaged in the negotiations which finally led to the sale of the company's lands to the Philippine Islands government at a price which greatly enhanced the value of the stock, was fraudulent as procured by "insidious machinations" inducing the execution of the contract of sale, within the meaning of Code P. I. art. 1269, defining deceit, where he employed an agent to make the purchase, concealing both his own identity as the purchaser, and his knowledge of the state of the negotiations and their probable successful result. *Strong v. Repide*, 29 Sup. Ct. 521, 524, 213 U. S. 419, 53 L. Ed. 853.

### INSIMUL COMPUTASSENT

"Insimul computassent," which means "they accounted together," was the name of the action upon an account stated, and it was averred that the parties had settled their accounts together and defendant engaged to pay plaintiff the balance. *Jasper Trust Co. v. Lampkin*, 50 South. 337, 339, 162 Ala. 388, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 33 (citing *Black, Law Dict.*).

### INSOLVENCY—INSOLVENT

See Being Insolvent; Claim Provable in Insolvency; Contemplation of Insolvency; Due to Insolvency.

See, also, Solvency—Solvent.

The general understanding is that an insolvent debtor is one whose property is insufficient to pay all his debts, or out of which his debts may be collected. *Kingsley v. City of Merrill*, 99 N. W. 1044, 1047, 122 Wis. 185, 67 L. R. A. 200, 2 Ann. Cas. 748.

"Insolvency," as the term is ordinarily used, is not the same thing as a mere failure to pay debts, but, in the case of an individual or corporation, it means an insufficiency of property and assets to pay debts. *San Antonio Hardware Co. v. Sanger* (Tex.) 151 S. W. 1104, 1107.

"Insolvency" means that condition in which a person has not sufficient assets to pay his debts. If the property of a person, whether real or personal, tangible or intangi-



ble, leviable or nonleviable, is in value more than sufficient to discharge all of his debts, he is not an "insolvent." *Cohen v. Parish*, 28 S. E. 122, 123, 100 Ga. 335 (citing *Brown v. Spivey*, 53 Ga. 158; *Powell v. Westmoreland*, 60 Ga. 572; *Burrill, Assignm.* § 43; *Herrick v. Borst* [N. Y.] 4 Hill, 850; *Toof v. Martin*, 13 Wall. [80 U. S.] 40, 20 L. Ed. 481; *Bouv. Law Dict.*; *And. Law Dict.*).

"Insolvency" denotes the insufficiency of the entire property and assets of an individual to pay his debts, and is to be determined from a comparison of all assets and resources with his liabilities, and not alone from the amount of money on hand or coming in, or from the absence of money on hand. *Rogers v. Ogden Bldg. & Sav. Ass'n*, 83 Pac. 754, 759, 30 Utah, 188.

It is not necessary to be a merchant to be insolvent; "insolvency" not being confined to merchants. *Rex Buggy Co. v. Ross*, 97 S. W. 291, 292, 80 Ark. 388.

"Insolvency" of the maker of a note, so as to excuse the holder from suing thereon at the request of the indorser, is an absence of property of the debtor out of which the debt can be made by execution. *First Nat. Bank v. Robinson* (Tex.) 124 S. W. 177, 178.

A person is deemed to be "insolvent," within the meaning of the bankruptcy act, when the aggregate of his present property "shall not, at a fair valuation, be sufficient in amount to pay his debts." *John S. Brittain Dry Goods Co. v. Bertenshaw*, 75 Pac. 1027, 68 Kan. 734; *Cullinane v. State Bank of Waverly*, 98 N. W. 887, 888, 123 Iowa, 340; *Paper v. Stern*, 198 Fed. 642, 644, 117 C. C. A. 346.

Bankr. Act July 1, 1898, defines "insolvency" as follows: "A person shall be deemed insolvent within the provisions of the act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." *Blyth Fargo & Co. v. Kastor*, 97 Pac. 921, 925, 17 Wyo. 180; *John S. Brittain Dry Goods Co. v. Bertenshaw*, 75 Pac. 1027, 1028, 68 Kan. 734; *In re Pfaffinger*, 154 Fed. 523, 525; *Hastings v. Fithian*, 60 Atl. 350, 352, 71 N. J. Law, 311; *In re McMurtry & Smith*, 142 Fed. 853, 854; *In re First Nat. Bank of Louisville*, 155 Fed. 100, 103, 84 C. C. A. 16; *Hardy v. Gray*, 144 Fed. 922, 924, 75 C. C. A. 562; *Plymouth Cordage Co. v. Smith*, 90 Pac. 418, 419, 18 Okl. 249, 11 Ann. Cas. 445.

The definition of what constitutes "insolvency," contained in section 1, subd. 15, of the bankruptcy act of July 1, 1898, 30 Stat. 544, c. 541, does not control in determining whether a debtor was insolvent, so as to make a voluntary conveyance fraudulent un-

der the laws of this state. Hence the exempt property of the debtor is not to be considered in determining the value of the assets retained. Nor is a debt that is amply secured by mortgage on the property conveyed to be included in determining whether the debtor has retained assets amply sufficient to satisfy existing claims. *Underleak v. Scott*, 134 N. W. 731, 734, 117 Minn. 136.

Under Bankruptcy Act July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544, providing that a person shall be deemed "insolvent" when the aggregate of his property, exclusive of property conveyed with intent to defraud his creditors, shall not at a fair valuation be sufficient to pay his debts, the question whether a mortgage and assignment of book accounts by one to his wife were invalid on account of insolvency must be determined by a valuation of his property at its fair market value, rather than by any personal value to the bankrupt which he might place on it. *Ziegler v. Thayer*, 83 Atl. 266, 267, 34 R. I. 288.

"In view of the authority of the Congress of the United States to enact bankruptcy laws, and such laws having been enacted and being in operation, we are of opinion that, when the question of insolvency is in issue in a state court, it would be proper for such court to follow the definition of 'insolvency,' as embraced in the Bankrupt Law, as enacted by Congress, (Act July 1, 1898, c. 541, § 1, subd. 15), declaring that 'a person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed, or removed or permitted to be sold or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.'" *Owen v. American Nat. Bank*, 81 S. W. 988, 989, 36 Tex. Civ. App. 490.

A person is "insolvent," within the Bankruptcy Act, "whenever the aggregate of his property \* \* \* shall not at a fair valuation be sufficient in amount to pay his debts." Hence notice that a debtor has not paid a claim at maturity is not necessarily and conclusively notice of insolvency. *Hackney v. Raymond Bros. Clarke Co.*, 94 N. W. 822, 823, 68 Neb. 624 (citing Act July 1, 1898, 30 Stat. 544, c. 541; *In re Eggert*, 43 C. C. A. 1, 102 Fed. 735).

Since Bankr. Act, § 60a, providing that a person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. The term "insolvency" has

been defined in chapter 1, § 1, cl. 15, as a person shall be deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. The act is largely different from Bankr. Act, 1867, where the term "insolvency" was construed to mean an inability to meet one's obligations as they matured in the ordinary course of business, and the term "insolvency" in the present act is equivalent to the term "bankruptcy" in the former. While, therefore, rulings under the former act are inapplicable in a certain sense, because of this difference in the meaning of the term "insolvency," they do apply so far as they determine the principles of law by which it is to be ascertained whether a creditor receiving a preference had reasonable cause to believe that the debtor had not at the time property sufficient, at a fair valuation, to pay all of his debts. In *re Eggert*, 102 Fed. 735, 738, 43 C. C. A. 1.

Bankr. Act July 1, 1898, c. 541, § 1, cl. 15, declares that a person shall be deemed insolvent whenever the aggregate of his property shall not, at a fair valuation, be sufficient in amount to pay his debts. The fact alone that the indebtedness of a retail merchant to a wholesale house is past due when a payment is made thereon does not give the creditor reasonable cause to believe the debtor to be insolvent. In *re Goodhile*, 130 Fed. 471, 473.

The term "insolvency," as defined in Bankr. Act § 1, cl. 15, is the condition of a person whenever the aggregate of his property, exclusive of any which he may have conveyed, consolidated, or removed, with intent to delay his creditors, shall not, at a fair valuation be sufficient in amount to pay his debts. Where, as in Michigan, a mortgage, whether of real or personal property, does not convey the title, but imposes a lien only for the amount secured, a corporation mortgaged its entire property, and the mortgagor's remaining estate was greater in value than its unsecured debts, the execution of the mortgage did not constitute an act of bankruptcy, as it was not in fact insolvent. It seems an absurdity to say that a man is insolvent because he has transferred some of his estate with intent to defraud his creditors when he has an estate remaining which is abundantly sufficient to pay all his debts and open to seizure for the satisfaction thereof, or which he has an absolute right to dispose of and liquidate in cash. *Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son*, 128 Fed. 701, 704, 63 C. C. A. 253.

In determining the "solvency" or "insolvency" of a person who by Bankr. Act, § 1, is to be deemed insolvent within the pro-

visions of the act, whenever the aggregate of his property, exclusive of any property which he may have transferred or concealed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient to pay his debts, all the property which he owns is to be reckoned in computing the amount of his assets, except such as he may have transferred or concealed in fraud of creditors, but not excluding property which is exempt from execution by the laws of the state. In *re Crenshaw*, 156 Fed. 638, 639.

Under Bankr. Act July 1, 1898, exempt property must be included in determining "insolvency." *Plymouth Cordage Co. v. Smith*, 90 P. 418, 419, 18 Okl. 249, 11 Ann. Cas. 445.

"Insolvency," as defined in the Bankruptcy Act, exists whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. Where conveyances of property by an alleged bankrupt are charged as acts of bankruptcy, under both subdivisions 1 and 2 of section 3, Bankr. Act July 1, 1898, c. 541, 30 Stat. 546, as made with intent to defraud and also as preferences, the value of the property thus conveyed is not to be computed in determining the question of solvency at the time of the filing of the petition as a defense under the first subdivision, but, if the conveyances are found not to have been fraudulent, the value of such property is to be considered in determining the question of solvency or insolvency when the conveyances were made under subdivision 2. *Acme Food Co. v. Meier*, 153 Fed. 74, 77, 82 C. C. A. 208.

That a debtor is insolvent does not mean inability to pay any portion of a debt, but simply that his assets at a fair market value are not sufficient to pay his liabilities. *Avery v. Moore*, 124 Pac. 173, 175, 87 Kan. 337.

Under Bankr. Act 1898, § 1, cl. 15, providing that a person shall be deemed "insolvent," within the provisions of the act, whenever the aggregate of his property shall not, at a fair valuation, be sufficient in amount to pay his debts, one is not required to be able to realize from his property, at the time of an alleged preference, a sufficient amount to pay his debts; but, if a fair valuation of his property at that time is sufficient to pay such debts, he is solvent. *J. W. Crancer & Co. v. Wade*, 110 Pac. 778, 779, 26 Okl. 757.

The word "insolvent," as used by the courts in dealing with the legal proposition that if there is a negligent delay in presenting a bill of exchange for acceptance, whereby the antecedent parties, though not discharged from legal liability, became insolvent, the amount of the bill is *prima facie* the

loss, is used in its ordinary sense to show that nothing can be collected from the parties remaining on the bill. *Hendricks v. Jefferson County Savings Bank*, 45 South. 136, 137, 153 Ala. 636, 14 L. R. A. (N. S.) 686.

Under paragraph 15 of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, providing that a person shall be deemed "insolvent," within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts, the property or assets of the debtor must be valued as of a going concern, if that is the actual condition, and subsequent insolvency is not the only test. *Empire State Trust Co. v. William F. Fisher Co.*, 57 Atl. 502, 505, 67 N. J. Eq. 88.

In determining whether or not a debtor was "insolvent" within the meaning of Bankr. Act July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544, at the time of the commission of an alleged act of bankruptcy by suffering a creditor to obtain a preference through legal proceedings, the test of a "fair valuation" of his property is its market value at the time the legal proceedings were taken, where that can be fairly established, and not its value as it may have been affected by such proceedings; and the property to be taken into consideration includes all of his property, whether legally exempt from execution or not, except such as may have been conveyed, concealed, or removed with intent to defraud, hinder, or delay his creditors. In *re Hines*, 144 Fed. 142, 144.

Pub. St. 1901, c. 189, § 13, authorizing the probate court to determine the net income received by the administrator from the rents and profits of real estate, "in case the estate is insolvent," does not mean actual "insolvency," but merely the method adopted when the estate is being settled in the insolvency courts. *Mansfield v. Holton*, 68 Atl. 541, 542, 74 N. H. 417.

#### **Bankruptcy synonyms**

"Insolvency laws" have been frequent in colonial and state legislation, and no distinction was practically or theoretically attempted between such laws and bankrupt laws. A bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those common to bankrupt laws. *Hanover Nat. Bank v. Moyses*, 22 Sup. Ct. 857, 859, 186 U. S. 181, 46 L. Ed. 1113.

Under the Bankrupt Act of 1867, the term "insolvency" was construed to mean an inability to meet one's obligations in the ordinary course of business, while in the present act it is equivalent to the word "bankruptcy," in the former statute; but the

principles of construction laid down by the courts in determining the force and effect to be given to the phrase "reasonable cause to believe," found in the former act relating to preferences, are equally applicable in considering the meaning of this phrase in the act of 1898. *Stevenson v. Milliken-Tomlinson Co.*, 59 Atl. 472, 475, 99 Me. 320.

"In a general sense, and to all practical ends in business transactions, there is no sound distinction between bankruptcy and 'insolvency.' It is believed that the terms are used convertibly in ordinary parlance; they are so historically. \* \* \* The difference lies essentially in the scheme of remedies adopted in reference to bankruptcy or insolvency, to effectuate which the law arbitrarily pronounces a man bankrupt upon the commission of particular acts, though he be indisputably solvent." The word "insolvency," in the fourteenth section of the act [of 1841 (5 Stat. 448)], as applied to voluntary applications for a decree, means inability to meet engagements; but, in relation to compulsory proceedings by creditors, it means the bankruptcy of the debtor as known to the court as a ground for proceedings, and must be proved in the manner indicated by the first section of the statute. *Ex parte Hull*, 12 Fed. Cas. 853, 856 (citing and distinguishing *Ex parte Galbraith*, 9 Fed. Cas. 1077).

The term "insolvency," under the bankrupt act of 1867, was construed to mean inability to meet one's obligations in the ordinary course of business, and in Act 1898, § 1, cl. 15, and section 60, cls. "a," "b," it is equivalent to the word "bankruptcy" in the former statute, and the effect to be given to the phrase "reasonable cause to believe," found in the former act relating to preferences, is applicable to this phrase in the act of 1898, and it is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief in his debtor's insolvency. *Stevenson v. Milliken-Tomlinson Co.*, 59 Atl. 472, 475, 99 Me. 320.

#### **As disability**

See Disability.

#### **As failure**

See Failure.

#### **Inability to pay debts**

"Insolvency" carries with it inability to presently pay indebtedness. *Reinhardt v. Interstate Tel. Co.*, 63 Atl. 1097, 1101, 71 N. J. Eq. 70 (quoting *Ft. Wayne Electric Corp. v. Franklin Electric Light Co.*, 41 Atl. 219, 57 N. J. Eq. 7, 13).

"Insolvency" is merely the opposite of solvency. A man who is unable to pay his debts out of his own means, or whose debts cannot be collected out of such means by legal process, is insolvent; and this although it may be morally certain that with indul-

gence from his creditors in point of time he may be ultimately able to satisfy his engagements in full. The term "insolvency" imports a present inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. If a man's debts cannot be made in full out of his property by levy and sale on execution, he is "insolvent," within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the bankrupt act. In *re Wells*, 29 Fed. Cas. 637, 638 (citing *Burrill*, *Assignm.* 38, 41; *Herrick v. Borst & Warnick*, 4 Hill [N. Y.] 652; *Bradford v. Union Bank of Tennessee*, 13 How. [54 U. S.] 57, 14 L. Ed. 49; *In re Lewis*, 15 Fed. Cas. 452; *Foster v. Hackley*, 9 Fed. Cas. 545).

"When a person is unable to pay his debts, he is 'insolvent.' As said in *Brouwer v. Harbeck*, 9 N. Y. 594: 'A corporation, like an individual, is said to be insolvent when it is not able to pay its debts. Insolvency means a general inability to answer, in the course of business, the debts existing and capable of being enforced.' In all the cases which we have had occasion to examine, a finding of 'insolvency' on inability to meet obligations has been upheld, but in none has it been declared that a mere failure to meet them has justified the finding, where the present ability to do so was shown." Hence, where it appears that a company desired to hold its property for a raise in value, and refused to sell in order to pay its debts, where there was no showing that the property was insufficient to pay the debts in case of a sale, the granting of a receiver on the ground of "insolvency" alone is not warranted. *Brenton & McKay v. Peck*, 87 S. W. 898, 901, 39 Tex. Civ. App. 224.

Strict proof of insolvency is not essential to exercise the right of stoppage in transitu; "insolvency" in that sense meaning general inability to pay debts. *Selgfried v. Chicago, B. & Q. R. Co.*, 126 S. W. 798, 800, 147 Mo. App. 543.

#### **Inability to pay debts in usual course of business**

The term "insolvency" as used in bankruptcy and insolvency laws, means the inability of a person to pay his debts as they mature in the ordinary course of business; but as used in a general sense, it means a substantial excess of a person's liabilities over the fair cash value of his property. *Grunsfeld Bros. v. Brownell*, 76 Pac. 310, 311, 12 N. M. 192.

A debtor who is unable to meet his engagements and pay his debts in the ordinary course of business, as persons in trade usually do, is "insolvent," within the meaning of the bankruptcy act. *Graham v. Stark*, 10 Fed. Cas. 939, 941 (citing and adopting 2 Kent, Comm. 389; *Thompson v. Thompson*, 4 Cush. [58 Mass.] 127; *Lee v. Kilburn*, 3

*Gray* [69 Mass.] 594; *Buckingham v. McLean*, 13 How. [54 U. S.] 150, 14 L. Ed. 90; *Merchants' Nat. Bank v. Truax*, 17 Fed. Cas. 58; *In re Black*, 3 Fed. Cas. 495; *In re Gay*, 10 Fed. Cas. 105; *In re Louis*, 15 Fed. Cas. 940; *Morgan v. Mastick*, 17 Fed. Cas. 752).

It is difficult for a court to lay down a definition of "insolvency" that is applicable to every case. Whenever a business concern is unable to meet its commercial paper as it matures in the ordinary course of business, it is insolvent. The term must necessarily be construed to the particular facts of the case. But it is undoubtedly the great rule that where a business concern is unable to meet its paper as it matures, and its assets are in such a condition that they are not available either as security or collateral, for the purpose of borrowing or for the purpose of conversion, and in addition to that it is apparent that there would not be sufficient money realized by sale under execution to meet these liabilities, it is practically insolvent. *Cronan v. District Court, First Judicial District in and for Kootenai County*, 96 Pac. 768, 775, 15 Idaho, 184.

Statutory "insolvency" is generally determined as an inability to pay debts when due or demandable. *James Clark Co. v. Colton*, 46 Atl. 386, 401, 91 Md. 195, 49 L. R. A. 698.

The words "insolvent" and "insolvency," as used in Rev. St. c. 70, § 29, as applied to persons engaged in mercantile or commercial business, are defined as an inability to meet maturing demands in the ordinary course of business, although the insolvent may in fact have sufficient property or assets to pay his debts. *Morey v. Milliken*, 30 Atl. 102, 105, 86 Me. 464.

Inability to meet engagements in the usual course of business constitutes "insolvency," within the meaning of the bankrupt law. When, therefore, a merchant fails to pay his notes or other mercantile obligations as they become payable, an immediate presumption of inability to pay arises. When a merchant does not so pay, he is at once and everywhere assumed, in the common language applied to the subject, to have failed. A man may be fully able to pay his debts, if he will, and yet in the eye of the law he is insolvent, if his property is so situated that it cannot be reached by process of law, and subjected, without his consent, to the payment of his debts. To say that a debtor is solvent, when his entire estate is exempt to him from the payment of his debts and cannot be subjected by his creditors against his will, would be a solecism. "Solveny" involves not only the ability of the debtor to pay, but the ability of the creditor to enforce payment by legal process. "Solveny" implies as well the present ability of the debtor to pay out of his estate, as also

such attitude of his property as that it may be reached and subjected to process of law without his consent to the payment of such debts. *Pelham v. Chattahoochee Grocery Co.*, 47 South. 172, 174, 156 Ala. 500 (citing *Mayer v. Hermann*, 10 Blatchf. 260, 16 Fed. Cas. 1240; *Mitchell v. Bradstreet Co.*, 22 S. W. 358, 724, 116 Mo. 226, 20 L. R. A. 142, 38 Am. St. Rep. 592; 22 Cyc. p. 1260).

"Insolvency," as the term is used in equity, is clearly differentiated from the meaning which is given by the bankruptcy act. Allegations in a bill that defendant could not pay its current obligations as they matured, and that it was unable in the ordinary course of its business to pay its existing and enforceable liabilities, was a proper and sufficient allegation of insolvency. *American Can Co. v. Erie Preserving Co.*, 171 Fed. 540, 542.

Under the bankruptcy act of 1867, the term "insolvency" was construed to mean an inability to meet one's obligations in the ordinary course of business, while in the act of 1898 it is equivalent to the word "bankruptcy" in the former statute. *Stevenson v. Milliken-Tomlinson Co.*, 59 Atl. 472, 475, 99 Me. 320.

The federal Supreme Court, when considering the term "insolvency" under the bankruptcy act of 1867, says: "Insolvency, in the sense of the bankruptcy act, means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions." It is again said that: "In the mercantile sense it means a person unable to pay his debts according to the usages of trade, but in the broad sense used by the statute it means a person whose affairs have become so deranged that he is unable to pay his debts as they fall due, and if from such deranged state of his affairs, and the sense of inability to meet his moneyed engagements, he should transfer his property to a person to pay his debts, we should regard such assignment as made in contemplation of insolvency and within the meaning of the statute." *Cincinnati Equipment Co. v. Degnan*, 184 Fed. 834, 840, 107 C. C. A. 158 (quoting *Dutcher v. Wright*, 94 U. S. 553, 557, 24 L. Ed. 130; *Mitchell v. Gazzam*, 12 Ohio, 315, 336).

The words "insolvent" and "insolvency," contained in Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, §§ 35, 39, had a very different meaning than they have under the present Bankrupt Act. Under the former act, it was held that "by insolvency as used \* \* \* when applied to traders and merchants is meant inability of the party to pay his debts as they become due in the ordinary course of business." The present act declares that "a person shall be deemed insolvent \* \* \* whenever the aggregate of his property, exclusive of any property which he may have

conveyed, \* \* \* shall not at a fair valuation be deemed sufficient in amount to pay his debts." To have reasonable cause to believe that a trader or merchant is unable to pay his debts as they become due in the ordinary course of business is a very different thing than to have cause to believe that the aggregate amount of the debtor's available property and assets are insufficient in amount, at a fair valuation, to pay his debts. *Suffel v. McCartney Nat. Bank*, 106 N. W. 837, 839, 127 Wis. 208, 115 Am. St. Rep. 1004.

That a company's estate and effects through attachments and litigation and other proceedings are in danger of being wasted or lost shows its "insolvency." "Insolvency" exists in its application to persons engaged in commercial pursuits "when they can no longer continue in the ordinary course, securing to the existing creditors an equal division of the assets before they shall be wasted and frittered away in a hopeless struggle under conditions which compel disaster in the end," or when one is unable "to pay his debts as they become due in the ordinary course of business." *Moody v. Port Clyde Development Co.*, 66 Atl. 967, 971, 102 Me. 365 (quoting and adopting definition in *Morey v. Milliken*, 30 Atl. 102, 86 Me. 464).

"Insolvency" has been defined as a general inability to answer in the course of business liabilities existing and capable of being enforced, as applied to a person, firm, or corporation engaged in trade. "Insolvency" is an inability to pay debts as they fall due in the course of the business. The purchase of goods on time, expecting to meet the obligations thereby incurred, as they mature, out of the sale of the goods purchased, does not render the purchaser of the goods insolvent, merely because a forced sale of the goods at any particular time might not produce a sufficient sum to equal the aggregate of present and future liabilities. The "insolvency" of a firm may depend upon many facts, such as the amount of liabilities, the time of their maturity, and the amount and value of the assets. *Martin v. Hertz*, 79 N. E. 558, 559, 224 Ill. 84 (citing *Best v. Fuller & Fuller Co.*, 56 N. E. 1077, 185 Ill. 43; *Atwater v. American Exch. Nat. Bank*, 38 N. E. 1017, 152 Ill. 605).

The word "insolvent," as used in *Sanborn & B. Ann. St. § 1693a*, declaring a conveyance by an insolvent debtor within 60 days prior to a voluntary assignment and in contemplation of such assignment or of insolvency, etc., to be invalid, is used in its ordinary sense of inability to meet obligations as they fall due. *Barnes v. National Bank of Oshkosh*, 71 N. W. 602, 604, 97 Wis. 16.

An "insolvent debtor" will not be permitted to alienate his property and place it in a position where it is not subject to process in

behalf of its creditors, unless there has been received a full and fair consideration for the property transferred, and the transfer has been made in good faith, and in this connection an "insolvent debtor" is one who is unable to pay his debts from his own means as they become due. *Hall v. Feeney*, 118 N. W. 1038, 1041, 22 S. D. 541, 21 L. R. A. (N. S.) 513.

#### Of bank

"Insolvency," in its legal sense, as applied to banks and trust companies, exists whenever such an institution, from any cause, is unable to pay its debts in the ordinary course of business. *Commonwealth v. Tradesmen's Trust Co. of Philadelphia*, 85 Atl. 363, 364, 237 Pa. 316.

To say that a bank is "insolvent" is simply to say that all of its assets are insufficient to meet its liabilities. *Youmans v. State*, 66 S. E. 383, 389, 7 Ga. App. 101.

"Insolvency," in its true meaning, is the failure and consequent suspension of business, and, where a bank has not closed its doors and has not failed in business, a bona fide sale made in the exercise of the power given to stockholders by Rev. St. § 5139, to transfer their stock like other personal property, was not void as a fraud on the bank's creditors, because the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities. *Earle v. Carson*, 23 Sup. Ct. 254, 259, 188 U. S. 42, 47 L. Ed. 373.

Under Pen. Code 1895, § 206, providing that every "insolvency" of a chartered bank, or refusal or failure to redeem its bills on demand, shall be deemed fraudulent, etc., it was not the intention of the Legislature to treat the failure to redeem bills on the part of the bank as synonymous in a criminal sense with "insolvency," although, so far as civil liability was concerned, a failure to redeem its bills might be a badge of insolvency. *Youmans v. State*, 66 S. E. 383-385, 7 Ga. App. 101.

The term "insolvency" as used in Ky. St. § 597, providing that, if any president of a bank shall receive or assent to the receiving of deposits with knowledge that the bank is insolvent, he shall be guilty of a felony, means that all of the bank's property and assets are not sufficient to satisfy its debts, and not that it may not have sufficient funds in its vaults to satisfy all its depositors, or any considerable number of them, on the same day, or in case of a run. *Parrish v. Commonwealth*, 123 S. W. 339, 345, 136 Ky. 77.

In Rev. Codes, § 2985, relating to receiving deposits in a bank while it is insolvent, the word "insolvent" means that a bank is insolvent when its assets and property are of such a character and value or in such a condition that it is unable to meet the demands made upon it in the usual and

ordinary course of banking business. *State v. Cramer*, 119 Pac. 30, 35, 20 Idaho, 639.

It is true that the phrase "unsafe to continue to transact business," as used in Act March 26, 1895 (St. 1895, p. 172, c. 147), providing that upon the failure of a bank to conform to the bank commissioners' order requiring the discontinuance of unsafe practices, or if the commissioners decide it to be unsafe for the bank to continue to transact business, they shall take control of the bank, etc., is broader than the term "insolvent"; and a finding that it is unsafe for a banking corporation to continue business does not necessarily mean that it is insolvent. But the converse of this is not true. The act clearly contemplates that it is unsafe for an insolvent banking corporation to continue business, and that a determination by the commissioners that such corporation is insolvent is equivalent to a finding that it is unsafe for it to continue business. *People v. Bank of San Luis Obispo*, 97 Pac. 306, 309, 154 Cal. 194.

A bank is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands. *Livingstain v. Columbia Banking & Trust Co.*, 62 S. E. 249, 252, 81 S. C. 244, 22 L. R. A. 445.

The words "unsafe or insolvent" in St. 1898, § 4541, making a bank officer criminally responsible who shall receive a deposit, knowing the bank to be unsafe or insolvent, are used as legal equivalents. *Ellis v. State*, 119 N. W. 1110, 1118, 138 Wis. 513, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022.

A bank is insolvent or in failing circumstances, within Acts 25th Leg. c. 100, punishing any officer of any bank who receives any deposit with knowledge that the bank is insolvent or in failing circumstances, when the bank does not have sufficient "assets," consisting of real or personal property, bills receivable, notes, obligations to the bank of every character, considering the solvency of the makers, indorsers, guarantors thereof, and the value of the securities thereon, if any, and stocks and bonds held by the bank as its property, to pay its debts. *Fleming v. State*, 139 S. W. 598, 606, 62 Tex. Cr. App. 653.

#### Of building and loan association

The "insolvency" of a public building and loan association consists of its inability to perform the purposes for which it was created. *Lewis v. Clark*, 129 Fed. 570, 574, 64 C. C. A. 138.

"The 'insolvency' of a building association, which is that condition of its affairs in which it is unable to pay back to its members the amounts paid in by them, respectively, dollar for dollar, puts an end at once

to its operations, and as it thus prevents the stock from maturing and extinguishing the loans, according to the contracts between the association and its borrowing members, constitutes a breach of those contracts, and, on the one hand, excuses the borrowers from all further liability for the payment of dues and fines, and, on the other hand, renders the mortgages given to secure the loans due and enforceable at once, without regard to their terms, even though payable in installments, and the receiver can proceed to collect them." *Graves v. Seifried*, 87 Pac. 674, 677, 31 Utah, 203 (quoting and adopting definition in 5 Am. & Eng. Decisions in Equity, p. 278, note 20).

Where a building association had no outside creditors, the use of the word "insolvency" in the report of a commissioner, in an action between members of the association, had reference to the inability of the company to satisfy the demands of its own members. *Collin v. Wellford*, 46 S. E. 780, 782, 102 Va. 581, 102 Am. St. Rep. 859.

"Insolvency," as applied to a building and loan association, does not mean inability to pay its outside debts; but it is insolvent, in such sense as to warrant a suit by a stockholder for the appointment of a receiver and to wind up its affairs, when its financial condition is such that it is unable to carry to completion the purpose of its creation. *Gunby v. Armstrong*, 133 Fed. 417, 426, 66 C. C. A. 627.

Where the record shows that a building and loan association was insolvent and in the hands of a receiver, a debt due to it must be treated as that due an "insolvent concern," on a question as to whether the debt of the corporation should be treated as that of a going concern or of an insolvent one. *Carman v. Carrico* (Ky.) 80 S. W. 216, 218.

#### Of corporation

A corporation is insolvent when its assets are insufficient to pay its debts and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or when its embarrassments are such that early suspension and failure must ensue. Mere excess of liabilities over assets does not necessarily constitute insolvency. *State v. Trinity Life & Annuity Society*, (Tex.) 127 S. W. 1174, 1178.

That the assets of a corporation are less than its liabilities does not necessarily constitute insolvency if the corporation is able to pay its obligations as they become due in the regular course of business, but, if the corporation transfers all its property and abandons business when its assets are known to be less than its liabilities, it is insolvent to the knowledge of its officers and of a bank

which had control of the business of the corporation. *Abrams v. Manhattan Consumers' Brewing Co.*, 126 N. Y. Supp. 844, 846, 142 App. Div. 392.

As popularly and generally understood, "insolvency" denotes the insufficiency of the assets of a debtor to pay his debts in full, and such is the meaning of the term as relating to the condition of a corporation when executing mortgages to secure debts owing by it. *Harle-Haas Drug Co. v. Rogers Drug Co.*, 113 Pac. 791, 798, 19 Wyo. 35, Ann. Cas. 1913E, 181.

Under P. L. 1896, p. 298, § 64, "insolvency" as applied to a corporation denotes a general inability to meet pecuniary liabilities as they mature, by means of either available assets or an honest use of credit. *Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co.*, 60 Atl. 940, 67 N. J. Eq. 602, 3 Ann. Cas. 393.

The insolvency which will authorize the dissolution of a corporation under the statute means inability of the debtor to pay its debts as they become due in the ordinary course of business. *Howeth v. Coulbourne Bros. Co.*, 80 Atl. 916, 919, 115 Md. 107.

The word "insolvency," as used throughout Bankr. Act July 1, 1898, c. 541, means insolvency as defined in such act; and an order of a state court appointing a receiver for a corporation on a petition charging insolvency does not constitute an act of bankruptcy, under section 3a (4), as amended by Act Feb. 5, 1903, c. 487, § 2, where the term is there used to define a different state of facts, and by an amendment of the order of the state court made after the filing of the petition in bankruptcy it appears that it was not made on a finding of insolvency within the meaning of the bankruptcy act. *In re Golden Malt Cream Co.*, 164 Fed. 326, 328, 90 C. C. A. 258.

The appointment of receivers to take charge of the property of a corporation at suit of a stockholder, who alleged fraud and mismanagement by the officers and that the corporation was in danger of insolvency, but not that it was insolvent, cannot be said to have been "because of insolvency," so as to constitute an act of bankruptcy. *In re Perry Aldrich Co.*, 165 Fed. 249, 252.

A corporation may be in a condition of "insolvency" sufficient to authorize the appointment of a receiver when it cannot continue in business, although it is not absolutely insolvent. *Wood & Nathan Co. v. American Mach. & Mfg. Co.* (N. J.) 62 Atl. 768, 771.

A corporation is not "insolvent," so as to invalidate a preferential transfer to creditors, who are also directors, merely because it has not enough assets which can be used within a reasonable time to pay its creditors and stockholders in full, provided it has

sufficient property to pay the creditors alone; the capital stock not being considered a liability in determining the question of "insolvency." *Hamilton v. Menominee Falls Quarry Co.*, 81 N. W. 876, 878, 106 Wis. 352.

"'Insolvency,' essential to justify receivership proceedings against a corporation in equity, is the inability of the corporation to pay its debts according to mercantile usage as they mature in the ordinary course of its business, and not the statutory definition contained in Bankr. Act 1898, cl. 15, § 1, providing that a person should be deemed insolvent within such act whenever the aggregate of his personal property should not at a fair valuation be sufficient in amount to pay his debts." *Cincinnati Equipment Co. v. Deggan*, 184 Fed. 834, 840, 107 C. C. A. 158 (quoting and following *Mitchell v. Gazzam*, 12 Ohio 315, 336; *American Hosiery Co. v. Baker*, 18 Ohio Cir. Ct. R. 604, 605; *Perkins v. Scott*, 9 Ohio Cir. Ct. R. 207, 215; *Remington & Son v. Central Press Ass'n Co.*, 3 Ohio N. P. 258, 263; *Baker v. Fraternal Mystic Circle*, 32 Wkly. Law Bul. 84, 85).

Though the property of a corporation may be sufficient to pay all its debts, it may be "insolvent," where it is unable to pay and discharge its obligations as they accrue in the ordinary course of its business. *Denike v. New York & R. Lime & Cement Co.*, 80 N. Y. 599, 608 (citing *Hazelton v. Allen*, 3 Allen [85 Mass.] 114; *Brouwer v. Harbeck*, 9 N. Y. 589; *Ferry v. Bank of Central New York* [N. Y.] 15 How. Prac. 445).

Where a corporation owed, apart from a mortgage, over \$32,000, having assets amounting to \$26,000, and was unable to pay its obligations as they matured, and had not sufficient credit to borrow money, it was "insolvent." *Mowen v. Nitsch*, 62 Atl. 582-584, 103 Md. 685.

A corporation is "insolvent," within the national bankruptcy law, where its assets, though of great value, could not be sold at a forced sale for enough cash to meet all of the liabilities assumed and incurred by the corporation, and where it is unable to go on with the means at its disposal and operate its property and meet its liabilities. *Barrie v. United Rys. Co. of St. Louis*, 119 S. W. 1020, 1057, 138 Mo. App. 557.

If a corporation has assets substantially in excess of its liabilities, is not embarrassed by the demands of creditors, and is a going concern apparently able to continue business indefinitely, it is not "insolvent" with reference to its creditors though its capital stock be impaired; it being "insolvent" only when its assets are insufficient to pay its debts, and it is about to or has practically incapacitated itself for carrying on the business with reasonable prospects of success. *Banta v. Hubbell*, 150 S. W. 1089, 1092, 167 Mo. App. 38.

Acts 1903, p. 338, § 50, authorizing a creditor or stockholder to apply for an injunction and appointment of a receiver, and the dissolution of a corporation, where it shall become insolvent or suspend its ordinary business for lack of funds, by an "insolvent" corporation has reference to a corporation whose liabilities exceed its assets, and not to a corporation which is merely unable to pay its debts as they become due in the ordinary course of business, but which has assets in excess of its liabilities. *Alabama Cent. Ry. v. Stokes*, 47 South. 336, 157 Ala. 202.

Since the assets of a corporation which is "insolvent" in the sense of being unable to pay its debts as they mature, are trust funds belonging primarily to its creditors, the administration and distribution of such funds is a matter of general equitable cognizance. *Burton v. R. G. Peters Salt & Lumber Co.*, 190 Fed. 262, 264.

"Insolvency," under the Corporation Acts, is general inability to meet pecuniary liabilities as they mature, by means of either available assets or any honest use of credit. Where, at the time a corporation suspended business its entire tangible property, including its leasehold and most of its accounts, were assigned as collateral security for debts aggregating \$10,000, and where its unsecured debts amounted to \$15,000 more, which were far in excess of the equity in the property mortgaged, and where suits had been brought against the company and a judgment entered in one of them, and its credit had been exhausted, and it had little or no cash on hand or in bank, the corporation was insolvent, although the book valuation of its stock and property exceeded its entire liability by about \$4,000, and its officers believed such valuation was honest and correct. *Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co.* (N. J.) 62 Atl. 421, 423 (citing *Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co.*, 60 Atl. 940, 67 N. J. Eq. 602, 3 Ann. Cas. 393).

Where a corporation is losing money in the carrying on of its business, and is seriously embarrassed for want of funds to carry out the project for which it was organized, and is without available assets to pay its present indebtedness, notwithstanding there may not have been a complete suspension of its business, it is insolvent within the meaning of Corporation Act 1896, p. 298, c. 185, § 65, providing that, when any corporation shall become insolvent, or suspend its ordinary business for want of funds to carry on the same, any creditor may apply to the court for an injunction and the appointment of a receiver, and that, if upon the hearing it shall appear that the corporation has become insolvent and is not about to resume its business, the injunction may issue and the receiver be appointed, and hence is subject to the issuance of an injunction and the ap-



pointment of a receiver. A corporation may be "insolvent," though it has not suspended its business for want of funds, and it may suspend its business for want of funds and still be able to pay its debts if properly administered. Insolvency is a general inability to meet pecuniary liabilities as they mature by means of available assets or an honest use of credit. The court said: "I agree that the word 'resumption,' as used in the statute, predicates some interruption of the insolvent's business, but I do not understand that it contemplates the entire suspension of its workings. Such has been the practical interpretation the bar and the courts have given, for manufacturing and other corporations with plants in operation have constantly been adjudged to be insolvent and put in the hands of receivers, and in so doing large values have been saved to creditors and stockholders because of the salable condition of a live plant as compared with one that is dead. An insolvency carries with it inability to presently pay indebtedness and suspension of that function, and the word 'resumption,' used in the statute, is, I think, to be taken in the sense of taking up again that suspended function, so that payment of indebtedness, as well as the operation of the work of the corporation, after temporary, partial, or complete paralysis, may be resumed with safety to the public and advantage to its stockholders." *Catlin v. Vichachi Min. Co.*, 67 Atl. 194, 196, 73 N. J. Eq. 286 (citing *Reinhardt v. Interstate Telephone Co.*, 63 Atl. 1097, 71 N. J. Eq. 70; *Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co.*, 60 Atl. 940, 67 N. J. Eq. 602, 3 Ann. Cas. 393).

#### Of partnership

Under the Bankruptcy Act of 1898, a partnership is "insolvent" if the partnership property is insufficient to pay the partnership debts, because it is a person (section 1 [19], c. 541), because any person is insolvent under that act whose property is insufficient to pay his debts (section 1 [15]), and the only property a partnership has or can convey or apply to the payment of its debts is partnership property, and the only debts it owes are the partnership debts. In *re Bertenshaw*, 157 Fed. 363, 364, 371, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986.

A partnership is not "insolvent," within the meaning of Bankr. Act July 1, 1898, c. 541, when the property of the partnership, together with that of the individual members, exceeds in value the indebtedness of the firm and members. In *re Perley & Hays*, 138 Fed. 927, 928 (citing *Vaccaro et al. v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279; *Davis v. Stevens et al.*, 104 Fed. 235, 242).

The term "insolvent," as used in Bankr. Act 1898, cl. 15, § 1, is defined to mean that the aggregate of the debtor's property, at a fair valuation, is insufficient in amount to

pay his debts, and hence, in a suit by a trustee in bankruptcy of the estate of a bankrupt partnership to recover a payment made by the firm to a creditor as a preference, plaintiff is bound to show not only that the property of the firm, but also of the partners, was insufficient, at a fair valuation, to pay their debts. *J. W. Crancer & Co. v. Wade*, 110 Pac. 778, 779, 26 Okl. 757.

One is solvent if he has sufficient assets to pay his debts; thus a man cannot be said to be "insolvent" because he has transferred some of his estate with intent to defraud his creditors, when he has an estate remaining which is abundant to pay all his debts and open to seizure for the satisfaction thereof, or which he has an absolute right to dispose of and liquidate in cash. A partnership is not "insolvent" so long as any of its members have sufficient property after his private debts are paid to pay the creditors of the firm. *Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son*, 128 Fed. 701, 705, 63 C. C. A. 253 (quoting *Vaccaro v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279).

#### INSOLVENT CRIMINAL COSTS

"Insolvent criminal costs" are costs in criminal cases which the statute provides shall be due sheriffs as fees for services rendered in criminal cases, and which are expressly and specifically provided for as to the services rendered, and the amount to be paid therefor, and which are insolvent for the reason that they cannot be collected either on account of the insolvency of the party liable therefor or otherwise. *Clark v. Clark*, 73 S. E. 15, 137 Ga. 189; *Id.*, 73 S. E. 16, 18, 137 Ga. 185.

#### INSOLVENT DEBTOR

See Insolvency—Insolvent.

### INSPECT—INSPECTION

See Under the Inspection of Proper officers.

"To 'inspect,' as defined by Webster, is to examine, to view closely and critically, especially in order to ascertain quality and condition, to detect errors, etc.," and an inspection law for malt liquors, which is satisfied by a single inspection of the mash in fermentation as to manufactures within the state, and as to manufactures outside the state, by an affidavit by the manufacturer, or other reputable person who knows the facts, of compliance with the law, cannot be sustained as an inspection measure. *Pabst Brewing Co. v. Creushaw*, 25 Sup. Ct. 552, 557, 198 U. S. 17, 49 L. Ed. 925.

The "inspection" required of an employe's place to work by his employer is not necessarily limited to visual examination, but is ordinarily understood to embrace such tests and examinations as are proper to determine fitness, and to include an inquiry in-

to safety, efficiency, and quality not resting on visual inspection alone. *Pettersen v. Rahtjen's American Composition Co.*, 111 N. Y. Supp. 329, 332, 127 App. Div. 32 (citing 4 Words and Phrases, p. 3657, and quoting and adopting the definition in *People v. Compagnie Générale Transatlantique*, 2 Sup. Ct. 87, 107 U. S. 59, 27 L. Ed. 383).

The word "inspection," "properly defined, means careful or critical investigation." *Horton v. Ft. Worth Packing & Provision Co.*, 76 S. W. 211, 212, 33 Tex. Civ. App. 150.

"Inspection" is something which can be accomplished by weighing or measuring the thing to be inspected or applying to it at once some crucial test. *Kucker v. Sunlight Oil & Gasoline Co.*, 79 Atl. 747, 749, 230 Pa. 528, Ann. Cas. 1912A, 503.

Whether one seizing a pick, a hammer, or an ax, and striking a blow with it without even glancing at the condition of the implement, is in the exercise of ordinary care, is a question of fact for the jury; the rule that the servant is not bound to inspect machinery and appliances furnished by the master, but may rely upon the master to furnish safe tools and appliances, not applying; the word "inspection" meaning a somewhat careful or critical examination. *Lehman v. Chicago, St. P., M. & O. Ry. Co.*, 122 N. W. 1059, 1061, 140 Wis. 497.

The portion of the charge, "Plaintiff was not bound to inspect the track at the place in question to ascertain if it was reasonably safe to be used by him in the performance of his duties as brakeman," given after a portion, that "though the track at the place was not reasonably safe, plaintiff assumed the risk from such unsafe condition, if any, of which he had actual knowledge, or would have learned by the exercise of that ordinary circumspection which a prudent and competent man would have used in the particular employment; and in an action for injury to a brakeman by being struck by an engine, while his foot was caught in an unfilled space between ties in the track, on evidence that the unfilled spaces directly causing the injury were covered and obscured by tall, thickly-growing grass, making it appear on casual inspection that the spaces were filled, and that plaintiff had never had an opportunity to be on the track before, and did not know that there were unfilled spaces there"—was not calculated to confuse and mislead the jury; there being a difference between making a previous critical examination which the word "inspection" means, of the track to ascertain if it was reasonably safe, and using reasonable care and caution, which is the meaning of "ordinary circumspection," to observe what was open and obvious, to discern whether it was unsafe. *St. Louis Southwestern Ry. Co. of Texas v. Ford*, 121 S. W. 709, 713, 56 Tex. Civ. App. 521.

The right of "inspection" is a common-law right, and, unless restricted by statute or the corporation's charter, will not be denied when sought by a stockholder for a proper purpose. The provision that all books of a corporation shall at reasonable hours be subject to the inspection of a stockholder in Rev. St. 1898, § 329, does not restrict the common-law right, but is in harmony therewith. Visitorial powers and the stockholders' right of inspection are not one and the same thing. Visitation of corporations is correctly defined and its purposes aptly stated as follows: "By 'visitation of corporations' is meant the act of examining into its affairs. The person authorized to make such examinations is called the visitor. The purpose of visitation is to supervise, direct, and control the management of the corporation." In the United States, visitorial power over all except private eleemosynary corporations, existing under and by virtue of the laws of a state, vests in the state, and, as to those formed under an act of Congress, it vests in the general government, and is exercised through the medium of the courts, or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated that "visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings. In America there are very few corporations which have private visitors, and, in the absence of such, the state is the visitor of all corporations." The common-law right of inspection by the stockholder is a personal privilege arising from his ownership of stock of the corporation, and can be exercised for any legitimate purpose beneficial to him, without any special appointment for that purpose; but he cannot, in its exercise, as the state, through the medium of the courts, or a visitor, may do, interfere with or direct the general operations of the corporation. The difference between the visitorial powers over corporations and the stockholder's right of inspection is obvious. *Harkness v. Guthrie*, 75 Pac. 624, 625, 27 Utah, 248, 107 Am. St. Rep. 664, 1 Ann. Cas. 129 (quoting *Merrill, Mandamus*, § 175).

#### As determination of fitness for commerce

Laws 1901, c. 79, providing for the inspection of horses driven or transported from the state, and for a record and publication of inspections made, was passed for the protection of the public against fraud or crime in relation to a class of property that may easily be wrongfully appropriated and removed beyond the state without detection, and tends to render such fraudulent or criminal practices more difficult, and to assist in identifying the owner and discovering any unlawful act committed and is an inspection law; "inspection" being defined as the examination of certain articles made by law subject to

such examination so that they may be declared fit for commerce; an examination of an article to determine its fitness for a given purpose. *Messenger v. Board of Com'rs of Converse County*, 117 Pac. 126, 132, 19 Wyo. 309.

**As proceeding at law**

See Proceeding.

**INSPECTION ALLOWED**

A contract for the sale of perishable produce stipulated that the prices were f. o. b. cars. The bill of lading contained the notation "inspection allowed." There was a custom that the buyer could inspect the goods on arrival and, if not in good condition, reject them, which custom was known to the agent of the seller making the sale. The words "inspection allowed," in view of such custom, gave the buyer the right of inspection before delivery, and he might refuse acceptance on the goods being damaged. *Z. T. Fort Produce Co. v. Dissen*, 101 S. W. 477, 478, 45 Tex. Civ. App. 403.

**INSPECTOR**

See Competent Inspector.

**INSPECTOR OF MASONRY**

Where plaintiff was appointed by the department of parks of a city as "inspector of masonry," the very term implies that his services would be required only when there was masonry work in course of construction. *Dunne v. City of New York*, 101 N. Y. Supp. 678, 679, 116 App. Div. 331.

**INSTALL**

Notwithstanding Civ. Code, §§ 1645, 1654, 1656, providing that technical words in contracts must be interpreted as understood by persons in the business to which they relate, and that in cases of uncertainty a contract must be interpreted most strongly against the party causing the uncertainty to exist, and that all things necessary to carry a contract into effect are implied therefrom, a lease, which required the lessee to "install a sidewalk elevator from the basement to the sidewalk" in front of the premises, does not require the lessor to prepare the premises for the installation of the elevator; but the lessee must provide a suitable lift with the usual accessories connecting the basement with the sidewalk; the word "install" meaning to set up or fix in position for use or service. *Metzler v. Thye*, 124 Pac. 721, 722, 163 Cal. 95.

**INSTALLMENT**

See Payable in Equal Annual Installments.

The word "installment," as used in a contract wherein plaintiff granted to defendant the sole right to sell moving picture ma-

chines, defendant agreeing to order goods to the amount of \$12,850 on the execution of the agreement, and to pay the price therefor one-half within 10 days after the delivery of each installment and the balance within 60 days after such delivery, referred to actual deliveries, and defendant could not contend that the contract was an entirety, and that the first installment was the \$12,850 worth of goods, and that plaintiff was therefore precluded from recovering the price of goods delivered until it had delivered goods to the amount of \$12,850. *Ikonograph v. John Newton Porter Co.*, 113 N. Y. Supp. 537, 539.

An assessment payable in one payment is within Local Improvement Act 1897, p. 135, § 90, as amended by Laws 1901, p. 118, providing that when an "installment" of an assessment confirmed under prior acts shall mature, proceedings to return delinquent and collect it shall conform to the provisions of such act. *Cummings v. People ex rel. Hanberg*, 72 N. E. 1094, 1097, 213 Ill. 443.

"Installments" is defined by the Century Dictionary to be "partial payments on account of a debt due." *Campbell v. American Alkali Co.*, 125 Fed. 207, 209, 61 C. C. A. 317 (quoting Cent. Dict.).

Where the bond of a borrowing stockholder, in a building and loan association, provided that on final settlement with the association it is to retain, as an "installment on said stock and interest," no greater sum than that actually advanced, with interest thereon at the rate of 8 per cent. per annum, the words "installment on said stock and interest" exclude the payments on account of premium; that is, whatever payments may be made by the defendant, either during the currency of the contract or at its termination on final settlement, the association cannot retain a greater sum than the amount of the debt, with 8 per cent. annual interest to that date. If more money than that is paid, the surplus may be returned, and, if that amount is paid on final settlement, the bond must be canceled and the mortgage satisfied. *Alexander v. Southern Home Bldg. & Loan Ass'n*, 120 Fed. 963, 966.

Rev. St. 1909, § 3389, which directs, after providing for the making of loans by building and loan companies by competitive bidding for premiums, that the by-laws of the company may dispense with bids and provide for the making of loans to members at such a rate of interest and premium as may be provided in the by-law, "such premium to be paid in gross installments." Section 3390 provides that premiums shall consist of a percentage of the amount loaned. Held that, as "installment" means a part of a greater amount and is a word only fitly used in connection with an ascertained amount, especially when qualified by "gross," and as "interest" is a certain rate per cent. of the sum loaned for the time the money is detained

by the borrower, while a "bonus" or "premium" is a definite sum agreed upon which is paid in addition to interest, either in advance or by installments, the statute means that the premium referred to should be in gross, payable in installments, and it does not therefore authorize the charging of a rate per cent. for the uncertain period for which the money may be kept, so that, though such a charge be called a "bonus" in by-law authorizing it, it is without statutory authority. *Holmes v. Royal Loan Ass'n*, 150 S. W. 1111, 1113, 166 Mo. App. 719.

#### Assessment and call synonyms

The word "assessment" and the words "call" or "installments" are used interchangeably in the statute; yet, strictly speaking, the word "assessment" means a demand upon stockholders for payments above the par value of their stock to meet the money demands of creditors of the corporation, while the word "call," or "installments" means the action of the board of directors of the corporation demanding the payment of all or a portion of unpaid subscriptions. The word "assessments," as used in Rev. Codes, § 2769, granting power to a corporation to admit stockholders or members, and to sell the stock or shares for the payment of assessments or installments, is distinguished from "calls" or "installments," and means assessments upon full-paid stock, as distinguished from calls or installments for portions of unpaid subscriptions. *Wall v. Basin Mining Co.*, 101 Pac. 733, 736, 16 Idaho, 313, 22 L. R. A. (N. S.) 1013.

#### Loan distinguished

Where the note of a borrowing member of a building and loan association contained the words "monthly installments on said share," but no reference indicated an agreement to apply such installments on the member's loan, and the deed to secure the loan was conditioned on the payment of the "loan" and of "installments on certain shares," referring to the principal debt covered by the note both as a "loan upon 18 membership shares," the terms "loan" and "installments" were not used synonymously. *Cooper v. Newton*, 160 Fed. 190, 191.

#### INSTALLMENT PREMIUM PLAN

The method employed by a building association in taking the premium and determining the amount is called the "installment premium plan," where the borrower agrees to pay periodically a sum or percentage in addition to the interest and the dues on his stock. *Fidelity Sav. Ass'n v. Bank of Commerce*, 75 Pac. 448, 456, 12 Wyo. 315.

### INSTANCE

See In the First Instance.

### INSTANT

#### INSTANTANEOUS

"Instantaneous" means done or occurring in an instant, or without any perceptible duration of time. *Perkins v. Oxford Paper Co.*, 71 Atl. 476, 479, 104 Me. 109.

#### INSTANTANEOUS DEATH

Where decedent was dead when taken from beneath the car which struck him, though he lived some 15 minutes after being struck, death was "instantaneous," so as to constitute a cause of action under the so-called "death act" (Comp. Laws § 10,427), rather than under the survival act (Comp. Laws, § 10,117). *West v. Detroit United Ry.*, 123 N. W. 1101, 1102, 159 Mich. 269.

#### INSTANTANEOUS SEISIN

"The rule (as to 'instantaneous seisin'), as it appears in the older authorities, is chiefly applied in cases where dower is sought. It is thus stated by Blackstone: 'The seisin of the husband for a transitory instant only when the same act which gives him the estate conveys it also out of him again (as where by a fine land is granted to a man, and he immediately renders it back by the same fine); such a seisin will not entitle the wife to dower, for the land was merely in transitu and never rested in the husband, the grant and render being one continued act. But, if the land abides in him but for a single moment, it seems that the wife shall be endowed thereof.' 2 Bl. Comm. 132. There is much in this word 'abides.' A well-known English writer seems to have caught its meaning when he says it means when the husband holds the estate for an instant beneficially for his own use." *Libbey v. Tidden*, 78 N. E. 313, 316, 192 Mass. 175, 7 Ann. Cas. 617 (citing Prest. Est. tit. "Dower," as cited in Bac. Abr. "Dower," c. 2, in notes).

#### INSTANTLY

"Instantly" in its legal sense means forthwith, or at once, and as used in Practice Act, 1874 (Revision 1877, p. 886) § 242, means within a reasonable time. In its logical or colloquial sense it means at the same time; simultaneously; or immediately after; without any intervening time. *State v. Mangano*, 72 Atl. 366, 368, 77 N. J. Law, 544.

"Instantly" implies without any intervention of time, allows not a particle of delay, and makes an interval too small to be appreciated. *Antonian v. Southern Pac. Co.*, 100 Pac. 877, 884, 9 Cal. App. 718.

#### Immediate synonyms

In a contract to indemnify a person, in case of accident, for injury sustained by violent means, which shall, "independently of all other causes, immediately, wholly and continuously prevent him from the prosecution of any and every kind of business per-

taining to his occupation," the word "Immediately" is not synonymous with "Instantly," "at once," and "without delay." A disability is immediate, within the meaning of such contracts, when it follows directly from an accidental hurt, within such time as the processes of nature consume in bringing the person affected into a state of total incapacity to prosecute every kind of business pertaining to his occupation. *Order of United Commercial Travelers of America v. Barnes*, 80 Pac. 1020, 1023, 1024, 72 Kan. 293, 7 Ann. Cas. 809.

## INSTITUTE

The word "institute," as used in Code Civ. Proc. § 26, authorizing a proceeding to be continued by a judge of the same court with like effect as if it had been "instituted" before the judge who last hears the same, means to originate, to establish, to set on foot. *Bridges v. Koppelman*, 117 N. Y. Supp. 306, 312, 63 Misc. Rep. 27.

A proceeding by certiorari to review the dismissal of a patrolman is instituted when the petition is presented to the court, and not when the writ is served, under Greater New York Charter Laws 1901, p. 129, c. 466, § 302, providing that such proceedings shall be instituted within four months after the decision sought to be reviewed. *People ex rel. Syperrek v. McAdoo*, 110 N. Y. Supp. 140, 141, 125 App. Div. 673.

### Maintain distinguished

While it would be possible, under certain circumstances, to construe the phrase "maintenance of an action" as including all steps from the making of the writ to the recovery of final judgment, in its ordinary significance "maintain" carries a different meaning from "institute" or "begin"; and under St. 1903, p. 444, c. 437, § 60, providing that "no action shall be 'maintained'" by a foreign corporation so long as it fails to comply with the law, when considered in connection with other provisions of the act imposing penalties on officers and corporations for failing to comply with the law, and providing that a failure to comply shall not affect the validity of contracts made by such corporations, an action by a foreign corporation must be stayed during the period of its noncompliance with the law, on noncompliance being properly pleaded in abatement, the word "maintain" carrying a different meaning from "institute" or "begin," and implying that an action has been begun before it can be maintained. *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 82 N. E. 671, 672, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510.

To "commence" is to "institute," and, where a statute authorized the householder to "institute" an action for breach of any condition of the bond of a school district

treasurer, he was also authorized to maintain it to adjudication. *School Dist. No. 9, Kingman County v. Brand*, 81 Pac. 473, 474, 71 Kan. 728.

## INSTITUTION

See Banking Institution; Charitable Institution; Educational Institution; Private Institution; Public Institution; Religious Institution; Scientific Institution; State Institution.

Mercantile Institution, see Mercantile.

"The word 'educational' does not necessarily describe a public or charitable institution. \* \* \* An 'institution' is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things make such object definite. The use of the word 'institution' does not point to a public, as distinguished from a private, organization. \* \* \* In *re Sutro's Estate*, 102 Pac. 920, 922, 155 Cal. 727 (quoting and adopting definition in *Re Shuttuck's Will*, 86 N. E. 445, 193 N. Y. 446).

In a will giving property to the trustees of a university for the purpose of female education of high grade under the management of such trustees, the said institution to be made a part of the university or kept independent, the use of the word "institution" did not require the creation of a separate corporation, and the gift was absolutely to the university and not to the trustees in trust. *Morgan v. Durand*, 101 N. Y. Supp. 1002, 1003, 51 Misc. Rep. 523.

Gen. St. 1902, § 1368, provides that every person, who being a trustee or officer of an institution receiving state aid, shall furnish supplies or be interested in any contract for furnishing supplies to such institution, unless he be the lowest bidder for such supplies or contract after open competition, shall be fined \$50. Held, that the term "institution," as so used, did not embrace such municipal districts or corporations composed of the inhabitants of certain territory as a school district; and hence a member of a school district committee did not violate such act by selling coal to the district without submitting to competition. *Hassett v. Carroll*, 81 Atl. 1013, 1018, 85 Conn. 23, Ann. Cas. 1918A, 333.

Laws 1903, p. 81, c. 79, § 2, relating to bank inspection, provides that where reference is made to banks, bankers or banking in the act, the same shall be construed as applying to any corporation, association, firm, or individual engaged in such business; and section 26 (page 88) declares that every officer, agent, or clerk of any banking institution within the title, who subscribes or makes

any false statement, or enters or subscribes or exhibits any false paper, etc., shall be subject to imprisonment, etc. Held, that the term "institution" as so used, included a private banker, and hence the section was not unconstitutional, as conferring a special privilege, on private bankers. *State v. Stuble*, 104 N. W. 465, 466, 19 S. D. 646.

In Const. art. 7, § 1, which provides that institutions for the benefit of the insane, blind, and deaf and dumb will always be fostered and supported by the state, the word "institution" had a popular, if not a legal, signification, and did not authorize an act providing that all male blind persons over the age of 21 years and all female blind persons over the age of 18 years, who have been residents of the state for five years and of the county for one year, and have no property, shall be entitled to a certain sum per capita quarterly from the county treasury. *Auditor of Lucas County v. State ex rel. Boyles*, 78 N. E. 955, 956, 75 Ohio St. 114, 7 L. R. A. (N. S.) 1196.

Testator gave his residuary estate, on the death of his wife and son without descendants, to the trustees of a certain university; the "institution" to be made a part of the university, or kept independent, subject to the control of the trustees, and provided that on the trustees' acceptance the executors should pay over the same to the trustees, to be held as a perpetual fund, the income to be devoted to the objects named. He also gave his son certain personalty for life, and after his death "to the institution named herein should the trustees of the university accept the trust hereby created." The charter of the university, adopted before the execution of the will, provided that the trustees and their successors should be a body corporate and politic, by the name of, etc. Held, an absolute gift to the university, taking effect in possession on the death of the wife and son without descendants; the word "institution" meaning not more than a department or college, and the direction that the income of the fund should be applied to the purposes named not creating a trust. *In re Durand*, 87 N. E. 677, 678, 194 N. Y. 477.

Laws 1893, p. 1748, c. 701, § 1, as amended by Laws 1901, p. 751, c. 291, provides that no gift for religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid on account of indefiniteness or uncertainty of the beneficiaries; but the title to the subject-matter of the gift shall vest in the trustee named in the instrument, and, if no trustee is named, the same shall vest in the Supreme Court. Section 2 provides that the Supreme Court shall have control over the gifts provided for by section 1, and that the Attorney General shall represent the beneficiaries and enforce the

trust by proper proceedings. A will devised the residue of testator's estate to his executor in trust to collect the rents and profits thereof and to pay the same annually to "religious, educational or eleemosynary institutions" as in his judgment shall seem advisable, not more than \$500 to any one institution in any one year. Held: That the statute applies to public and not private charitable gifts, and has reference to indefiniteness of beneficiaries, but not of the purposes for which the gift is made; that while the words, "religious" and "eleemosynary," when used to designate institutions, may necessarily imply that the institutions are engaged in public and not private charitable work, the words "educational" and "institutions" have a broad significance, and may refer as well to private as to public organizations or charities; and that, since the terms used are in the disjunctive, the invalidity of the provision as to educational institutions renders the entire gift invalid. *In re Shattuck's Will*, 86 N. E. 455, 456, 193 N. Y. 446.

#### As the buildings or property

The word "institution," as used in Const. art. 9, § 3, exempting from taxation "institutions of purely public charity," comprehends not only a building and the ground covered by it, but adjacent ground which is reasonably necessary or proper for the purposes and object in view, and which is used directly for the promotion and accomplishment of the same. *State v. St. Barnabas Hospital*, 104 N. W. 551, 552, 95 Minn. 489.

#### Corporation or person

A Catholic bishop is not an "institution," within Code 1873, § 1101, which provides that no person leaving a wife, child, or parent shall devise or bequeath to such institution or corporation more than one-fourth of his estate after payment of his debts. The word "institution" manifestly has reference to an association similar to a corporation and not to an individual in trust for charitable uses. While a bishop is for some purposes designated a corporation, he is none the less an individual, and as such may act as a trustee for any legal purpose. *Rine v. Wagner*, 113 N. W. 471, 473, 135 Iowa, 626.

Property owned by a private individual and used by him directly and exclusively for educational purposes is exempt from taxation, under Code 1906, § 4251, par. "d," as property belonging to a college or "institution for the education of youth"; the statute making no distinction between natural and artificial persons. *City of Jackson v. Preston*, 47 South. 547, 549, 93 Miss. 366, 21 L. R. A. (N. S.) 164.

#### INSTITUTION IN THE STATE

The words "institutions in this state," as used in Rev. St. § 2731—1, imposing a collateral inheritance tax, but declaring that the provisions of the act shall not apply to prop-

erty transmitted to "institutions in this state for purposes of purely public charity or other exclusively public purposes," do not include boards and societies, and auxiliaries thereto, which are incorporated and organized under the laws of other states for purposes of purely public charity or other exclusively public purposes. *Humphreys v. State*, 70 N. E. 957, 959, 70 Ohio St. 67, 65 L. R. A. 776, 101 Am. St. Rep. 888, 1 Ann. Cas. 233.

### INSTITUTION OF EDUCATION

See Educational Institution.

### INSTITUTION OF LEARNING

Where a private school, not conducted for profit, affords a course of study and opportunity for a higher education than that provided by the public schools, and classes in fact pursue the studies provided by the higher course, the fact that the majority of the pupils do not avail themselves of the opportunity for studying the higher branches does not deprive the school of its right to exemption from taxation as an "institution of learning." *People ex rel. Thompson v. St. Francis Xavier Female Academy*, 84 N. E. 55, 56, 233 Ill. 26.

### INSTITUTION OF PUBLIC CHARITY

See Public Charity; Purely Public Charity.

## INSTRUCT

See Misinstruct.

Where a town voted not to "instruct" its board of county commissioners to buy certain land, the word did not preclude the commissioners from buying the land under St. 1886, c. 240, § 10, giving commissioners power to buy lands subject to such instructions as the town might impose by its vote. *Inhabitants of Stoughton v. Paul*, 53 N. E. 272, 273, 173 Mass. 148.

### INSTRUCTION

See Private Instruction; Sectarian Instruction.

The giving of a signal, though by the mechanical act of pressing a button, is an "instruction," within employer's liability act (Code 1907, § 3910 [4]), declaring the master liable for injury to an employé, caused by the act of another person in the service of the master, done in obedience to particular instructions given by a person delegated with the authority of the master in that respect. *Tennessee Coal, Iron & R. Co. v. Cottrell*, 55 South. 791, 792, 172 Ala. 538.

#### In practice

See General Instruction; Sufficient Instruction; Written Charge or Instruction.

See, also, Charge.

"Instructions" are directions in reference to the law of the case, enabling the jury to better understand their duty, and to prevent them from arriving at erroneous and wrong conclusions. *Butler v. Gill*, 127 Pac. 439, 440, 34 Okl. 814.

"An 'instruction' is an exposition of the principles of law applicable to a case, or to some branch or phase of a case, which the jury are bound to apply in order to render the verdict establishing the rights of the parties in accordance with the facts proved." *Wickham v. People*, 93 Pac. 478, 479, 41 Colo. 345.

"Instructions" are directions in reference to the law of the case, enabling the jury to better understand their duty, and prevent them from arriving at erroneous and wrong conclusions. *Leavitt v. Deichmann*, 120 Pac. 983, 985, 30 Okl. 423.

The object of "instructions" is to enlighten the minds of the jury with reference to the evidence which has just been detailed to them so that they may intelligently arrive at a verdict in accordance with the proof. *Stout v. Commonwealth*, 94 S. W. 15, 16, 123 Ky. 184, 13 Ann. Cas. 547.

An oral statement to the jury relative to the district attorney electing to stand on the first of two acts as to which testimony has been given, and cautioning the jury that the evidence as to the other act may not be considered as establishing an offense but only to corroborate or explain other evidence made at the request of the district attorney, is not an instruction, within section 1468a, 3 Mills' Ann. Statutes of Colorado, requiring that "instructions" shall be reduced to writing. *Irving v. People*, 95 Pac. 940, 941, 43 Colo. 260.

A colloquy occurring between counsel and the jury in the presence of the jury, after the close of the evidence, with respect to allowing writings to go to the jury, during which defendant stated that he wished the jury instructed that the writings did not constitute all the contract, to which the court replied, "Certainly, this writing is not the complete contract; the jury will so understand it," followed by the statement of defendant that he would ask the court to charge as to the implied provision that work done under the contract "must be done in good workmanlike manner," to which the court replied, "The jury will so understand it," are not "instructions" to the jury as to the law which must govern them in passing on the facts. *Simons v. Haberkorn*, 102 N. W. 659, 660, 139 Mich. 130.

Statements by the court to the jury with reference to the form or character of their verdict, which do not contain instructions or directions upon some question of law involved, do not come within Wilson's Rev. & Ann. St. 1903, § 5484, subsec. 6, requiring instructions to be reduced to writing, unless

waived by both parties. *Sturgis v. State*, 102 Pac. 57, 73, 2 Okl. Cr. 362.

Admonitions made by the court during the progress of the trial are not instructions within Cr. Code Prac. § 225, requiring instructions to be in writing; the instructions referring to those given at the close of the evidence and before the submission of the case to the jury. *Wendling v. Commonwealth*, 137 S. W. 205, 210, 143 Ky. 587.

Remarks made by a judge to counsel during the progress of the trial are not "instructions" to the jury; and, where the remarks by the judge during the progress of the trial are not calculated to mislead the jury or prejudice the party complaining, they are not ground for reversal. *City of Guthrie v. Carey*, 81 Pac. 431, 432, 15 Okl. 276.

Oral statements by the court to the jury as to the form of their verdict, which do not contain directions or instructions on questions of law, or comment on the evidence, are not within the statute requiring instructions to be reduced to writing unless waived by the defendant. *Douglas v. Territory*, 98 Pac. 1023, 1024, 1 Okl. Cr. 583.

#### Authority synonymous

The word "authority," as used in the rule that a master is only responsible for the acts of a servant within the scope of his authority, is not synonymous with "instructions," but often has a broader meaning. *Weatherford, M. W. & N. W. Ry. Co. v. Crutcher (Tex.)* 141 S. W. 137, 142.

## INSTRUMENT

See Blunt Instrument; Musical Instrument; Perfect Instrument; Professional Instrument.

The word "instrument" in the statute punishing the disfiguring of the person of another "by means of a knife or other instrument" includes any means by which one may disfigure, and carbolic acid maliciously thrown into the face of another is an instrument within the statute; the word "instrument" being defined as that which is made a means or cause to serve a purpose. *Lee v. State (Tex.)* 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

A rock is an instrument, within an indictment charging a murder by striking with an instrument to the grand jury unknown. *Williams v. State*, 40 South. 405, 407, 144 Ala. 14.

The words "instruments" and "implements," in the exemption law, were meant to describe the same species of property and should be regarded as of identical import. A bowling alley is not exempt from seizure and sale on execution as the tools or "implements" of the keeper's trade or business. *Williams v. Vincent*, 79 Pac. 121, 122, 70 Kan. 595, 68 L. R. A. 634, 109 Am. St. Rep. 469.

## INSTRUMENT (A Writing)

See Executory Instrument; Inchoate Instrument; Negotiable Instrument; Original Instrument; Sealed Instrument; Written Instrument.

Whether instrument is subject to forgery, see Forgery.

A copy of a water appropriation notice required to be recorded by Civ. Code, § 1415, was not an "instrument," within section 1161, providing that before an "instrument" can be recorded, unless it belongs to certain excepted classes not including such notice, it must be acknowledged. *De Wolfskill v. Smith*, 89 Pac. 1001, 1004, 5 Cal. App. 175.

An attachment is not an "instrument," within the meaning of Civ. Code, § 1107, making a grant conclusive against the grantor and all subsequently claiming under him except a purchaser or incumbrancer, who in good faith and for value acquired a title or lien by an instrument that is first duly recorded, so that one taking under an unrecorded deed held by a title superior to the right of one claiming under a subsequent attachment and judgment against the grantor. *Wolfe v. Langford*, 112 Pac. 203, 204, 14 Cal. App. 359.

A judgment is not an "instrument" within the meaning of Civ. Code, § 1107, making a grant conclusive against the grantor and all subsequently claiming under him except a purchaser or incumbrancer who in good faith and for value acquired a title or lien by an instrument that is duly recorded so that one taking under an unrecorded deed held by a title superior to the right of one claiming under a subsequent judgment against the grantor. *Wolfe v. Langford*, 112 Pac. 203, 204, 14 Cal. App. 359.

Where a contract of insurance demanded proof by affidavit with proper seal of death of insured, an indictment for passing a forged proof of death, which set out an affidavit without a seal, did not allege an instrument which was the subject of forgery within Pen. Code 1895, art. 537, requiring that the alleged forged instrument must be such as would have affected property had it been true. *Bagley v. State*, 141 S. W. 107, 108, 63 Tex. Cr. App. 606.

An "instrument," in the ordinary accepted sense, is a document or writing. In the law of evidence it has a still wider meaning, and includes, not merely documents, but witnesses and things, animate or inanimate, which may be presented for inspection. *Bouv. Law Dict.* (16th Ed.) 1064. Laws 1901, p. 751, c. 291, provides that the Supreme Court shall have control over gifts in all cases provided for by section 1 of the act, and when it appears that circumstances shall have so changed, since the execution of an instrument containing a gift or grant to religious, charitable, or benevolent purposes,



as to render a literal compliance with the terms of the instrument impracticable, the court may direct that such gift shall be administered in such manner as will most effectively accomplish the general purposes of the instrument, but that no such order shall be made until after 25 years from the execution of the instrument. Held that, where money was contributed to the relief of the sufferers by the General Slocum disaster, the word "instrument" did not render the statute inapplicable to the conditions, though donors had given the funds in almost all instances orally and without any specific instructions, and merely on the understanding that the contribution should be applied to the relief of the sufferers. *Loch v. Mayer*, 100 N. Y. Supp. 837, 839, 50 Misc. Rep. 442.

"The word 'instrument,' as used in Civ. Code Cal. § 1217, providing that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof, indicates some written paper or instrument signed and delivered by one person to another transferring the title or creating a lien on property or giving a right to a debt or duty." In *re McIntosh*, 150 Fed. 548, 548, 80 C. C. A. 250 (quoting and adopting definition in *Hoag v. Howard*, 55 Cal. 564, 565).

The word "instruments," in Code Pub. Gen. Laws 1904, art. 16, § 221, requiring every trustee to whom any estate shall be conveyed for the benefit of creditors or to be sold for any other purpose, except on a contingency, shall file with the clerk of the court, in which the deed or instrument creating the trust may be recorded, a bond, does not include a will, and a testamentary trustee, to convey, need not execute a bond. *Philbin v. Thurn*, 63 Atl. 571, 573, 103 Md. 342.

A bill of lading was an "instrument or writing," within Rev. Laws 1905, §§ 5051, 5060, punishing forgery of instruments not negotiable, as well as negotiable instruments. *State v. Bierbauer*, 128 N. W. 406, 407, 111 Minn. 129.

#### **INSTRUMENT FOR THE PAYMENT OF MONEY**

A check for a sum certain, payable to the order of a payee named, with the words: "For Wilkes. This check may not be paid unless object for which drawn is stated"—is an "instrument for the unconditional payment of money," within Comp. St. 1910, § 4406, providing that, in an action on an instrument for the unconditional payment of money only, plaintiff need only set forth a copy of the instrument, and state that there is due to him on account thereof from the adverse party a specified sum which he claims, with interest. *Brown v. Cow Creek Sheep Co.* (Wyo.) 126 Pac. 886, 888.

An "instrument for the payment of money" is an instrument which acknowledges an absolute obligation to pay, not conditional or contingent; one the execution of which, being admitted, it would be incumbent on the plaintiff, in an action to enforce it, only to offer the instrument in evidence to entitle him to a recovery. In other words, an instrument that admits an existing debt. *Ancient Order of Hibernians*, Division No. 1, of *Anaconda v. Sparrow*, 74 Pac. 197, 199, 29 Mont. 132, 64 L. R. A. 128, 101 Am. St. Rep. 563, 1 Ann. Cas. 144 (quoting and adopting the definition in *Trepagnier v. Rose*, 46 N. Y. Supp. 397, 18 App. Div. 393).

#### **INSTRUMENT IN NATURE OF WILL**

A power of appointment, to be exercised by an instrument in the nature of a last will and testament, meant that it was to be exercised by will, since an "instrument in the nature of a will" means a will. *McFall v. Kirkpatrick*, 86 N. E. 139, 143, 236 Ill. 281.

#### **INSTRUMENT TRANSFERABLE BY DELIVERY MERELY**

An action by the indorsee of a lost note against the payee is within Civ. Code Prac. § 7, providing that in an action on a lost instrument, transferable by delivery only, no judgment shall be given against defendant until an indemnity bond has been given him. *Hoyland v. National Bank of Middlesborough*, 126 S. W. 356, 357, 137 Ky. 682.

Civ. Code Prac. § 7, provides that no action shall be brought upon an instrument transferable by delivery merely which is alleged to be lost, without a previous tender by plaintiff to defendant if his name and place of residence be known to plaintiff, of an indemnifying bond, etc. Held, that "instruments transferable by delivery merely" means bills of exchange or negotiable paper which the holder takes free of defenses good between the original parties, and does not embrace a note secured by mortgage which under the law was taken by a holder subject to all defenses that the maker had against it before notice of the assignment. *Hill's Adm'r v. Grizzard*, 119 S. W. 168, 170, 133 Ky. 816.

#### **INSTRUMENTAL**

One may be "instrumental" in the sale of property without having anything to do with finding the purchaser so as to be a procuring cause thereof and entitle him to commissions; and hence a finding that an agent was "instrumental" in causing the sale would not of itself entitle him to commissions. *Kurtz v. Payne Inv. Co.* (Iowa) 135 N. W. 1075, 1077.

#### **INSTRUMENTALITY**

See *Dangerous Instrumentality*.

## INSUBORDINATION

"Insubordination" in a civil service employé implies intentional, willful disobedience. *Griffin v. Thompson*, 95 N. E. 7, 9, 202 N. Y. 104.

Ky. St. 1903, § 4367, requires common school pupils to comply with legal regulations for their government, and makes willful disobedience or defiance of teachers' authority, etc., ground for suspension. Section 4473 authorizes school trustees to adopt such legal regulations as they may deem necessary. The trustees of a common school gave the principal general supervision over the pupils, and provided for annual commencement exercises. Plaintiff, a pupil, was familiar with the rules of the school. He was suspended for the remainder of the term, three weeks, for refusing to take a part in a dialogue in annual commencement exercises, as directed by the principal. Held that, though he could ask to be excused from taking the part assigned and to give his reasons for his request, if the principal regarded his reasons insufficient, it was plaintiff's duty to obey, and his refusal to do so constituted disobedience, and his continued disobedience and refusal of offers permitting his return on taking another part constituted insubordination, and was good cause for the suspension. *Cross v. Board of Trustees of Walton Graded Common School*, 110 S. W. 346, 347, 129 Ky. 35.

## INSUFFICIENCY—INSUFFICIENT

In a statute providing that when sureties are or become insufficient new bond may be required, "insufficient" is a comprehensive term, embracing every cause or ground the court may regard as amounting to that. It includes removal of surety from the state. *State, to Use of Baird, v. Hull*, 53 Miss. 626, 644.

An objection that the certificate of protest related to matter between other parties than those to the suit on the note, and was therefore incompetent, is not within the contention that the certificate was insufficient; and, where defendant objected to the admission in evidence of the protest of a note on the specific objection that it was not competent, he could not on appeal raise the question that the protest could only be proved by a certified copy of the record kept by notaries. *Ewen v. Wilbor*, 70 N. E. 575, 579, 208 Ill. 492.

Under a statute providing that no appeal shall be dismissed for insufficiency of the undertaking if a good and sufficient undertaking be filed before the hearing on motion to dismiss, the term "insufficient," as applied to an undertaking on appeal, must be construed as meaning such a one as has some efficiency, but "not enough" to meet the necessary requirements, and bears the ordi-

nary meaning of "not enough"; that is, importing degree in quantity or quality, and not total absence. *Pirrie v. Moule*, 81 Pac. 390, 392, 33 Mont. 1.

"Insufficient security," within Ballinger's Ann. Codes & St. § 5186, providing that non-residents may be required to give security for costs, and that a new or additional bond may be ordered upon proof that the original bond is "insufficient security," means insufficiency in the amount of the bond as well as insufficiency of the sureties. *Morris v. Warwick*, 93 Pac. 905, 906, 48 Wash. 426.

### Of pleadings

A motion to strike an answer, authorized by rule No. 213, takes the place of exceptions, and may be based on scandal impertinence, or insufficiency; "insufficiency" meaning that a portion of the bill had not been answered, and not that an equitable defense had not been presented. *Synnott v. Kobbe* (N. J.) 83 Atl. 193, 194.

## INSUFFICIENT EVIDENCE

A statute authorizing the trial justice to set aside a verdict and grant a new trial for "insufficient evidence" is not limited to evidence insufficient in point of law. Strictly speaking, evidence is said to be insufficient in law only where there is a total absence of proof, either as to quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Insufficiency in point of fact may exist where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case competent both in quality and quantity in law, but which may be met by countervailing proof so as to leave no reasonable doubt as to the opposing conclusion. And so upon the whole evidence in the case the testimony in support of the action, or of the defense, may be so slight, though competent in law, or the preponderance against it may be so convincing, that a verdict would be plainly unreasonable or unjust. *Gunn v. Union R. Co.*, 62 Atl. 118, 121, 27 R. I. 320, 2 L. R. A. (N. S.) 362 (quoting and adopting definition in *Metropolitan R. Co. v. Moore*, 7 Sup. Ct. 1334, 121 U. S. 558, 30 L. Ed. 1022).

## INSUFFICIENTLY VERIFIED

Code Civ. Proc. § 528, permitting a party to treat as a nullity an "insufficiently verified" pleading, applies only where a pleading is defectively verified, and does not permit a plaintiff whose complaint is unverified to treat as a nullity an unverified answer. *Beglin v. People's Trust Co.*, 95 N. Y. Supp. 910, 911, 48 Misc. Rep. 494.

## INSULT

An "insult" offered to a person does not necessarily consist in the use of language imputing crime to him, and hence it may be

an insult to call a white man a negro or to intimate that he is of African descent. *Wolfe v. Georgia R. & Electric Co.*, 58 S. E. 899, 902, 2 Ga. App. 499.

In an instruction defining defendant's liability if plaintiff, a passenger, was set upon by a conductor, and insulted, and violently handled, the words "to set upon," "insult," and "roughly handle" are utterly antagonistic to the idea that the person guilty of such conduct was justifiable or acting in self-defense. "As shown by the collocation of words, 'insult' conveys simply the idea of affront by the use of profane or obscene words towards, or opprobrious epithets applied to, the person insulted. Without regard to its primitive or derivative meaning, certain it is that, used colloquially, as here, it reflects the idea merely of 'scoffs and scorns and contumelious taunts.' 'To insult,' says Webster, means 'to treat with abuse, insolence, indignity, or contempt, by word or action.'" *Yazoo & M. V. R. Co. v. Williams*, 39 South. 489, 490, 87 Miss. 344.

The words "insulting words or conduct towards a female relative," as used in the statute defining adequate cause, embrace not only such circumstances as really insult the woman, but such conduct as to be an insult to her husband, which, if in fact it does produce such anger or resentment as to render his mind incapable of cool reflection, reduces his homicide to manslaughter. *Rogers v. State* (Tex.) 149 S. W. 127, 129.

## INSUPPORTABLE

Under a statute requiring that cruelties shall be "insupportable" in order to constitute ground for divorce, an allegation that defendant's acts of cruelty were "unendurable" was sufficient; both words being expressive of intolerable conduct and having practically the same meaning. *Gamblin v. Gamblin*, 114 S. W. 408, 409, 52 Tex. Civ. App. 479.

## INSURABLE INTEREST

### In fire and marine insurance

An "insurable interest" is that property or right of the assured in respect to which he is liable to loss. The assured has an insurable interest when he has an interest in the subject insured, and the happening of the event insured against might bring upon him pecuniary loss. *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619, 621.

Whether one has an insurable interest in property is tested by the question whether he will be directly and financially affected by loss of the property. *Getchell v. Mercantile & Manufacturers' Mut. Fire Ins. Co.*, 83 Atl. 801, 802, 109 Me. 274, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 738.

In general, to give a party an "insurable interest," it is not necessary that he have ac-

tual right of property, legal or equitable, in the subject insured; but it is sufficient if he, or those whom he represents, will suffer any sort of loss by its destruction. Real estate acquired for partnership with partnership means, and used in its business, gives the partnership an "insurable interest" to warrant a policy insuring it against loss by fire. *Scott v. Dixie Fire Ins. Co.*, 74 S. E. 659, 660, 70 W. Va. 533, 40 L. R. A. (N. S.) 152.

Plaintiff's right being something more than a mere vendor's lien, and he being entitled to the very property for which he had bargained in exchange, unless he had lost the right to demand it by his inability to transfer his insurance policy, if the loss of the barn terminated his ability to carry out the contract, the loss was a damage to him, so that he had an "insurable interest"; the policy not requiring that the legal title should be in him, and not containing any conditions of forfeiture. *Bartling v. German Mut. Ins. Co. (Iowa)* 123 N. W. 63, 65.

A vendee of premises, under a contract of purchase, who has paid part of the price, and gone into possession, has an "insurable interest" therein, and the vendor and holder of the legal title as security for the purchase money also has an "insurable interest" in the premises. *Zenor v. Hayes*, 81 N. E. 1144, 1145, 228 Ill. 626, 13 L. R. A. (N. S.) 909.

A mortgagee of real property has an "insurable interest," for any title or interest, legal or equitable, will support a contract of insurance against loss by fire, though the term "interest" does not necessarily imply property in the subject of insurance; and hence a declaration alleging a promise by an insurance company to both the mortgagor and mortgagee shows sufficient consideration to entitle both to sue jointly. *Williams Mfg. Co. v. Insurance Co. of North America*, 81 Atl. 916, 917, 85 Vt. 282.

A bailee, mortgagee, or other lienholder on property has an "insurable interest" therein. *American Cereal Co. v. Western Assur. Co.*, 148 Fed. 77, 78.

Where a purchaser of property on which insured buildings were situated paid the consideration, but took the title in the name of the mortgagee, and received a policy in the mortgagee's name, with the loss, if any, payable to the purchaser as his interest might appear, both the purchaser and the mortgagee had an "insurable interest," as defined by a statute, providing that every interest in property of such a nature that the contemplated peril might directly damnify the insured is an "insurable interest." *Loring v. Dutchess Ins. Co. of Poughkeepsie, N. Y.*, 81 Pac. 1025, 1026, 1 Cal. App. 186.

### In life insurance

A person has an insurable interest in the life of another, where there is a reasonable probability that he will gain by the latter's

remaining alive or lose by his death. *State v. Willett*, 86 N. E. 68, 71, 171 Ind. 296, 23 L. R. A. (N. S.) 197 (quoting 4 Words and Phrases, p. 3672).

An "insurable interest" is such an interest in property arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured, otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. *Brett v. Warnick*, 75 Pac. 1061, 1064, 44 Or. 511, 102 Am. St. Rep. 639 (citing *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924).

"As to what relationship must exist between the parties to create in one of them an 'insurable interest' in the life of the other is a question upon which the authorities are not so definite, but it seems to be settled that, when such interest is dependent alone upon consanguinity, the parties must be related as closely as the second degree, and such interest will only be presumed in favor of the husband, wife, father, mother, child, brother, or sister of the insured. Such interest, however, may exist in one not so related by blood or affinity to the insured, when the facts show that he has a reasonable expectation of pecuniary benefit or advantage from the continued life of the insured." *Wilton v. New York Life Ins. Co.*, 78 S. W. 403, 404, 34 Tex. Civ. App. 156.

It is not easy to define with precision what will in all cases constitute an "insurable interest," so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the parties obtaining the insurance, either as creditor of, or surety for, the insured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has

an insurable interest in the life of his child, and the child in the life of his parent, a husband in the life of his wife, and the wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. It is well settled that a man has an insurable interest in his own life and that of his wife and children, a woman in the life of her husband, and a creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. Generally the courts have endeavored to make insurable interest depend on the question that pecuniary loss would presumably result to the beneficiary from the death of the insured; but where the relationship, as in the case of husband and wife, parent and child, sister and brother, is so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary consideration is not deemed essential to sustain the validity of the policy. Looking at the question from any standpoint, cousins, who are not dependent on or creditors of the insured, cannot fairly be said to have an insurable interest in his life. *Hess' Adm'r v. Segenfelder*, 105 S. W. 476, 478, 127 Ky. 348, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343.

"An 'insurable interest' may arise from blood relationship, without regard to whether or not the beneficiary has any pecuniary interest in the life of the insured or is dependent upon the latter." The relationship between brothers is sufficient to give either an insurable interest in the life of the other. *Hahn v. Supreme Lodge of the Pathfinder*, 125 S. W. 259, 261, 136 Ky. 823 (citing *Basye v. Adams*, 81 Ky. 368).

While difficult to define, it may be stated generally that an "insurable interest" is "such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." This states a reasonable and now substantially accepted rule. Where a niece lived with her aunt from early childhood at different times, amounting to years, and their relations were as those of mother and daughter, and the aunt supported the niece,

the aunt had an "insurable interest" in the life of the niece. *Cronin v. Vermont Life Ins. Co.*, 40 Atl. 497, 20 R. I. 570.

An "insurable interest" of a niece in the life of her uncle does not depend upon the existence of the fact that she has shown him such natural affection as would tend naturally to create a desire to prolong his life, but on the existence of such facts as would create a reasonable expectation on her part of benefit or advantage to her from the continuance of his life and of loss by reason of his death. *McFarlane v. Robertson*, 73 S. E. 490, 491, 137 Ga. 132.

An uncle of one whose life is insured has no "insurable interest" in the life of the insured through the kinship. *Metropolitan Life Ins. Co. v. Ellison*, 83 Pac. 410, 411, 72 Kan. 199, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909.

### INSURABLE VALUE

The "insurable value" of a ship in an open policy is what she is worth to her owner at the port where the voyage commences, including stores. *Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.*, 185 Fed. 172, 174.

### INSURANCE

See Accident Insurance; Additional Insurance; Burglary Insurance; Casualty Insurance; Co-Insurance; Concurrent Insurance; Double Insurance; Endowment Insurance; Existing Insurance; Fire Insurance; Industrial Insurance; Life and Accident Insurance; Life Insurance; Lloyds; Marine Insurance; Mutual Insurance; Other Insurance; Policy of Insurance; Reinsurance; Specific Insurance; Stock Insurance; Subject (of Insurance); Term Insurance; Title Insurance; Tontine Insurance; Total Insurance; Travelers' Insurance; Whole Insurance.

Any other insurance, see Any Other.

Application for insurance, see Application.

Party in policy, see Party.

Representation in insurance, see Representation.

See, also, Particular Average; Premium; Unlimited Policy.

"Insurance" is a contract by which one of the parties, called the insurer, binds himself to the other, called the insured, to pay to him a sum of money, or otherwise indemnify him. *Rogers v. Shawnee Fire Ins. Co. of Topeka, Kan.*, 111 S. W. 592, 593, 132 Mo. App. 275.

An "insurance contract" is one whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject, by specific perils. *State v. Willett*, 86 N. E. 68, 70, 171 Ind. 296, 23 L. R. A. (N. S.) 197.

"An 'insurance contract' is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril." A contract whereby one guarantees a merchant against loss from sales on credit resulting from the insolvency of customers, to be determined in a manner specially described, is an insurance contract. *Shakman v. United States Credit System Co.*, 66 N. W. 528, 531, 92 Wis. 366, 32 L. R. A. 383, 53 Am. St. Rep. 920.

A "contract of insurance" (life excepted) is an agreement by which one party for a consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest. Under Rev. St. c. 49, § 1, in order to recover insurance a plaintiff must have both an interest and an existing contract at the time of the destruction or injury of the property. *Lyford v. Connecticut Fire Ins. Co.*, 58 Atl. 916, 917, 99 Me. 273.

A contract by which a corporation, in consideration of stipulated amount, agrees to defend a physician against all suits for damages for malpractice at its own expense, but not to pay any judgment obtained against the physician, is a contract of insurance, and the corporation on making such contract is engaged in the business of insurance. *Physicians' Defense Co. v. O'Brien*, 111 N. W. 396, 100 Minn. 490.

Under Rev. St. c. 49, § 1, providing that a contract of insurance, life excepted, is an agreement by which one party, for a consideration, promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest, a party cannot recover on a contract of insurance without proving both an insurable interest in the property destroyed and a valid subsisting contract of insurance at the time of its destruction. *Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co.*, 84 Atl. 1078, 1079, 109 Me. 483.

Code 1906, § 2563, defines an "insurance contract" as "an agreement by which one party for a consideration promises to pay money, or its equivalent, or do some act of value to the assured, upon the destruction, loss or injury of something in which the other party has an interest." Held, that a fire policy in favor of a lumber company for \$3,000 on property aggregating in value \$8,000, made by a manufacturing lumbermen's underwriters' association, composed of a number of persons, firms, etc., was an insurance contract falling literally within such definition; such organization being a "party" within the meaning of the statute. *State v. Alley*, 51 South. 467, 476, 96 Miss. 720.

A bond issued by a fidelity company to a bank which guarantees the bank against

any loss it may sustain between designated dates in consequence of the infidelity of its employé, and which stipulates that after the expiration of a specified time after proofs of loss it will pay to the bank the amount of any loss to the bank through the dishonesty of the employé, is an "insurance contract," subject to the rules of construction applicable to insurance policies generally. *United States Fidelity & Guaranty Co. v. First Nat. Bank of Dundee*, 84 N. E. 670, 672, 233 Ill. 475.

Guaranteeing the fidelity of persons holding places of trust, and the performance of contracts and undertakings, and becoming surety on bonds, constitute a kind of "insurance," and fall within the exception in Laws 1872, of "An act concerning corporations," providing "that corporations may be formed in the manner provided by this act, for any lawful purpose except \* \* \* insurance, \* \* \*" although, at the time when the act was passed, companies doing business of that nature were not organized within the state. *People ex rel. Kasson v. Rose*, 51 N. E. 246, 247, 174 Ill. 310, 44 L. R. A. 124.

Under Laws 1895, c. 160, § 2, and Laws 1899, c. 31, defining a "contract of insurance" as an agreement by which one party, for a consideration, promises to pay or to do some act of value to insured, on the destruction or injury, loss or damage, of something in which the insured party has an insurable interest, a fidelity corporation is an "insurance company," within Laws 1907, c. 541, § 6, imposing a privilege tax on insurance companies; and the fact that Laws 1875, c. 142, makes provision for fire, life, and marine insurance companies, and that Laws 1895, cc. 113, 175, provide for the organization of surety companies, with power to become surety on specified bonds, do not make surety companies a distinct class, though the insurance act of 1895 was enacted prior to the adoption of chapter 175. *American Surety Co. of New York v. Folk*, 135 S. W. 778, 779, 124 Tenn. 139, Ann. Cas. 1912D, 1024.

Civ. Code, § 1793, defines insurance as a contract whereby one undertakes to indemnify another against loss. Section 1845 provides that a policy is either open or valued. Section 1846 defines an open policy as one in which the value of the thing insured is not agreed upon, but left to be ascertained in case of loss. Section 1847 defines a valued policy as one which provides that the thing insured shall be valued at a specified sum. Section 1877 provides that double insurance exists where the same person is insured by several insurers in respect to the same subject. Section 1878 provides that in case of double insurance each insurer shall contribute ratably toward the loss. Sess. Laws 1905, c. 126, prescribes a standard form of fire policy which provides that the amount of insurance written therein on real property shall be taken conclusively to be

the true value. Held that, under the standard policy, the value of real property on total loss is conclusively fixed by the total of all the insurance written therein which is the amount of the policy and concurrent insurance, and the total amount of loss is the sum total of insurance, and, the value of the property being conclusively fixed at a sum equal to the loss, the several policies cannot be prorated. *Lawver v. Globe Mut. Ins. Co.*, 127 N. W. 615, 620, 25 S. D. 549.

In *Fairchild v. Liverpool & London F. & L. Ins. Co.*, 51 N. Y. 65, it was said: "Insurance is a matter of contract, and the parties to it can specify what property, value, or interest it shall in any case cover. It may cover the whole property or any special interest or value in it. It may indemnify against loss generally or loss above a certain sum or percentage." A fire policy provided that the insurer should not be liable for a greater proportion of any loss than the amount insured by the policy bore to the "whole insurance," whether valid or not, "covering such property," etc. Held, that a floating insurance policy covering plaintiff's injured goods, but providing that the policy should not cover in whole or in part any merchandise on which there might be at any time specific insurance, excepting on the excess of value over and above such specific insurance, when such specific insurance was exhausted, did not cover the goods insured by the first policy, and was not to be considered in determining the "whole insurance" on the property at the time of the loss. *Klotz Tailoring Co. v. Eastern Fire Ins. Co.*, 102 N. Y. Supp. 82, 84, 116 App. Div. 723.

Insurance Law (Consol. Laws 1909, c. 28) § 54, prohibits any person from engaging "in the business of insurance" within the state except on compliance with the requirements of the insurance law. Held, that where defendants employed plaintiff to manufacture trousers out of defendants' material, and, in consideration of a deduction of 1 per cent. from the amount to become due, agreed to pay for plaintiff's services if the goods should be damaged by fire, defendants did not, by such provision, assume a risk, and hence that part of the contract did not constitute doing an insurance business by defendants within such section. *Stern v. Rosenthal*, 128 N. Y. Supp. 711, 713, 71 Misc. Rep. 422.

"A beneficiary certificate of a fraternal association is a contract of 'insurance,' subject to the same risks of interpretation as are other contracts, and, as in the case of any other contract, can be neither impaired in its obligation or changed in its terms by either party without the assent of the other." Where a mutual benefit association absolutely agreed to pay to a beneficiary, on the death of a member in good standing, \$2,000, etc., a by-law subsequently enacted, by which

the society attempted, without the member's consent, to scale its obligation on such certificate one-half, was void as impairing the obligation of the member's contract. *Bornstein v. District Grand Lodge No. 4, Independent Order B'Nai B'rith*, 84 Pac. 271, 272, 2 Cal. App. 624.

**As article of manufacture**

See Manufactures—Manufactured Articles.

**As commerce**

See Commerce; Interstate Commerce.

**As contract of indemnity**

A policy of fire insurance is a contract of indemnity. *Scheel v. German-American Ins. Co.*, 78 Atl. 507, 508, 228 Pa. 44.

A policy of "insurance" is a simple contract of indemnity against loss. *Harris v. Commonwealth*, 73 S. E. 561.

A "life insurance" policy is not a contract of "indemnity" but a contract to pay money upon insured's death in consideration of certain payments being made during his life. *Reed v. Provident Sav. Life Assur. Soc.*, 82 N. E. 734, 736, 190 N. Y. 111.

A "contract of insurance" is one of indemnity, but not purely so, as the insurer, on payment of the loss, has a right to be subrogated to the insured's right to proceed against one who negligently caused the loss. *The Livingstone*, 130 Fed. 746, 749, 65 C. C. A. 610.

"Contracts of insurance" are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guarantee the insured against loss or damage upon the terms and conditions agreed upon and upon no other, and, when called upon to pay in case of loss, the insurer therefore may justly insist upon the fulfillment of these terms." *San Francisco Sar. Union v. Western Assur. Co.*, 157 Fed. 695, 697 (quoting and adopting the definition given in *Imperial Fire Insurance Co. v. Coos County*, 14 Sup. Ct. 379, 381, 151 U. S. 452, 462, 38 L. Ed. 231).

As a general proposition of law "a contract of insurance" is one of indemnity, requiring insurable interest on the part of the insured, and therefore the extent and nature of such interest are very material to the contract and the risk, since an absolute, unconditional owner has a far stronger motive to care for and protect the property than one who is not the absolute, unconditional owner." *Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt*, 151 Fed. 681, 683.

Ohio has no statutory definition of "insurance," but it has been repeatedly held that the contract of insurance is a contract of indemnity. It is defined by May as "the contract where one, for a consideration, under-

takes to compensate another if he shall suffer loss," and it is said that it is elementary that the contract of insurance, other than that of life and of accident, where the injury results in death, is one of indemnity. By indemnity is meant that the party insured is entitled to be compensated for such loss as is occasioned by the perils insured against, in precise accordance with the principles and terms of the contract of insurance; the right to recover being commensurate with the loss sustained. Where a foreign corporation makes a business of defending physicians and surgeons against civil prosecution for malpractice, and issues and sells to the persons of the medical profession contracts entitling them to defend the holder against such suits during the term specified therein, the agreement is not an insurance contract. *State ex rel. Physicians' Defense Co. v. Laylin*, 76 N. E. 567, 568, 73 Ohio St. 90 (citing *May, Ins. § 1*).

Under Civ. Code, §§ 2527, 2551, 2558, defining insurance as a contract whereby one undertakes to indemnify another against loss arising from an unknown event, and providing that the sole object of insurance is the indemnity of insured, and declaring that gaming or wagering policies shall be void, a policy of insurance is a contract of indemnity, and, except in case of a valued policy, insured may only recover such loss as he has actually sustained, not exceeding the sum stipulated. *Whitney Estate Co. v. Northern Assur. Co. of London*, 101 Pac. 911, 912, 155 Cal. 521, 23 L. R. A. (N. S.) 123, 18 Ann. Cas. 512.

A contract of "insurance" against fire is a contract of indemnity to reimburse insured for his actual loss not exceeding an agreed sum. *Getchell v. Mercantile & Manufacturers' Mut. Fire Ins. Co.*, 83 Atl. 801, 802, 109 Me. 274, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 738.

An insurance policy is a contract of indemnity for loss, and the intent of the parties must be sought for in accordance with the true meaning in which the agreement was made and expressed in the written instrument. *North British & Mercantile Ins. Co. v. Tye*, 58 S. E. 110, 111, 1 Ga. App. 380.

A "contract for insurance against fire" is a contract of indemnity under which assured is only entitled to be put in the same condition peculiarly that he would have been if there had been no fire, and where assured holds property under a conditional sale, the title remaining in the vendor, assured may recover only to the amount of his insurable interest represented by the amount of payment on the purchase price. *Tabbut v. American Ins. Co.*, 70 N. E. 430, 431, 185 Mass. 419, 102 Am. St. Rep. 353.

An agreement between a limited number of individuals, partners, and corporations engaged in a printing business to indemnify

each other against loss by fire is not a contract for the creation of the insurance business without complying with Rev. St. 1899, §§ 7945-8052, but merely an interindemnity contract, which was not within the insurance law, either before or after the enactment of Laws 1911, p. 301, which expressly provides that such contracts shall not be subject to the insurance law. *Isaac M. Blanchard Co. v. Hamblin*, 144 S. W. 880, 881, 162 Mo. App. 242.

An association organized to protect physicians against civil prosecutions for malpractice, which issues contracts to physicians for a specified consideration and agrees to defend at its own cost, not in excess of a specified sum, actions against physicians, for malpractice, without assuming the payment of any judgment in any suit defended, is engaged in the business of insurance within Civ. Code Cal. §§ 2527, 2531, defining "insurance" as a contract whereby one undertakes to indemnify another against loss or liability arising from an unknown or contingent event, and providing that any contingent or unknown event which may damage a person or create a liability against him may be insured against, since the contract is one of indemnity and not one to render personal services for another, and such company is subject to the provisions of the statutes of the state regulating the business of insurance therein. *Physicians' Defense Co. v. Cooper*, 188 Fed. 832, 833.

#### **As life insurance**

The word "insurance," as used in a warranty of accident or health insurance that no application ever made by the insured for insurance had been declined, and no accident or health policy issued to him had been canceled or renewal refused, etc., held to mean life insurance. *MacKinnon v. Fidelity & Casualty Co.*, 60 Atl. 180, 181, 72 N. J. Law, 29.

#### **As merchandise**

See Merchandise.

#### **As necessities**

See Necessaries.

#### **As separate estate**

See Separate Estate.

#### **As trade**

See Trade.

### **INSURANCE AGENT**

**As profession**, see Profession.

**As public officer**, see Officer.

**As trader**, see Trader—Tradesman.

**Insurance broker distinguished**, see Insurance Broker.

An insurance agent, within Laws 1895, p. 537, c. 175, § 87, rendering an agent procuring insurance in companies not authorized to do business personally liable, is one who assumes to act for such a company;

and it is not essential that he be appointed as the representative of such company, or be the authorized agent of a duly licensed company. *Webster v. Ferguson*, 102 N. W. 213, 214, 94 Minn. 86.

### **INSURANCE BROKER**

An "insurance broker" is ordinarily one who is engaged in the business of procuring insurance for such persons as apply to him for that service, and he is usually the agent of insured. The mere fact that an insurance broker receives a commission from insurer for placing the insurance with him does not change his character as agent of the insured; and one contracting with an agent of an insurance company to turn over surplus business to such agent is a mere broker, and is not an agent of the company. *Monast v. Manhattan Life Ins. Co.*, 79 Atl. 932, 937, 32 R. I. 557.

Rev. Laws 1905, § 1620, provides that whoever, not being the appointed agent of an insurance company, for compensation acts for or in any manner aids another in effecting insurance or reinsurance, shall be deemed an insurance broker. Section 1716 provides that every insurance agent or broker who acts for another in negotiating a contract of insurance shall be held the insurer's agent to collect or secure the premium therefor, whatever condition may be contained in the contract. Section 1642 provides that every person who solicits insurance and procures an application therefor shall be held to be the agent of the party afterwards insuring insurance thereon or a renewal. An insurance broker solicited a renewal of an existing fire policy on a stock of liquor. Insured declined to have the policy renewed, but it was agreed between them that the broker should procure for insured a policy for the same amount as the existing policy on the furniture in the restaurant of insured. The broker notified the agents of the insurance company that the old policy would be renewed, and a renewal policy was written on the stock of liquor and delivered to the broker for insured. The broker did not inform the agents of the agreement between him and insured. The policy was delivered to insured, who retained it unaware that it did not cover the furniture until after the same had been destroyed by fire. Held, in an action to reform the policy so as to make it cover the furniture and to recover thereon, that the broker was not the agent of the insurance company for the purpose of making a contract of insurance or an agreement to insure, since, under section 1716, a broker is not the agent of the insurance company except for the purpose of collecting or securing premiums, which agency is not enlarged by section 1642, which must be construed in connection with section 1716, and that there was therefore no mutual mistake which would authorize the reformation of



the contract of insurance. *Fredman v. Consolidated Fire & Marine Ins. Co. of Albert Lea*, 116 N. W. 221, 223, 104 Minn. 76, 124 Am. St. Rep. 608.

#### Insurance agent

There is a well-understood distinction between "insurance agents" and "insurance brokers." "Unless otherwise provided, an 'insurance broker' represents the insured, although he may represent either the insured or the insurer, or both, for certain purposes. It is a question of fact to be determined by the evidence. He may be the agent of the insurer for the purpose of delivering the policy and collecting the premiums, for the collection of the premiums only, or not even for that purpose. An insurance company is bound by the knowledge of its agent; but it is not bound by the knowledge of a broker, unless such knowledge has been actually communicated to it." This distinction is recognized in Rev. Laws 1905, § 1620, providing that "whosoever not being the appointed agent or officer of the insuring company for compensation acts for or in any manner aids another in effecting insurance or reinsurance shall be deemed an insurance broker, but no person shall act as such except as hereinafter provided." *Fredman v. Consolidated Fire & Marine Ins. Co. of Albert Lea*, 116 N. W. 221, 223, 104 Minn. 76, 124 Am. St. Rep. 608 (citing *Seamans v. Knapp-Stout & Co. Company*, 61 N. W. 757, 89 Wis. 171, 27 L. R. A. 362, 46 Am. St. Rep. 825; *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 70 N. W. 84, 95 Wis. 226, 37 L. R. A. 131; *Indiana Ins. Co. v. Hartwell*, 24 N. E. 100, 123 Ind. 177; *Newark Fire Ins. Co. v. Sammons*, 110 Ill. 166; *Hermann v. Niagara F. Ins. Co.*, 3 N. E. 341, 100 N. Y. 411, 53 Am. Rep. 197; *East Texas Fire Ins. Co. v. Blum*, 13 S. W. 572, 76 Tex. 653; *Davis v. Etna Ins. Co.*, 39 Atl. 902, 67 N. H. 335; *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Improvement Co.*, 100 Pa. 137; *United Fireman's Ins. Co. v. Thomas*, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450; *Devens v. Mechanics' & Traders' Ins. Co.*, 83 N. Y. 168; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Fire Ass'n of Philadelphia v. Hogwood*, 4 S. E. 617, 82 Va. 342; *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 79; *Royal Ins. Co. v. McCrea*, 8 Lea [76 Tenn.] 531, 41 Am. Rep. 656; *Bradley v. German-American Ins. Co.*, 90 Mo. App. 369; *Fire Ass'n of Philadelphia v. American Cement Plaster Co.*, 84 S. W. 1115, 37 Tex. Civ. App. 629).

#### INSURANCE BUSINESS

See Marine Insurance Business.

See, also, Doing Business.

Complainant, in consideration of a specified yearly consideration, issued a contract to physicians, guaranteeing that, in case they were sued for damages for civil malpractice, complainant agreed to employ a local attorney, in whose selection the contract holder

should have a voice, who, with the defendant's attorney, would defend the case without expense to the contract holder to the extent of the exhaustion of the sum named in the policy, which for the defense of one suit was \$5,000, or not to exceed \$10,000 in any one year in case more than one suit was brought against such holder, relieving the latter from liability for costs and attorney's fees to that extent. Held, that complainant was engaged in the insurance business, within Civ. Code Cal. §§ 2527, 2531, 2532, 2534, regulating insurance, and that complainant was not entitled to do business within the state without complying with the insurance laws. *Physicians' Defense Co. v. Cooper*, 199 Fed. 576, 580, 118 C. C. A. 50.

#### INSURANCE COMMISSIONER

The insurance commissioner is a creature of the statute, possessing no authority except that which the statute confers on him; and, where he undertakes to act in a case in which the statute gives him no authority, he may be controlled by injunction. *Mutual Life Ins. Co. of New York v. Prewitt*, 105 S. W. 463, 465, 127 Ky. 399.

#### INSURANCE COMPANY

See Foreign Insurance Company; Life Insurance Company; Live Stock Insurance Company; Mutual Fire Insurance Company; Stock Insurance Company.

Mixed insurance company, see Mixed Company.

There are three kinds of "insurance companies," stock, mutual, and mixed. A "stock company" is one where the stockholders contribute all the capital, pay all the losses, and take all the profits. A "mutual company" is one wherein the members constitute both the insurers and the insured, where the members all contribute, by a system of assessments, to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests. "Mixed companies" are such as the term implies. They embody the characteristics of both the others. *State v. Willett*, 86 N. E. 68, 70, 171 Ind. 296, 23 L. R. A. (N. S.) 197.

The term "insurance company," in its broader meaning, includes fraternal beneficiary societies; in its restricted sense, and confining it to its literal meaning, it does not include such societies. Applying, then, the ordinary rule of construction which obtains in determining the meaning of contracts of insurance, the Modern Woodmen of America is not to be regarded as an insurance company, within the meaning of a question, in an application for life insurance, "Have you ever been declined or postponed by any company?" and a negative answer would not defeat recovery on the policy, although the insured had been rejected by this frater-

nal order. *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 470, 244 Ill. 329, 18 Ann. Cas. 96.

Benefit societies are not always included in the general term "insurance companies." *Westerman v. Supreme Lodge Knights of Pythias*, 94 S. W. 470, 483, 484, 196 Mo. 670, 5 L. R. A. (N. S.) 1114.

Though Rev. Laws 1905, § 1594, declares that, unless the context otherwise requires, the words "insurance company" shall include every corporation and association engaged in insurance, such term does not include fraternal beneficiary associations. *Louden v. Modern Brotherhood of America*, 119 N. W. 425, 426, 107 Minn. 12.

Ky. St. § 641, declaring that the words "insurance company" or "insurance corporations," as used in the article, mean any association, company, corporation, partnership, or joint-stock company carrying on, in any manner the business of insurance, except that the provisions of the chapter shall not apply to fraternal societies, and section 679 requiring that the application or charter and by-laws of an insurance company doing business under the laws of the state, or a copy thereof, shall be attached to the policy before it can be treated as a part of the contract and used in evidence, applies to assessment co-operative companies doing business on the lodge plan. *Supreme Commandery of United Order of Golden Cross of the World v. Hughes*, 70 S. W. 405, 406, 114 Ky. 175.

Ky. St. 1903, § 679, relating to assessment or co-operative life insurance, providing that the application, or a copy thereof, shall be attached to the policy before it can be treated as a part of the contract, applies to a fraternal insurance order doing business exclusively on the lodge plan, notwithstanding section 641, defining "insurance company" to include any association, company, or corporation engaged in or carrying on in any manner the business of insurance in the state, excepting fraternal orders doing business exclusively on the lodge plan. *Grand Lodge, A. O. U. W., of Ky., v. Edwards (Ky.)* 85 S. W. 701, 702.

The word "company," in an application for a mutual benefit certificate containing the question, "Has any \* \* \* application to insure your life ever been made to any company \* \* \* upon which a policy has not been issued?" refers only to regular "insurance companies," and excludes fraternal associations; Civ. Code, § 451, declaring that benefit associations are not "insurance companies" within the insurance laws, recognizing a distinction between regular insurance companies and benefit associations. *Lyon v. United Moderns*, 83 Pac. 804, 805, 808, 148 Cal. 470, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672.

Under Laws 1895, c. 160, § 2, and Laws 1899, c. 31, defining a "contract of insurance"

as an agreement by which one party, for a consideration, promises to pay or to do some act of value to insured, on the destruction or injury, loss or damage, of something in which the insured party has an insurable interest, a fidelity corporation is an "insurance company," within Laws 1907, c. 541, § 6, imposing a privilege tax on insurance companies; and the fact that Laws 1875, c. 142, makes provision for fire, life, and marine insurance companies, and that Laws 1895, cc. 113, 175, provide for the organization of surety companies, with power to become surety on specified bonds, do not make surety companies a distinct class, though the insurance act of 1895 was enacted prior to the adoption of chapter 175. *American Surety Co. of New York v. Folk*, 135 S. W. 778, 779, 124 Tenn. 139, Ann. Cas. 1912D, 1024.

Since an "insurance company" exercises no special or exclusive privilege not allowed by law to natural persons, it is not like a "guaranty or surety company," which may, by statute, be the sole surety in all cases where by law two or more sureties are required. An insurance company is not a guaranty or surety company on which Ky. St. 1899, § 4077, imposes a franchise tax. *Aetna Life Ins. Co. v. Coulter*, 74 S. W. 1050, 1052, 115 Ky. 787.

Where a foreign insurance society was authorized to issue insurance to the legal representatives of the insured, it was an "insurance company," subject to Rev. St. 1899, § 7890, providing that misrepresentations made by insured in obtaining the policy are no defense unless the matters misrepresented shall have actually contributed to the death, and not a "fraternal beneficiary society," authorized by section 1408 to issue certificates only for the benefit of "families, heirs, blood relatives, affianced husband or affianced wife, or to person dependent upon the member." *Herzberg v. Modern Brotherhood of America*, 85 S. W. 986, 987, 110 Mo. App. 328.

Rev. St. Wis. 1898, § 1978, providing that no corporation shall do an insurance business in this state except according to the conditions and restrictions of the statute, expressly declares that the term "insurance corporation," as used in the chapter, may be taken to embrace every corporation, association, partnership, or individual engaging in any such business. *Presbyterian Ministers' Fund v. Thomas*, 105 N. W. 801, 802, 126 Wis. 281, 110 Am. St. Rep. 919.

A business conducted by an association organized for the purpose of securing to each of its members a burial worth \$100 in consideration of stipulated assessments to be paid by such members during life is an "insurance association," within the provisions of Gen. St. 1901, § 3386. *State v. Wichita Mut. Burial Ass'n*, 84 Pac. 757, 73 Kan. 179.

A contract by which a corporation, in consideration of stipulated amount, agrees

to defend a physician against all suits for damages for malpractice at its own expense, but not to pay any judgment obtained against the physician, is a contract of insurance, and the corporation on making such contract is engaged in the business of insurance. *Physicians' Defense Co. v. O'Brien*, 111 N. W. 396, 100 Minn. 490.

### INSURANCE LAW

Acts 1903, p. 94, c. 69, declares that any provision in an insurance policy contracted for in Texas that the answers or statements in the application, if false, shall render the policy void or voidable, shall not constitute a defense unless shown to have been material to the risk. Such provision was an amendment to Rev. St. 1895, tit. 58, embodying the law of insurance, and was added to chapter 4, which treats of life and accident insurance companies, their contracts, and policies. Held, that such provision was an "insurance law," within Laws 1899, p. 195, c. 115, § 1, relating to fraternal associations, and providing that they shall not be subject to the insurance laws of the state unless expressly designated therein. *Modern Order of Praetorians v. Hollmig*, 103 S. W. 476-477, 100 Tex. 623.

### INSURANCE POLICY

See Policy of Insurance.

As credits, see Credits.

Void construed as voidable, see Void.

### INSURE

Keep insured, see Keep.

### INSURE SAFETY

As used in a railroad rule providing that transfermen and yard crews working within yard limits must move at a speed to insure safety, and during obscure weather must move under flag protection, the words to "insure safety" meant that the speed should be such that it would not be the approximate cause of a collision. *Clary v. Chicago, M. & St. P. R. Co.*, 123 N. W. 649, 651, 141 Wis. 411.

### INSURED

Assured synonymous, see Assured.

A provision in an insurance policy that, where the expression "insured" is used therein, it shall include the "legal representatives" of the insured does not entitle a receiver to take the place of the insured in answer to a demand by the company that the insured shall appear for examination under oath respecting a loss, as required by the policy, although the receiver was appointed for the express purpose of collecting the insurance: the insured having absconded and having been adjudged a bankrupt. *Sims v. Union Assur. Soc.*, 129 Fed. 804, 805, 808.

Under a fire policy issued to the owner of the property, providing "loss, if any, first

payable to M., mortgagee, as his interest may appear," requiring proof of loss by "the insured," such proof by the mortgagee, the owner refusing to make it, and the amount of the mortgage exceeding that of the policy, is sufficient. *McDowell v. St. Paul Fire & Marine Ins. Co.*, 130 N. Y. Supp. 294, 296, 145 App. Div. 724.

The "insured," under Insurance Law (Consol. Laws 1909, c. 28) § 122, which provides that a fire insurance company shall cancel any policy of insurance upon the request of the insured, and shall return the amount of the premium paid, less the short rate premium, includes a mortgagee, for whose benefit a mortgagee clause has been inserted in the policy; and the original assured cannot cancel the policy and recover the unearned premium without the consent of the mortgagee, who holds an independent contract with the insurer. *Lewis v. London & Lancashire Fire Ins. Co.*, 137 N. Y. Supp. 887, 888, 78 Misc. Rep. 176.

A fire policy had indorsed thereon, "Loss, if any, payable to C., as his mortgage interest may appear," and such mortgagee was not again mentioned in the policy, save where it was provided in the body of the policy that, if with the consent of the insurer any interest should exist in favor of a mortgagee, the conditions of the policy should apply to such interest. In regard to the settlement of a loss, it was provided that the determination of loss should be made by insured and the company or, in case of a disagreement, by appraisers. Held, that a settlement of the loss, accepted by the insured, was binding on the mortgagee. The word "insured" should be construed to include legal representatives of the insured and nothing more. *Collinsville Sav. Soc. v. Boston Ins. Co.*, 60 Atl. 647, 651, 77 Conn. 676, 69 L. R. A. 924.

Civ. Code, § 2541, provides that, where a mortgagor effects insurance in his own name, the loss to be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, and any act of his, which would otherwise avoid the insurance, will have the same effect, although the property is in the hands of the mortgagee. Section 1442 provides that a condition involving a forfeiture must be strictly interpreted. Section 1654 provides that, in cases of uncertainty in the interpretation of contracts, the language of a contract must be interpreted most strongly against the one who caused the uncertainty. A fire policy provided that, unless otherwise provided by agreement indorsed thereon, it should be void if any change should take place in the title of the property, and provided that, if an interest "shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the man-

ner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached, or suspended hereto." Subsequent provisions declared that the policy was "subject to the foregoing stipulations and conditions," and that no privilege or permission affecting the insurance should ever be claimed by "insured" unless written or attached to the policy. After the issuance of a fire policy the premises were mortgaged, and the insurer indorsed on the policy a statement that the loss should be payable to the mortgagee, and thereafter the mortgagor sold the premises. Held, that the mortgagee was entitled to recover for a loss, since, by virtue of the mortgage clause, the interest of the mortgagee was free from all such conditions, except such as were at the time of the creation of his interest written upon the policy or attached or appended thereto. The word "insured" refers to the original holder of the policy or his successor, and not to the mortgagee. *Welch v. British American Assur. Co.*, 82 Pac. 964, 966, 148 Cal. 223, 113 Am. St. Rep. 223, 7 Ann. Cas. 396.

Plaintiff having procured a policy on a dwelling house, containing a stipulation that, if "the insured" procured other insurance on the property, the policy should be void, sold the property to the wife of H., retaining a lien for the unpaid portion of the price, and, with the insurer's consent, assigned the policy, to which a rider was attached, providing that any loss due the assured under the policy should be payable to plaintiff as her interest might appear. H. without the knowledge or consent of plaintiff or the insurer procured additional insurance on the property payable to plaintiff as her interest might appear. Held, that the conveyance and the assignment of the policy with insurer's consent created a new contract of insurance between defendant and the grantee, who thereupon became the "insured" within the meaning of the provision against additional insurance. *Dumphy v. Commercial Union Assur. Co., Limited, of London (Tex.)* 142 S. W. 116, 117.

### INSURED PROPERTY

A town or county co-operative insurance company may reinsure the risks of another such company, and the subject-matter of the reinsurance thereupon becomes "insured property" of the indemnifying company within Insurance Law (Laws 1898, p. 1506, c. 654) § 278, as amended, allowing a town or county co-operative insurance company doing business in five counties to extend into adjoining counties not exceeding one for each \$1,000,000 of its "insured property," and the reinsured company becomes a member of the indemnifying company and subject to pro rata liability for assessments to pay losses during the life of the reinsurance contract (Laws 1897, p. 12, c. 29); section 2CS requiring assessments for a loss or

a general assessment for the current year to pay estimated losses to be made pro rata "upon all the property at that time insured." *Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co. of Monroe County*, 114 N. Y. Supp. 200, 204, 61 Misc. Rep. 457.

### INT.

A claim presented to an administrator for a specified sum "& int." allowed by the administrator and approved by the court in similar language is a claim for the specified sum and interest; the abbreviation under Code Civ. Proc. § 186, standing for the word "interest." *Raggio v. Palmtag*, 103 Pac. 312, 316, 155 Cal. 797 (citing *Belford v. Beatty*, 34 N. E. 254, 145 Ill. 414).

### INTAGLIOS

Semi-spherical rock crystal, polished, and the flat surfaces of which have been engraved in designs of animal heads, and the intaglio cuttings of which are painted in living colors, are "intaglios." *United States v. Benedict & Warner*, 145 Fed. 914, 915, 76 C. C. A. 446.

### INTANGIBLE PROPERTY

See Tangible or Intangible Property.

Ky. St. 1903, §§ 4077-4081, provide that certain corporations, including telephone companies, shall, in addition to other taxes, annually pay a tax on their franchises to the state and a local tax thereon to the county, incorporated city, town, and taxing district where the franchises may be exercised; and each corporation shall report the amount of tangible property in the state, and where situated and assessed, and the fair cash value thereof; and the board of valuation and assessment is to fix the value of the capital stock of each corporation, and from such amount deduct the assessed value of all tangible property assessed in the state, the remainder to be the value of its corporate franchise, subject to taxation in each county, incorporated city, town, or district through or into which the lines of the company pass. Section 4020 provides that all property of domestic corporations, including intangible property, considered in determining value of franchises, shall be subject to taxation, unless exempt by the Constitution, and shall be assessed at its fair cash value. Held, that the bonds, notes, accounts, cash, stock in other corporations, and other credits of a telephone corporation are "intangible property," and not subject to assessment by the local assessor, but are to be considered by the board of valuation in fixing the franchise tax. *Commonwealth v. Cumberland Telephone & Telegraph Co. (Ky.)* 99 S. W. 604, 606.

## INTEGRAL

### INTEGRAL PART OF JUDGMENT

The part of a judgment of foreclosure, which pursuant to Rev. St. 1898, §§ 3156, 3162, orders judgment for the deficiency and holds that a certain person is liable therefor, is an "integral part of the judgment" and fixes the rights of the parties and is appealable, and such liability cannot be questioned on appeal from the formal judgment for deficiency. *Pereles v. Leiser*, 101 N. W. 413, 414, 123 Wis. 233 (citing *Gaynor v. Blewett*, 57 N. W. 44, 86 Wis. 399, 400; *Kane v. Williams*, 74 N. W. 570, 99 Wis. 65, 72; *Richards v. Land & River Imp. Co.*, 75 N. W. 401, 99 Wis. 625, 629).

## INTEGRITY

"Integrity" means, among other significations, "moral soundness," in an action for breach of marriage promise; and the exclusion of testimony as to defendant's reputation for integrity was harmless, where several witnesses had testified that his reputation for chastity and morality was good. *Lanigan v. Neely*, 89 Pac. 441, 449, 4 Cal. App. 760.

The word "integrity," as used in Code, § 1369, providing that no person shall be entitled to serve as administrator who has been adjudged incompetent to execute the duties of a trust because of want of understanding or integrity, means soundness of moral principle and character, as shown by a person's dealing with others in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for "probity," "honesty," and "uprightness" in business relations with others. In *re Gordon's Estate*, 75 Pac. 672, 674, 142 Cal. 125.

A finding that a father is a man of intemperate habits and lacking in "integrity" is not sufficient to deprive him of the guardianship of his minor child, under Rev. Codes, § 5774, providing that a surviving parent who is competent to transact his own business, and not otherwise unsuitable, is entitled to the guardianship of the minor, the word "integrity" meaning uprightness of character and soundness of moral principle; honesty; probity; as, his business career showed his integrity. In *re Crocheron's Estate*, 101 Pac. 741, 746, 16 Idaho, 441, 33 L. R. A. (N. S.) 868.

## INTELLIGENCE

An instruction "that the term 'negligence' means the want of that care and prudence which a man of ordinary 'intelligence' would exercise under all the circumstances of the situation" is erroneous, where the case is bottomed on negligence and defended on the ground of contributory negligence, since

it does not correctly define the term. "Intelligence" is not a synonym for either "caution," "prudence," or "care." *Van Cleve v. St. Louis, M. & S. E. R. Co.*, 101 S. W. 632, 634, 124 Mo. App. 224.

## INTEMPERANCE

See Habitual Intemperance.

### INTEMPERATE

A charge that "the best definition I can give you of the word 'intemperate' so far as the intemperate use of intoxicating liquor is concerned is the immoderate use of intoxicating liquor. I don't know whether you know any more about it now than you did before; I don't"—simply indicated that the word "intemperate" did not admit of precise definition, though well understood, and was not erroneous. *Schon v. Modern Woodmen of America*, 99 Pac. 25, 27, 51 Wash. 482.

Where a mutual benefit certificate provided for forfeiture in case insured should become intemperate in the use of intoxicating liquors, the word "intemperate" should be held to mean, not the excessive or habitual use of intoxicating liquors, but the habitually excessive use thereof. *Evans v. Modern Woodmen of America*, 129 S. W. 485, 491, 147 Mo. App. 155.

Insured was not "intemperate" within a provision of a benefit certificate that it should become void if insured should become intemperate in the use of alcoholic liquors, even if he drank liquors to excess upon exceptional occasions, unless he was addicted to periodical indulgences, which became habitual. *Schon v. Modern Woodmen of America*, 99 Pac. 25, 27, 51 Wash. 482.

### INTEMPERATE HABITS

A man is not of "intemperate habits" within the meaning of an insurance policy because he occasionally uses intoxicating liquors and sometimes to excess. *Fludd v. Equitable Life Assur. Soc. of United States*, 55 S. E. 762, 763, 75 S. C. 315.

### INTEMPERATE USE

Where a by-law of a mutual benefit society provided that it should be relieved from liability in case the member became intemperate in the use of intoxicating liquors, or his death should result from his intemperate use thereof, the words "intemperate use" should be construed as equivalent to habitual intemperance in such use, but the word "use" employed in the sentence relieving the company from liability in case of death resulting from the intemperate use of such liquors was not employed with reference to a fixed habit, but should be construed to mean the means only by which death was caused, so that where insured died as the result of a fall, which was directly caused by his intoxicated

condition, the society was not liable without regard to whether insured had acquired a fixed habit of intoxication. *Ury v. Modern Woodmen of America*, 127 N. W. 665, 666, 149 Iowa, 706.

The expression "intemperate use of intoxicating liquors," in a contract of insurance, means such indulgence in intoxicants as tends to impair the health of the insured or renders the risk more hazardous. *O'Connor v. Modern Woodmen of America*, 124 N. W. 454, 456, 110 Minn. 18, 25 L. R. A. (N. S.) 1244.

## INTEND

See Manifestly Intend; Shall be Intended to be or Shall be Carried.

Laws 1905, p. 154, c. 71, requires retail liquor dealers to obtain a license from the county treasurer, but provides that he shall not issue a license until directed so to do by the board of county commissioners on a petition signed by a specified number of freeholders residing in the city, etc., in which any person, seeking such a license, "intends to engage in business." Code Civ. Proc. § 3135, provides that, in the construction of a statute, the intention of the Legislature is to be pursued, if possible; that, when general and particular provisions are inconsistent, the latter is paramount; and that a particular intent controls a general one inconsistent therewith. Held, that one engaged in the liquor business, under a license, on the expiration thereof is not entitled to receive another license from the treasurer until there has been a petition to the county commissioners and favorable action thereon by them. 'As to appellant's contention that the words "intends to engage in business," used in section 1 of chapter 71, cannot refer to one already holding a liquor license, and that therefore the statute does not require the possessor of a liquor license to again apply for a license at the expiration of his old license, the court said: "We think the general intention of the Legislature is manifest, and that the loose use of the word 'intends' in the recital, upon which appellant founds his contention, cannot be held to be an expression of a particular intent which will control and in great measure render the act nugatory. Literally interpreted, the word 'intends' conveys the idea contended for by appellant; but we think it apparent that its use was the result of hasty and careless work on the part of the person who drew the bill, rather than that it is the expression of a well-defined intention on the part of the Legislature to limit its operation." *State ex rel. Bray v. Settles*, 87 Pac. 445, 446, 34 Mont. 448.

"The words 'intends to appeal,' 'will appeal,' or 'give notice of their application to appeal' are equivalent to and have the same effect as the more direct phraseology of the statute ('appeals from the judgment'); that

is, each will effect an appeal. Of course, if the phrases above cited are sufficient to effect the appeal, the words 'has appealed' will likewise perform the same office." *James v. James*, 77 Pac. 1082, 1083, 35 Wash. 655 (citing *Ranahan v. Gibbons*, 62 Pac. 773, 23 Wash. 255; *In re Murphy's Estate*, 66 Pac. 424, 26 Wash. 222; *Brown v. Calloway*, 75 Pac. 630, 34 Wash. 175).

## INTENDED

As applied to the law of homicide, the word "intended" means "designed." *Keigans v. State*, 41 South. 886, 890, 52 Fla. 57.

The word "intended," as used in Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, providing that if a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, shall have had reasonable cause to believe that it was "intended" thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person, is used in its ordinary sense and means an actual intention; and it does not necessarily follow that such person had reasonable cause to believe the bankrupt's insolvency, or that he had reasonable cause to believe that a preference was intended. *Lynch v. Bronson*, 69 Atl. 538, 541, 80 Conn. 566 (citing *In re Andrews*, 144 Fed. 922, 75 C. C. A. 562; *First Nat. Bank of Louisville, Ky., v. Holt*, 155 Fed. 100, 84 C. C. A. 16).

## INTENDED REGULATION

The "intended regulation" of a street, for which Greater New York Charter (Laws 1901, c. 466) §§ 979, 980, authorize commissioners of estimate in a street opening proceeding to make awards of damages, is one to be made in connection with the opening, and does not apply to a change of grade wholly independent of the street opening proceedings, whether or not the actual grading is completed before commencement of such proceedings. *In re Thirteenth Ave. in the Borough of Queens, City of New York*, 137 N. Y. Supp. 7, 8, 77 Misc. Rep. 479.

## INTENSELY ALKALINE NATURE

An enamel of an "intensely alkaline nature" is any enamel which will give a strongly alkaline reaction. *National Enameling & Stamping Co. v. New England Enameling Co.*, 151 Fed. 19, 28, 80 C. C. A. 485.

## INTENT

See Criminal Intent; Felonious Intent; Legal Intent; With Intent of Bringing Action; With Intent to Intimidate; With Like Intent.

As element in preference, see Preference. As element of assault, see Assault and Battery.

As element of robbery, see Robbery. Signature requiring, see Sign—Signature.

"Intent" is the state of mind which precedes or accompanies an act; volition. *Crosby v. Wells*, 67 Atl. 295, 302, 73 N. J. Law, 790 (citing Wig. Ev. §§ 242, 300).

"Intent" is a mental attitude made known by acts. *People v. Haxar*, 108 N. W. 90, 91, 144 Mich. 575.

"The 'intent' of a person cannot be proven by direct and positive evidence. It is a question of fact to be proven, like any other fact, by acts, conduct, and circumstances." *People v. Johnson*, 63 Pac. 842, 131 Cal. 511, 514.

In murder "intent" is the purpose to make effective the means adopted for the commission of the crime. *State v. Hyde* (Mo.) 136 S. W. 316, 322.

The word "intent," as used in Rev. St. 1898, § 4068, providing that "in every crime or public offense there must exist a joint operation of act and intent," indicates an intent to commit an act or to do something which the law denounces as a crime, regardless of the motives the accused may have had for doing the wrong. "The intent required is, not to break the law, but to do the wrong." "If a man intends to do what he is conscious the law, which every one is conclusively presumed to know, forbids, there need be no other evil intent." *Skeen v. Craig*, 86 Pac. 487, 490, 31 Utah, 20 (quoting and adopting definition in 1 Bishop, Crim. Law, 300, 343).

"Intent" imports contemplation and more or less expectation of the intended end as the result of the act alleged." An indictment, in a prosecution for attempt to kill, under Pub. St. c. 202, § 32, which alleges, in substance, "that defendant feloniously, willfully, and maliciously attempted to murder L. by placing a quantity of deadly poison, known as 'Rough on Rats,' known to the defendant to be deadly poison, upon, and causing it to adhere to, the under side of the crossbar of a cup of L.'s, known as a 'mustache cup,' the cup being then empty, with the intent that L. should thereafter use the cup for drinking while the poison was there, and should swallow the poison," sufficiently sets forth a criminal "intent." *Commonwealth v. Kennedy*, 48 N. E. 770, 771, 170 Mass. 18.

#### Implied from circumstances

An "intent" to murder, while an essential ingredient of the offense of assault with intent to murder, being entirely a mental operation, may be disclosed by the words of the assailant, or may be inferred from his acts and conduct. *State v. De Paolo* (Del.) 84 Atl. 213, 214.

On a trial for assault with intent to murder, the murderous "intent" may be proved, either by direct evidence or by acts and conduct from which it may be reasonably inferred, such as the voluntary use of a deadly weapon in an unlawful manner, or under

circumstances directly tending to great bodily harm, or to imperil human life. *State v. Jackson* (Del.) 82 Atl. 824, 825.

The "intent" with which an act is done denotes a state of mind, and can be proved only from expressions or conduct, or both, considered in the light of the given circumstances. *State v. Johnson*, 65 S. E. 1023, 1024, 84 S. C. 45.

"There can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The 'intent' which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent." *Raymond v. City of Wichita*, 79 Pac. 323, 326, 327, 70 Kan. 523 (quoting and adopting definition in Elliott, Roads and Streets, § 124).

The most important element to be established tending to prove that a chattel has been merged into a fixture is the intent with which the party provided its use, and such intent is the intent which the law deduces from all the circumstances of the annexation. *Roderick v. Sanborn*, 76 Atl. 263, 264, 106 Me. 159, 30 L. R. A. (N. S.) 1189, 20 Ann. Cas. 469.

#### Attempt distinguished

The word "attempt" is more comprehensive than the word "intent," implying both the purpose and an actual effort to carry that purpose into execution. In crimes which require force as an element in their commission, there is no substantial difference between an assault with intent and an assault with attempt to perpetrate the offense. *Taylor v. State*, 55 S. E. 474, 475, 126 Ga. 557 (quoting and adopting definition in 2 Bish. New Cr. Proc. [4th Ed.] § 80).

The only distinction between an "intent" and an "attempt" to do a thing is that the former implies the purpose only, while the latter implies both the purpose and an ac-

tual effort to carry that purpose into execution; and since the word "attempt" embraces the full meaning of "intent," with something more, it is not impossible that the courts may hold it to be an admissible substitute in an indictment. *Smith v. State*, 100 N. W. 806, 807, 72 Neb. 345 (citing 2 Bish. Cr. Proc. § 80; *Atkinson v. State*, 30 S. W. 1064, 34 Tex. Cr. R. 424; *Rummells v. State*, 30 S. W. 1065, 34 Tex. Cr. R. 431).

#### **Motive and ultimate object distinguished**

"Intent," in its legal sense, is quite distinct from motive. It is defined as the purpose to use a particular means to effect a certain result. Motive is the reason which leads the mind to desire that result. *Baker v. State*, 97 N. W. 566, 570, 120 Wis. 135.

The "intent" essential to constitute perjury must be distinguished from "motive" and from "ultimate object." In the popular mind, intent and motive are not infrequently regarded as one and the same thing, but in law there is a clear distinction between them. "Motive" is the moving power which impels to action for a definite result. "Intent" is the purpose to use a particular means to effect such result; a good motive does not prevent an act from being a crime. *People ex rel. Hegeman v. Corrigan*, 87 N. E. 792, 796, 195 N. Y. 1 (citing *People v. Molineux*, 61 N. E. 286, 168 N. Y. 264, 62 L. R. A. 193; 1 *Burrill, Law Dict.*; *Clark, Cr. Law*, § 14).

#### **Premeditation implied**

Under Rev. St. 2380, providing that the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, shall be murder in the first degree, the word "design" means "intent," and both words imply premeditation. *Olds v. State*, 33 South. 296, 299, 44 Fla. 452 (citing *Ernest v. State*, 20 Fla. 383).

#### **INTENT TO COMMIT FELONY**

See Assault with Intent to Commit Felony.

#### **INTENT TO COMMIT GREAT BODILY INJURY**

See Assault with Intent to Commit Great Bodily Injury.

#### **INTENT TO COMMIT MANSLAUGHTER**

See Assault with Intent to Commit Manslaughter.

#### **INTENT TO COMMIT RAPE**

See Assault with Intent to Commit Rape.

#### **INTENT TO INJURE OR DEFRAUD**

In discussing the motive and "intent" for a conspiracy to do an act not unlawful, the court said: "An 'intent to injure' in strictness means more than an intent to harm. It

connotes an intent to do wrongful harm. 'Maliciously' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports in its term the infringement of some right." *State v. Van Pelt*, 49 S. E. 177, 187, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495.

If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily and intentionally does the act, he is chargeable, in law, with the intent to injure or defraud. It is not necessary that his object or purpose was primarily to injure or defraud. It may have been to benefit himself. *United States v. Breese*, 131 Fed. 915, 922.

#### **INTENT TO KILL**

See Assault with Intent to Kill; Shooting with Intent to Kill.

"Intent to kill" means just what the ordinary signification of the words suggest, whether it be described by the words "actual intent," "design," or "premeditated design" makes no difference. When we leave entirely out of view those subtleties often indulged in, in discoursing on the meaning of "premeditated design," and giving words the meaning ordinarily attributed to them, the person who effects the death of another by design does so intentionally, and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated or thought of, because without mental action the purpose could not be formed. So, when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design or premeditated design. That the word "premeditated," as used in the statutes on the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term "premeditated design" where used inclusively in murder in the first degree, as to "design" where that word alone is used exclusively in murder in the third, and manslaughter in the first, second, and third, degrees. *Cupps v. State*, 98 N. W. 546, 549, 120 Wis. 504, 102 Am. St. Rep. 996.

#### **INTENT TO MURDER**

See Assault with Intent to Commit Murder.

#### **INTENT TO ROB**

See Assault with Intent to Rob.

#### **INTENTION**

See Floating Intention; Indeterminate Intention.

As affecting residence, see Residence.  
Change of intention, see Change.



"Intention" or motive is an operation of the mind, a mental act, which may take place, but remain confined in the mind which conceived it, and never be susceptible of proof unless it is evidenced by some act or declaration of the party which betrays it. We say a man's motives must be judged by his acts; the act therefore becomes the evidence or proof upon which we convict of the intention. In pleading the intention, it may be alleged that a person had a certain intent without pleading a conclusion. *Willcox v. Davis*, 4 Minn. 197, 200 (Gil. 139, 142).

### INTENTIONAL

As willful, see Willful—Willfully.

The word "intentional" is defined in Webster's International Dictionary, as "done by intention or design; intended; designed; as the act was intentional, not accidental." In an action against a carrier for recovery of actual and exemplary damages for the act of one of its conductors in kicking plaintiff, a messenger boy, 13 years old, over the heart, as he was attempting to board the car as a passenger, an instruction that, in assessing plaintiff's damages, the jury were not limited to the physical injury inflicted, but in addition to this, if they found the tort was malicious, they might allow punitive damages, and defining the term "malice" to mean "the intentional doing of a wrongful act without justice, cause, or excuse, though without spite or ill will" sufficiently defined what was necessary to authorize exemplary damages. *McNamara v. St. Louis Transit Co.*, 81 S. W. 880, 882, 182 Mo. 676, 66 L. R. A. 486.

The word "intentional," when used in connection with the doing of a wrongful act, signifies not only that the party intended to do the particular act, but to do it knowing at the time that it was wrongful. *Ickenroth v. St. Louis Transit Co.*, 77 S. W. 162, 167, 102 Mo. App. 597, (citing *Trauerman v. Lipincott*, 39 Mo. App. 478).

"The words 'negligence' and 'intentional' are contradictory," so that an allegation that defendant violently, insolently, and willfully assaulted and beat plaintiff is not supported by proof of a battery resulting from negligence. *Gibeline v. Smith*, 80 S. W. 961, 963, 106 Mo. App. 545 (citing *Raming v. Met. St. Ry. Co.*, 57 S. W. 268, 157 Mo. 507, 508).

The "intentional" doing of a wrongful act is not necessarily a malicious act. Every voluntary act of a human being is intentional, but, generally speaking, a voluntary act becomes willful in law only when it involves some degree of conscious wrong or evil purpose on the part of the actor, or at least an inexcusable carelessness or recklessness on his part, whether the act be right or wrong. *State v. Willing*, 105 N. W. 355, 356, 129 Iowa, 72.

A count is demurrable which in its charging part alleges that the act was recklessly "and" wantonly done while the specification shows that it was recklessly "or" wantonly done; "reckless" not being equivalent to "wanton" or "intentional." *Merrill v. Sheffield Co.*, 53 South. 219, 222, 169 Ala. 242.

"Culpable negligence" does not necessarily result from an "intentional" act. If the killing is caused by culpable negligence, then it is not necessarily "intentional." Hence a requested instruction that culpable negligence is not merely an omission to use ordinary caution and care, but must be the result of intentional act, or acts which are done without the exercise of ordinary care or caution, was erroneous, because requiring it to be the result of "intentional" acts. *Kent v. State*, 43 South. 773, 774, 53 Fla. 51 (citing *State v. Lockwood*, 24 S. W. 1015, 119 Mo. 463).

"Intentionally" is often used as synonymous with 'knowingly,' and when so used, an act is 'intentional' if the person who does it is conscious of what he is doing and its probable consequences, without regard to the motive which induced him to act. In this sense 'intentional' is an apt word to describe the injury which results when the person whose act causes it is conscious of the injured person's situation and of his duty in the matter in time to prevent an accident, but is not conscious of an intent to injure any one." *Brown v. Boston & M. R. R.*, 64 Atl. 194, 198, 73 N. H. 568.

### INTENTIONAL INJURY

As willful injury, see Willful—Willfully.

Loss of an eye from a blow struck by another, with the intent to injure, but not to put out an eye, is within the clause of an accident policy exempting the insurer from liability for "intentional injuries." *Travelers' Protective Ass'n of America v. Well*, 91 S. W. 886, 887, 40 Tex. Civ. App. 629.

'An injury from being struck by a brick in a difficulty in which the person struck was without fault and the other party the aggressor is within the clause of a policy exempting the insurer from liability for "intentional injuries." *Washington v. Union Casualty & Surety Co.*, 91 S. W. 988, 115 Mo. App. 627.

Where it was alleged that insured had been placed under arrest by officers of the law and disarmed, and while so in custody such officers negligently and without lawful excuse permitted certain parties to assault and shoot deceased, and thereby cause his death, such death was caused by "intentional injuries inflicted by another person," within a provision of an accident policy held by deceased exempting the company, from liability for such injuries. *Jarnagain v. Travelers' Protective Ass'n of America*, 133

Fed. 892, 893, 66 C. C. A. 622, 68 L. R. A. 499.

In an accident policy, a provision that "in case of injuries \* \* \* 'intentionally' inflicted on himself by the insured, or inflicted on himself or received by him while insane," the company shall not be liable exempts the insurer from liability for injuries to insured while insane, whether intentionally inflicted or not. *Blunt v. Fidelity & Casualty Co.*, 78 Pac. 729, 730, 145 Cal. 268, 67 L. R. A. 793, 104 Am. St. Rep. 34.

### INTENTIONAL NEGLIGENCE

The words "intentional negligence," as used in a count in an action for injuries to a servant, characterizing the conduct of the engineer as wanton or "intentional negligence," is the equivalent of wantonness, willfulness, and sufficiently alleged that the act was done intentionally. *Alabama Great Southern R. Co. v. Williams*, 37 South. 255, 258, 140 Ala. 230.

### INTENTIONAL WRONG

Negligence distinguished, see Negligence.

### INTENTIONALLY

"Intentionally" is defined in Webster's International Dictionary to mean "in an intentional manner; with intention; by design or purpose." In an action against a carrier for recovery of actual and exemplary damages for the act of one of its conductors in kicking plaintiff, a messenger boy, 13 years old, over the heart as he was attempting to board the car as a passenger, an instruction that, in assessing plaintiff's damages, the jury were not limited to the physical injury inflicted, but in addition to this, if they found the tort was malicious, they might allow punitive damages, and defining the term "malice" to mean "the intentional doing of a wrongful act without justice, cause, or excuse, though without spite or ill will," sufficiently defined what was necessary to authorize exemplary damages. *McNamara v. St. Louis Transit Co.*, 81 S. W. 880, 882, 182 Mo. 676, 66 L. R. A. 486.

Kirby's Dig. § 1899, makes it a misdemeanor to willfully and intentionally destroy, injure, or obstruct any telegraph or telephone line and imposes a penalty of double damages. Held, that the words, "willfully" and "intentionally," implied an evil intent without justifiable excuse so that the destruction of a portion of a telephone line by a railway company which is mistakenly believed was an unlawful obstruction of its right of way, and was also a hindrance and a menace to the safe operation of the railway, was not an act for which the owners of the telephone line were entitled to recover double damages under such section. *St. Louis, I. M. & S. Ry. Co. v. Batesville & W. Telephone Co.*, 97 S. W. 660, 662, 80 Ark. 499.

Where an officer employed by the commissioner of forestry, under Act March 11, 1903 (P. L. 24), is indicted for willfully and maliciously killing a dog, and the evidence shows that the defendant had heard of the character of the dog as a deer dog, and that the dog was killed three miles from his master's residence, and when not in company with his master, it is error for the trial court to place upon the defendant the burden of disproving malice. The defendant in such a case is entitled to start with the presumption in his favor that his act was legal rather than illegal. *Commonwealth v. Frederick*, 27 Pa. Super. Ct. 228, 230.

Under Laws 1901, p. 550, c. 379, § 5, providing that any member of a board of review of any assessment district, who shall intentionally omit or agree to omit from assessment any property liable to taxation in such assessment district or shall otherwise intentionally violate or fail to perform any duty imposed upon him by law, shall forfeit a certain sum of money, the word "intentionally" will be given its usual meaning when used in penal laws as importing willfulness, evil intent, or unlawful purpose. *State v. Zillmann*, 98 N. W. 543, 545, 121 Wis. 472.

### As knowingly

"Intentionally" is often used as synonymous with 'knowingly,' and when so used an act is 'intentional' if the person who does it is conscious of what he is doing and its probable consequences, without regard to the motive which induced him to act. In this sense 'intentional' is an apt word to describe the injury which results when the person whose act causes it is conscious of the injured person's situation and of his duty in the matter in time to prevent an accident, but is not conscious of an intent to injure any one." *Brown v. Boston & M. R. R.*, 64 Atl. 194, 198, 73 N. H. 568.

The word "intentionally," as used in Rev. St. 1899, § 2572, providing that any miner who shall "intentionally" injure any shaft or enter any place of the mine against caution or disobey any order given in carrying out the provisions of the statute shall be guilty of a misdemeanor, only requires that the act constituting the alleged violation of the section shall be knowingly done. *Kopala & Lampe v. State*, 89 Pac. 576, 577, 15 Wyo. 398.

### INTERCOURSE

See Habitual Carnal Intercourse; Sexual Intercourse; Unlawful Intercourse.

"Intercourse" means "a commingling; intimate connections or dealings between persons or nations, as in common affairs and civilities, in correspondence or trade; communication; commerce; especially interchange of thought and feeling; association; communion." Webster's Dict. In a prose-

cution for rape under Pen. Code, § 261, par. 1, a conviction cannot be had on proof alone that defendant had intercourse with the prosecutrix. *People v. Howard*, 76 Pac. 1116, 1117, 143 Cal. 316.

"Intercourse," as used to represent commerce between the states, which Congress has constitutional power to regulate, is not limited to trade in commodities but includes as well the transmission of intelligence, which may not therefore be obstructed or unnecessarily incumbered by state legislation. *International Text-Book Co. v. Pigg*, 30 Sup. Ct. 481, 484, 217 U. S. 91, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

#### As sexual intercourse

Evidence that defendant solicited prosecutrix to enter a building with him after dusk, told her his desire, said her objection did not make any difference, and had "intercourse" with her, held sufficient to warrant a finding of penetration; the term "intercourse," under such circumstances, meaning sexual intercourse. *State v. Bailly*, 137 N. W. 352, 353, 29 S. D. 588.

## INTEREST

See As Interest may Appear; Beneficial Interest; Beneficially Interested; Best Interests of Territory; Direct and Special Interest; Direct Interest; Direct Legal Interest; Directly Interested; Licensee with an Interest; Partner's Interest; Power Coupled with an Interest; Present Interest; Public Interest; Relative Interested in Welfare; Successor in Interest.

Any person interested, see Any.

The words "rents, issues, and profits" are commonly connected together with reference to the income of real estate. What are called "rents, issues, and profits" in real estate are the same as what are naturally called "interest and income" when referring to personal property. A testator's use of the word "income" in addition to the word "interest" indicates that he was thinking of productive personal property other than the ordinary interest-producing investments. *Oram v. Peirce*, 67 Atl. 1053, 1056, 73 N. J. Eq. 391.

In a drainage act, a provision that, in fixing the boundaries, the board should determine them with a view to promoting the "interest of said drainage district," the phrase quoted meant the public interest of this district and not the private advantage to be gained by the property owners. *State ex rel. Harris v. Hanson*, 115 N. W. 294, 297, 80 Neb. 724.

An inquiry by the Post Office Department for the purpose of determining whether a corporation has been guilty of a fraudulent use of the mails, and whether a fraud order shall be issued against it, is a proceeding in which the United States is "interested"

within Rev. St. U. S. § 1782, prohibiting a United States senator from receiving compensation for services rendered by him to any person or any bureau of the United States in relation to a matter in which the United States is interested. *United States v. Burton*, 131 Fed. 552, 553, 557.

Within the meaning of Rev. St. § 1782, making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department in relation to any proceeding in which the United States is so interested, the word "interested" is not restricted to cases in which the United States has a direct moneyed or pecuniary interest, and a fraud order inquiry pending before the Post Office Department is a proceeding in which the United States has an interest. *Burton v. United States*, 26 Sup. Ct. 688, 695, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

#### In assignment

The court can remove, under the act in relation to the Supreme Court, a voluntary assignee for the benefit of creditors, upon petition, for cause shown, only in case the application for his removal be made by a majority in interest of the creditors "interested in the assignment." Held that, in ascertaining such majority, lien creditors and mortgagees, who are fully secured outside the assignment, are not to be reckoned as "interested" in the sense of the statute in it. *In re Durfee*, 4 R. I. 401, 407.

#### In business

An owner of property who leases it for a saloon for a specified sum per month, and a part of the profits of the business, is not "interested" in the business within Acts 31st Leg. c. 17, § 9, requiring each person desiring a liquor license to state his name in the application, and to swear that no other person is interested in the business; the word "interested" meaning an interest in the business itself. *Doyle v. Scott (Tex.)* 134 S. W. 829, 830.

#### In corporation or corporate stock

A contract between an inventor and capitalists, who had each contributed \$250 for the perfection of a machine, provided that the capitalists were to contribute a certain amount of money, and that the inventor, in lieu of money, was to give his process and time to the enterprise, and that, when it was under way, a corporation should be formed to manufacture the desired product. It further provided that the "interest" of the inventor in the capital stock of the corporation should be three-fifths, and "the interest" of the capitalists two-fifths, and that the capital stock should be distributed accordingly. The capitalists were entitled to two-fifths of the capital stock of the corporation after it was formed. The privilege of going into the market and buying stock of the concern at market rates would not seem to be an "inter-

est" which satisfies either the meaning of the agreement or the equities of the parties, and such purchase would scarcely be a distribution of stock. *Hunter Smokeless Powder Co. v. Hunter*, 91 N. Y. Supp. 620, 623, 100 App. Div. 191.

In a corporation which was involved financially, plaintiffs owned four-sevenths of the capital stock, and defendants three-sevenths. To give defendants a controlling interest, the parties contracted that plaintiffs should transfer their interest to defendants, with the exception of a specified number of shares; that defendants were to have two years in which to comply with the contract, and, should they fail to so comply, the "interest" of plaintiff should reinvest in them in the same proportion as they held and were possessed of at the signing of the agreement. Held that, upon default of defendants in view of the fact that the word "reinvest" implies a previous divestiture and the use of the phrase "in the same proportion and ratio as they were held and possessed of," whereas plaintiffs never had possession of the corporate property as such, plaintiffs were entitled to recover their interest conveyed in the "stock" only, and not in the "property" of the corporation. *Tevis v. Ryan*, 108 Pac. 461, 464, 13 Ariz. 120.

#### **In claim upon United States**

An agreement to pay counsel a sum equal to 33⅓ per cent. of the amount which may be allowed on a claim was not within Rev. St. U. S. § 3477, providing that all transfers and assignments made of any claim upon the United States, or any part or share thereof, or "interest" therein, whether absolute or conditional, shall be absolutely null and void unless made after the claim is allowed. *Knut v. Nutt*, 35 South. 686, 688, 83 Miss. 365, 102 Am. St. Rep. 452.

#### **Engage distinguished**

The term "interested," as used with reference to a person's connection with a business, is not synonymous with "engaged," since a person might have a financial interest in a business in the operation of which he took no part; thus, where insured was financially interested in a saloon business with his son, but took no part in the operation of the business, he was "interested" but not "engaged" therein, within a provision of an insurance company's laws providing that no beneficial member of the order should be engaged as principal, agent, or servant in the manufacture or sale of liquors as a beverage. *Graves v. Knights of Maccabees of the World*, 112 N. Y. Supp. 948, 949, 128 App. Div. 660.

#### **In estate or fund**

Civ. Code Prac. § 439, provides that after an execution and return of nulla bona plaintiff may institute an equitable action for the discovery of any money, etc., to which defendant is entitled, and persons indebted to defendant, or holding money in which he

has an interest, may be made parties defendant in such action. H. attached money due from defendant to plaintiff, and the attachment had been sustained, when defendant bank, a creditor of H., attached the money in the hands of defendant which was due H., the former being served with notice of the attachment. Held, that after his attachment thereof H. had an interest in the money in the hands of defendant within the statute, service of the attachment upon defendant being sufficient notice of the attachment of the fund due H. under his attachment, and it was immaterial that plaintiff was not made a party, and hence the purchase thereafter by defendant of the judgment from H. was at his peril, and did not defeat the claim of the bank to the fund which it had attached in his hands. *Brackett's Adm'r v. Boreing's Adm'r*, 110 S. W. 276, 279, 131 Ky. 751.

#### **In estate of bankrupt**

Bankr. Act July 1, 1898, c. 541, § 39, subd. 3, provides that the referee shall furnish such information concerning estates in process of administration as may be requested by parties in interest. Section 47, subd. 5, provides that the trustee shall furnish such information as may be requested by parties in interest; and section 49 declares that the accounts and papers of the trustee shall be open to inspection of officers and parties in interest. Held, that a creditor of a bankrupt was a "party in interest" within such sections, even though he had not formally proved his claim. *In re Samuelsohn*, 174 Fed. 911, 912.

Bankr. Act July 1, 1898, c. 541, § 32, provides that in the event petitions are filed against the same person in different courts of bankruptcy, each having jurisdiction, the cases shall be transferred to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of "parties in interest"; and General Order 6 provides that the court retaining jurisdiction, in case several petitions are filed in different courts, if satisfied that it is for the greatest convenience of "parties in interest" that another of said courts should proceed with the cases, shall order them to be transferred to that court. Held, that the term "parties in interest" was not limited to unsecured creditors of the bankrupt, but included all persons whose pecuniary interests were directly affected by the bankruptcy proceedings. *In re United Button Co.*, 137 Fed. 668, 672.

"An application for a discharge" in bankruptcy "may be opposed by any of the parties in interest." To entitle a party to oppose a discharge, he must have a pecuniary interest in the matter, and that interest must be satisfactorily shown. A person has been held to have an interest sufficient to entitle him to oppose a discharge, where his claim was contingent and unliquidated so as not to

be capable of being proved as a debt, or where he held an equitable claim only against the estate, or where his claim was being contested, although his claim has not been proved, or is no longer provable. But, where a debt is barred by a lapse of time, the creditor has no interest, and therefore cannot oppose the discharge." In *re Levey*, 133 Fed. 572, 574 (quoting and adopting definition in *Loveland, Law & Proceed. Bankr.* pp. 738, 739).

The term "party in interest," as used in the rule that objections to discharge in bankruptcy may be made by any "party in interest," includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets. *Talcott v. Friend*, 179 Fed. 676, 681, 103 C. C. A. 80.

One who has a suit pending against a bankrupt for the recovery of a debt which is contested is a party in interest, and entitled to contest the bankrupt's right to a discharge, although his claim has not been proved in the bankruptcy proceedings. In *re Conroy*, 134 Fed. 764, 766.

Specifications in opposition to a bankrupt's application for discharge, reciting that E., being interested as a creditor in the estate of the bankrupt, opposed the granting of the bankrupt's discharge, were sufficient, although bankruptcy form 58, promulgated by the Supreme Court, contains a recital that the person opposing such discharge is a "party interested" in the estate of the bankrupt. In *re Nathanson*, 155 Fed. 645, 649.

The phrase "party in interest," as used in *Bankr. Act* July 1, 1898, c. 541, § 14b, providing that objections to an application for a discharge may be filed by a "party in interest," refers not only to creditors but also includes the trustee in bankruptcy, so long as the estate is unsettled, and he is claiming and seeking to recover property from the bankrupt, alleged to belong to the estate. In *re Harr*, 143 Fed. 421, 423.

An averment in a petition for revocation of the discharge of a bankrupt merely that petitioners are "creditors" of the bankrupt is insufficient to show that they are "parties in interest," entitled to object to the discharge or to file such petition under section 14b, as amended by *Act Feb. 5, 1903*, c. 487. The petition must show that they had provable debts which were affected by the discharge. In *re Chandler*, 138 Fed. 637, 638.

A trustee in bankruptcy, so long as the estate is unsettled, and so long as he is claiming and seeking to recover property or money from the bankrupt alleged to belong to the estate and to be wrongfully withheld or concealed, is a "party in interest," within the meaning of section 14b, as amended *Feb. 5, 1903*, c. 487, and may file and prosecute spec-

ifications of objection to the bankrupt's discharge. In *re Levey*, 133 Fed. 572, 573.

The term "parties in interest," as used in *Bankr. Act* July 1, 1898, c. 541, § 57d, which permits parties in interest to object to the allowance of claims against the estate, applies only to those who have an interest in the res which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt. In *re Sully*, 152 Fed. 619, 620, 81 C. C. A. 609.

An unsecured creditor of a bankrupt is a "party in interest," within the meaning of section 57d, and may, as well as the trustee, object to the allowance of a claim of another unsecured creditor. In *re Hatem*, 161 Fed. 895, 896.

A creditor of a bankrupt, who has assigned his claim, receiving a consideration therefor, is no longer a "party in interest" who can maintain a petition to set aside the confirmation of a composition subsequently entered, although the assignment was obtained through the fraud and misrepresentation of the trustee and bankrupt, whatever may be his right to proceed against them. In *re Allen B. Wrisley Co.*, 133 Fed. 388, 389, 66 C. C. A. 450.

#### In estate of decedent

Testator's only heir when the will was admitted to probate was a "person interested" entitled to file a bill to contest the will under *Hurd's Rev. St. 1908*, c. 148, § 7, providing that any person interested may within one year after probate file a bill to contest the will. *Selden v. Illinois Trust & Savings Bank*, 87 N. E. 860, 862, 239 Ill. 67, 130 Am. St. Rep. 180.

Where contestant's husband was the sole heir of testatrix, and contestant was his sole heir, as well as his sole devisee and legatee, she was a "party interested," and entitled to contest the probate of testatrix's will. *Rainey v. Ridgway*, 41 South. 632, 148 Ala. 524 (citing *Lockard v. Stephenson*, 21 South. 996, 120 Ala. 641, 74 Am. St. Rep. 63; *Donald v. Portis*, 42 Ala. 29).

Where a decedent left him surviving a daughter, who died before his will was offered for probate, a son of the daughter was "interested in the estate" so as to entitle him to contest the probate. *Henry v. Wert*, 42 South. 405, 406, 149 Ala. 674.

Purchasers from an heir of a testator may resist the probating of his will; they being "persons interested," within *Ky. St. 1903*, §§ 4856-4861, making such persons proper or necessary parties to probate proceedings. *Foster v. Jordan*, 113 S. W. 490, 491, 130 Ky. 445.

Creditors of an heir of decedent who claim that the probate of a will is barred by the statute of limitations are "persons in-

terested," within the meaning of Ky. St. 1903, §§ 4856, 4857, 4860, providing that a person offering a will for probate may obtain from the clerk of the court process directed to the proper officer requiring him to summon any person interested in such probate to appear at the next term of the court, that the court itself may cause persons interested in the probate to be summoned, or that it may proceed to probate and admit the will to record or reject the same without summoning any party, and are entitled to contest the probate of the will. *Mullins v. Fidelity & Deposit Co. (Ky.)* 100 S. W. 256, 258 (citing *Brooks v. Paine [Ky.]* 90 S. W. 600).

A "person interested in the estate of the decedent," under Code Civ. Proc. § 2647, is a person who may maintain proceedings for the revocation of the probate of a will once duly admitted to probate. Where the half-sister of a decedent would be entitled to a distributive share in his estate in the absence of a will, she is "interested in the estate," within Code Civ. Proc. § 2643, relating to letters of administration with the will annexed, though she takes nothing under the will. In *re Brown's Estate*, 113 N. Y. Supp. 937, 938, 60 Misc. Rep. 628.

The "interest" referred to in Rev. St. 1909, § 555, providing that a will contest may be instituted by any person interested in the probate of the will, must be a financial interest in the estate, and one which will be benefited by the setting aside of the will, and, where the petition for a contest shows that if the will is set aside contestant will get nothing, he is not a party in interest. *State ex rel. Damon v. McQuillin*, 152 S. W. 341, 346, 246 Mo. 674.

One entitled to property passing under the residuary clause of a will altered by lines drawn through it, if admitted to probate in its original condition, has such an "interest in the estate" as authorizes him to file a caveat for the revocation of the probate of the will, as altered, and for the granting of a probate of the will in its original condition. *Home of the Aged of the Methodist Episcopal Church v. Bantz*, 66 Atl. 701, 703, 106 Md. 147.

The public administrator has no "interest in the estate" of a deceased person which entitles him to appear and object to the probate of the will, under a statute providing that any person interested in the estate may contest such proceedings. *State ex rel. Eakins v. District Court of Second Judicial Dist.*, 85 Pac. 1022, 1023, 34 Mont. 226.

The possibility that all of the heirs of a decedent or some one of them may fail to appear and claim the property, so that thereupon the Attorney General may proceed under Code Civ. Proc. § 1269, to declare an escheat, and that no heir may then or within 20 years after judgment appear to claim the property or its proceeds, so that absolute

ownership will vest in the state under sections 1271, 1272, does not give the state an "interest in the estate of the decedent," within the meaning of section 1307, authorizing any person interested in an estate to appear in probate proceedings and contest the will. *State ex rel. Attorney General v. Superior Court of Sacramento County*, 82 Pac. 672, 674, 148 Cal. 55, 2 L. R. A. (N. S.) 643.

A brother of an intestate, who resided in a foreign country and was not cited or made a party to the settlement, can institute proceedings against the administrator for a new accounting, under Code Civ. Proc. § 2727, providing that a judicial settlement of an administrator's accounts may be compelled by the next of kin or any party in interest after the expiration of one year from the issuance of letters of administration, since section 2514, subd. 11, declares that the expression "person interested," where it is used in connection with an estate or a fund, including every person entitled either absolutely or contingently to share in the estate for the proceeds thereof. In *re Killan's Estate*, 65 N. E. 561, 565, 172 N. Y. 547, 63 L. R. A. 95.

Where the superior court of a county appointing a public administrator, as administrator of the estate of a nonresident, was without power to make such appointment, the administrator so appointed was not a "person interested," within Code Civ. Proc. § 1374, entitled to oppose the appointment of an administrator in the county in which jurisdiction had attached. In *re Davis' Estate*, 87 Pac. 17, 18, 149 Cal. 485.

An attorney employed by an executor or administrator to assist him in the execution of his trust is not the attorney of the estate, but simply of the executor or administrator who selects and employs him, and allowances for his services must be made to the executor or administrator and not to the attorney, and he has no claim that he can enforce against the estate by action or in any other manner; nor is he a "person interested in the estate," within the meaning of Code Civ. Proc. § 1635, permitting such parties to file exceptions to accounts of executors or administrators, though he has agreed with the executor or administrator that he will accept for his services such sum as the probate court may allow. In *re Kruger's Estate*, 76 Pac. 891, 892, 143 Cal. 141.

Where the superior court appointing a public administrator as administrator of the estate of a nonresident had no power to appoint him because proceedings had been previously instituted for the appointment of another in another county, the administrator so illegally appointed was not a "person interested," within the meaning of Code Civ. Proc. § 1374, and as such entitled to oppose the appointment of an administrator in the county in which jurisdiction had attached.

In re Davis' Estate, 87 Pac. 17, 18, 149 Cal. 485.

A public administrator and nonresident heirs are "persons interested," within the meaning of Code Civ. Proc. § 1374, providing that any person interested may contest a petition for letters of administrator on the ground of incompetency of the applicant, and they may contest not only in the lower court but on appeal. It is not necessary that the contestant shall be competent to assert the right to administer himself nor be entitled to nominate the appointee in order to contest. If the facts constituting the incompetency of the applicant were not properly or sufficiently stated, this would not be a ground for the dismissal of the appeal. An appeal lies from an order granting or denying letters of administration, and no reason is given why the right of the person interested to contest should cease upon the adverse order being made by the superior court. In re Grave's Estate, 96 Pac. 792, 793, 8 Cal. App. 254.

A legatee is a "person interested," within Orphans' Court Act (P. L. 1898, p. 757) § 116, authorizing any person interested in an estate on failure to make settlement, to cite the executor, or administrator to make such settlement in case of default. In re Hastendenbeck, 75 Atl. 823, 73 N. J. Eq. 337.

A receiver in supplementary proceedings against one having either a vested or a contingent interest in an estate, his interest being dependent upon the validity of trusts created by the will, is a "person interested" in the estate within Code Civ. Proc. §§ 2514 (11), 2685, so that he may ask for the removal of the executors for wasting the estate, though section 2463 prevents the seizure of the trust estate. In re Kennedy's Estate, 128 N. Y. Supp. 626, 627, 143 App. Div. 839.

Under Code, § 2143, authorizing "any person interested" to appear and contest any item of the account of the personal representative, a creditor may often be a "person interested," within the meaning of the statute. A creditor may maintain a bill in chancery for the settlement of the estate of the deceased debtor, and may as a matter of right remove the administration from the probate court into the chancery court, before jurisdiction has attached in the probate court for a final settlement, and after, on showing special equities. Rensford v. Joseph A. Magnus & Co., 43 South. 853, 854, 150 Ala. 288.

Code Civ. Proc. § 2679, provides that, if a temporary administrator neglects to make a deposit within the time limited, the surrogate must, upon the application of a "person interested" in the estate, make an order, etc. Section 2514 says: "The expression 'person interested,' where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds

thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor." In re Hopkins' Will, 96 N. Y. Supp. 941, 943, 110 App. Div. 907.

Code Civ. Proc. § 2481, subd. 11, authorizes the Surrogate's Court to exercise such incidental powers as may be necessary to carry out powers expressly conferred. Section 2808 provides that a testamentary trustee may be called to account by petition in the Surrogate's Court by any person interested in the execution of the trust, and by section 2514, subd. 11, a "person interested" is any one entitled to share in the estate, except a creditor. An executrix sued an executor and trustee for an accounting on the ground that defendant had wrongfully retained income bequeathed to plaintiff's testator, and it appeared that defendant had accounted in the Surrogate's Court, and that his account had been there settled. Held, that the complaint would be dismissed, as the matters were properly recognizable in the Surrogate's Court. Meeks v. Meeks, 100 N. Y. Supp. 667, 669, 51 Misc. Rep. 538.

Under a statute entitling a husband, where there are no children, to one-half of the estate absolute, a husband is a "person interested" in the estate, within the meaning of another statute authorizing a "person interested" to file an affidavit preliminary to proceedings for the discovery of assets. Ex parte Gfeller, 77 S. W. 552, 556, 178 Mo. 248.

The purchaser of the interest of an heir to land owned by decedent is not entitled to apply for a sale thereof for the payment of debts, under Rev. St. 1899, § 150, providing that such application may be made by any "creditor or other person interested in the estate." The term "other person interested in the estate" contemplates persons who have an interest in the distribution of the estate or who have a right to participate in such distribution, such as an heir or one who is made the legatee by will, or the guardian or creditor of one of the heirs of the estate or other persons who may be entitled to a distributive share of the estate. The purchase of the interest of two children of deceased in land which descended to them falls far short of creating any "interest in the estate," as contemplated by the statute. Stark v. Kirchengraber, 85 S. W. 868, 871, 186 Mo. 633, 105 Am. St. Rep. 629.

The phrase "person interested therein," as used in title 1, div. 7, c. 9, Rev. St., authorizing partition by heirs at law, includes a widow or one holding a lien, but does not include an administrator. Stout v. Stout, 92 N. E. 465, 466, 82 Ohio St. 358, 137 Am. St. Rep. 785.

The phrase "persons interested in the estate," as used in Rev. St. 1899, § 148, providing that, on filing of a petition for the sale of real estate of a decedent, the court

shall order "all persons interested in the estate" to be notified thereof, and that such notice be published, provided that, where the heirs of the devisee are residents of the county, notice shall be served on each one, was purposely left a broad one and will not be held to include only heirs and devisees. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587.

Code Civ. Proc. § 2617, providing that any person, although not cited, who is named as a devisee or legatee in the will propounded, or as executor, trustee, devisee, or legatee in any other paper purporting to be a will of decedent, or "who is otherwise interested in sustaining or defeating the will," may appear and at his election support or oppose the application, in authorizing a person "who is otherwise interested in sustaining or defeating the will" to appear, means only a person who has a pecuniary interest to protect, either as an individual or in a representative capacity. An interest resting on sentiment or sympathy, or on any basis other than the gain or loss of money or its equivalent, is not sufficient; but any one who would be deprived of property in the broad sense of the word, or who would become entitled to property, by the probate of a will, is authorized to appear and be heard upon the subject. *In re Hoyt's Will*, 106 N. Y. Supp. 359, 361, 55 Misc. Rep. 159 (citing *In re Davis*, 75 N. E. 530, 182 N. Y. 468).

#### In partnership

The interest of a defendant in a partnership, which is held by a temporary injunction in a suit by a creditor, is the balance which would become due him after the payment of all firm debts and the adjustment of the accounts of the partners. *Gay v. Ray*, 80 N. E. 693, 694, 195 Mass. 8.

The interest of each partner in the partnership property is his share of the surplus after payment of all the partnership debts and settlement of all accounts between himself and his partners. *Jones v. Way*, 97 Pac. 437, 438, 78 Kan. 535, 18 L. R. A. (N. S.) 1180.

"The 'interest' of a partner in the partnership property of his firm is his share of what may be left of such property after the payment of the debts of the firm, and after the deduction therefrom of his indebtedness, if any, to his firm; for his copartners have a specific lien on his share of the assets of the partnership to secure his indebtedness to the firm, and in the ascertainment of his interest in the property of the firm his indebtedness thereto must be taken into the account and settled out of his share. When therefore, as in this case, a partner makes a sale of his 'interest in the concern,' it must be presumed, we think, that he sells only his legal interest in the firm, and nothing more. It cannot be assumed, in such case, in the absence of any stipulation to

that effect, that such partner sold, or intended to sell, if he could, his own indebtedness to the firm, or any part thereof." *Riddell v. Ramsey*, 78 Pac. 597, 602, 31 Mont. 386 (quoting *Over v. Hetherington*, 66 Ind. 365).

#### In patent

An article in the contract by which patentees granted an exclusive license to manufacture and sell the invention for a term of years, provided that, if the patentees do not desire to renew the contract they shall deliver such transfers as will vest in the licensee fifteen one-hundredths interest in said patent, and also fifteen one-hundredths interest in all the profits arising from business during the life of the patent, and all the provisions of the article defining profits shall apply to the parties mutatis mutandis, and if the patentees desire to sell said patent, and obtain a bona fide offer, then the licensee may buy and credit his fifteen one-hundredths interest on the price, and if he does not buy then the patentees may sell the same and account to him for his fifteen one-hundredths part of the proceeds of such sale. Held, that the licensee was not entitled to an assignment of the title to any part of the patent on the termination of the contract; the term "interest," as used, meaning a limited property right less than ownership, namely, a right to a fractional part in the proceeds of a sale when one was made, to a preferential option to buy at the same price offered by an outsider, crediting his interest towards such purchase price, and to share in the profits as defined by the contract. *Copeland v. Eaton*, 95 N. E. 291, 292, 209 Mass. 139, Ann. Cas. 1912B, 521.

#### In public contract

Where a councilman, who is a co-owner with his brother of a quarry, assists in ratifying a contract with his brother to supply the city with stone from the quarry, he may be convicted of violation of Act March 31, 1860 (P. L. 400) § 66, forbidding any member, officer, or agent of the corporation or a municipality from being "interested" in furnishing supplies to it. *Commonwealth ex rel. Kutz v. Witman*, 66 Atl. 986, 988, 217 Pa. 411.

Where a contract for the construction of a schoolhouse was properly let to a solvent contractor, and was fully completed, the fact that the contractor purchased the lumber required from a corporation in which one of the trustees of the school district was a stockholder, and thereafter assigned the orders drawn for the amount due under the contract through an attorney to such corporation, was not a violation of Pol. Code, § 1876, declaring that no school trustee shall be "interested" in any contract made by the board of which he is a member, etc. *Escondido Lumber, Hay & Grain Co. v. Baldwin*, 84 Pac. 284, 285, 2 Cal. App. 606.



Burns' Ann. St. 1908, § 2423, provides that any school trustee who shall, while holding office, be interested, directly or indirectly, in any contract for any work for the use of any city shall be fined and imprisoned. When a contract was executed between the trustees of a school city and a heating company for a heating plant for the city schools, the president of the company had a perfect title to the office of trustee, though he had not then qualified. The contract provided that, in case a part should be performed while the president was trustee, the company should employ, at its own expense, an expert, approved by the two other members of the school board, to act with the disinterested members to determine whether there was a compliance with the contract. The president qualified while the contract was being performed. Held, that he was "interested" in the contract within the statute, so that it was void, notwithstanding the provision authorizing the employment of an expert at the heating company's expense. *Noble v. Davison*, 98 N. E. 325, 329, 177 Ind. 19.

#### In railroad

One is not "interested," within Pub. St. 1901, c. 155, § 1, providing that no person who owns railroad stock, or who is employed by a railroad company, or who is otherwise interested in one, shall be eligible to office of railroad commissioner, unless his interest prevents him from being "indifferent." In re Opinion of Justices, 72 Atl. 754, 758, 75 N. H. 613.

#### In sale of liquor

A person not engaged in the liquor traffic whose employé inadvertently, or without authority, makes a sale of intoxicating liquor at his place of business, is not "interested" in the sale within the statute making it unlawful for any person to sell either for himself or another, or to be "interested" in a sale of intoxicating liquor without a license. *Partridge v. State*, 114 S. W. 215, 216, 88 Ark. 267, 20 L. R. A. (N. S.) 321, 129 Am. St. Rep. 100.

#### In will

Illinois Statute of Wills (Hurd's Rev. St. 1901, c. 148) § 7, as amended by Act July 1, 1903 (Laws 1903, p. 355), provides that if any person interested, within one year after the probate of any will, shall appear and by bill in chancery contest the validity of the same, an issue of law shall be made up as to whether the writing produced be the will of testator. Held, that decisions of the Supreme Court of Illinois that the phrase "any person interested" does not include persons having a mere expectancy, but only includes those having an interest already attached in case the ancestor is held to have died intestate, is conclusive on the federal courts. *Selden v. Illinois Trust & Savings Bank*, 184 Fed. 872, 675, 107 C. C. A. 196.

Section 8 of the Wills Act (Hurd's Rev. St. 1908, c. 148) provides that, "if any beneficial devise, legacy or interest" shall be given to a person subscribing it as a witness, such devise, etc., shall, as to such witness, be void, unless the will be attested by a sufficient number of other witnesses, and he or she shall be compellable to give testimony on the residue of such will in like manner as if no devise or bequest had been made. Held, that the interest which an executor takes under the will that disqualifies him as a witness is such an interest as is mentioned in such section, and an executor as to his competency is placed in the same class with a devisee or legatee. *Fearn v. Postlewaite*, 88 N. E. 1057, 1058, 240 Ill. 626.

An executor named in a will who has signed as an attesting witness falls within Wills Act (Hurd's Rev. St. 1908, c. 148) § 8, making any beneficial "interest" given in a will to a subscribing witness void, etc., and under that section he may be required to testify in support of the execution of the will, though its establishment by his testimony bars him from participating in the administration of the estate. *Jones v. Grieser*, 87 N. E. 295, 296, 238 Ill. 183, 15 Ann. Cas. 787.

The "interest" which disqualifies a witness to a will must be a present certain legal interest of a pecuniary nature. The test is whether he will either gain or lose financially as the direct result of the suit, or whether the judgment or decree will be evidence for or against him in another action. *O'Brien v. Bonfield*, 72 N. E. 1090, 213 Ill. 428.

The "interest" which will disqualify a witness to the execution of a will, within Act April 26, 1855 (P. L. 328), is an interest in the existing charity for which a bequest is made by the will, or in a charity created by the testator. In re *Stinson's Estate*, 81 Atl. 207, 209, 232 Pa. 218, 36 L. R. A. (N. S.) 504.

An "interest" sufficient to disqualify a witness to a will containing charitable bequests, under Act April 26, 1855 (P. L. 332) § 11, requiring such wills to be signed by two disinterested witnesses, is such an interest as appears to exist at the time of the execution of the will, either by the terms of the will itself, or by reason of the attesting witness being then interested in a religious or charitable institution, for which provision is made by the testator. In re *Kessler's Estate*, 70 Atl. 770, 773, 221 Pa. 314, 128 Am. St. Rep. 741, 15 Ann. Cas. 791.

The wife of deceased's beneficiary and proponent of the will was a "person deriving an interest" under decedent, within Code Civ. Proc. § 829, so as to make her testimony as to communications or transactions with decedent incompetent in a will contest, since, if the will be valid, she has an inchoate right of dower in the land devised to her husband.

In re Weed's Will, 127 N. Y. Supp. 966, 967, 143 App. Div. 822.

### INTEREST (In Property)

See Chattel Interest; Community of Interest; Contingent Interest; Dower Interest; Future Interest; Heritable Interest; Insurable Interest; Joint Interest; Permanent Interest; Pre-emption Interest; Remainder and Contingent Interest; Right, Title, and Interest; Title or Interest; Unity of Interest; Vested Interest.

All interest, see All.

All right, title, and interest, see All.

Any interest or rights as meaning legal title, see Any.

Change in interest, see Change.

Otherwise united in interest, see Otherwise.

See, also, Contract of Sale.

While the word "interest" in some connections includes title in others, it includes advantages less than title. In re Horn's Estate, 72 Atl. 791, 792, 223 Pa. 415.

St. 1909, c. 490, pt. 2, §§ 59, 61, authorizing the owner or any person having an interest in land sold for taxes to redeem, gives an attaching and judgment creditor of the owner of the legal title, who, prior to the sale, attached the land as security, a right to redeem the land sold for taxes. The word "interest," in common speech, in connection with land, includes all varieties of titles and rights, and comprehends estates in fee, for life, and for years, mortgages, liens, easements, attachments, and every kind of claim of land which can form the basis of a property right. Union Trust Co. v. Reed, 99 N. E. 1093, 1094, 213 Mass. 199.

The word "interest" in its ordinary signification includes any right, title, or estate in, or lien upon, real estate. It has such meaning in Comp. St. 1903, c. 73, § 4814, providing that an action may be maintained by any person claiming title to real estate against another who claims an adverse interest therein, for the purpose of determining such interest. Johnson v. Samuelson, 117 N. W. 470, 471, 82 Neb. 201, 130 Am. St. Rep. 666.

A will, after giving a life estate to persons named, provided that on the decease of such persons all the "interest" of the deceased in the property described should vest in his or her heirs. Held, that the word "interest" denoted the properties or portions thereof given as described in the devise. Pierce v. Pierce, 14 R. I. 514, 516.

The word "interest," as used in Civ. Code 1895, § 3090, providing that a tenant for life who commits acts tending to the permanent injury of the remainder or reversion shall forfeit his "interest" to the remainderman, if the latter elects to claim immediate possession, is to be construed as calling for

a forfeiture of the entire "interest" of the tenant without reference to the portion of the estate which was the subject of the waste. Roby v. Newton, 49 S. E. 604, 606, 121 Ga. 679, 68 L. R. A. 601.

"Interest," as used in Acts 1899, p. 83, c. 421, § 4, providing that when mineral, mineral water, oil, gas, or coal privileges or interests, are held by a party, exclusive of the surface, the same shall be assessed separately, to such party, necessarily means the minerals, not the estates in them or interests in the titles thereto. The statute does not authorize the assessment of an undivided interest in the minerals, and a tax deed founded upon such an assessment will be set aside. Toothman v. Courtney, 58 S. E. 915-920, 62 W. Va. 167.

The natural and ordinary meaning of the phrase "interest in lands" includes the entire right held in them, and, as used in an instrument conveying the grantor's interest without qualification, it operates to convey all the rights of the grantor. Dickson v. Wildman, 183 Fed. 398, 402, 105 C. C. A. 618.

One having an option in writing from the owner for the sale of land has an "interest in land," within the meaning of Rev. St. § 2302, declaring that no estate or interest in lands shall be surrendered unless by act or operation of law, or by deed or conveyance in writing, etc. Telford v. Frost, 44 N. W. 835, 836, 76 Wis. 172.

The right to construct and maintain for a limited time a railway track on a fixed portion of the street, and the right to operate cars on such track, for the purpose of carrying passengers and freight for hire, does not constitute an "interest in land" as that term is ordinarily understood. City of Seattle v. Seattle Electric Co., 94 Pac. 194, 195, 48 Wash. 599, 15 L. R. A. (N. S.) 486.

The right to erect and maintain a pier and column for her own benefit upon the property of another, is an "interest in lands" within the statute of frauds. Hartman v. Powell, 59 Atl. 628, 629, 68 N. J. Eq. 293.

A contract, by which one who had laid a cement sidewalk took in part payment the sand excavated in the course of the work, is not a contract in or concerning an interest in land required to be in writing by Statute of Frauds (2 Gen. St. 1895, p. 1603) § 5, subd. 4. Okin v. Seldor, 78 Atl. 770, 78 N. J. Law, 54, 138 Am. St. Rep. 588.

Under Real Property Law (Consol. Laws 1909, c. 50) § 389, authorizing every person interested in the property "or whose interest may be affected by the judgment in the action" to appear, it was not necessary for an abutting owner to apply to the court for leave to appear, nor was plaintiff authorized to determine whether such abutting owner's interest might be affected by the judgment so as

to entitle him to appear. *Sundermann v. People*, 132 N. Y. S. 68, 70, 148 App. Div. 124.

Plaintiff pending a proceeding against her husband to compel him to account as executor and trustee of an estate in which defendants were interested, and to secure an adjournment of the accounting, conveyed real property to a trustee for the purposes set out in a declaration of trust executed by him to the plaintiff, whereby the trustee was required to pay all sums which upon a proper accounting by plaintiff's husband should be found due to defendants or other persons, and to pay over any balance over such sums due and payable to defendants to the plaintiff, with power of sale for such purposes. Held, that plaintiff's remaining interest in the property under her deed to the trustee and his declaration of trust was "an interest in real property," within Real Property Law (Consol. Laws 1909, c. 50) § 242, prohibiting the conveyance of such interests except by writing subscribed by the grantor, or his agent thereto authorized in writing, so that her oral consent to a conveyance of the property by the trustee to the defendants pending the accounting was no bar to her interest. *Nestell v. Hart*, 95 N. E. 703, 705, 202 N. Y. 280.

Under Pub. Laws 1893, p. 37, c. 6, § 1, as amended by Pub. Laws 1903, p. 1121, c. 763, providing that an action may be brought by any person against another who claims an estate or interest in real estate adverse to him to determine such adverse claims, and that if judgment has been docketed, whether in favor or against the person bringing the action or the person against whom such action was brought, the lien of such judgment shall be such a claim of an estate or interest in real estate as is contemplated by the act, where a creditor had his debt determined by a judgment and by attachment of land brought it within the jurisdiction of the court, and had it condemned as the property of his debtor to the satisfaction of his debt, and a third person claims the entire and absolute estate in the land, under deeds which antedate the action of the creditor and the levy of the attachment, his claim is of an "estate or interest in real estate," within the act, and he may sue to quiet his title thereto. *Crockett v. Bray*, 66 S. E. 666, 667, 151 N. C. 615.

Where a fire policy stipulating that it should be void on the "interest" of the insured becoming other than unincumbered was, with consent of the insurer, subject to its conditions, assigned to a purchaser whose deed of the property retained a vendor's lien, of which the insurer had no notice, such lien on the property constituted an incumbrance on the "interest" of the insured and avoided the policy. *Wright v. Hartford Fire Ins. Co.*, 118 S. W. 191, 192, 54 Tex. Civ. App. 6.

### Contingent interest or remainder

"An interest in land is the legal concern of a person in the thing or property, or in the right to some of the benefits or uses from which the property is inseparable." A contingent remainderman has such a present and existing interest as is susceptible of release to the life tenant in possession. *McDonald v. Bayard Sav. Bank*, 98 N. W. 1025, 1026, 123 Iowa, 413.

Where a decree for divorce from bed and board, with perpetual separation, reserves for further order the question "of the interest" of the parties in the property, the word "interest" is sufficient to include curtesy, as curtesy is a contingent interest, which the word is usually construed as embracing. *Hartigan v. Hartigan*, 64 S. E. 726, 728, 65 W. Va. 471, 131 Am. St. Rep. 973, 17 Ann. Cas. 728.

### Easement in general

See, also, Easement.

An easement is an "interest in land," within the statute of frauds, and a contract creating an easement must be in writing. *Indianapolis Southern R. Co. v. Wycoff (Ind.)* 95 N. E. 442, 443.

The expressions "estate in lands" and "interest in lands" are broad enough to include the right to an easement therein. *Oates v. Town of Headland*, 45 South. 910, 911, 154 Ala. 503.

### Estate synonymous

The word "interest," as applied to property, is broader than the word "title." It is practically synonymous with the word "estate." *Widnucamp v. Phenix Ins. Co. of Brooklyn*, 62 S. E. 478, 4 Ga. App. 759.

### Equitable interest

The expression "persons interested" in proceedings to condemn land under the power of eminent domain includes not only the person in whom is vested the legal title, but also others having some right or interest in the land sought to be taken, not amounting to a legal interest. Under Civ. Code 1896, § 1713, as amended by Gen. Acts 1903, p. 374, requiring an application for the condemnation of land to state the names and residence of the owners of each tract, if known, in trust estates, the trustee being the only proper party, it is unnecessary to name the cestui que trust, but the interest of the cestui que trust should be fully protected by the trustee. *Birmingham & A. A. R. Co. v. Louisville & N. R. Co.*, 44 South. 679, 681, 152 Ala. 422.

The term "interest," as used in a provision of a fire policy declaring that a change of insured's interest, title, or possession of the subject of the insurance, without the insurer's consent, shall work a forfeiture of the policy, is not limited to a change in the legal title, but extends to both legal and equi-

table rights. *Finkbohner v. Glens Falls Ins. Co. of Glens Falls, N. Y.*, 92 Pac. 318, 320, 6 Cal. App. 379; *Brickell v. Atlas Assur. Co.*, 101 Pac. 16, 19, 10 Cal. App. 17 (quoting *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 99 N. Y. Supp. 219, 114 App. Div. 728; *Id.*, 82 N. E. 1124, 189 N. Y. 526).

As used in a policy providing that it shall be void, if any change, other than by the death of insured, takes place in the interest, title, or possession of the subject of insurance, etc., the word "interest" has the same meaning as in the phrase "right, title, and interest." It means a legal interest, a proprietary or insurable interest, not a mere sentimental interest. *Stenzel v. Pennsylvania Fire Ins. Co.*, 35 South. 271, 272, 110 La. 1019, 98 Am. St. Rep. 481.

The terms "owner" and "parties in interest" in redemption laws have a broad and comprehensive meaning. Any right which in law or in equity amounts to an ownership in the land, any right of entry upon it, to its possession, or enjoyment of any part of it, which can be deemed an estate, makes the person an owner so far as it is necessary to give him the right to redeem. In *Bouv. Law Dict.* it is said: "The word 'owner' has no technical meaning, and, being 'nomen generalissimum,' should, especially when used in a remedial statute, be construed liberally in favor of the parties whom it is the duty and intention of the Legislature to protect." By deed dated and recorded January 30, 1895, M. conveyed to F. lot No. 11, in the town of Union, Monroe county. The lot was not transferred on the assessor's books for the year 1895 to F., but was charged in the name of M., returned delinquent, and sold by the sheriff for the taxes of that year on the 13th day of December, 1897, and was purchased by J. C. M. On the 28th day of July, 1898, F. conveyed the lot to C., trustee, to secure a debt to A. No offer was made to redeem within a year from day of sale, and the purchaser neither took a deed nor order therefor of a court or judge within the second year after the sale. On the 14th day of December, 1899, C., the trustee, offered to redeem the lot as such trustee, and as such agent of F., when J. C. M. refused to permit redemption, and on the 16th of December, 1899, procured a deed from the clerk for said lot. In a suit brought by the trustee to set aside such deed, C. had the right to redeem. *Clark v. McClaugherty*, 44 S. E. 269, 270, 53 W. Va. 376 (quoting and adopting definition in *Adams v. Beale*, 19 Iowa, 61; *Dubois v. Hepburn*, 10 Pet. [35 U. S.] 1, 9 L. Ed. 325).

#### Ground rent

A "ground rent," being an estate of inheritance in the rent of lands, is a right and interest in the lands within the meaning of section 4158, Rev. St. 1892, relating to descent and distribution. *McCammon v. Cooper*, 69 N. E. 658, 659, 69 Ohio St. 366.

#### Inchoate right of dower

An inchoate right of dower is not an "interest in real estate," the barring of which by a judgment makes a case involving title to real estate. *Brannock v. Magoon*, 116 S. W. 500, 502, 216 Mo. 722.

#### Leasehold

A leasehold for a term of years is an "interest in lands." *Moeller v. Gormley*, 87 Pac. 507, 508, 44 Wash. 465 (citing *Reilley v. Anderson*, 73 Pac. 799, 33 Wash. 58; *Chicago Attachment Co. v. Davis Sewing Mach. Co.*, 31 N. E. 438, 142 Ill. 171, 15 L. R. A. 754; *Sanford v. Johnson*, 24 Minn. 172; *McKee v. Howe*, 31 Pac. 115, 17 Colo. 538).

The word "interest," as used in Code 1899, c. 75, § 3, providing that every material-man furnishing material for the construction of any house or other structure shall have a lien to secure the payment of the value of such material upon such house or other structure, and upon the "interest" of the owner in the lot of land on which the same may stand, covers a leasehold estate. *Showalter v. Lowndes*, 49 S. E. 448, 56 W. Va. 462, 3 Ann. Cas. 1096.

An executory contract to enter into a lease of land in the future relates to an "interest in land," and, if oral, is unenforceable under Statute of Frauds, § 7, relating to contracts for the sale of land. *Donovan v. Maloney* (Del.) 84 Atl. 1032, 1033.

Where the owner of a leasehold estate assigned the full term to another, and the lessor accepted rent from the assignee, all privity of estate between the original lessee and the lessor was destroyed, and the interest of the original lessee under the contract could not be sold under execution as real estate; for, while section 3 of the act relating to judgments and decrees (*Hurd's Rev. St.* 1911, c. 77) declares a "leasehold" estate, the unexpired term of which exceeds five years, to be real estate, and so subject to lien of a judgment, a leasehold estate in legal contemplation is an interest in or concerning lands and not a mere contractual right. *Taylor v. Marshall*, 99 N. E. 638, 639, 255 Ill. 545.

#### Lien or mortgage

Tax liens held by the state are not interests in and claims upon the land on which they are a lien, within the meaning of Laws 1903, c. 234, § 6, p. 341, relating to the registration of land titles. *National Bond & Security Co. v. Daskam*, 97 N. W. 458, 459, 91 Minn. 81.

A mortgage on land does not give the mortgagee an "interest" in land, so as to make it taxable as such. *Adams v. Colonial & U. S. Mortg. Co.*, 34 South. 482, 488, 528, 82 Miss. 263, 17 L. R. A. (N. S.) 138, 100 Am. St. Rep. 633.

An assignment of a mortgage lien is not a "conveyance" or a "transfer" of "any interest" in land covered by the mortgage within the meaning of section 2480, Gen. St. 1906, relating to recording of conveyances and transfers of lands or interests therein. *Garrett v. Fernauld*, 57 South. 671, 672, 63 Fla. 434.

"However created, a lien (and a mortgage is a lien) is not an 'interest in land,' but merely a security for the payment of a debt." *Stearns-Rogers Mfg. Co. v. Aztec Gold Min. & Mill. Co.*, 93 Pac. 706, 712, 14 N. M. 300 (quoting and adopting the definition of Chief Justice Mills in *Alexander v. Cleland*, 86 Pac. 425, 13 N. M. 524).

A "mortgage" is a "lien," and since a lien is not an interest in land, but merely a security for the payment of debt, a contract to release a mortgage is not within the statute of frauds. *Alexander v. Cleland*, 86 Pac. 425, 427, 13 N. M. 524.

A lien upon land is not an estate or "interest" in the land. "A lien is not, strictly speaking, either a *jus in re* or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing." "'Lien' is a term of very large and comprehensive signification. In its widest sense it may be defined to be a hold or claim which one person has upon the property of another as a security for some debt or charge. But it never imports more than security. It confers no right of property." Even a mortgagee holding the legal title is said to have, in equity, only a chattel interest. *Morrison v. Clarksburg Coal & Coke Co.*, 43 S. E. 102, 106, 52 W. Va. 331 (citing *Story*, Eq. Jur. §§ 506, 1215; 4 Kent, Comm. 160; *Clark v. Beach*, 6 Conn. 142; *Wilkins v. French*, 20 Me. 111; *Kinna v. Smith*, 3 N. J. Eq. 14; *Clift v. White*, 12 N. Y. 519. "A lien upon land is not an estate or interest in it." *Brackett v. Gilmore*, 15 Minn. 251 [Gil. 191]; *Bidwell v. Webb*, 10 Minn. 62 [Gil. 44], 88 Am. Dec. 56; *Donohue v. Ladd*, 17 N. W. 381, 31 Minn. 244; *Power v. Bowdle*, 54 N. W. 404, 3 N. D. 107, 21 L. R. A. 328, 44 Am. St. Rep. 511; *Bouv. Law Dict. tit. "Lien"*).

An attaching officer is a person "having an interest" in the property within the meaning of St. 1892, c. 428, § 2, requiring a mortgagee whose loan is secured by mortgage to discharge the same and restore the pledge, upon the payment or tender of the sum legally due, by the debtor or by any person having an interest in the property mortgaged or pledged. *Hanly v. Davis*, 49 N. E. 914, 170 Mass. 517.

Laws 1893, p. 190, c. 84, § 4, governing condemnation suits by cities of the first class, provides that actions thereunder shall proceed in the names of the owners and occupants of the lands and all persons having an

interest therein. Held, that the object was to bring before the court the owners, occupants, mortgages, and such others as the records might show had an interest in the land or the compensation to be paid, and the county, having a lien on the land for unpaid taxes, was not included among "persons having an interest therein," the city in the absence of an express reservation possessing by delegation the state's power to take land without regard to taxes or tax liens, and the county, being merely the state's agent to collect public revenues, lost its right thereto upon its delegation by the state. *Id.*

The omission of any proper party will not invalidate the proceedings as against such persons as are made parties. *Gasaway v. City of Seattle*, 100 Pac. 991, 993, 52 Wash. 444, 21 L. R. A. (N. S.) 68.

The words "those having an interest" and "all persons interested," as used in Civ. Code Prac. § 499, subsec. 1, providing that a person desiring a division of land held jointly with others may file a petition containing a statement of the names of "those having an interest" in the land, and thereon "the persons interested" in the property who have not united in the petition shall be summoned to answer, refer to persons owning an interest in the land under the same title, and do not include the holder of a lien on the undivided interest of one of the owners. *Barry v. Baker* (Ky.) 93 S. W. 1061, 1062.

#### **Ownership of fixtures and right to remove them**

A defense by a tenant whereby he asserted ownership and a right to remove fixtures which had become a part of the real estate was a claim of interest in the real property within the meaning of Code Civ. Proc. § 1638, relating to actions to compel the determination of claims to real property. *Robinson v. Pratt*, 136 N. Y. Supp. 98, 100, 151 App. Div. 738.

#### **Right of appropriator to use public lands**

An appropriator's right pending the determination of his application to use public lands was an "interest in real property" which he was entitled to protect by a suit to determine conflicting claims to real property authorized by Code Civ. Proc. § 738. *Inyo Consol. Water Co. v. Jess*, 119 Pac. 934, 936, 161 Cal. 516.

#### **Right of way**

An easement of a right of way is an "interest in land." *Dahlberg v. Haeberle*, 59 Atl. 92, 93, 71 N. J. Law, 514.

An easement of a right of way over land is an "interest in land" within the eminent domain act (P. L. 1900, p. 79), providing for compensation to all persons having any "interest in land" taken. *Butterworth-Judson Co. v. Central R. Co. of New Jersey*, 66 Atl. 198, 199, 72 N. J. Eq. 568.

A right of way for an irrigation ditch is an "interest in real property" within Code Civ. Proc. § 1971, providing that no interest in real property can be created, assigned, etc., otherwise than by a conveyance in writing subscribed by the grantor, etc. *Bashore v. Mooney*, 87 Pac. 553, 556, 4 Cal. App. 276.

**Rights as to minerals, etc., reserved by grantor**

The right to minerals, marble, and granite beneath the surface of land conveyed, the right to mine the same, and the right of ingress and egress in order to conduct such mining operations, reserved to a grantor, constituted an "interest in real estate," within Rev. St. 1899, § 4262, providing that an action to recover an interest in real estate may be brought at any time within 10 years after the right of action accrues. *Hudson v. Cahoon*, 91 S. W. 72, 76, 193 Mo. 547.

**Sale of buildings**

An oral contract, by which plaintiff agreed to pay \$500 for certain old buildings and to remove them from the land on which they stood, was a contract for the sale of an "interest in land," within the statute of frauds, and unenforceable. *Volk v. Olsen*, 104 N. Y. Supp. 415, 54 Misc. Rep. 227.

**Sale of crops**

A sale of a growing crop of hay with leave to the buyer to enter and remove the crop is not a sale of an "interest in land" within the fourth section of the statute of frauds. *Kreisle v. Wilson* (Tex.) 148 S. W. 1132, 1133.

**Sale of timber**

A sale of standing timber is a contract concerning an "interest in land" within the meaning of the statute of frauds. *Richbourg v. Rose*, 44 South. 69, 71, 53 Fla. 173, 125 Am. St. Rep. 1061, 12 Ann. Cas. 274; *High v. Jasper Mfg. Co.*, 49 South. 156, 157, 57 Fla. 437.

A sale of standing timber is a "contract concerning interest in land" within the meaning of the Florida statute of frauds (Gen. St. 1906, § 2517). *Elsbeery v. Sexton*, 54 South. 592, 593, 61 Fla. 162.

Independently of statute, a contract for sale of standing trees is *prima facie*, at least, a sale of an "interest in land," and so within the statute of frauds, unless under the agreement the title is not to pass till they have been severed. *Hurley v. Hurley*, 65 S. E. 472, 474, 110 Va. 31, 18 Ann. Cas. 968.

Where a purchaser in a written contract for the sale and purchase of standing timber transferred his right to cut and remove the timber to a third person, who, to obtain a release of a lien for the price reserved by the owner, orally agreed to pay the price, the promise was not void as an agreement as to an interest in land within the statute of frauds (Revisal 1905, § 976). *Rogers v. Gen-*

*nett Lumber Co.*, 69 S. E. 788, 789, 154 N. C. 108.

A contract for the sale of standing timber, contemplating separation from the soil within a reasonable time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take them away, is not a sale of an "interest in land" within the fourth section of the statute of frauds, but is a sale of goods only. *Good-nough Mercantile & Stock Co. v. Galloway*, 171 Fed. 940, 951.

**As a share or portion**

Where an instrument states that the first party hereby sells to the second party certain real estate, to wit, 32 acres more or less, being my undivided interest in land belonging to a certain estate, the words "being my undivided interest in land belonging to the estate" are descriptive merely of the 32 acres, and serve the further purpose of designating the interest sold as undivided, and the word "interest" is equivalent to "part" or "share" and is not to be construed as designating the extent of the vendor's title. *Brooks v. Halane*, 116 Ill. App. 383, 386.

**Title distinguished**

The words "interest" and "title," as used in a policy, which provides that it is to be void if any change other than by death of insured takes place in the interest, title, or possession of the subject of insured, are not synonymous. The word "interest" is broader and more comprehensive than the word "title"; it embraces both a legal and equitable right. The doctrine contended for that when the condition is against a change in the title there is no breach unless there is a change in the legal title, and that since the insured retains the legal title the policy is not avoided by a transfer of the equitable title, cannot be applied to a condition against a change of interest. The true test is whether the vendor has dominion over the property insured, and, if he has, a change in interest has been effected and the policy is void. *Brickell v. Atlas Assur. Co.*, 101 Pac. 16, 19, 10 Cal. App. 17 (quoting *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 99 N. Y. Supp. 219, 113 App. Div. 728; *Id.*, 82 N. E. 1124, 189 N. Y. 526).

The word "interest," as used in a fire insurance policy declaring that the policy shall be void if any change shall take place in the interest, title, or possession of the subject of insurance, is not synonymous with "title," but means some right different from title. It cannot mean a greater estate than title, since title as used in the policy is intended to mean estate. The word must therefore be used in contradiction to title as including any right in the property less than title. Therefore if the insured is the owner of the title, the word "interest" has no application. *Garner v. Milwaukee Mechanics' Ins. Co.*, 84 Pac. 717, 718, 73 Kan. 127, 4 L.

R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459.

The word "interest," when applied to property, has a variable meaning. It may be used as synonymous with estate or title, or may denote something less than an estate or title. The word "interest," as used in an insurance policy, is not synonymous with title. It means some right different from title. It cannot mean a greater estate than title since title is used to mean the entire estate in such a policy, and, when used in contradiction of title, means any right in property less than title, and the word "interest" as used in a judgment holding that plaintiff's title to certain real estate is valid, and that defendants had no right or claim thereto and no estate or interest therein, is sufficient to cover a mortgage lien. *Hillyard v. Bancher*, 118 Pac. 67, 69, 85 Kan. 516.

There is a change of "title" as well as of "interest" and "possession," within a fire policy declaring it void in case of any change in the interest, title, or possession of the insured property, where insured, the owner in fee of the insured property, makes a contract of sale of it, declaring that deed shall pass when final payment is made, and that the purchaser shall pay all taxes and assessments levied against the property subsequent to contract, and shall have the right to occupy the property before passing of title, as tenant of the seller, without pay, and the purchaser goes into possession and is not in default. The word "interest" is broader and more comprehensive than the word "title," since it embraces both legal and equitable rights, and the words are not synonymous. The true test is whether the vendor has parted with the absolute control and dominion over the property insured. In this case, there was a change in possession within the meaning of that word as used in the policy. While the agreement designates the occupancy of the vendee as that of a tenant of the vendor without pay or rent, the contract gives and secures to him more than the rights and interests of a tenant. He is charged with the liabilities, and entitled to enforce the rights of a purchaser in possession, and cannot be ejected as a tenant regardless of such rights. The possession of the vendee is absolute and exclusive of the vendor, as long as he performs the contract. *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 99 N. Y. Supp. 219, 221, 113 App. Div. 728 (citing *Lett v. Guardian Fire Ins. Co.*, 25 N. E. 1088, 125 N. Y. 82).

#### INTEREST (In Suit or Action)

See Disqualifying Interest; Real Party in Interest.

##### As authorizing appeal

The phrase "person interested," as used in the statute that any person interested in any order, etc., may appeal, means one who has some legal interest which may by the

decree of the court be either enlarged or diminished. *Hemmenway v. Corey*, 16 Vt. 225, 226.

"A person 'interested' in a decree, within the meaning of a statute providing that a person interested in a decree of the probate court who considers himself injured thereby may appeal therefrom, is one who has some legal right or is under some legal liability that may be enlarged or diminished by the decree." An administrator de bonis non, who has been directed by the probate court to pay a sum to a distributee, is a person "interested" in a decree appointing an administrator of the distributee and is entitled to appeal therefrom. In *re Clark's Estate*, 79 Vt. 62, 64 Atl. 231, 232, 118 Am. St. Rep. 938.

Under Comp. St. 1909, c. 50, § 4, providing that on the hearing of an application for liquor license, upon objections to its issuance, any party interested shall have process to compel the attendance of witnesses, and if any party feels himself aggrieved by the decision, he may appeal to the district court, the right of appeal is accorded to none but a "party interested" and such right does not belong to petitioners who signed the application for license. *Weiler v. Fischer*, 126 N. W. 296, 298, 86 Neb. 614.

Ky. St. 1903, § 4849, gives the county court of the county of decedent's residence original jurisdiction to probate his will. Section 4852 declares the probate of a will before the county court conclusive, except as to the jurisdiction of the court, until superseded, reversed, or annulled. Section 4857 authorizes the court to permit a document to be proven ex parte or to cause all parties in interest to be brought before the court. Section 4859 authorizes any person "interested in the probate" of a will to prosecute an appeal to the circuit court. Held, that general creditors of an insolvent heir of a decedent, who claim that a purported will disinheriting their debtor is spurious and fraudulent as to them, may appeal from an order probating the will where their debtor himself fails to prosecute such an appeal. *Brooks v. Paine's Ex'r*, 90 S. W. 600, 601, 123 Ky. 271.

##### As authorizing bringing of suit

An administrator has an interest in decedent's real estate within Code Civ. Proc. § 675, authorizing an action by any person against another claiming an interest in real estate adverse to him, and, if another is asserting a claim adversely to such interest, he may maintain an action. *Berry v. Howard*, 127 N. W. 526, 527, 26 S. D. 29, Ann. Cas. 1913A, 994.

One who held a mortgage, but assigned it before proceedings were brought to correct the title to the property, had no "interest" therein that entitles him to appear as plain-

tiff in the cause. *Turpin v. Derickson*, 66 Atl. 276, 279, 105 Md. 620.

In order to entitle a creditor to enjoin the sale of personal property secured by a chattel mortgage, and enable him to resist the foreclosure thereof, he should connect himself with some interest in or claim upon the specific property, either by judgment, lien, or attachment, in order to constitute him an "interested party" within the statute authorizing any person interested to contest the foreclosure. *Neustadter Bros. v. Doust*, 92 Pac. 978, 979, 13 Idaho, 617.

#### **As criterion of proper parties**

A charter gave borough control of the construction and widening of sidewalks, the establishing of curb lines, and the extension of highways, but the control of the construction and repair of the remainder of the highway remained in the town. Held that, where suit was brought to restrain the borough from using certain land for the widening of a street, the town was "interested" in the question whether such land was a part of the highway, and was therefore properly summoned as a codefendant. *Pinney v. Borough of Winsted*, 66 Atl. 337, 340, 79 Conn. 606.

A bill in equity must not include as defendants parties not interested in the whole of the relief sought, since the "parties in interest" whose rights can be completely disposed of in one litigation in equity comprise only those persons who can be united in a single bill of complaint. *Gaither v. Bauernschmidt*, 69 Atl. 425, 428, 108 Md. 1.

#### **As disqualifying judge, etc.**

"Interest," within the rule as to disqualification of a judge by reason of interest, refers to some direct pecuniary interest. *State ex rel. Cook v. Houser*, 100 N. W. 964, 978, 122 Wis. 534 (citing *Frangerford v. Cushing*, 2 Wis. 397; *Taylor v. Williams*, 26 Tex. 583; *Foreman v. Hunter*, 13 N. W. 659, 59 Iowa, 550).

In a proceeding to condemn land, pursuant to chapter 15, art. 10, and sections 1370 to 1374, inclusive, of chapter 20, art. 9, of Snyder's Stats. of Okl. 1909, the interest of the district judge as a resident taxpayer of the petitioning municipality is not such an "interest" within the contemplation of section 2012 of said statutes as will disqualify him to act upon the petition, and try the cause. *Lawton Rapid Transit Ry. Co. v. City of Lawton*, 122 Pac. 212, 213, 31 Okl. 458.

As used in Act March 30, 1875 (P. L. 35), providing for the disqualification of a judge in case he is "personally" interested, denotes a direct and immediate private interest, as distinguished from an interest which the judge or other citizens have in public affairs resulting from liability to taxation. The fact that the word "interest" is thus

qualified shows that it was not every interest, however trifling or insignificant, which a judge might have that might bring a case within the statute, but only such an interest as was personal to himself and direct and immediate in its effect, thus excluding such interest as a judge might have as a taxpayer in an action brought against the county. *Brittain v. Monroe County*, 63 Atl. 1076, 1077, 214 Pa. 648, 6 Ann. Cas. 617.

A judge has no "interest" disqualifying to try an action against an irrigating company for not supplying all the water which plaintiff claims he was entitled to, though defendant alleges plaintiff was not entitled to a fixed amount, but only to a proportion of whatever water the company might have for distribution, and that certain other persons, including the judge, have prior water rights; they not being necessary parties, no showing for making them parties being made, and any judgment which might be rendered in the case being incapable of affecting them. *Lassen Irr. Co. v. Superior Court of Lassen County*, 90 Pac. 709, 710, 151 Cal. 357.

A "party in interest," within the section, is one who has a financial interest, directly or indirectly; and hence an affidavit to disqualify a judge in an insanity inquiry, which merely shows that affiants are brothers of the person claimed to be insane, is insufficient to show that they are "parties in interest." *State ex rel. Morris v. Montgomery*, 142 S. W. 474, 476, 160 Mo. App. 724.

*Bankr. Act* July 1, 1898, c. 541, § 39b, providing that referees shall not act in cases in which they are directly or indirectly "interested," does not apply to the interest of a referee by way of commissions on sums paid to creditors as dividends. *In re Abbey Press*, 134 Fed. 51, 53, 67 C. C. A. 161.

#### **As disqualifying juror**

By the term "interest in the cause," rendering a person incompetent to serve as a juror, is meant an interest either direct or indirect in the subject-matter of the particular action, and not a mere general interest in the class of subjects to which the particular action belongs, as such interest carries no mark of suspicion either of malice or favor. *Ballentine v. Mercer*, 109 S. W. 1037, 1038, 130 Mo. App. 605.

#### **As disqualifying or affecting credibility of witnesses**

While it seems clear that the term "interest," as used in the statute which limits the competency of persons in interest to testify concerning transactions with decedents, was used in the common-law sense, it is equally clear that, by restricting the disqualification to those having a direct legal interest in the action, the Legislature intended to admit the testimony of some persons having interests, not direct, or not legal,



which at common law would have excluded them. In an action by a married woman against the representatives of a decedent to enforce specific performance of a decedent's contract to convey land made before her marriage, the husband's courtesy interest is so remote as not to make him incompetent to testify in behalf of the wife. *Hiskett v. Bozarth*, 105 N. W. 990, 992, 75 Neb. 70 (quoting and adopting definition in *Wylie v. Charlton*, 62 N. W. 220, 43 Neb. 844).

Where a corporation was sued by an administrator for damages for wrongfully transferring stock belonging to intestate, the secretary was not disqualified from testifying as to the transfer as a "person interested in the event," within Comp. Laws 1907, § 3413, providing that any person directly interested in the event of an action shall not be a witness when the adverse party sues or defends as administrator as to any transaction equally within the knowledge of witness and decedent. *Rasmussen v. Sevier Valley Canal Co.* (Utah) 121 Pac. 741, 745.

Testimony of plaintiff contractors for the erection of a church building as to statements made by them as to the doing of extra work, and declarations made by the rector showing his knowledge of such work, were not incompetent within Code Civ. Proc. § 829, defining when a person interested in the event shall not be examined as a witness. *Kelly v. St. Michael's Roman Catholic Church in City of Brooklyn*, 133 N. Y. Supp. 328, 335, 148 App. Div. 767.

In determining "the competency of a witness for "interest," the test is not whether the witness may be interested in the question in issue, or may entertain wishes on the subject, or may even have occasion to test the same question in a future suit, but whether the proceeding can be used as evidence for him in some pending or future suit. He must have an interest to be affected by the result of the suit, or by force of the adjudication. *Sayre v. Woodyard*, 66 S. E. 320, 322, 66 W. Va. 288, 28 L. R. A. (N. S.) 388.

In an action to recover a ring, a witness testified that plaintiff purchased the ring of him and paid for it, and when it was delivered the ring was loaned to defendant's intestate by plaintiff under a parol agreement with intestate; title and ownership being retained in plaintiff. Code Civ. Proc. § 829, provides that "upon the trial of an action \* \* \* a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title," shall not be examined as a witness in his own behalf, or in behalf of the party succeeding to his title or interest, concerning a personal transaction between witness and decedent. Held, that the witness testifying for plaintiff was not a "person interested in the event," within the statute; he having sold the ring and

been paid therefor. *Abbott v. Doughan*, 97 N. E. 599, 600, 204 N. Y. 223.

"Interested in the event thereof," as used in Gen. St. 1894, § 5660, making incompetent testimony of a witness as to transactions with a person since deceased, means a direct and immediate pecuniary interest adverse to that of the party against whom his testimony was offered. *Pitzl v. Winter*, 105 N. W. 673, 674, 96 Minn. 499, 5 L. R. A. (N. S.) 1009.

A chauffeur charged with negligently running his master's taxicab to the injury of a third person who sues the master therefor, is an interested witness, though he has no pecuniary interest in the result of the suit; and the action of the court in refusing to charge that he is an interested witness, and in charging that only those witnesses who are financially interested in the result are interested witnesses within the rule authorizing the jury to refuse to receive the testimony of an interested witness, is error. *Harris v. Fifth Ave. Coach Co.*, 132 N. Y. Supp. 743.

The mother of an illegitimate child is not a "party interested in the event" of an action brought by the child against the executor of his putative father on a contract whereby the father agreed to settle a sum of money on the child in consideration of support by the mother until a certain date, within Code Civ. Proc. § 829, rendering such persons incompetent as witnesses to transactions with decedents in actions against executors or administrators. *Rousseau v. Rouss*, 86 N. Y. Supp. 497, 501, 91 App. Div. 230.

Where a fire policy sued on provided that it should be void in case of fraud or false swearing by the insured, whether before or after a loss, insured's husband was not a "party in interest" within an instruction that while the law permits a party in interest to testify in his own behalf, the jury in weighing the evidence of parties so testifying should "consider the fact that such party is interested in the matter in controversy," etc. *Orient Ins. Co. of Hartford, Conn., v. Kaptur*, 95 N. E. 230, 176 Ind. 308.

Where the motorman of a street car which struck plaintiff was not made a party to an action by her to recover for her alleged injuries, and, as executrix of her husband's estate, for injuries sustained to the community by reason thereof, and such motorman had not been notified to appear in the suit wherein he was allowed to testify, the record in such action was not binding on him, nor conclusive as to his liability over to the defendant in case plaintiff recovered, and he was not a "party in interest or to the record" who was admitted "to testify in his own behalf," within the meaning of the statute (2 Ballinger's Ann. Codes & St. § 5991), which would have prohibited him as

such a party from testifying to a conversation with the husband before his death. *O'Toole v. Faulkner*, 75 Pac. 975, 977, 34 Wash. 371.

### INTEREST (On Money)

See Compound Interest; Legal Interest; Money at Interest; Put on Interest; Unlawful Interest; With Interest.

Exclusive of interest and costs, see Exclusive.

Interest after date, see After.

Place where usurious interest is taken as disorderly house, see Disorderly House.

Usurious interest, see Usurious.

"Interest" is a premium paid for the use of money. *Barker Asphalt Pav. Co. v. Webster County*, 121 N. W. 1072, 1073, 143 Iowa, 255.

Webster defines "interest" as a premium paid for the use of money, usually reckoned as a percentage. *Hagan v. Commissioners' Court of Limestone County*, 49 South. 417, 421, 160 Ala. 544, 37 L. R. A. (N. S.) 1027.

"Interest" is a consideration paid for the use of money, or for forbearance in demanding it when due. *Maryland Casualty Co. of Baltimore, Md., v. Omaha Electric Light & Power Co.*, 157 Fed. 514, 519, 85 C. C. A. 106.

"Interest" may include recompense for the use of anything that has an ascertained pecuniary value, as well as money. *Wasey v. Whitcomb*, 132 N. W. 572, 578, 167 Mich. 58.

"Interest" is the legal damages for injurious detention of money due. *McDonald v. Loewen*, 130 S. W. 52, 55, 145 Mo. App. 49.

"Interest" is a compensation for the use of money for its detention." *Mills' Ann. St. Colo.* § 2252, which provides that "creditors shall be allowed to receive interest when there is no agreement as to the rate thereof at the rate of eight per centum per annum for all moneys after they become due, \* \* \*" is mandatory in an action at law to recover for labor performed and materials furnished, and requires the allowance of interest at the statutory rate from the date of demand of payment, and the court cannot, as in equity cases, take into consideration the laches of plaintiff in bringing suit. *City of Denver v. Barber Asphalt Paving Co.*, 141 Fed. 69, 71, 72 C. C. A. 402.

"Interest" for money as a legal consequence was unknown to the common law. *Cherry's Ex'rs v. Mann, Cooke* (3 Tenn.) 268 (5 Am. Dec. 696). It has, however, been given by statute on judgments, and on a large class of assignable and negotiable instruments, and upon liquidated accounts signed by the parties. Code, §§ 1942, 1945. It is defined by the statute to be the compensation which may be demanded by a lender from

the borrower, or by the creditor from the debtor, for the use of money. Code, § 1943. In all cases which are left as at common law, the jury has an equitable power, and may, in the form of damages, give interest, if they think justice demands it. *Cole v. Sands*, 1 Tenn. 106. Under our statute and decisions interest has become an incident of debt after maturity, because either given by positive law, or, in the absence of counter-vailing equity, by the inevitable verdict of the jury, or by the court acting in the place of the jury." In the absence of express statute, the jury in an action against a railroad for damages to property, caused by fire from a locomotive, have an equitable power to allow "interest" on the amount of plaintiff's loss as found by them. *Louisville & N. R. Co. v. Fort*, 80 S. W. 429, 435, 112 Tenn. 432 (quoting and adopting *Davidson County v. Olwill*, 4 Lea [72 Tenn.] 34).

A personal injury does not create a debt, and does not become a definite obligation until a verdict entered; and "interest," which is compensation for the use of money which is due, may not be considered in determining the amount of damages, which must be such as will fairly compensate the injured person for the loss of time, physical and mental suffering suffered and likely to be suffered, and money reasonably expended and to be expended in consequence of the injury. *Cochran v. City of Boston*, 97 N. E. 1100, 1101, 211 Mass. 171, 39 L. R. A. (N. S.) 120, Ann. Cas. 1913B, 206.

The words "put on interest," "the interest of my property shall be paid annually," and "the principal shall go," etc., as used in a will, all relate, in their ordinary sense, to dealing with money, the value of the use of money measured by interest and securities, dischargeable by the payment of money, and not the rents and profits of real estate. *Benner v. Mauer*, 113 N. W. 663, 664, 133 Wis. 325.

"It is also settled law that the term 'interest,' as used in the Constitution and statutes fixing jurisdiction of the several courts, has a limited signification, and that in cases of this character a claim for interest is part of the amount in controversy." Under the constitutional and statutory provisions limiting the jurisdiction of a justice of the peace to \$200 exclusive of interest, parties on appeal to the county or district court cannot enlarge the demand sued upon beyond the jurisdiction of the justice, and where the amount of interest, regarded as damages, constitutes the amount in controversy and exceeds \$200, the county court has no appellate jurisdiction. *Texas & P. Ry. Co. v. Walter Hunt & Co.*, 85 S. W. 1168, 38 Tex. Civ. App. 460.

The use of the word "interest," in the verdict of a jury as follows: "We, the jury herein, do find the issues joined in favor of the plaintiff, and that she be awarded \$21,-

000 and interest," meant from the time from which by law interest ought to be reckoned and the interest claimed by the petition. *Miller v. Steele*, 153 Fed. 714, 722, 82 C. C. A. 572.

Interest, defined by Sayles' Rev. Civ. St. art. 3097, as "the compensation allowed by law or fixed by the parties to a contract for the use, forbearance or detention of money," is not allowed on a judgment unless it is based upon a contract to pay interest, or the money for which it is rendered is wrongfully withheld. *Jones v. United States & Mexican Trust Co.*, 105 S. W. 328, 329, 47 Tex. Civ. App. 430.

Under Sayles' Ann. Civ. St. 1897, art. 3105, providing that all judgments of the several courts of the state shall bear interest at the rate of 6 per cent. per annum, except where the contract on which the judgment is founded bears a greater rate, and article 3097, defining "interest" as compensation allowed by law or fixed by the parties "to a contract for the use or forbearance or detention of money," a judgment in favor of the state on a liquor dealer's bond does not bear interest. *Hawthorne v. State*, 87 S. W. 839, 841, 39 Tex. Civ. App. 122.

"Interest" on legacies is the compensation allowed for the deprivation of a legacy beyond the period when it is payable under the will or by statute. A legacy does not carry interest, pending a contest of the will, after one year from the grant of letters testamentary, for, as the law suspends payment of the legacy until the determination of the contest, the administrator pendente lite appointed pursuant to Rev. St. 1899, § 13 (Ann. St. 1906, p. 342), having no power in the meantime to pay it over, the legacy does not fall due until capable of being paid by the executor. *Good Samaritan Hospital v. Mississippi Valley Trust Co.*, 117 S. W. 637, 640, 137 Mo. App. 179.

Where, in an action for \$98.65 damages, plaintiff recovered judgment for that sum on appeal to the county court, with interest thereon, which made the total amount recovered \$100.45, the additional amount over the sum sued for was an element of the damages recoverable, and not "interest," within Sayles' Ann. Civ. St. 1897, art. 996, subd. 3, giving the Court of Civil Appeals appellate jurisdiction of cases of which the county court had appellate jurisdiction when the judgment shall exceed \$100 exclusive of interest, etc., so that the Court of Civil Appeals would have jurisdiction of the appeal. *Pecos & N. T. Ry. Co. v. Faulkner* (Tex.) 118 S. W. 747, 748.

In an action for damages, with legal interest, the interest prayed for is recoverable as part of the damages only, and not as "interest" within the meaning of that term as used in Const. art. 5, § 16, giving the county court concurrent jurisdiction with the dis-

trict court when the matter in controversy does not exceed \$1,000 "exclusive of interest"; and, where the damages claimed and the interest thereon at the legal rate from the time of the injury to the institution of the suit or the time of the trial aggregated more than \$1,000, the action was not within the jurisdiction of the county court. *Ft. Worth & D. C. Ry. Co. v. Rayzor* (Tex.) 125 S. W. 619.

Payment of a commission of more than 6 per cent. for a loan of government bonds which are subject to market fluctuations and are bought and sold on the market as other securities was not in violation of the New York usury law, prohibiting the payment of more than 6 per cent. interest for the loan or forbearance of any money, goods, or any other things in action, and did not render the loan usurious, since the terms "interest" and forbearance," as used in the usury law (Consol. Laws, c. 20, § 373), are applicable only to a loan of money. *Title Guaranty & Surety Co. v. Klein*, 178 Fed. 689, 690, 102 C. C. A. 189, 29 L. R. A. (N. S.) 620.

Rev. St. 1909, § 3389, which directs, after providing for the making of loans by building and loan companies by competitive bidding for premiums, that the by-laws of the company may dispense with bids and provide for the making of loans to members at such a rate of interest and premium as may be provided in the by-law, "such premium to be paid in gross installments." Section 3390 provides that premiums shall consist of a percentage of the amount loaned. Held that, as "installment" means a part of a greater amount and is a word only fitly used in connection with an ascertained amount, especially when qualified by "gross," and as "interest" is a certain rate per cent. of the sum loaned for the time the money is detained by the borrower, while a "bonus" or "premium" is a definite sum agreed upon which is paid in addition to interest, either in advance or by installments, the statute means that the premium referred to should be in gross, payable in installments, and it does not therefore authorize the charging of a rate per cent. for the uncertain period for which the money may be kept, so that, though such a charge be called a "bonus" in by-law authorizing it, it is without statutory authority. *Holmes v. Royal Loan Ass'n*, 150 S. W. 1111, 1113, 166 Mo. App. 719.

The "mercantile method" of computing interest in case of partial payments consists in calculating interest on each item of the debt and adding these amounts together and deducting therefrom the sum of all partial payments with interest on each payment from the date it was made. *Christie v. Scott*, 94 Pac. 214, 215, 77 Kan. 257.

#### As commission

A loan made under a contract providing for a loan of \$70,000 for one year, with 6 per cent. interest, payable semiannually, and pro-

viding for the payment of a cash commission of \$1,400 for the loan, is not a loan of \$70,000 for one year at 6 per cent. interest, payable semiannually, but a loan at 8 per cent. interest; the commission being "interest." *Atlantic Trust & Deposit Co. v. Union Trust & Title Corp.*, 67 S. E. 182, 184, 110 Va. 286, 135 Am. St. Rep. 937.

#### **Demurrage distinguished**

The distinction between "interest" and "demurrage" is not based upon the actual repair of the injured vessel by the owner, but "interest" attends an allowance for loss of value; "demurrage," an allowance for cost of repair. *The Cumberland*, 135 Fed. 234, 236 (citing *The Earnest A. Hamill*, 100 Fed. 509).

#### **As incidental to debt**

The term "debt" embraces interest as well as principal, and "interest," in the absence of an express agreement, is a mere incident of the debt, and may be recovered as damages for its detention. *Central Bank & Trust Corp. v. State*, 76 S. E. 587, 589, 139 Ga. 54.

Interest is merely an incident to the debt to be paid from time to time or when the principal falls due in consideration of forbearance to the debtor, and becomes a part of the debt, or a debt at all, only when earned. *Carlson v. City of Helena*, 102 Pac. 39, 41, 39 Mont. 82, 17 Ann. Cas. 1233.

#### **Income or earnings synonymous**

The word "interest," as used in an antenuptial contract providing that a wife should receive in lieu of dower for each year she might survive her husband the interest on a certain sum, is synonymous with "income," as distinguished from an "annuity," so as to render the annual tax payable out of the interest rather than out of the residue of the husband's estate. *Dulaney's Adm'r v. Dulaney*, 54 S. E. 40, 42, 105 Va. 429.

A bequest of the "interest" on \$2,000 to be paid to testatrix's son semiannually during his life was a bequest of the income of the fund for life. In *re Dull's Estate*, 86 Atl. 567, 217 Pa. 358.

The words "interest or earnings" in a will whereby testator gave property to trustees to control and pay the interest or earnings to his children for life, with gift over to their heirs, and whereby he provided that on the death of a child leaving no living heirs the spouse of the child might, if living, receive annually a specified sum of the interest money due the deceased, and in case of the death of a child leaving no living heirs his estate, principal and interest, should be divided equally with the grandchildren, are synonymous with each other, and with the word "income" in its ordinary sense. *Ex parte Humbird*, 80 Atl. 209, 211, 114 Md. 627.

#### **As legal interest**

The word "interest," as used in an antenuptial contract providing that the wife should receive in lieu of dower for each year she might survive her husband the interest on a certain sum, is to be taken as meaning "legal interest." *Dulaney's Adm'r v. Dulaney*, 54 S. E. 40, 41, 105 Va. 429.

#### **As penalty**

"Interest" is a premium paid for the use of money. The penalty for nonpayment of special assessments was a penalty and not interest. *Barber Asphalt Pav. Co. v. Webster County*, 121 N. W. 1072, 1073, 143 Iowa. 255.

The interest fixed by Rev. St. Mo. 1899, § 5686, in relation to the construction of sewers by municipalities, providing that the tax bill of an assessment shall bear interest at a specified rate from 30 days after the date of issue, etc., is not interest at all; that is to say, it is not a consideration provided for the use of money, but it is a penalty inflicted as a punishment for a breach of duty. *City of St. Joseph v. Forsee*, 91 S. W. 445, 446, 115 Mo. App. 510.

The imposition by Rev. St. 1899, § 9225, of one per cent. per month as an additional tax or penalty for failure to pay general taxes before the end of the year, is not "interest" in any proper sense. *Seaboard Nat. Bank v. Woesten*, 75 S. W. 464, 468, 176 Mo. 49.

Legal interest is the measure of damages for failure to pay debts when they are due, and hence a contract to pay an amount in excess of such interest on account of a default in the payment of money when it is due is an agreement for a penalty which the courts will not enforce. *United Shoe Machinery Co. v. Abbott*, 158 Fed. 762, 763, 86 C. C. A. 118.

The statute providing for the collection of 10 per cent. "interest" on special tax bills for the first 6 months excluding the first 30 days, and for 15 per cent. per annum thereafter until paid, and allowing interest on a judgment thereafter from the date of its rendition at 15 per cent. per annum, imposed a penalty; and hence where the tax bill sued on was defective, in that it was issued against the estate of the holder of the record title, instead of defendant, who was the owner, defendant was only liable for interest on the judgment at the rate of 6 per cent. *City of St. Joseph ex rel. Gibson v. Forsee*, 84 S. W. 1138, 1139, 110 Mo. App. 237 (citing *City of St. Louis v. Allen*, 53 Mo. 57; *Seaboard Nat. Bank v. Woesten*, 75 S. W. 464, 176 Mo. 60; *Tipton v. Norman*, 72 Mo. 380; *Eyerman v. Blaksley*, 78 Mo. 145).

The term "interest," when used to designate a rate per cent. to be paid for the use of money, has a distinct significance derived from commercial usage, meaning simply the market value of the use of money, which val-

ue may be limited by law; while the term "penalty" is used to designate a clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract contained in another clause of the same agreement. A "penalty" always includes two distinct agreements, so that when the first is fulfilled the second is void; and when a breach has taken place the obligee has the option to require the fulfillment of the first obligation or payment of the penalty, but not before. *National Life Ins. Co. v. Hall*, 125 Pac. 1108, 1109, 34 Okl. 395 (citing Words and Phrases).

#### Premium

Complainant, a New York life insurance corporation, made so-called "policy loans" to policy holders in Louisiana; the transactions being as follows: When sufficient premiums had been paid on a policy to give it a recognized reserve value, complainant on application would advance the amount of such reserve value to the holder, taking the policy in pledge and requiring the insured to pay in addition to each future annual premium a sum equal to the interest on the amount of the advance. Such advance was never collected until the policy matured or lapsed, when it was deducted from the amount due from complainant thereon. This additional payment may be called "interest" or may be called an "additional premium." As a matter of fact, it is essentially an additional premium paid by the policy holder in order to obtain the privilege of drawing down the earned reserved value of his policy. It is thereafter treated strictly as a part of the premium. *N. Y. Life Ins. Co. v. Board of Assessors, for Parish of Orleans*, 158 Fed. 462, 467.

#### INTEREST IN COMMON

Civ. Code, § 686, defines the term "interest in common" as every interest created in favor of several persons in their own right unless declared in its creation to be a joint interest. *Conde v. Dreisam Gold Min. Co.*, 86 Pac. 825, 828, 3 Cal. App. 583.

Civ. Code, § 1350, provides that a devise to more than one person vests in them as owners in common. Section 683 defines a "joint interest" as one owned by several persons in equal shares by title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy. Section 685 declares that an "interest in common" is one owned by several persons not in joint ownership or partnership. Where a bequest was made of all the testator's estate to two persons without declaring any joint tenancy or right of survivorship, it created a clear tenancy in common. In *re Hittell's Estate*, 75 Pac. 53, 54, 141 Cal. 432.

#### INTEREST OF DRAINAGE DISTRICT

The phrase, "with a view to promoting the interests of said drainage district," used

in Laws 1907, p. 474, c. 153, authorizing the establishment of drainage districts, relative to the duties of the county commissioners in establishing a district, means the public interest, and not the private advantage to be gained by any property owner. *State ex rel. Harris v. Hanson*, 115 N. W. 294, 295, 80 Neb. 724.

#### INTERFERE—INTERFERENCE

When the owner of an easement is deprived of his right, he is not referred to as having been "dispossessed" of the land, but it is referred to as an "interference." "obstruction," or "disturbance." The remedy is on the case, for damages for the injury done, or, if this is inadequate, permanent injunction is the proper remedy. *Kansas & C. P. R. Co. v. Burns*, 79 Pac. 238, 240, 70 Kan. 627.

In mining parlance an interference exists where within the boundaries of the lands sold, or partially within those boundaries, there are other lands owned by other parties; and it is a prejudicial interference, when the intervening lands are so situated as to interfere with the operation and use of the lands sold, and thereby affect their value. *Hotchkiss v. Bon Air Coal & Iron Co.*, 78 Atl. 1108, 1113, 108 Me. 34.

The term "interference," used with reference to a public street or highway, conveys the idea of actual disturbance. *People v. Eckerson*, 117 N. Y. Supp. 418, 422, 133 App. Div. 220.

Where a nonunion laborer was kept out of employment by threats of violence to his person, made by union laborers, there was an interference with the employment of the nonunion laborer, within Rev. St. 1899, § 2155 (Ann. St. 1906, p. 1385), prohibiting interference with lawful employment by threats. *Carter v. Oster*, 112 S. W. 995, 996, 134 Mo. App. 146.

#### INTERFERENCE WITH FREEDOM TO CONTRACT

The limitation of employment in bakeries, attempted by Rev. St. 1899, § 10088, fixing the number of days in a week employes shall work, and between what hours in certain cases, is an arbitrary "interference with freedom to contract" guaranteed by Const. U. S. Amend. 14, § 1, and by similar provisions in Const. Mo. art. 2, §§ 4, 30. *State v. Miksicek*, 125 S. W. 507, 509, 225 Mo. 561, 135 Am. St. Rep. 597.

#### INTERFERENCE WITH INTERSTATE COMMERCE

See Interstate Commerce.

#### INTERIOR

In a contract by which there was to be delivered to the commissary of the United States troops stationed at certain points and

camps as were situated in the "interior" of the Island of Cuba, at certain times such quantities of fresh meat fit for immediate use as from time to time might be required, the word "interior" means remote from the sea coast, and does not include Los Quemados, the camp of the main body of troops near Havana, and only 6 or 8 miles therefrom, and 2½ miles from the beach of Mariacao. *Simpson v. United States*, 26 Sup. Ct. 54, 55, 199 U. S. 397, 50 L. Ed. 245.

### INTERIOR FINISH

New York Building Code, § 105, relating to fireproof buildings, provides that no wood-work or other inflammable material shall be used in any of the partitions, furrings, or ceilings in any fireproof building, except the doors and window frames in certain buildings less than 12 stories high, and that, when the building exceeds 12 stories, the floor surfaces shall be of stone or similar incombustible material, or the floors and sleepers may be of wood treated by some process approved by the board of buildings to render same fireproof, and that all inside window frames and sash and other "interior finish" may be of wood covered with metal, or of wood treated with some fireproofing process. Held, that the words "interior finish" related to the permanent structure, and that the section did not require trade fixtures used in a fireproof building over 12 stories high to be covered with metal or treated with a fireproofing process. *City of New York v. A. T. Stewart Realty Co.*, 96 N. Y. Supp. 513, 515, 109 App. Div. 702.

### INTERLOCK

An "interlock" occurs where the title papers of one person are not limited to or bounded by those of another, but the courses and distances or natural objects called for carrying the claim of the one over onto the land of the other so that the calls in the title papers of the former necessarily describe a portion of the land included in those of the latter. The word necessarily implies a lapping of boundaries, or there can be no interlock within which actual adverse possession of a part can ripen the junior title into good title to the whole as against the senior claimant. A mere dispute between conflicting claimants as to where the true lines and corners are does not constitute an interlock, within the meaning of the West Virginia decisions, respecting adverse possession of interlocks. *Robinson v. Sheets*, 61 S. E. 347, 348, 63 W. Va. 394 (citing *Storrs v. Felck*, 24 W. Va. 606; *Oney v. Clendenin*, 28 W. Va. 34).

Where one grant conflicts in part with another, occasioning what is called a "lap" or "interlock," the elder patentee under his grant acquires at once constructive seisin in deed of all the land embraced within its boundaries, although he has taken no actual

possession of any part thereof. The junior grantee under his grant acquires similar constructive seisin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seisin of which had already vested in the senior grantee. *Green v. Pennington*, 54 S. E. 877, 878, 105 Va. 801 (citing *Kolner v. Rankin's Heirs*, 11 Grat. [52 Va.] 427).

"'Interlocking' means united with, to embrace, to connect with, to flow into, to be connected in one system, to interlace firmly." As used in an inventor's description of certain parts of a milk can, it did not necessarily mean that such parts were to be interlocked in a sense that a door is locked. *Iron Clad Mfg. Co. v. Dairymen's Mfg. Co.*, 138 Fed. 123, 129.

### INTERLOCUTORY

"Interlocutory" (in law) means that which does not decide the cause, but settles some intervening matter relating to the cause. In *re Sullivan's Estate*, 78 Pac. 945, 946, 36 Wash. 217.

### INTERLOCUTORY APPLICATION

An "interlocutory application" is "a request to the court or to a judge at chambers for its interference in a matter arising in the progress of a cause or proceeding; and it may either relate to the process of the court, or to the protection of the property in litigation pendente lite, or to any matter upon which the interference of the court or judge is required before, or in consequence of, a decree or order." *Horn v. Pere Marquette R. Co.*, 151 Fed. 626, 636 (quoting and adopting *Daniel's Ch. Pl. & Pr.* [4th Am. Ed.] 1734, 1735).

### INTERLOCUTORY DECREE OR JUDGMENT

See, also, Final Decree or Judgment.

An "interlocutory decree" is properly a decree pronounced for the purpose of ascertaining matter of fact or law preparatory to a final decree. *Crockett v. Crockett*, 106 N. W. 944, 946, 132 Iowa, 388.

An "interlocutory decree," such as is provided for in divorce cases by Comp. Laws 1907, §§ 1184, 1212, as amended by Sess. Laws 1909, c. 109, §§ 1, 2, is one made pending a cause and before final hearing on the merits, one where further action of the court is necessary to give complete relief. *Parsons v. Parsons* (Utah) 122 Pac. 907, 908 (citing 4 Words and Phrases, 3712).

The term "interlocutory decree" indicates that it is not final, that it is intermediate, that something may supervene affecting the status of the thing adjudged. *Jordan v. Missouri & Kansas Telephone Co.*, 116 S. W. 432, 434, 136 Mo. App. 192.

An "interlocutory decree" is usually one which determines some matter between the commencement and the end of a suit, but leaves something else to be determined, not being a final disposition of the matter in issue. *Reed v. Reed*, 100 Pac. 897, 898, 9 Cal. App. 748.

A decree sustaining demurrers to a cross-bill and dismissing the same is not appealable as an "interlocutory decree," under Code 1907, § 2838, authorizing appeals from certain interlocutory decrees. *Aston v. Dodson*, 49 South. 856, 857, 161 Ala. 518.

In Act March 3, 1891, c. 517, § 7, 26 Stat. 828, creating the Circuit Courts of Appeals, as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666, and Act June 6, 1900, c. 803, 31 Stat. 660, relating to appeals from Circuit and District Courts, and providing that "where upon a hearing in equity \* \* \* an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree \* \* \* an appeal may be taken from such interlocutory order or decree," the phrase "hearing in equity" does not mean the trial of an equity cause on the merits; the right of appeal being given from an "interlocutory" order or decree, which means one entered pending the cause and before final hearing on the merits, and disposing of some intervening matter relating to the cause. *Taylor v. Breese*, 163 Fed. 678, 683, 90 C. C. A. 558.

An interlocutory judgment is an intermediate or incomplete judgment, where the rights of the parties are settled but something remains to be done. *White v. Gibson*, 113 N. Y. Supp. 983, 985, 61 Misc. Rep. 436.

Interlocutory judgments are such as are given in the middle of a cause upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory. *Leonard v. Sibley*, 56 Atl. 1015, 76 Vt. 254.

"Interlocutory judgments" are such as are given in the progress of a cause upon some plea, proceeding, or default, which is only intermediate and does not finally determine or complete the suit; but contemplates further proceeding for that purpose. *Ellott v. Mayfield*, 3 Ala. 223, 226 (citing 2 Toml. Law Dict. 287; Bing. Judgm. 2, 13; 3 Bl. Comm. 396).

An order of the court, made in the progress of the court, requiring something to be done or observed, but without determining the controversy, is an interlocutory order, which is sometimes called an "interlocutory judgment." *Neyens v. Flesher*, 79 N. E. 1087, 1089, 39 Ind. App. 399 (citing *Pfeiffer v. Crane*, 89 Ind. 485).

An interlocutory order or judgment from which an appeal will not lie is one that relates only to some question of law or matter of practice in the course of the proceeding, and leaves something remaining to be done by the court entering the order, or by some other court having jurisdiction to entertain the same, and to proceed further therewith. *City of Batesville v. Ball*, 140 S. W. 712, 714, 100 Ark. 496.

An order of the court, made in the progress of the cause, requiring something to be done or observed, but not determining the controversy, is an "interlocutory order," and is sometimes called an "interlocutory judgment." *Mak-Saw-Ba Club v. Coffin*, 82 N. E. 461, 462, 169 Ind. 204 (citing *Pfeiffer v. Crane*, 89 Ind. 485).

A judgment which merely settles some preliminary point or reserves for future determination some detail essential to the adjustment of the litigation is interlocutory. *State ex rel. Potter v. Riley*, 118 S. W. 647, 655, 219 Mo. 667.

An "interlocutory judgment" is one which is given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. *Miller v. Crawford*, 126 S. W. 984, 985, 140 Mo. App. 711.

A judgment is interlocutory under Code Civ. Proc. § 1200, defining a judgment as either interlocutory or final where it is entered against the defendant after demurrer to reply to a separate defense has been overruled, dismissing the separate defense, and providing that plaintiff recover a certain sum as costs and disbursements on the trial of the demurrer and issue of law. *Maeder v. Wexler*, 87 N. Y. Supp. 402, 403, 43 Misc. Rep. 19.

The term "interlocutory judgment," in Code Civ. Proc. § 1774, providing that no final judgment in divorce shall be entered in an action until after three months from the filing of the decision, and that a judgment annulling the marriage or divorcing the parties shall be interlocutory only, and shall provide for the entry of judgment three months after the entry of the "interlocutory judgment," unless otherwise ordered by the court, must be regarded as referring to the form of judgment not heretofore within the meaning of the term, and the term is not restricted to its ordinary meaning, and the interlocutory judgment employed by the statute is not intended to serve as an adjudication annulling or dissolving the marriage, but serving, as in the case of the English decree nisi, as a cautionary measure delaying the final judgment for a period of three months in order to give the party in interest an opportunity to show cause why final judgment should not be entered. The entry in an action for absolute divorce of an inter-

locutory judgment of divorce does not affect the dissolution of the marriage, but it remains unimpaired until the entry of the final judgment. *Petit v. Petit*, 91 N. Y. Supp. 979, 980, 45 Misc. Rep. 155.

Under Acts 1903, p. 125, c. 59, supplementary to Acts 1901, p. 461, c. 207, relating to interurban railways crossing steam railroads at grade, and permitting an appeal from a decision adverse to the objections of the company whose way is crossed, to the point of crossing under the restrictions provided for appeals in civil cases, an appeal from an order fixing the point of crossing is an appeal from an "interlocutory order" within Burns' Rev. St. 1901, § 659, and must be dismissed where appellant has failed to comply with the procedure required in such an appeal. *Terre Haute & L. Ry. Co. v. Indianapolis & N. W. Traction Co.*, 78 N. E. 661, 662, 167 Ind. 193 (citing Black, Judgm. § 21; Elliott, App. Proc. § 83).

A judgment granted plaintiff "a divorce from bed and board for the term and period of two years from" the date of the judgment, and awarded her the right to possession, use, and income of a portion of the property for the term of five years from its date, and expressly provided that it should not prejudice the right of plaintiff to apply for judgment of divorce from the bonds of matrimony, or from bed and board forever, in the event that defendant did not refrain from the use of intoxicating liquors, and that it should not be deemed to provide for or to be a final distribution and division of the property of defendant between the parties thereto. The judgment was based on findings of cruel and inhuman treatment and habitual drunkenness. Held, that such judgment was interlocutory, within Rev. St. 1898, § 2883, which provides that "in case of a finding or decision substantially disposing of the merits, but leaving an account to be taken, or issue of fact to be decided, or some condition to be performed, \* \* \* an interlocutory judgment may be made, disposing of all the issues covered by the finding or decision, and reserving further questions," and that it did not bar plaintiff from filing a subsequent application in the same cause, after the expiration of two years, asking for separation from bed and board forever. *Lamberton v. Lamberton*, 104 N. W. 807, 811, 125 Wis. 616.

Code Civ. Proc. § 3367, provides for the trial of issues raised by the petition and answer in a condemnation proceeding by the court or referee. Section 3369 provides for judgment on the decision of the court or referee, and provides that, if in favor of the defendant, the petition shall be dismissed, with costs, but, if in favor of plaintiff, the judgment shall adjudge that condemnation is necessary, and the court shall thereupon appoint commissioners to ascertain the compensation, nothing being said as to costs be-

ing included in this judgment. Section 3371 provides that, upon confirmation of the commissioners' report, the final order shall be entered directing payment of the compensation, and that thereupon plaintiff shall be entitled to possession. Section 3372 provides for an offer by the plaintiff to purchase the property, and that if the offer is not accepted, and the compensation awarded by the commissioners does not exceed the offer, no costs shall be allowed, but that if the compensation exceeds the offer, or if no offer is made, the court shall in the final order direct that the defendant recover the costs of the proceeding at the same rate as where the defendant is the prevailing party in an action. It also provides that if a trial has been had, and the issues determined in favor of plaintiff, costs of the trial caused by the interposition of the unsuccessful defendant shall be allowed plaintiff. Section 3373 provides that upon entry of the final order it shall be attached to the judgment roll, and the amount directed to be paid as compensation, or costs, or expenses, shall be docketed as a judgment. Held, that a judgment dismissing the petition, entered on a decision in favor of defendant, is a "final judgment"; but the judgment directing the appointment of commissioners, entered on a decision in favor of plaintiff, is interlocutory. *Marshall v. Hatfield*, 138 N. Y. Supp. 733, 735.

#### Accounting or reference

A decree which perpetuates an injunction restraining defendant from cutting timber alleged to belong to plaintiff, and which appoints a master to ascertain the damages, is an "interlocutory decree," within Code 1906, § 35, providing that an appeal from an interlocutory decree must be applied for within 10 days after the date thereof. *Smith v. Hollfield*, 54 South. 84, 98 Miss. 649.

An "interlocutory judgment" is an intermediate or incomplete judgment, where the rights of the parties are settled, but something remains to be done, as when there is an accounting to be had, a question of damages to be ascertained, or a reference required to determine the amount of the rent due for use and occupation. *White v. Gibson*, 113 N. Y. Supp. 993, 985, 61 Misc. Rep. 436 (quoting *Cambridge Valley National Bank v. Lynch*, 76 N. Y. 514, 516).

A decree, in a suit for specific performance of a contract for the exchange of property, which directs defendant to convey on the delivery to him by plaintiff of a special sum, less whatever amount may be found to be due plaintiff on an accounting, and which adjudges that plaintiff is entitled to an accounting for the profits of the real estate which defendant agreed to convey, less the amount paid by him for taxes, repairs, and interest on an incumbrance, is an "interlocutory decree," and defendant is not required to appeal from it. *Gray v. Ames*,



77 N. E. 219, 220, 220 Ill. 251, 5 Ann. Cas. 174.

**Final decree or judgment distinguished**

See Final Decree or Judgment.

**INTERLOCUTORY INJUNCTION**

"Preliminary or 'interlocutory injunctions' are those granted prior to the final hearing and determination of the trial, and continue until answer, or until the final hearing, or until the further order of the court. \* \* \* Their object is to maintain the status quo, to maintain property in its existing condition, to prevent further or impending injury—not to determine the right itself." In re Sharp, 124 Pac. 532, 534, 87 Kan. 504, Ann. Cas. 1913E, 460 (quoting definition in 22 Cyc. p. 740).

Under B. & C. Comp. § 417, defining an injunction as an order requiring a defendant to refrain from a particular act, an interlocutory injunction operates in personam, and does not determine the merits of the case or the rights of the parties, and does not change the possession of real or personal property, the title to which is in dispute, but it merely seeks to preserve the status quo pending the trial. Gobbi v. Dileo, 111 Pac. 49, 51, 58 Or. 14, 34 L. R. A. (N. S.) 951.

**INTERLOCUTORY MOTION**

A motion under Rev. St. c. 84, § 23, to require a party to produce books and papers for inspection, is "Interlocutory." Fidelity & Casualty Co. v. Bodwell Granite Co., 66 Atl. 314, 316, 102 Me. 148.

**INTERLOCUTORY ORDER**

See Final Order.

Interlocutory order or decree, see Interlocutory Decree.

Interlocutory order or judgment, see Interlocutory Judgment.

"Interlocutory orders" are orders made in the course of the cause which does not touch the merits of the cause so as to affect the rights of the parties. Nelson v. Brown, 10 Atl. 721, 722, 59 Vt. 600.

An order setting aside a default before entry of judgment thereon is not appealable; it not being an "order after judgment" or an "interlocutory order," within Code Civ. Proc. § 963, making appealable interlocutory orders entered in actions to redeem mortgaged property or in partition suits, etc. Savage v. Smith, 97 Pac. 821, 822, 154 Cal. 325.

Where, in an action against a railroad company to recover for an alleged illegal discrimination in the distribution of cars, a rule on defendant to produce distribution sheets is made absolute, an appeal will not lie from the order before judgment is rendered against defendant by default on such rule, as provided by Act Feb. 27, 1798, as such order is "interlocutory." Quinn v. Pennsylvania R. Co., 67 Atl. 949, 950, 219 Pa. 24 (citing

Logan v. Pennsylvania R. Co., 19 Atl. 137, 132 Pa. 403).

Under Rev. St. 1899, § 3644, providing that the plaintiff in a civil action may have a temporary injunction, that after answer filed a motion may be made to dissolve the injunction, and that on such motion the parties may introduce testimony, and that the court shall decide on the weight of the testimony, an order on a motion to dissolve is an "interlocutory order," and the effect is not changed by section 806, providing that an appeal may be taken from any order dissolving an injunction, and that failure to appeal from any decision before final judgment shall be without prejudice to the right to have the action reviewed on appeal from the final judgment; nor is the character of such order affected by the fact that on the motion to dissolve testimony was heard on the merits of the whole case, and that the account of the receiver appointed by the court on its own motion as an adjunct of the temporary injunction was settled. State ex rel. Manning v. Smith, 86 S. W. 867, 869, 188 Mo. 167.

**INTERMEDDLE—INTERMEDDLING**

See, also, Maintenance.

Under Revisal 1905, § 28, providing that a foreign executor has no authority to "intermeddle" with the "estate" until he shall have entered into bond, etc., a foreign executor to whom land situate in North Carolina is devised in his representative capacity, with power to sell and receive the price, has no authority to convey the land without first qualifying in North Carolina; the word "estate" embracing an interest in anything that is the subject of property, and the word "intermeddle" meaning any interference with or control over any part of the estate including a sale thereof. Glascock v. Gray, 62 S. E. 433, 435, 148 N. C. 346.

**INTERMEDDLER**

An "intermeddler" is a person who officiously intrudes into a business to which he has no right, and the distinction between an intermeddler and a trespasser is not in any case very great. Vassor v. Atlantic Coast Line R. Co., 54 S. E. 849, 852, 142 N. C. 68, 7 L. R. A. (N. S.) 950, 9 Ann. Cas. 535; Aga v. Harbach, 102 N. W. 833, 835, 127 Iowa, 144, 109 Am. St. Rep. 377, 4 Ann. Cas. 441 (quoting and adopting definition in Sloan v. Central Iowa Ry. Co., 16 N. W. 331, 62 Iowa, 728).

**INTERMEDIATE ORDER**

Code Civ. Proc. § 515, abolishes writs of error and certiorari in criminal proceedings, and section 517 provides for appeal to the Supreme Court from a judgment of conviction and review thereon of intermediate orders forming a part of the judgment roll.

Held, that an "intermediate order," within the meaning of section 517, is not confined to orders made between the finding of the indictment and the preparation of the judgment roll in the first instance, but the word "intermediate" as thus used means between the finding of the indictment and the completion of the judgment roll by the attachment of the case thereto whenever it is filed. *People v. Jackson*, 100 N. Y. Supp. 126, 138, 114 App. Div. 697.

An order granting a new trial was not reviewable upon appeal from the judgment on the second trial as an "intermediate order," under Rev. Code Civ. Proc. § 463, providing that upon appeal from a judgment the Supreme Court may review any intermediate order or determination of the court which involves the merits and necessarily affects the judgment appearing upon the record transmitted from the circuit court. *Ewing v. Lunn*, 115 N. W. 527, 529, 22 S. D. 95.

Under Code Civ. Proc. § 542, providing that the Supreme Court may reverse, vacate, and modify a judgment of a district court, or other court of record, excepting a probate court, for errors appearing on the record, and in the reversal of such judgment or order may reverse, vacate or modify any "intermediate order" involving the merits of the action or any portion thereof, the "intermediate order" mentioned is an order from which no appeal can be taken under the Code, and which therefore but for this provision could be reviewed, and applies exclusively to non-appealable orders. *White v. Atchison, T. & S. F. Ry. Co.*, 88 Pac. 54, 56, 74 Kan. 778, 11 Ann. Cas. 550 (quoting and adopting definition in *Brown v. Willoughby*, 5 Colo. 1, 8; and citing *McCourtney v. Fortune*, 42 Cal. 387, 390; *Maynard v. Johnson*, 2 Nev. 16).

An order for the inspection and copy of documents made under Code Civ. Proc. § 368, is reviewable after judgment as an intermediate order involving the merits. *Atchison, T. & S. F. Ry. Co. v. Burks*, 96 Pac. 950, 951, 78 Kan. 515, 18 L. R. A. (N. S.) 231.

Where a final judgment was entered in a mortgage foreclosure action by direction of the court in the form of an order overruling a demurrer to the complaint as frivolous, an appeal from the judgment raised the propriety of the decision directing its entry, and did not limit the review to the question whether the judgment complied with the order, though the notice of appeal did not state an intention to review the order, since the order was not appealable and was not an "intermediate order" within Code Civ. Proc. § 1347, specifying appealable orders. *Smith v. Thompson*, 103 N. Y. Supp. 336, 337, 118 App. Div. 6.

An "intermediate order," within Code Civ. Proc. § 1316, providing that an appeal taken from a final judgment brings up for review an interlocutory judgment or an "in-

termediate order" which is specified in the notice of appeal and necessarily affects the final judgment, etc., is one made between the commencement and termination of the action. Where, after a referee made a report dismissing the complaint, plaintiff moved to amend, and to recommit the report to the referee for further findings, orders denying such motions were not "intermediate orders" reviewable on appeal from the final judgment, and were therefore reviewable only by a direct appeal. *Spencer v. Huntington*, 91 N. Y. Supp. 561, 568, 100 App. Div. 463.

An order overruling a demurrer to the complaint is an intermediate order within Rev. Codes 1905, § 7216, and a stay of proceedings on an appeal from such an order is, under the statute, within the discretion of the court. *Devereaux v. Katz*, 133 N. W. 553, 22 N. D. 351.

An order denying a motion to interpose an additional plea of former jeopardy is intermediate and not appealable, as it may be gotten into the judgment roll, as defined by Code Cr. Proc. § 485, and so, under section 517, reviewable on appeal from a judgment on conviction. *People v. Wendel*, 112 N. Y. Supp. 837, 838, 128 App. Div. 437.

## INTERMEDIATE POINT

Where freight less than a car load destined for a point on a branch line was loaded into a car intended to go through without breaking bulk, and the car at the junction was shifted from the carrier's main to its branch line, and transported to destination, the junction point was an "intermediate point" within Revisal 1905, § 2632, entitling a carrier to a delay of 48 hours at one intermediate point for every 100 miles of distance or fraction thereof without penalty for delay. *Wall-Huske Co. v. Southern Ry. Co.*, 61 S. E. 277, 278, 147 N. C. 407.

A station at which a car must be taken out of a local train which comes into the station and then placed into another train leaving the station for the point of destination is not an "intermediate point," within Revisal 1905, § 2632, requiring transportation of freight within a reasonable time, and authorizing a delay at an intermediate point. *Brooks Mfg. Co. v. Southern Ry. Co.*, 68 S. E. 243, 245, 152 N. C. 665.

A station on defendant's railroad which was the terminus of two other railroads was not an "intermediate point" with reference to freight not transferred to the other lines but shipped through on defendant's line to points beyond, within the meaning of Revisal 1905, § 2632, providing what shall be a reasonable time for the transportation of freight, and authorizing a delay of 48 hours at one intermediate point for each 100 miles. *Davis & Hooks v. Atlantic Coast Line R. Co.*, 59 S. E. 53, 54, 145 N. C. 207.

## INTERMENTS

The word "interments," as used in a statute empowering boards of health to regulate interments, is not confined to the acts done within burial grounds, and properly includes and describes the removal of bodies for the purpose of burial. *Commonwealth v. Goodrich*, 13 Allen [95 Mass.] 546, 548.

## INTERNAL

### INTERNAL AFFAIRS

"Internal affairs," within Const. art. 4, § 7, subd. 11, prohibiting the Legislature from passing private, local, or special laws regulating the internal affairs of municipalities, are those which are governmentally, and not merely territorially, internal to the municipalities. *Meehan v. Board of Excise Com'rs of Jersey City*, 70 Atl. 363, 364, 75 N. J. Law, 557.

Where a corporate act complained of affects the complainant only in his relation as a shareholder or officer of the corporation, and no public right is involved, then the controversy must be said to relate to the "internal affairs" of the company, and, in case of a foreign corporation, the great weight of authority is opposed to the jurisdiction of the court of equity. *Westminster Nat. Bank v. New England Electrical Works*, 62 Atl. 971, 975, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637 (citing *Bradbury v. Waukegan & W. Mining & Smelting Co.*, 113 Ill. App. 600).

The word "internal," as used in the constitutional prohibition of special legislation in regard to the internal affairs of municipalities, means governmentally, not territorially, internal. Such matters of local government as are confided to the municipalities at once become, and until recalled remain, their internal affairs, but it is not every matter of governmental regulation, local in its effect when territorially considered, that is an internal affair of the municipality within the meaning of the constitutional interdict, as otherwise there would have been little need for the prohibition of special legislation regulating roads, public grounds, etc., and the constitutional inhibition is not violated by *P. L. 1903*, p. 777, relative to the creation of the Passaic Valley sewerage district. *Van Cleve v. Passaic Valley Sewerage Com'rs.*, 58 Atl. 571, 575, 71 N. J. Law, 183.

A suit in equity by a trustee in bankruptcy of a foreign corporation against all resident stockholders, who alone are solvent, to set aside a fraudulent dividend by which unpaid stock subscriptions were nominally satisfied and to recover the amount thereof, is not a suit relating to the management of the internal affairs of the corporation, which is foreign to the jurisdiction of the court, as the term "internal affairs" does not extend to cheating creditors, but is confined to rela-

tions affecting only the stockholders and the corporation among themselves; and, as the corporation and creditors are represented in the litigation by the trustee, all the necessary parties are before the court, and it will take jurisdiction of the controversy. *Edwards v. Schillinger*, 91 N. E. 1048, 1053, 245 Ill. 231, 33 L. R. A. 895, 137 Am. St. Rep. 308.

Where an act complained of affects complainant solely in his capacity as a member of a corporation, whether as stockholder or officer, and is the act of the corporation, whether acting in stockholders' meeting or through the board of directors, such action is the management of the "internal affairs of a corporation." *Jackson v. Hooper*, 75 Atl. 568, 573, 76 N. J. Eq. 592, 27 L. R. A. (N. S.) 658.

### INTERNAL IMPROVEMENT

The term "works of internal improvement," in Const. art. 3, § 34, declaring that the General Assembly shall not have power to involve the state in the construction of "works of internal improvement" or in granting any aid thereto, was not intended to and does not embrace the public highways contemplated by Acts 1904, p. 388, § 225, authorizing the furnishing of state aid for the construction of roads by counties and appropriating a certain sum annually for that purpose. *Bonsal v. Yellott*, 60 Atl. 593, 597, 100 Md. 481, 69 L. R. A. 914.

The construction and maintenance of parks, waterworks, sewers, and a public lighting system are not works of "internal improvement," within Const. art. 14, § 9, providing that the city shall not be a party to or interested in any work of internal improvement, nor engage in carrying on any such work, etc., such undertakings being mere contributions to the public health, safety, and welfare. *Attorney General ex rel. Brother-ton v. Common Council of City of Detroit*, 111 N. W. 860, 861, 148 Mich. 71.

Canals and other works constructed for irrigation or water power purposes are works of "internal improvement," and the right of eminent domain is extended to persons and corporations engaged in the construction of such works. *Cline v. Stock*, 102 N. W. 265, 266, 71 Neb. 70.

To erect and maintain a public wharf is not a "work of internal improvement," within Const. 1850, art. 14, § 9 (Const. 1908, art. 10, § 14), providing that the state shall not be a party to or interested in any work of internal improvement, etc., nor engage in carrying on any such work except in certain immaterial cases. Hence there is no constitutional limitation on the power of the Legislature to authorize a city of the fourth class to erect and maintain a public wharf. *Nicholls v. Charlevoix Circuit Judge*, 120 N. W. 343, 155 Mich. 455.

The construction, operation, and maintenance of an oil refinery, for the purpose of

receiving, manufacturing, and handling oil and its by-products, and marketing the same, constituted a "work of internal improvement," within a constitutional provision prohibiting the state to carry on such works. *State v. Kelly*, 81 Pac. 450, 457, 458, 459, 71 Kan. 811, 70 L. R. A. 45, 6 Ann. Cas. 298.

An appropriation of money from a state general revenue fund to build roads and bridges constitutes a "work of internal improvement" within a constitutional prohibition against the state being a party to such works. *Cooke v. Iverson*, 122 N. W. 251, 253, 108 Minn. 388.

### INTERNAL INJURIES

The complaint, after alleging injuries to the head, hips, knee, shoulder, the small of his back, and kidneys, alleged that "he suffered other internal injuries not yet fully ascertained and determined." Held, that evidence of injuries to a testicle, which was immediately known was not admissible. *Cincinnati, N. O. & T. P. Ry. Co. v. Bennette*, 119 S. W. 181, 182, 134 Ky. 19.

### INTERNAL ORGANS

Injury to the pelvic organs may well be included in a claim in a declaration in an action for injuries to the "internal organs." specific notice that pelvic injury was claimed being given to defendant's surgeon. *O'Donnell v. Rhode Island Co.*, 66 Atl. 578, 28 R. I. 245.

An allegation of a petition that plaintiff was injured "internally" was sufficient to admit proof of injury to her womb or any of her internal organs. *Houston Electric Co. v. McDade*, 79 S. W. 100, 101, 34 Tex. Civ. App. 497.

### INTERNAL REVENUE COLLECTOR'S CERTIFICATE

As record, see Record.

## INTERNATIONAL

The word "international" is a generic term pertaining to relations between nations, and, when applied to business or transactions of private character, it imports dealings of some sort in matters or with people of different nations. *Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn.*, 134 S. W. 877, 881, 142 Ky. 523 (quoting from *Koehler v. Sanders*, 25 N. E. 235, 122 N. Y. 65, 9 L. R. A. 576).

### INTERNATIONAL STOCK FOOD

As condiment, see Condiment.

## INTERPLEADER

See Bill in the Nature of Interpleader; Bill of Interpleader; Strict Interpleader.

Under Code, § 189, which provides that a defendant may apply for an order substi-

tuting in his stead another who claims the debt, an order making a third person a party makes such person an "interpleader," though the order designates him as a "substitute." *Maynard v. Life Ins. Co. of Virginia*, 44 S. E. 405, 132 N. C. 711.

## INTERPRETATION

In common usage "interpretation" and "construction" are usually understood as having the same significance, although there may be an abstract difference between them, and both are included in the word "construction" as used in Act March 2, 1907, authorizing a writ of error on behalf of the government from the federal Supreme Court to review a judgment of the District or Circuit Court quashing an indictment, when based upon the construction of the statute upon which the indictment was founded. *United States v. Keitel*, 29 Sup. Ct. 123, 127, 211 U. S. 370, 53 L. Ed. 230.

The object of an "interpretation" of a written instrument always is or should be to reach the actual intention of the parties as that intention is expressed in the writing. *Laclede Const. Co. v. T. J. Moss Tie Co.*, 84 S. W. 76, 87, 185 Mo. 25 (citing *Ellis v. Harrison*, 16 S. W. 200, 104 Mo. 279).

### INTERPRETER

As witness, see Witness.

An "interpreter" who is selected by persons speaking different languages as the medium of their communication with each other is regarded as their joint agent for that purpose. *Kelly v. Ning Yung Benev. Ass'n*, 84 Pac. 321, 323, 2 Cal. App. 460.

An interpreter is a witness, for the purpose of interpreting testimony of others. *Birmingham Ry., Light & Power Co. v. Jung*, 49 South. 434, 440, 161 Ala. 461, 18 Ann. Cas. 557.

## INTERROGATORIES

See Special Interrogatories.

## INTERRUPT—INTERRUPTION

Rev. Civ. Code La. 1870, art. 3518, defined a legal "interruption" (of prescription) as taking place when the possessor has been cited to appear before a court of justice on account either of the ownership or of the possession, and provided that the prescription was interrupted by such demand, whether the suit had been brought before a court of competent jurisdiction or not. *Lockhart v. Lockhart*, 37 South. 860, 861, 113 La. 872.

Under a policy insuring rents, but requiring insured to rebuild as soon as the nature of the case would admit, and providing that insurer should not be liable for loss caused by "interruption of business," insurer is not liable for loss of rent from interruption of business caused by delays in rebuild-

ing resulting from the fall of debris of the fire throughout the burnt district. *Palatine Ins. Co. v. O'Brien*, 71 Atl. 775, 778, 109 Md. 100.

## INTERSECT—INTERSECTION

Cross and intersect, see Cross.

M. street runs east and west, and is joined on the north by P. avenue, which runs approximately north and south, and on the south by B. street; each of those streets ending at M. street. The southerly line of P. avenue, where it joins that street, is 19 feet from the northerly line of B. street, measured in the northerly line of M. street, and 29½ feet measuring at the southerly line. Defendant's street car track on the northerly side of M. street is 19 feet from the curb of M. street at the corner of P. avenue. Plaintiff was injured by the collision of a street car with a hack, in which he was being driven from P. avenue across M. street, in going to a place at the corner of B. street, and claimed that the collision was caused by defendant's negligent violation of an ordinance requiring the speed of cars to be slackened to four miles an hour when crossing intersecting streets. Held, that P. avenue and B. street were not "intersecting streets," within the meaning of the ordinance, nor were P. avenue and M. street "intersecting streets"; to "intersect" ordinarily meaning to cross, to cut into or between. *Atwood v. Connecticut Co.*, 74 Atl. 899, 901, 82 Conn. 539.

Under St. 1885, c. 153, § 3, providing that, before any work shall be done or improvement made, the city council shall pass a resolution of intention so to do, and describing the work, the board of supervisors of the city and county of San Francisco passed a resolution of intention to order the following street work in the city, to wit: "That granite curbs be laid where not already laid on the intersection of San Jose avenue, Twenty-Eighth and Guerrero streets, and that the roadway of said intersection be paved with bituminous rock except that portion required by law to be kept in order by the railroad company having tracks thereon." Such resolution was followed by a resolution ordering the work, and directing "that granite curbs be laid where not already laid on the intersection of San Jose avenue, Twenty-Eighth and Guerrero streets, and that the roadway of said intersection be paved with bituminous rock except that portion required by law to be kept in order by the railroad company having tracks thereon." Held, that the word "intersection" interpreted in its broadest sense meant the place where the three streets crossed each other, and that the letting of a contract for the improvement of a space outside such intersection was unauthorized, and an assessment levied thereon was void on its face, the act requiring that the notice of intention shall describe the work, and the

limits of the district with common certainty, so that a person of ordinary understanding would know what it was proposed to do. *Pacific Paving Co. v. Verso*, 107 Pac. 590, 592, 12 Cal. App. 362.

An "intersection," when applied to streets, means: "A place of crossing; a point where two lines or the lines in the two surfaces cross each other." *Godfrey v. City of New York*, 93 N. Y. Supp. 899, 903, 104 App. Div. 357 (quoting *Stand. Dict.*).

A provision of the transfer directing that it be tendered "at the intersection of the issuing line" means any point on the issuing line where a passenger can continue his direct journey by taking another car, and the fact that the point is at an intersection of tracks merely, and not an intersection of lines, is immaterial. *Charbonneau v. Nassau Electric R. Co.*, 108 N. Y. Supp. 105, 109, 123 App. Div. 531.

Under a statute authorizing railroad companies to "intersect, join, and unite," it is not essential, when more than two companies consolidate, that the line of each shall intersect the line of every other. *Bonner v. Terre Haute & I. R. Co.*, 151 Fed. 985, 988, 81 C. C. A. 476.

"Ordinarily, we do not speak of a street, which starts from or terminates in another, as 'intersecting' it. It is only when it crosses or cuts through the other that it is said to intersect it. and that the streets are said to be 'intersecting streets.' Otherwise it is said to extend to or from the street in which it terminates. Intersect ordinarily means to cross, literally to cut into or between." *Atwood v. Connecticut Co.*, 74 Atl. 899, 901, 82 Conn. 539.

## INTERSECTING BOUNDARY

A turnpike may be treated as an "intersecting boundary" within the annexation act (Acts 1888, p. 113, c. 98), as amended by the Foutz act (Acts 1902, p. 198, c. 130), defining a block for taxation purposes to be an area bounded by intersecting avenues, streets, or alleys, etc. *Coulson v. City of Baltimore*, 71 Atl. 990, 109 Md. 271.

## INTERSECTING WAY

St. 1909, c. 534, § 1, which defines the meaning of various terms used in the subsequent sections, providing that "intersecting way" shall mean any way which joins another at an angle, whether or not it crosses the other, is applicable to section 16, which makes it an offense to operate an automobile at a greater rate of speed on certain streets than is reasonable and proper, having regard to traffic, etc., notwithstanding section 33, providing that section 16, etc., shall take effect July 1, 1909, and that the act, except as otherwise provided, shall take effect on December 1, 1909. *Commonwealth v. Cassidy*, 95 N. E. 214, 216, 209 Mass. 24.

## INTERSTATE BUSINESS

See Business of an Interstate Character.

Where the points of transmission and destination of a telegram sent over the lines of a single company were within the same state, the fact that a part of the transmission was made over lines of the company in another state did not make the same "interstate business" nor prevent it from being subject to a state statute providing a penalty for delay. *Western Union Tel. Co. v. Hughes*, 51 S. E. 225, 227, 104 Va. 240.

## INTERSTATE COMMERCE

See Connection with Interstate Commerce; Railroad Engaged in Interstate Commerce.

Restraint of, see Restraint of Commerce. Used in interstate commerce, see Use—Used.

See, also, Commerce; Regulate Commerce.

By "interstate traffic" is meant "traffic that is moving from one state or territory into or through some other state or territory." *United States v. Chicago Great Western R. Co.*, 162 Fed. 775, 781.

Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. "Interstate commerce," or commerce among the several states, is commerce that concerns more than one state. The only form of commerce within the limits of the United States which is not subject to the vast and exclusive power of Congress is the purely internal commerce of each state, which is reserved to each by direct implication. *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545, 560 (citing *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 6 L. Ed. 23).

Commerce being intercourse, it is important, in determining whether a transaction was interstate commerce, whether the negotiations were conducted by mail, by traveling salesmen, by telegraph, or by telephone. Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes importation from one such division to another, whether it be of goods, persons, or information, is a trans-

action of interstate commerce. *United States v. Tucker*, 188 Fed. 741, 743.

**Safety Appliance Act Cong. March 2, 1893, c. 196, § 6**, as amended by Act Cong. April 1, 1896, c. 87, requiring common carriers "engaged in interstate commerce by railroad" to equip their cars with automatic couplers, etc., must be construed with the "Act to regulate commerce," etc., approved February 4, 1887 (Act Feb. 4, 1887, c. 104), as thereafter amended, and known as the "Interstate Commerce Act" (Act June 29, 1906, c. 3591), which relates to "any common carrier engaged in the transportation of passengers or property wholly by railroad," etc., "under a common control, management, or arrangement, for a continuous carriage or shipment" from one state to another, such laws being part of one scheme, which is limited strictly to interstate commerce, and not intended to affect railroads operated wholly within a state independent of outside connections, and it is only when there is an arrangement with outside carriers for a continuous carriage from one state to another that the act applies; and hence, where the difference in gauge between defendant's line and that of a connecting carrier prevented a continuous carriage in the same car, and there was no through bill of lading and no conventional division of through charges, each company receiving its own charges according to its own rates, defendant was not "engaged in interstate commerce" within the meaning of the act though the goods carried were intended for shipment beyond the state. *United States v. Geddes*, 180 Fed. 480.

The mere hauling of an empty car from one state to another, though for the purpose of repairing a defect, is "engaging in interstate commerce." *United States v. Chicago & N. W. Ry. Co.*, 157 Fed. 616, 619.

A city ordinance merely providing that no person shall distribute in any public street or from any buildings handbills, cards, circulars, or papers of any description except newspapers, reasonably construed and enforced by the officers as a police regulation only, to protect people on the streets from annoyance, is not unlawful as an "interference with interstate commerce," as against a concern doing business in another state and desiring to distribute on the public streets circulars advertising such business. *International Text-Book Co. v. Auburn*, 155 Fed. 986, 987.

Act Feb. 23, 1903 (24 St. at Large, p. 81), imposing a penalty on a carrier failing to adjust and pay within a specified time a claim for loss of freight, is not unconstitutional, as an "interference with interstate commerce." *De Lorme v. Atlantic Coast Line R. Co.*, 60 S. E. 440, 441, 79 S. C. 370.

A tax upon property within the state which is the product of the soil of other states, imposed under the authority of Const.

Tenn. 1870, art. 2, §§ 28-30, and Acts Tenn. 1903, c. 258, §§ 1, 2, which exempt like property when produced from the soil of Tennessee, violates Const. U. S. art. 1, § 8, as directly "interfering with interstate commerce." *I. M. Darnell & Son Co. v. City of Memphis*, 28 Sup. Ct. 247, 252, 208 U. S. 113, 52 L. Ed. 413.

Failure to deliver freight is not "interstate commerce." *Hockfield v. Southern R. Co.*, 64 S. E. 181, 182, 150 N. C. 419, 134 Am. St. Rep. 945 (citing *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.*, 59 S. E. 667, 146 N. C. 171, 15 L. R. A. [N. S.] 983).

A corporation engaged in the manufacture and sale of tobacco in its various forms, which purchases its raw materials and supplies in different states and in foreign countries, and ships them by means of common carriers into other states for manufacture, and its products from one state into another between its different factories and agencies, and sells the same by means of agencies and salesmen throughout the United States and in the markets of the world, is engaged in "interstate commerce," and it is immaterial that it distributes its products by means of common carriers or that the title technically passes on delivery to such carriers. *United States v. American Tobacco Co.*, 164 Fed. 700, 704.

Webster defines "commerce" to be "the exchange or buying and selling of commodities, especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic." In *Gibbons v. Ogden*, it was said that "commerce" is more than traffic; it is intercourse; and that it is regulated by prescribing rules for carrying on that intercourse. It has even been held that "commerce" includes navigation and transportation of both persons and property, as well as traffic generally, and all the cases agree in treating the word "commerce" as one of large and extensive meaning. In *Hopkins v. United States*, 171 U. S. at page 597, 19 Sup. Ct. at page 47, 43 L. Ed. 290, it is said that the term "interstate commerce" is one of very large significance; that it comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Brooks v. Southern Pac. Co.*, 148 Fed. 986, 991 (citing *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 317; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Hooper v. California*, 15 Sup. Ct. 207, 155 U. S. 648, 653, 39 L. Ed. 207; *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 156 U. S. 1, 39 L. Ed. 325).

A single shipment of a commodity, as tobacco, from one state into another to be marketed, constitutes "interstate trade and commerce," within the meaning of Anti-Trust Act July 2, 1890, c. 647, § 1. *Steers v. United States*, 192 Fed. 1, 4, 112 C. C. A. 423.

Car loads of coal shipped from one state into another remain subjects of "interstate commerce" until delivery to the consignee, and an order of a state corporation commission directing the railroad company to place the cars on a certain track for unloading, as requested by the consignee, is without jurisdiction, and void, as an interference with "interstate commerce." *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. 82, 91.

In determining the meaning and scope of the clause of the federal Constitution giving Congress power to regulate commerce, the Supreme Court has deemed it undesirable to give to the words employed therein any hard and fixed definition, or to mark with absolute certainty the extent of the power thereby conferred. It has been declared that "interstate commerce" is a term of very large significance, and that the power conferred by the Constitution as to interstate and foreign commerce, one without limitation. It authorizes legislation with respect to all subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. "Commerce" undoubtedly is traffic, but it is something more; it is intercourse. In view of the large significance given to the terms of the commerce clause and the scope of the power thereby conferred, Act Cong. June 11, 1906, 34 Stat. 232, c. 3073, commonly called the "Federal Employers' Liability Act," is a "regulation of commerce between the states, or with foreign nations," within the meaning of the commerce clause of the Constitution, and hence within the power of Congress. *Kelley v. Great Northern Ry. Co.*, 152 Fed. 211, 217 (citing *Hopkins v. U. S.*, 19 Sup. Ct. 40, 171 U. S. 578, 597, 43 L. Ed. 290; *Sherlock v. Alling*, 93 U. S. 101, 23 L. Ed. 819; *Telegraph Co v. Texas*, 105 U. S. 460, 464, 26 L. Ed. 1067; *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 189, 194, 6 L. Ed. 23).

"Interstate commerce" comprehends intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states; and if any commercial transaction reaches an entirety in two or more states, and if the parties dealing with reference to that transaction deal from different states, then the whole transaction is a part of the interstate commerce of the United States, and subject to regulation by Congress under the Constitution. In re Charge to Grand Jury, 151 Fed. 834, 840.

"Interstate commerce" is a term of the "largest import, comprehending intercourse

for the purposes of trade in any and all its forms, including transportation." Act Cong. June 11, 1906, c. 3073, 34 Stat. 232, relating to the liability of common carriers engaged in commerce between the states to their employes, as stated in its title, commonly called the "Federal Employers' Liability Act," is a regulation of "interstate commerce." *Spain v. St. Louis & S. F. R. Co.*, 151 Fed. 522, 523.

The "power to regulate commerce" conferred by the federal Constitution on Congress is the power to regulate; that is, to prescribe the rule by which "commerce" is to be governed. Like all other powers vested in Congress, it is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed by the Constitution. Webster defines "commerce" as the "exchange, or the buying and selling of commodities, intercourse." In *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. Ed. 23, it is said that: "Commerce undoubtedly is traffic; but it is something more. It is intercourse." In *Wabash, St. L. & P. R. Co. v. Illinois*, 7 Sup. Ct. 4, 118 U. S. 557, 30 L. Ed. 244, it is held that "transportation of freight and passengers is commerce." "Interstate commerce" is the trading and trafficking in commodities between and amongst citizens of different states. It is transporting, by common carriers, passengers and property from one state into another state. It is the selling and buying of a commodity, or commodities, by a citizen of one state to a citizen of another state, which commodity is to be transported from the state of the seller to the state of the buyer, or to another state, and there resold, or used, as may serve the purpose of the buyer. Under these definitions, Act June 11, 1906, c. 3073, 34 Stat. 232, "relating to the liability of common carriers \* \* \* engaged in commerce between the states \* \* \* to their employes," and which makes every such carrier liable to any employe or his personal representative for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works, is not a regulation of "interstate commerce," but establishes new rules of liability, growing out of the relation of master and servant, which, if valid, are binding on all courts, both state and federal, but which have no such relation to "interstate commerce" as to bring them within the constitutional power of Congress to regulate such commerce, and the act is for that reason void. *Howard v. Illinois Cent. R. Co.*, 148 Fed. 997, 999, 1000 (citing *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 826, 114 U. S. 196, 29 L. Ed. 158; *Wabash, St. L. & P. R. Co. v. Illinois*, 7 Sup. Ct. 4, 118 U. S. 557, 30

L. Ed. 244; *Hopkins v. United States*, 19 Sup. Ct. 40, 171 U. S. 578, 43 L. Ed. 290).

"Interstate commerce" within the exclusive jurisdiction of Congress, involves, as an essential and indispensable element, the transportation of property or intelligence from one state to another, embracing not only the property or intelligence so sent, but the physical agencies, as the railroad, express and telegraph companies engaged in the commerce, and their employes, as well as all persons who are directly connected as principals or agents in carrying on the business, except that as applied to intelligence it does not include all persons who write letters, but is confined to those persons, such as the postal authorities and employes of telegraph companies, through whose agency or instrumentality the intelligence desired to be sent is conveyed, and those who send or exchange intelligence as an essential part of their business and that directly results in the transportation of property. Defendant, a foreign corporation, operated a scheme to obtain commercial credits by publishing a list of attorneys throughout the United States, to promptly remit all moneys collected, and placed in the hands of subscribing business concerns throughout the United States. The attorneys paid defendant for advertisement or representation in the list, and also agreed to furnish defendant's business customers gratis credit reports direct concerning business houses in the vicinity of the attorney's residence with whom the business subscribers were contemplating contracts. These reports were sent through the mail irregularly and had no direct relation to the sale of goods to be transported in interstate commerce. Held, that the furnishing of such reports by defendant through its attorneys was not "interstate commerce," so as to relieve defendant from liability for a license tax under Ky. St. § 4224 (Russell's St. § 6157), providing that each corporation and its representatives in the state, engaging in reporting credits, shall pay a license tax of \$100. *United States Fidelity & Guaranty Co. v. Commonwealth*, 129 S. W. 314, 317, 139 Ky. 27, Ann. Cas. 1912B, 333.

Whatever may be the precise meaning of the words "interstate commerce," and their significance is certainly very broad, goods brought from one state into another at some time reach a stage where they are no longer immune by reason of the interstate commerce clause from any otherwise legal intrastate regulation. Respecting intoxicating liquors, that point of time is fixed by Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313, to be upon arrival in the state. *Commonwealth v. People's Exp. Co.*, 88 N. E. 420, 423, 201 Mass. 564, 131 Am. St. Rep. 416 (citing *Hopkins v. United States*, 19 Sup. Ct. 40, 171 U. S. 578, 597, 43 L. Ed. 290).

While the installation of a new elevator in a building by a foreign corporation en-



gaged in the business of manufacturing, constructing, and installing elevators might be an act of "interstate commerce," the repair of an old elevator is not. *Haughton Elevator & Mach. Co. v. Detroit Candy Co.*, 120 N. W. 18, 19, 156 Mich. 25.

#### **Agencies or instruments of**

A sectionhand working on the track of a railroad over which both interstate and intrastate traffic is moved is employed in "interstate commerce" within *Employers' Liability Act* April 22, 1908, c. 149, 35 Stat. 65. *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893, 898.

"Interstate commerce," though perhaps not limited thereto, includes interstate intercourse. "Interstate intercourse" is the passage of property, persons, or messages from within one state to within another state. It has certain adjuncts, to wit, the persons corporate or natural and their employes effectuating the passage; the means by which they effectuate it, including the ways, artificial, or natural, over which, and the instrumentalities by which, the passage is made and the money charged for the services rendered. Strictly speaking, these things are not interstate intercourse or commerce. They are merely the adjuncts thereof, but Congress is empowered by the provision of subsection 3, § 8, art. 1, of the Constitution, conferring on it the power to regulate commerce with foreign nations and among the several states and with the Indian tribes, to regulate the adjuncts of interstate commerce as much so as interstate commerce itself. Its power to regulate them is as extensive, full, and complete as its power to regulate it. *United States v. Adair*, 152 Fed. 737, 743.

A connecting railroad carrier over whose line an interstate shipment passes is engaged in "interstate commerce" with respect to such shipment and subject to the law regulating the same, although its line may lie wholly within one state. *United States v. Standard Oil Co.*, 155 Fed. 305, 310.

The headlight law (Act Aug. 17, 1908; Laws 1908, p. 50), requires a railroad company to equip and maintain every locomotive running on its main line after dark with a good and sufficient headlight, which shall consume not less than 300 watts at the arc, with a reflector not less than 23 inches in diameter, and to keep such headlight in good condition, and provides that any railroad company violating the act shall be liable to indictment and punishment, and that the act shall not apply to tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills. Held, that the act does not violate Const. U. S. art. 1, § 8, par. 3, giving Congress power to regulate commerce among the states, etc., because it would require at the state line a change of headlights on locomotives doing an interstate business, if oth-

er states required headlights different from those prescribed by the act, though such change might involve some loss of time and expense on the part of the railroad company. *Atlantic Coast Line R. Co. v. State*, 69 S. E. 725, 729, 135 Ga. 545, 32 L. R. A. (N. S.) 20.

Revisal 1905, § 1097 (5), requiring that a railroad shall, in certain cases, put in side tracks to private industrial concerns, is not an interference with interstate commerce although such a road may run through several states, and may carry freight over this side track to other states. *Corporation Commission v. Southern Ry. Co.*, 69 S. E. 621, 622, 153 N. C. 559.

A foreign corporation controlling the subordinate councils of a beneficial association within a state is not engaged in interstate commerce in such sense as to preclude the Legislature from excluding it from the state. *National Council Junior Order United American Mechanics v. State Council Junior Order United American Mechanics*, 51 S. E. 166, 169, 104 Va. 197.

Act Cong. April 22, 1908, c. 149, 35 Stat. 65, imposing on interstate carriers liability to employes engaged in interstate commerce for injuries received through negligence of fellow servants, held a valid regulation of interstate commerce. *Owens v. Chicago Great Western Ry. Co.*, 128 N. W. 1011, 1013, 113 Minn. 49.

A corporation organized for the purpose of maintaining a stockyard, with the usual facilities of such yards as to loading and unloading and caring for freight, which lawfully owns and operates a railroad system for the transportation of cars to and from trunk lines, in the course of their transportation from beyond the state and to points outside of the state, is an interstate railway carrier, within the meaning of the interstate commerce act of February 4, 1887, and as such is obliged to file its tariffs with the Interstate Commerce Commission, as required by section 6 of that act. *United States v. Union Stockyard & Transit Co. of Chicago*, 33 Sup. Ct. 83, 85, 226 U. S. 286, 57 L. Ed. 226.

#### **Commencement**

Produce does not become a matter of interstate commerce until delivered to the carrier to be transported out of the state to the state of its destination, or until it has started on its ultimate transportation to that state. *State v. Missouri Pac. Ry. Co.*, 115 N. W. 614, 617, 81 Neb. 15.

"Interstate commerce" does not begin until the freight has been shipped or started for transportation from one state to another. *Reid v. Southern Ry. Co.*, 69 S. E. 618, 619, 153 N. C. 490.

#### **Employers' Liability Act**

Where an employe of defendant, an interstate railroad company, was injured, in

part through the negligence of a fellow servant, when working in repair shops connected with an interstate track, engaged in repairing a car used by defendant indiscriminately in both interstate and intrastate commerce as occasion required, defendant was at the time "engaged in interstate commerce," and the employé was employed by defendant in such commerce, within the meaning of Employers' Liability Act April 22, 1908, c. 149, § 1, and an action for his injury or death may be maintained against defendant thereunder. *Northern Pac. Ry. Co. v. Maerkel*, 198 Fed. 1, 4, 117 C. C. A. 237.

Employés of a railroad company, injured while repairing a car of another company which had reached the end of its run, been unloaded, and was lying at a station awaiting orders, were not at the time employed in interstate commerce within Employers' Liability Act. *Heimbach v. Lehigh Valley R. Co.*, 197 Fed. 578, 579.

An employé of a railroad company engaged in interstate commerce, who was killed in a collision while riding to his home by permission on one of the company's trains, but who was not at the time and so far as appeared had not just previously been employed in interstate commerce, was not within Employers' Liability Act, and there can be no recovery for his death thereunder. *Bennett v. Lehigh Valley R. Co.*, 197 Fed. 578, 579.

A member of a railroad bridge gang, injured, while engaged and within the scope of his employment in repairing bridges, by an alleged defective scaffold, though his duties required work in the repair of bridges for the railroad company in different states, was not "employed in interstate commerce," within the Employers' Liability Act, making a common carrier by railroad, while engaged in commerce between the several states, liable in damages to any person suffering an injury while he is employed by such carrier in such commerce, etc. *Taylor v. Southern Ry. Co.*, 178 Fed. 380, 381.

An extra conductor in the employ of a railroad company directed on reporting for work to ride to another point within the same state for service on a work train, and who was injured while proceeding to his train, was not at the time employed in interstate commerce within Employers' Liability Act. *Feaster v. Philadelphia & R. Ry. Co.*, 197 Fed. 580, 581.

Where interstate, a fireman on one of defendant's switch engines, was ordinarily employed in interstate commerce, though mingled with employment in commerce wholly within the state, he was engaged in interstate commerce within the federal Employers' Liability Act, so that an action for his alleged wrongful death could be maintained thereunder, though at the precise time of the accident he was working on an intrastate train.

*Behrens v. Illinois Cent. R. Co.*, 192 Fed. 581, 582.

A brakeman on a train running between points in this state, but consisting in part of freight cars consigned to points outside the state, injured by the negligence of a fellow servant while engaged at a siding in cutting out cars shipped from and billed to points in this state, was engaged in interstate commerce within the federal Employers' Liability Act, so that an action for his injury could be maintained thereunder; his work at the siding being merely an incident to the operation of the entire train in interstate commerce. *Carr v. New York Cent. & H. R. R. Co.*, 136 N. Y. Supp. 501, 506, 77 Misc. Rep. 846.

When an engine and tender used by defendant railroad company in hauling interstate trains between two points reached the end of their run and had been placed on a fire track as usual to await the time for starting on the return trip, plaintiff, who was employed in making running repairs, was sent to replace a bolt which had been lost from a brake shoe of the tender, and while so employed was injured through the negligence of a fellow servant. Held, that defendant was engaged in interstate commerce, and plaintiff was employed therein at the time of his injury, within the meaning of Employers' Liability Act, and could maintain an action thereunder. *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665, 668.

Where a train was being prepared to leave a town, and the conductor was engaged in getting it ready for transportation of freight both within the state and beyond the boundaries, he was "engaged in interstate commerce," within the Employers' Liability Act. *Neil v. Idaho & W. N. R. R.*, 125 Pac. 331, 336, 22 Idaho, 74.

A carrier was engaged in interstate commerce at the time of the death of an engineer from a collision occurring after the arrival with his train from another state at the terminus of the railroad in this state while switching certain cars of his train preparatory to placing them in the yards according to orders previously received. *Kansas City, M. & O. Ry. Co. of Texas v. Pope (Tex.)* 152 S. W. 185, 187.

Employés of a railroad company engaged in hauling freight from some intermediate point on its line to another point where it is taken up by regular trains for interstate shipment are "employed in interstate commerce" within the meaning of Act March 4, 1907, c. 2939, § 2, regulating the hours of service of employés. *United States v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 624, 626.

#### Brokers or soliciting agents

A broker, engaged in buying and selling cotton for future delivery, employed a local agent to take orders of those desiring to buy

or sell future cotton contracts, which were executed by the broker at the New York or New Orleans exchange. The customer, at the time of giving the order, deposited with the agent money as margin to protect the broker against loss in the event the course of the market was adverse to the customer. The broker furnished the customer with a memorandum reserving the right to close the transaction when the margin deposited was exhausted, and to settle the contract in accordance with the customs of the exchange at which the order was placed. The order of the customer was transmitted by wire by the agent to the broker's office in New York or New Orleans, where it was executed. Held, that the contracts entered into by the broker with his customers were not "interstate commerce," and the broker was properly chargeable with the tax imposed by Gen. Acts 1903, p. 207, imposing a tax on persons engaged in the business of buying and selling futures for speculation. A shipment of cotton in discharge of such contract, though made from one state to another, was not interstate commerce by virtue of the contract, but by the subsequent and independent act of a party thereto; and the fact that the contracts were sometimes discharged by the delivery of cotton did not relieve the broker of the liability to pay the tax imposed. *Ware v. Mobile County*, 41 South. 153, 155, 146 Ala. 163, 14 L. R. A. (N. S.) 1081, 121 Am. St. Rep. 21 (citing *Paul v. Virginia*, 8 Wall. 183, 19 L. Ed. 357; *Hooper v. California*, 15 Sup. Ct. 207, 155 U. S. 648, 39 L. Ed. 297; *New York Life Ins. Co. v. Cravens*, 20 Sup. Ct. 962, 178 U. S. 389, 44 L. Ed. 1116).

Code 1896, § 5087, prohibiting the soliciting of orders for spirituous, vinous, or malt liquors to be shipped into a district in which the sale of such liquors is prohibited, in so far as it purports to apply to residents of other states soliciting orders for spirituous liquors to be transported from another state into Alabama, is violative of the commerce clause of the federal Constitution. *Moog v. State*, 41 South. 166, 168, 145 Ala. 75 (citing *Austin v. Tennessee*, 21 Sup. Ct. 132, 179 U. S. 343, 45 L. Ed. 224; *Walling v. Michigan*, 6 Sup. Ct. 454, 116 U. S. 446, 459, 29 L. Ed. 691; *Lelsy v. Hardin*, 10 Sup. Ct. 681, 135 U. S. 100, 34 L. Ed. 128; *Plumley v. Massachusetts*, 15 Sup. Ct. 154, 155 U. S. 461, 470, 471, 479, 480, 39 L. Ed. 223; *In re Rahrer*, 11 Sup. Ct. 865, 140 U. S. 545, 564, 35 L. Ed. 572; *Rhodes v. Iowa*, 18 Sup. Ct. 664, 170 U. S. 412, 426; 42 L. Ed. 1088; *In re Bergen*, 115 Fed. 339; *State v. Hanaphy*, 90 N. W. 601, 117 Iowa, 15; *Westheimer v. Weisman*, 57 Pac. 969, 60 Kan. 753).

The business of taking orders on commission for the purchase and sale of grain and cotton for future delivery, and transmitting them to other states, is not interstate commerce, so as to be exempt from state taxation, where, in those cases in which con-

tracts for purchases for future delivery result in an actual delivery, the property is bought in the state to which the orders are transmitted, and there held for the purchaser, and in those cases in which there is a delivery upon a contract of sale made by the broker, the seller is at liberty to acquire the property in the market where delivery is required or elsewhere. *Ware & Leland v. Mobile County*, 28 Sup. Ct. 526, 529, 209 U. S. 405, 52 L. Ed. 855, 14 Ann. Cas. 1031.

Defendant, having taken orders for groceries in Missouri, sent them to wholesale grocers in Illinois, where the different articles were made up in packages, and all shipped together in one or more large boxes and barrels to the grocers' own order in Missouri, with directions to their agent not to deliver the goods to defendant until paid for. Such agent received the goods and removed them to his warehouse, where the bulk was broken, and the different packages for each customer segregated and delivered to them, through defendant, on their paying the price to defendant, and he delivering the money to such agent. Held, that the sale was not a transaction in "interstate commerce." *Town of Canton v. McDaniel*, 86 S. W. 1092, 1097, 188 Mo. 207.

The sale of picture frames, etc., by an agent acting for a principal in another state, where the pictures were made and shipped to the purchaser, constituted "interstate commerce"; and hence the agent was not subject to a state law (Acts 1906, p. 202) imposing a license tax on picture solicitors. *Commonwealth v. Baldwin*, 96 S. W. 914, 915.

In a prosecution for violation of a city ordinance imposing a license tax on persons soliciting orders for the sale of goods, where defendant is the agent of a nonresident merchant, carries samples and solicits orders, which he sends to his principal for approval, that the principal ships the goods to the same agent with authority to deliver and collect the price will not prevent the transaction from being interstate commerce. *City of Kinsley v. Dyerly*, 98 P. 228, 229, 79 Kan. 1, 19 L. R. A. (N. S.) 405.

Where a foreign corporation shipped perfumery to its agent within the state, who was in charge of a canvassing crew, and they carried the perfumery from house to house, to be purchased or sold by the householder or his children, and later accounted for to another agent of the corporation, such transaction did not constitute "interstate commerce," beyond the authority of plaintiff city to regulate. *City of Muskegon v. Hanes*, 112 N. W. 1077, 1078, 149 Mich. 460.

Where a foreign corporation, without office or place of business in the state, employed agents soliciting orders in the state for lightning rods for future delivery, according to sample rods exhibited when orders were solicited, and the rods ordered were crated

and shipped from the place of business of the corporation in the sister state to the nearest railway point of the buyers, consigned to the corporation, and its agents made deliveries, the transaction was "interstate commerce," and not within Code 1907, § 2361, subd. 58, imposing licenses on persons engaging in the business of selling or delivering lightning rods. *Clark v. State*, 59 South. 236, 237, 4 Ala. App. 202.

A transaction wherein a foreign corporation shipped building material f. o. b. cars in Wisconsin and Illinois, where the material was manufactured, pursuant to an order received by its salesman in Wisconsin and approved at the company's home office in Illinois, constituted interstate commerce within the federal Constitution, and hence the corporation is not prevented from suing on a claim arising from the transaction because it has not complied with St. 1898, § 1770b, prescribing requirements before a foreign corporation may lawfully do business in Wisconsin. *United States Gypsum Co. v. Gleason*, 116 N. W. 238, 241, 135 Wis. 539, 17 L. R. A. (N. S.) 906.

#### **Incidental passage through second state**

Plaintiff purchased a car of guano which was delivered for transportation from Charleston, destination at Barksdale, both within the state, a part of the route over defendant's railway, however, being through the state of Georgia. Held, that such shipment constituted interstate commerce, since the transportation was and hence was not subject to Act Feb. 15, 1907 (25 St. at Large, p. 490), imposing a penalty on carriers for delay. *Traynham v. Charleston & W. C. Ry. Co.*, 75 S. E. 381, 382, 92 S. C. 43.

A shipment of freight from one point in the state to another point therein by way of a town outside the state, is interstate shipment and is not governed by Revisal 1905, § 2632, imposing a penalty on a carrier for its failure to transport freight within a reasonable time. *Shelby Ice & Fuel Co. v. Southern Ry. Co.*, 60 S. E. 723, 724, 147 N. C. 61.

Under Act March 13, 1905 (Laws 1905, p. 29, c. 25), providing that when freight has been transported by two or more railroad corporations, or partly by one or more of them doing business as carriers in the state, suit for damages may be brought against any one or all of such carriers in any court of competent jurisdiction in any county in which either does business or has an agent, an action against the initial and connecting carriers for injuries to freight is properly brought in the county where the initial carrier has a line of railroad and has an agent, though the shipment was an interstate shipment, because in transporting the freight from one point in the state to another point in the state it passed through sister states.

*Texarkana & Ft. S. Ry. Co. v. Shivel & Stewart* (Tex.) 114 S. W. 196, 197.

If merchandise is consigned from one point in a state to another point in the same state, but is, during transit, carried through a portion of another state, the transaction constitutes "interstate commerce." *United States v. Erie R. Co.*, 166 Fed. 352, 354.

A shipment from New York City to Buffalo, by way of New Jersey and Pennsylvania, is "interstate commerce," and so is subject to the provisions of the Elkins law (Act Feb. 19, 1903, c. 708) as to rebates; the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 1), though providing that the provisions of the act shall apply to any carrier engaged in the transportation of passengers or property from one state to any other state, having a proviso that the provisions of this act shall not apply to the transportation of property "wholly" within one state. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269, 271 (citing *Hanley v. Kansas City Southern Ry. Co.*, 23 Sup. Ct. 214, 187 U. S. 617, 47 L. Ed. 333; *Lord v. Goodall N. & P. S. S. Co.*, 102 U. S. 541, 26 L. Ed. 224; *Pacific Coast S. S. Co. v. Board of Railroad Com'rs*, 9 Sawy. 253, 18 Fed. 10; *Lehigh Valley R. Co. v. Pennsylvania*, 12 Sup. Ct. 806, 145 U. S. 192, 36 L. Ed. 672; *United States ex rel. Kellogg v. Lehigh Valley R. Co.*, 115 Fed. 373).

A contract to carry freight between two points within a state constitutes "interstate commerce," where the carrier's line for some distance between the two points passes through another state. *Mires v. St. Louis & S. F. R. Co.*, 114 S. W. 1052, 1055, 134 Mo. App. 379.

A continuous transportation of freight between points within a state is "interstate commerce," free from the interference of the state, where a part of the route is outside of the state because of the unsafe condition of a bridge forming a part of the line of road in the state between such points. *St. Louis & S. F. R. Co. v. State*, 113 S. W. 203, 204, 87 Ark. 562.

The carrying of a pleasure party on a steamboat is not "interstate commerce," although the boat may touch the shores of different states. *State v. Seagraves*, 85 S. W. 925, 927, 111 Mo. App. 353.

Where a defendant manufactured whisky in Kentucky, sent it to Ohio, and then shipped it back into the state on orders for whisky solicited in local option territory in Kentucky, with the express purpose of evading the prohibition laws of Kentucky, the whisky shipped in filling such orders is not "interstate commerce." *Crigler v. Commonwealth*, 87 S. W. 276, 279, 120 Ky. 512.

Laws 1907, c. 276, requiring carriers to transport live stock within the state at a speed not less than 15 miles per hour unless

unavoidably prevented, does not apply to interstate commerce, and a shipment of live stock between points in the state which passes for a short distance over territory of another state is interstate commerce, and non-compliance with the act in such a shipment affords no ground for recovery against the carrier. *Leibengood v. Missouri, K. & T. Ry. Co.*, 109 Pac. 988, 989, 83 Kan. 25, 28 L. R. A. (N. S.) 985.

Merchandise transported between two points within the state, but carried by a carrier's lines through a neighboring state, is interstate commerce. *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co.*, 124 N. W. 819, 821, 110 Minn. 25, 19 Ann. Cas. 1088.

#### Insurance

The business of insuring property against loss by fire, or contracting for indemnity, as carried on by a company with citizens of different states, is not "interstate commerce" within the commerce clause of Const. U. S. art. 1, § 8, cl. 3. *State v. Insurance Co. of North America*, 106 N. W. 768, 769, 71 Neb. 320 (citing and adopting *New York Life Ins. Co. v. Cravens*, 20 Sup. Ct. 962, 178 U. S. 389, 44 L. Ed. 1116; *Hooper v. California*, 15 Sup. Ct. 207, 155 U. S. 648, 39 L. Ed. 297, and *Crutcher v. Kentucky*, 11 Sup. Ct. 851, 141 U. S. 47, 35 L. Ed. 649).

#### Sale of goods in another state

A sale for delivery beyond the state constitutes "interstate commerce." The national commerce includes not only carriage, but the purchase, sale, and exchange of commodities, and any agreement which directly operates upon the sale, transportation, and delivery of an article of "interstate commerce" by preventing or restraining its sale thereby regulates such commerce to that extent, and to the same extent trenches upon the power of the national Legislature. *Laws Wis. 1905*, p. 37, c. 19, as amended by *Laws Sp. Sess. 1905*, p. 19, c. 12, which provides for the inspection, grading, and weighing of grain at Superior, and requires all grain sold, delivered, stored, or reshipped at that point to be in accordance with the weights and grades so established and all warehouse receipts to be based thereon, and expressly prohibiting any sales or deliveries under Minnesota grades, is an interference with "interstate commerce." *Globe Elevator Co. v. Andrew*, 144 Fed. 871, 882.

Where plaintiff furnished certain furniture, fittings, etc., for certain United States vessels under a subcontract with the contractor, and all of the articles of furniture, etc., were brought from New Jersey into Pennsylvania and delivered in Philadelphia, the transaction constituted interstate commerce as to which Act Pa. 1874 (P. L. 108), requiring a foreign corporation to register before doing business within the state, was

inapplicable. *United States v. United States Fidelity & Guaranty Co.*, 178 Fed. 721, 725.

The selling by a corporation created by another state of goods manufactured in that state and shipped into the state of Texas is an interstate transaction, and, in a suit for the balance of the price of the goods, it is not necessary for plaintiff to allege or prove a permit to do business in Texas. *Heisig Rice Co. v. Fairbanks, Morse & Co.*, 100 S. W. 959, 960, 45 Tex. Civ. App. 383.

Transactions involving a physical transfer of merchandise from the possession and title of an owner in one state to the possession and ownership of purchasers in another state are interstate. *Loverlin & Browne Co. v. Travis*, 115 N. W. 829, 831, 135 Wis. 322.

Where plaintiff, engaged in the wholesale liquor business in Ohio, without any place of business in Michigan, except one where a few samples were kept, contracted in Michigan to sell defendant whisky to be shipped from Ohio to defendant in Michigan in the original packages, the transaction constituted "interstate commerce," and not a sale of liquor within Comp. Laws 1897, §§ 4018, 5379, regulating sales of liquor within the state, and imposing a tax on the business of selling such liquors at wholesale. *Sloman v. William D. C. Moebis Co.*, 102 N. W. 854, 855, 139 Mich. 334 (citing *Lyng v. Michigan*, 10 Sup. Ct. 725, 135 U. S. 161, 34 L. Ed. 150; *Leisy v. Hardin*, 10 Sup. Ct. 681, 135 U. S. 100, 34 L. Ed. 128; *Scott v. Donald*, 17 Sup. Ct. 265, 165 U. S. 58, 41 L. Ed. 632; *Vance v. W. A. Vandercook Co.*, 18 Sup. Ct. 674, 170 U. S. 438, 42 L. Ed. 1100; *American Express Co. v. Iowa*, 25 Sup. Ct. 182, 196 U. S. 133, 49 L. Ed. 417).

A corporation engaged in the business of manufacturing and selling hay presses, and employing agents in a state other than of its domicile to solicit orders, which are forwarded to it in such other state, for approval, and, if approved, the presses are shipped to the purchaser or to the agent for the purchaser, is engaged in "interstate commerce," and is not subject to the penalty imposed by a state statute for failure to comply with a requirement that it shall file in the office of the Secretary of State a statement of the location of its office and the name of its agent on whom process can be served. *Commonwealth v. Eclipse Hay Press Co. (Ky.)* 104 S. W. 224.

Intoxicating liquor shipped from one state into another on a C. O. D. contract is "interstate commerce," and cannot be controlled by state laws. *Sedgwick v. State*, 85 S. W. 813, 815, 47 Tex. Cr. R. 627.

Where a package of liquor was shipped C. O. D. from without the state by means of defendant express company to a consignee, within the state, to whom it was delivered upon payment of the price with the cost of

transportation added, the liquor having been ordered by the consignee in the state from which it was shipped, the shipment constituted "interstate commerce," and was not a violation of the local option law of the district to which the liquor was consigned. *Adams Express Co. v. Commonwealth (Ky.)* 96 S. W. 593, 594.

The sale of goods by citizens of one state to citizens of another state constitutes "interstate commerce," and no state may forbid or control such transactions. *Frank A. Menne Factory v. Harback Bros.*, 107 S. W. 991, 993, 85 Ark. 278.

#### Transportation

The intention or purpose of the owners of an interstate shipment of a car load of grain to forward such car from the original terminal point to another point in the same state does not make the shipment between such two points, when performed by a connecting carrier to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an "interstate" one, and, as such, exempt from the regulations of the State Railroad Commission. *Gulf, C. & S. F. R. Co. v. Texas*, 27 Sup. Ct. 360, 362, 204 U. S. 403, 51 L. Ed. 540.

Where a company in a foreign state ships to an agent only such goods as are ordered, placing several packages in a box, and the agent opens the box and delivers the packages to customers in accordance with their previous orders, the particular package involved being delivered in the form the company received them from the manufacturers, the whole transaction constitutes "interstate commerce." *State v. Eckenrode*, 127 N. W. 56, 62, 148 Iowa, 173.

The transportation of merchandise from a place in one state to a place in another is commerce among the states, or "interstate commerce." *Hardy v. Atchison, T. & S. F. R. Co.*, 5 Pac. 6, 9, 32 Kan. 698.

Transportation by a common carrier by railroad of articles of interstate commerce for an independent express company is "engaging in interstate commerce by railroad," within Safety Appliance Acts, Act March 2, 1893, c. 196, § 1, Act April 1, 1896, c. 87, and Act March 2, 1903, c. 976, § 1. *United States v. Colorado & N. W. R. Co.*, 157 Fed. 342, 344, 85 C. C. A. 48.

The reference in Safety Appliance Act March 2, 1903, c. 976, "to any railroad engaged in interstate commerce," applies to the interstate highway as an instrument of commerce; and, Congress having taken affirmative action in reference thereto, its control of the interstate highway being thereby conclusive, the statute requiring vehicles running on interstate highways to be provided with certain appliances embraces all uses of

the highway, whether for the transportation of interstate traffic or for the transportation of traffic from a point within the state to another point in the same state by carriers engaged in interstate commerce. *United States v. Southern Ry. Co.*, 164 Fed. 347, 351.

Defendant owned a railroad located wholly in Cook County, Ill. Its road constituted a belt which intersected the trunk lines leading into Chicago, and forming, by means of Y's, direct physical connection with such trunk lines. Defendant's business consisted entirely of transporting cars between industries located along its line and trunk lines and between such trunk lines, for which it received an arbitrary charge per car, which was collected monthly from the railroad companies, defendant having no dealings with shippers. Defendant paid no attention to the class of traffic, but acted as an agent for the trunk lines in transferring cars. Defendant moved a train of freight cars, containing one consigned from a point in Illinois and destined to Wisconsin from the tracks of the Chicago & Eastern Illinois Railroad to those of the Chicago & Northwestern Railroad. Held, that such transfer constituted in effect a continuous carriage over both such roads, so that defendant with respect thereto was engaged in interstate commerce, and was within the safety appliance acts in relation to power brakes. Act Cong. March 2, 1893, c. 196, Act Cong. April 1, 1896, c. 87, and Act Cong. March 2, 1903, c. 976. *Belt Ry. Co. of Chicago v. United States*, 168 Fed. 542, 543, 93 C. C. A. 666, 22 L. R. A. (N. S.) 582.

Defendant purchased whisky in North Carolina, and while transporting it from the place of purchase to his home, after entering South Carolina, was arrested for a violation of the state law, and the whisky seized. The liquor was for his personal use, was being conveyed by him in his buggy, and nothing had been done to break the continuity of the transportation from the place of purchase to his home. Const. U. S. art. 1, § 8, provides that Congress shall have power to regulate commerce among the several states, and the "Wilson Act" (26 Stat. 313) provides that all liquors transported into any state, or remaining there for use, consumption, or sale therein, shall on arrival in such state be subject to the laws of such state enacted in the exercise of its police powers. Held, that the whisky had not at the time of its seizure "arrived," within the meaning of the Wilson Act, but was in course of transportation, and was not subject to seizure under the state laws. *State v. Holleyman*, 33 S. E. 366, 367, 55 S. C. 207, 45 L. R. A. 567.

A so-called "lake cargo rate," made by a railroad company for the carriage of coal in car load lots from a mining district in Ohio to Huron and Cleveland, ports in that state on Lake Erie, which includes the loading of vessels with such coal for transportation to

ports in other states on the Upper Lakes, is a rate for transportation in interstate commerce, and not subject to regulation by the Railroad Commission of Ohio. *Railroad Commission of Ohio v. Worthington*, 187 Fed. 965, 969, 110 C. C. A. 85.

Where defendant railway company, which had, in accordance with the federal statutes, published its rate for interstate traffic, and filed this rate with the Interstate Commerce Commission and the State Railroad Commission, joined with other carriers in transporting marble, consigned to plaintiff, from Vermont to Kentucky, the shipment was interstate commerce, and subject to the freight rates fixed for interstate commerce, and not the local rates fixed by the State Railroad Commission, though defendant had no agreement with the initial carriers that it would constitute a part of a through line for interstate commerce from Vermont to Kentucky. *Corcoran v. Louisville & N. R. Co.*, 101 S. W. 1185, 1186, 125 Ky. 634.

A shipment of a case of beer from another state into local option territory in Kentucky is "interstate commerce," and is therefore not subject to the control of the prohibition statute in force where received. *Commonwealth v. Illinois Cent. R. Co. (Ky.)* 101 S. W. 894, 895.

"Interstate commerce," as that term is understood with reference to the provision of the federal Constitution, consists of intercourse and traffic between citizens of the states, including the transportation of persons and property between points in different states. It applies to all commerce crossing the state line, regardless of the distance of the point from which it comes or to which it is bound, before or after crossing such line; nor is it material, as applied to a particular carrier, that the whole line is within the state, if the transportation by the carrier is a part of one continuous journey from one state to another under one continuous contract of carriage. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 825, 246 Ill. 188.

Acts 1906, p. 413, c. 257, amending the charter of the C. & P. Railroad Company so as to prohibit it from allowing its tracks to connect with the tracks of the B. & O. Railroad Company, which passes through other states, unless the latter shall so arrange its freight charges on coal delivered to it from the former that the combined freight charges of the two companies shall not exceed the lowest freight charges on coal shipped to the same destination over the B. & O. from any point in Pennsylvania or West Virginia, which is as far or further distant from the destination than the point in Allegany county, where the coal is delivered to the C. & P. is invalid as an attempt to regulate "interstate commerce." *State v. Cumberland & P. R. Co.*, 66 Atl. 458, 461, 105 Md. 478.

A sale is not the test of "interstate commerce." All sales of sound articles of merchandise, which necessitate the transportation of goods sold from one state to another, are "interstate commerce"; but all "interstate commerce" is not sales of goods. Importation into one state from another is the indispensable element, the test, of "interstate commerce"; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of "interstate commerce." *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 7, 84 C. C. A. 167.

"Interstate commerce" consists of intercourse and traffic between citizens of different states, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980, 983 (citing *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 826, 828, 114 U. S. 196, 203, 29 L. Ed. 158).

The term "interstate commerce" always implies the idea of goods, wares, or merchandise, manufactured, produced, or prepared in one jurisdiction, and carried into another for the purpose of sale. *Cook v. Marshall County*, 93 N. W. 372, 373, 119 Iowa, 384, 104 Am. St. Rep. 283.

The importation into one state from another is the test of "interstate commerce." Every part of every transportation of articles of commerce in a continuous passage from a commencement in one state to a prescribed destination in another is a transaction of "interstate commerce." Every carrier who transports such goods through any part of such continuous passage is engaged in "interstate commerce," whether the goods are carried upon through bills of lading or are re-billed by the several carriers. *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321, 323, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

What is intended by the phrase commerce among the states is "interstate traffic," buying and selling of merchandise, transportation by common carriers of persons or property by land or by water from one state to another, and the use of navigable waters throughout the United States—all is comprehended. While "interstate commerce" necessarily involves interstate transportation, the converse is not always true. A railroad or ferry company, for example, which transports persons or property from one state to another, is undoubtedly engaged in "interstate commerce," and a tax by the state upon owners of vessels or common carriers so transporting persons or property has been held void as a regulation of commerce. On the other hand, interstate transportation

may be conducted without constituting commerce or traffic, which has been defined to be the exchange of merchandise between individuals, communities, or countries, whether direct in the form of barter or by the use of money or other medium of exchange. A manufacturer who sends his goods manufactured in Connecticut to his own entrepot or store in New York City transports the products from one state to another, but the transportation by such owner is not of itself, so far as the owner is concerned, interstate commerce in the sense that the city of New York has no power to tax the goods thus stored and awaiting sale in New York, although the merchandise may be intended for a foreign market. The transaction lacks the essential element of trade, namely, sale or exchange. *Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction*, 68 Atl. 806, 808, 75 N. J. Law, 922, 15 L. R. A. (N. S.) 514 (citing *Mobile County v. Kimball*, 102 U. S. 691, 702, 26 L. Ed. 238; *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 826, 114 U. S. 196, 203, 29 L. Ed. 158; *Kidd v. Pearson*, 9 Sup. Ct. 6, 128 U. S. 1, 32 L. Ed. 346; *Smith v. Turner*, 7 How. [48 U. S.] 283, 12 L. Ed. 702; *Pickard v. Pullman Southern Car Co.*, 6 Sup. Ct. 635, 117 U. S. 34, 29 L. Ed. 785; *American Steel & Wire Co. v. Speed*, 24 Sup. Ct. 365, 192 U. S. 500, 48 L. Ed. 538).

"'Interstate commerce' consists of intercourse and traffic between citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." *Barnhard Bros. & Spindler v. Morrison* (Tex.) 87 S. W. 376, 378.

"'Interstate commerce,' or commerce among the states, means the exchange of property in another state. Its essential characteristic is that the property affected must be transported to some point without the state. There must be interstate movement of property. The interchange may be between residents of different states or residents of the same state, but the property exchanged must move from one state to another. There can be no interstate commerce without interstate transportation of property, which includes money as well as merchandise and whatever can become the subject of exchange. *People ex rel. Hatch v. Reardon*, 77 N. E. 970-977, 184 N. Y. 431, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515.

"'Interstate commerce,' or commerce among the several states of the Union, is commerce which concerns more states than one. Strictly considered, it consists in intercourse and traffic; including in these terms navigation and the transportation and transfer of persons and property, as well as the purchase, sale, and exchange of commodi-

ties." *Belle City Mfg. Co. v. Frizzell*, 81 Pac. 58, 59, 11 Idaho, 1.

#### **Holding, inspecting, or storing goods**

Complainant shipped coal from Pennsylvania to its own order to a dock in New Jersey, where it was transferred from the cars either into bottoms for continued transportation to consignees then determined upon, or, when no bottoms were available, the coal was dumped onto a dock, from which it was later transferred to bottoms as occasion required. Held, that the coal so temporarily stored at the dock ceased to be "interstate commerce," notwithstanding the intention to trans-ship, and was therefore subject to state taxation, under the rule that, to claim exemption from taxation under the commerce clause of the federal Constitution, there must be a continuous movement of the merchandise in interstate commerce, pursuant to an existing contract of sale or consignment. *Susquehanna Coal Co. v. South Amboy*, 184 Fed. 941, 944.

Where goods were transported in interstate commerce to destination in Oregon, and received by the consignee, placed in a warehouse, and freight paid, the interstate character of the shipment terminated, and subsequent transportation in the original packages to other points in Oregon by the consignee was intrastate traffic, for which the carrier was only entitled to charge state rates provided by the State Board of Railroad Commissioners. *Oregon R. & Nav. Co. v. Campbell*, 180 F. 253, 254.

The agreement of the local agent of an express company to hold for a few days a C. O. D. interstate shipment of intoxicating liquors, to suit the convenience of the consignee in paying for such liquor and taking it away, does not destroy the character of the transaction as "interstate commerce," so as to render the express company amenable to prosecution for violating a state local option law. *Adams Exp. Co. v. Kentucky*, 27 Sup. Ct. 606, 607, 206 U. S. 129, 51 L. Ed. 987.

Defendant, a domestic corporation, agreed with the agent of plaintiff, a foreign corporation, to purchase a bale of sponges, subject to inspection. The agent had the sponges, together with other consignments, shipped to him at the city in which defendant conducted its business, and, on defendant's direction, inspected the bales by cutting the cords, examining the contents, and then putting all the sponges back, and refastening the bales as they were before they were opened. Thereupon a bale was delivered to defendant. Held, that the facts justified a finding that the sponges were shipped merely for purpose of inspection, and were delivered to defendant in the original package, and had not lost before their delivery their character as the subject of "interstate commerce." *Greek-American Sponge Co. v.*



Richardson Drug Co., 102 N. W. 888, 890, 124 Wis. 469, 109 Am. St. Rep. 961.

Coal shipped from Pennsylvania and stored in New Jersey to await orders for sale and then to be trans-shipped to customers purchasing, after such storage, is not in "interstate commerce." *Lehigh & Wilkesbarre Coal Co. v. Borough of Junction*, 66 Atl. 923, 75 N. J. Law, 68.

#### Telegraphing and telephoning

Intercourse between the states by the telegraph is "interstate commerce." *Western Union Tel. Co. v. Commercial Mill Co.*, 31 Sup. Ct. 59, 60, 218 U. S. 406, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815.

Telegraph business is interstate commerce, and the telegraph company is engaged in interstate commerce. *Postal Telegraph-Cable Co. v. City of Mobile*, 179 Fed. 955, 956.

A telegraph line is an "instrument of commerce," and telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business under Const. U. S. art. 1, § 8, authorizing Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, but the state is not precluded from enforcing a penalty for failure to deliver a message sent over a telegraph line from another state under Code 1887, § 1291. *Postal Telegraph-Cable Co. v. Umstadter*, 50 S. E. 259, 260, 103 Va. 742, 2 Ann. Cas. 511.

While all telegraph lines extending through different states are instruments of commerce, so that messages passing over them from one state to another constitute "interstate commerce," within the meaning of the provisions of the federal Constitution relating thereto, in absence of the enactment by Congress of statutes upon the same subject, a statute such as Rev. Laws, c. 122, § 9, requiring a telegraph company to receive dispatches from any person and transmit them impartially on payment of the usual charges, is not a regulation of interstate commerce, within the meaning of such constitutional provision, being a proper police regulation, which only incidentally affects interstate commerce. *Vermilye v. Western Union Telegraph Co.*, 93 N. E. 635, 639, 207 Mass. 401.

Communication by telegraph or telephone between points in different states is "interstate commerce." *Sunset Telephone & Telegraph Co. v. City of Eureka*, 172 Fed. 755, 758.

#### Conducting correspondence school

It has been decided by the federal Supreme Court that a foreign corporation conducting a correspondence school is "engaged in interstate commerce," within the federal Constitution. *International Text-Book Co. v. Gillespie*, 129 S. W. 922, 927, 229 Mo. 397.

"Interstate commerce" is unconstitutionally regulated by the provisions of Gen. St. Kan. 1901, § 1283, under which the filing of a statement of financial condition is made a prerequisite to the right of a foreign corporation engaged in imparting instruction by correspondence to do business in the state, where such business involves the solicitation of students in Kansas by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse by correspondence between the company and its students and agents, wherever situated, and the transportation of the needful books, apparatus, and papers. Commerce is conducted among the states, within the meaning of the federal Constitution, by a corporation engaged in imparting instruction by correspondence, whose business involves the solicitation of students in other states by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse between the corporation and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers. *International Text-Book Co. v. Pigg*, 30 Sup. Ct. 481, 485, 217 U. S. 91, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

Where plaintiff was engaged in business of instruction by correspondence in various subjects, the instruction being carried on entirely by letter through the mails, it was not engaged in interstate commerce within the federal Constitution, so as to prevent a state from requiring it to pay a license tax as a condition precedent to doing business therein under the protection of its laws. *International Text-Book Co. v. Lynch*, 69 Atl. 541, 543, 81 Vt. 101.

The business of a Pennsylvania correspondence school is carried on in New York by agencies in various parts of the state to solicit persons to contract with it for instruction. It has different division offices, each in charge of the corporation's district superintendent having under him a corps of the corporation's representatives. The expenses of the offices are paid by the corporation, and the payments made by subscribers are collected by the superintendents, deposited in special accounts in their own names in the cities where the offices are situated, and are from time to time sent to the corporation. The corporation sells textbooks, drawings, and other outfits in the state, and each of its superintendents and representatives is required to be qualified to give instruction to its students, and assistance therein is given at the division offices to such students as desire it. Held, that its business in the state is not "interstate commerce." *International Text-Book Co. v. Connelly*, 124 N. Y. Supp. 603, 608, 67 Misc. Rep. 49.

**INTERSTATE COMMERCE COMMISSION**

See Order of Interstate Commerce Commission.

**INTERSTATE INTERCOURSE**

See Interstate Commerce.

**INTERSTATE SHIPMENT**

See Interstate Commerce.

**INTERSTATE TRAFFIC**

See Interstate Commerce.

**INTERSTATE TRANSACTION**

See Interstate Commerce.

**INTERURBAN RAILROAD**

"There has recently come into existence a certain class of railroads, known as 'interurban roads,' which are a sort of hybrid, having in some respects the characteristics of the ordinary railroad and in others those of the street railroad. Within the limits of the cities which they enter, they usually pass along the streets, and perform the ordinary functions of street railroads, stopping where desired to let passengers on or off, and serving the public need for local street travel. Outside the cities, on their way from one city or town to another, they frequently travel upon a roadway obtained from private persons, not upon a public road, and stop, as in case of ordinary railroads, only at stations established by them for that purpose. They also often convey freight as well as passengers." *San Francisco & S. M. Electric Ry. Co. v. Scott*, 75 Pac. 575, 576, 583, 142 Cal. 222.

Code Supp. § 2033a, requires that any railway operated on the streets of a city or town by other than steam power, which extends beyond the limits of such city or town to another city or town, shall be known as an "interurban railway." Section 2033b makes all the statutory provisions relative to railways in general applicable to interurban street railways, and section 2033c declares that any interurban railway shall, within the corporate limits of any city or town acting under a special charter upon such streets as it shall use for transporting passengers and such freight, as it may carry in its passenger or combined baggage cars only, be deemed a street railway and subject to the laws governing street railways. A company owning street railway systems in two cities connected them by an interurban line in such a manner that the interurban traffic passed over but one or two blocks of the existing street railway lines, and in the main traversed only its own tracks, which were not within the city limits. The accounts of the interurban line and the existing street railway systems were separately kept; the only apparent connection between the two, other than common ownership, being the giving of

transfers from each line to the other. Held, that the entire system should, for purposes of taxation, be regarded as an "interurban line." *Waterloo & C. F. Rapid Transit Co. v. Board of Sup'rs of Black Hawk County*, 108 N. W. 316, 317, 131 Iowa, 237.

Under Code Supp. § 2033a, declaring that any street railway operated by other power than steam, which extends beyond the corporate limits to another city or village, shall be known as an "interurban railway," a corporation operating a line connecting three different municipal corporations and organized under Code, § 2026, authorizing street railway corporations to extend their lines beyond the limits of a city along public roads, is an "interurban railway." *Cedar Rapids & M. C. Ry. Co. v. Cummins*, 101 N. W. 176, 177, 125 Iowa, 430.

**As street railroad**

See Street Railroad.

**INTERVAL**

See Lucid Interval; Regular Interval.

**INTERVENE—INTERVENTION**

Right of intervention as remedy at law, see Remedy.

"Intervene," when applied to matters of law, means to interpose in a lawsuit so as to become a party to it, and at civil law signifies the act of a third person who becomes a party in a suit pending between other persons. In *re Ghio's Estate*, 108 Pac. 516, 524, 157 Cal. 552, 37 L. R. A. (N. S.) 552, 137 Am. St. Rep. 145.

"Intervention" is an act by which a third person becomes a party in a suit pending between other parties. A statute allowing third persons to intervene in an action is liberally construed in the interests of good practice, with due reference to its terms and to the nature of the issues involved, so as to effectuate the legislative intent. *Faricy v. St. Paul Inv. & Sav. Soc.*, 125 N. W. 676, 679, 110 Minn. 311.

The practice of "interventions," which has grown up in our equity courts, seems to have been borrowed from the civil law, and Mr. Beach says: "Intervention is the generic designation in the civil law of the various technical processes by which, when a suit is pending between two parties, a third party is allowed to interpose for the assertion of some collateral, implicit, or ulterior right, adverse to that of either or both of the others, or to defend a responsibility involved in the issue of the controversy \* \* \* No one, even in equity, is entitled to be made a party to the suit, unless he has an interest in its object; yet it is the common practice of the court to admit strangers to the litigation, claiming an interest in its subject-matter, to intervene in their own behalf, to

assert their title. *Ex parte Gray*, 47 South. 286, 288, 157 Ala. 353, 131 Am. St. Rep. 62 (citing 1 Beach, *Modern Eq. Pr.* § 571).

"Literally, to 'intervene' means, as the derivation of the word indicates [inter, between, venire, come], to come between. \* \* \* When the term is used in reference to legal proceedings, it covers the right of one to interpose or become a party to a proceeding already instituted, as a creditor may intervene in a foreclosure suit to enforce a lien upon property or some right in connection therewith; a stockholder may sometimes intervene in a suit brought by a corporation; the government is sometimes allowed to intervene in suits between private parties to protect a public interest, and whether we look to the English ecclesiastical law, the civil law, from which the Argentine Law is derived, or the common law, the meaning is the same." The word "intervene," as used in the Argentine Treaty of 1853 (10 Stat. 1009), giving to consular officers the right to "intervene" in the possession, administration, and judicial liquidation of the estate of a deceased fellow countryman, conformably with the laws of the country, for the benefit of the creditors and legal heirs, is to be construed to allow such officers to "intervene" in an administration instituted otherwise than by them, without intending to take away from the states the right of legal administration provided by their laws upon the estates of deceased citizens of a foreign country and to commit the same to the consuls of such foreign nation to the exclusion of those entitled to administer as provided by the legal laws of the state within which such foreigner resides and leaves property at the time of decease; and hence, if the most favored nation clause, included in the treaty with Italy in 1878, carries the provisions of the Argentine Treaty in regard to administration by consuls, it does not grant the Italian consul the right of original administration upon the estate of a deceased Italian to the exclusion of that authorized by local law. *Rocca v. Thompson*, 32 Sup. Ct. 207, 223 U. S. 317, 330, 56 L. Ed. 453 (citing *Black, Law Dict.* p. 651).

As the treaty with the Argentine Republic of July 27, 1853 (10 Stat. 1005), giving the Consul General or consul of either nation the right to intervene in the administration and judicial liquidation of the estate of a subject of his nation dying in the other nation, intestate, relates to local proceedings for the settlement of estates, the word "intervene," used therein, should be given the meaning it usually has in that connection, which, in proceedings in rem, does not usually include the right to take the property from the custody of the court or officer upon whom the law imposes the duty of administering and distributing it, and hence the word in the treaty will be deemed to imply an intention to give a right to the consul to

appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding itself, especially as the object of the treaty to allow the consul to represent the subjects of his country who are interested as heirs or creditors would be fully met by such construction. In *re Ghio's Estate*, 108 Pac. 516, 524, 157 Cal. 552, 37 L. R. A. (N. S.) 552, 137 Am. St. Rep. 145.

The treaty of May 8, 1878 (20 Stat. 732), between the United States and Italy, by article 17, provides that the respective consuls shall enjoy in both countries all the rights and privileges which are or hereafter may be granted to the officers of the same grade of the most favored nation. The treaty of July 27, 1853 (10 Stat. 1009), between the Argentine Republic and the United States, by article 9, provides that, if any citizen of either country die without will in the territory of the other, the consul of the nation to which decedent belongs shall have the right to intervene in the administration of decedent's estate conformably with the law, for the benefit of creditors, etc. Held, that the Italian consul was entitled to letters of administration upon the estate of an Italian subject killed in this country, as against a creditor of decedent. In *re Scutella's Estate*, 129 N. Y. Supp. 20, 22, 145 App. Div. 156.

#### INTERVENING CAUSE

See Independent Intervening Cause.

An "intervening cause" is one which moves from sources independent of the plaintiff and defendant. The phrase is probably not capable of definition in terms which will be applicable in all cases. The approved doctrine is sufficiently summarized in *Harrison v. Berkley* (S. C.) 1 Strob. 525, 47 Am. Dec. 578, where it is said that the natural and proximate consequences of a wrongful act are all those which are not controlled by the unforeseen agency of a moral being capable of discretion and left free to choose, or by some unconnected cause of greater influence. *Fishburn v. Burlington & N. W. R. Co.*, 103 N. W. 481, 485, 127 Iowa, 483.

The intervening cause which will relieve from liability for injury is an independent cause which intervenes between the original wrongful act and the injury, and produces a result which otherwise would not have happened. *City of Winona v. Botzet*, 169 Fed. 321, 329, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

#### INTERVENING EQUITY

An "intervening equity" is not necessarily one that "comes in after the fraud is discovered." Where a receiver of a mutual fire insurance company sued a member to recover assessments, a fraud perpetrated by the company on a member in inducing him to become such cannot be set up as against the rights of bona fide creditors and later mem-

bers of the company which had intervened after the date when defendant became a member of the company. *Van Dyke v. Baker*, 63 Atl. 594, 595, 214 Pa. 168.

### INTERVENER

As party, see Party.

## INTESTACY—INTESTATE

The word "intestacy," in Code Civ. Proc. § 2660, providing that administration in case of "intestacy" must be granted to the relatives of the decedent entitled to succeed to his personality in the order enumerated, when considered in connection with section 2662, providing that one entitled absolutely or contingently to administration on the estate of an intestate may present a written petition praying for letters of administration, etc., refers to the person and not to specific property. In *re Maccaffil*, 107 N. Y. Supp. 1115, 1118, 57 Misc. Rep. 264.

Testator gave his residuary estate to his mother, directed that no part of his estate should come into the possession of a sister or her descendants, and provided that on the death of his mother "intestate" the property should go to a third person. The mother devised real estate to a devisee, who, because of onerous conditions imposed, renounced the gift. Held, that the mother died "intestate" as to such real estate, and it passed to the third person; the word "intestate" not being limited to the ordinary meaning of one dying without making a will, but including the death of the mother without effectually disposing of the property devised to her. *Bradford v. Leake*, 137 S. W. 96, 100, 124 Tenn. 312, Ann. Cas. 1912D, 1140.

### INTESTATE LAWS

The words "intestate laws," as used in Tax Law (Consol. Laws, c. 60), § 220, subd. 1, refer to the statutes governing the descent and distribution of a decedent's property. In *re Green's Estate*, 124 N. Y. Supp. 863, 68 Misc. Rep. 1.

"The intestate laws of this state" comprise that body of laws which provide and prescribe the devolution of estates of persons who die without disposing of their property by last will or testament. One who dies intestate dies without leaving a will and without disposing of his property and estate by will or testament. *Kobny v. Dunbar*, 121 Pac. 544, 545, 21 Idaho 258, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492 (citing 4 Words and Phrases, 3732).

Laws 1905, c. 368, § 220, subd. 1, provides for a tax upon the transfer of any property or interest therein when the transfer is by will or the intestate laws of the state, from any person dying seised or possessed of property; the term "intestate laws" referring to the statutes governing the descent and distribution of a decedent's property. Real Prop-

erty Law (Laws 1896, c. 547) § 280, in force when chapter 368 was enacted, provided that the article (relating to descent) did not affect tenancy by curtesy or dower. Held, that an estate by curtesy, not being derived from the wife's estate nor acquired by inheritance, is not taxable under section 220; there being no "transfer" thereof within the section. In *re Starbuck's Estate*, 122 N. Y. Supp. 584, 585, 137 App. Div. 866.

## INTESTINES

"While all of the numerous internal organs of the human anatomy having their place within the abdominal cavity have each of them a technical name by which they are known to the professional man, yet, to the layman they are all of them included within the one general comprehensive term of 'intestines.' Webster, in the last edition of his International Dictionary, defines the word 'intestine' as meaning: 'On the inside, within; internal, inward, opposed to external; depending upon the internal constitution of a body or entity; the bowels; entrails; viscera'—thus making it synonymous with the word 'viscera,' which is defined as being applied to the organs contained in the abdomen. According to the Century Dictionary, the term 'intestines' is used in biology in a wider sense to include the whole enteron, and the term 'enteron' is there defined as meaning, in anatomy, 'the intestines, alimentary canal, including its annexes and appendages.'" On an indictment charging that defendant pulled out the intestines of the deceased, it may be shown that the great omentum was so torn out. *Hampton v. State*, 39 South. 421, 426, 50 Fla. 55.

## INTIMACY—INTIMATE

A statement that a married woman was "too intimate with the hired man," was slanderous per se if the word "intimate" was used in a defamatory sense; it being capable of being so used. *Arnold v. Lutz*, 120 N. W. 121, 141 Iowa, 596.

### INTIMATE ACQUAINTANCE

A witness who has known accused but a short time, and who has formed only a casual acquaintance with him, and who has but limited opportunity to observe his conduct, is not an "intimate acquaintance of accused within Rev. Codes, § 7887, and he is not competent to testify to the mental condition of accused, the word "intimate" meaning close in friendship or acquaintance; familiar; confidential. *State v. Leakey*, 120 Pac. 234, 239, 44 Mont. 354.

Where persons have known a testatrix for upwards of 20 years, and were on terms of social intimacy with her, and had seen and conversed with her immediately before and after the execution of the will, they were "intimate acquaintances" within Code Civ.

Proc. § 1870, permitting the opinion of an intimate acquaintance respecting the mental sanity of a person. In *re McKenna's Estate*, 77 Pac. 461, 462, 143 Cal. 580.

Under Code Civ. Proc. § 3146, subd. 10, providing that the opinion of "intimate acquaintanceship" respecting the mental sanity of a person, together with reasons therefor, may be given, the question whether a witness has an "intimate acquaintanceship" with or is an "acquaintance" of the person whose sanity is in issue, is a matter of discretion not reviewable except in a clear case of abuse; and two newspaper reporters whose only acquaintance with defendant, charged with homicide, consisted of their conversation with him for a half hour shortly after the homicide, are not "intimate acquaintances," within the statute. *State v. Penna*, 90 Pac. 787, 789, 35 Mont. 535.

To be an "intimate acquaintance," within Code Civ. Proc. § 1870, subd. 10, making admissible the opinion of an intimate acquaintance, necessarily requires a familiarity with the mental temperament of the person, the soundness of whose mind is in question. In *re Budan's Estate*, 104 Pac. 442, 444, 156 Cal. 230.

The words "intimate acquaintances," as used in Code Civ. Proc. § 1870, subd. 10, authorizing the intimate acquaintances of a person whose mental condition is in question to testify as to his mental sanity, do not include a person who had an acquaintance with the testator which was of a mere casual character, or of another person who knew him only through having given him massage treatments on three occasions. *Huyck v. Rennie*, 90 Pac. 929, 930, 151 Cal. 411.

The California Code makes competent evidence the opinion of an intimate acquaintance as to the sanity of a person. In construing this phrase the court says: "The phrase 'intimate acquaintance' cannot include all 'acquaintances.' Worcester, under the word 'acquaintance,' has the following: 'Acquaintance expresses less than familiarity; familiarity less than intimacy. Acquaintance springs from occasional intercourse; familiarity from daily intercourse; intimacy from unreserved intercourse. Acquaintance, having some knowledge; familiarity, from long habit; intimacy, by close connection.'" *Carpenter v. Bailey*, 29 Pac. 1101, 1103, 94 Cal. 406, 414.

## INTIMATION OF OPINION

A charge that the state contended that defendant was seen by a certain witness to take and carry away a basket containing articles testified about, that it was afterwards found in a wagon he was driving, and that this was the only possible way to account for the theft, so particularized and argumentatively enforced on the jury the inference of

guilt as to amount to an intimation of opinion, within Civ. Code 1895, § 4334, declaring that a judge shall not intimate his opinion as to the guilt, or innocence of defendant, and that such an intimation shall be reversible error. *Johnson v. State*, 58 S. E. 684, 685, 2 Ga. App. 405.

## INTIMIDATE—INTIMIDATION

See With Intent to Intimidate.

"Intimidation," as relates to law, has a definite meaning, and consists in putting a person in fear in some way. *Pray v. Pray*, 55 South. 666, 667, 128 La. 1087.

"Intimidation," in the Penal Code definition of robbery, is synonymous with the "putting in fear" in the common-law definition thereof. *Johnson v. State*, 57 S. E. 1056, 1057, 1 Ga. App. 729.

What amounts to coercion, intimidation, or threats of injury, within the law holding that a combination to injure another by threatening injury to the trade of those who have business relations with him, depends on the facts of each particular case; but intimidation, within the law, is not necessarily limited to threats of violence to person or property, and combinations between persons to do injurious acts expressly directed to another by way of intimidation or constraint, either of himself or persons employed or seeking to be employed by him, are unlawful. *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1005, 215 Mo. 421, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492.

The word "intimidation" denotes two kinds of coercion: (1) A threat by word or act of an individual, or by a combination of persons to do something unlawful, reasonably calculated to compel the person threatened to do or not to do something; and (2) request or persuasion by or on behalf of a combination of persons to do or not to do something, resulting in coercion of the will from the mere force of numbers. In the first case, the nature of the act, and the coercion, determine liability; in the second, the conspiracy or concerted act and the coercion determine it. A threatens B. with assault unless he quits work, and thus coerces him. A number of men, representing themselves and a larger number, request B. to quit work, and by force of numbers coerce him to do so. Civil liability follows in both cases: In the first, from the nature of the act threatened; in the second, from the coercion by force of numbers. In this case, however, it is unnecessary to go to the extent of holding that coercion of the second description would be a violation of the injunction, as I find that the company's workmen, and those about to become workmen, were coerced by threats of unlawful acts. A simple request to do or not to do a thing made by one or more of a body of strikers under circumstances cal-

culated to convey a threatened intimidation with a design to hinder or obstruct workmen is unlawful intimidation in violation of an injunction against the use of such means, and not less obnoxious than the use of physical force for the same purpose. *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, 150 Fed. 155, 173.

"Intimidation" is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there may also be a moral intimidation. Patrolling or picketing plaintiff's premises in furtherance of a conspiracy to prevent workmen from entering into or continue in his employment, the patrol at times going further than simple advice, not obtruded beyond the point where the other person was willing to listen, which patrol was used in combination with social pressure, threats of personal injury, or unlawful harm, was a means of intimidation. *Vegetahn v. Guntner*, 44 N. E. 1077, 1078, 167 Mass. 92, 98, 102, 107, 35 L. R. A. 722, 57 Am. St. Rep. 443.

"Picketing" has been condemned by every court having the matter under consideration. It is a pretense for "persuasion," but is intended for "intimidation." Gentlemen never seek to compel and force another to listen to the art of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion. "Intimidation" cannot be defined. Neither can fraud be defined. But every person knows whether his acts are fraudulent, and he knows whether his acts are intimidating. *Union Pac. R. Co. v. Ruef*, 120 Fed. 119, 121.

What amounts to intimidation, as an element of a restrainable boycott, depends on the facts of each particular case, not being limited to threats of violence, but extending to a combination to do injurious acts to another by way of intimidation or constraint, either of himself or third persons. *Baldwin v. Escanaba Liquor Dealers' Ass'n*, 130 N. W. 214, 216, 165 Mich. 98.

## INTO

See Entered Into; Intruded Into.

"Unto a jail or building" is not a common form of expression, and in no popular sense has it ever been used to mean to convey 'within' a building. Probably no case can be cited where that word has ever been construed to be synonymous with or to mean 'into.' *People v. Klammer*, 100 N. W. 600, 601, 137 Mich. 399.

The word "into," as used in Code Pub. Gen. Laws, art. 54, § 48, giving to proprietors of land bordering on navigable waters the exclusive right to make improvements into the waters in front of their respective land, etc., is a term inconsistent with entire sepa-

ration from the land. Wharfs, piers, and landings are examples of such improvements. *Western Maryland Tidewater R. Co. v. City of Baltimore*, 68 Atl. 6, 10, 106 Md. 561; *Hess v. Muir*, 5 Atl. 540, 6 Atl. 673, 65 Md. 608.

The preposition "into" indicates entrance, passing from the outside to the inside, a penetrating, and is used in the statute authorizing extension of public aid to railroads in its ordinary and generally accepted meaning, implying that the line of railroad to which a city can extend aid must be a line entering into the city, and must of necessity, therefore, come from the outside, and must either pass through the city or to a point in the city. A railroad whose beginning and termination is wholly within the corporate limits of the city is not such a line of railroad as the statute authorizes a city to aid. *Water, Light & Gas Co. v. Hutchinson Interurban Ry. Co.*, 87 Pac. 883, 884, 74 Kan. 661.

An assault committed on the gallery of a private residence is within the statute making it an aggravated assault, where the party assaulting goes "into" a private residence. *Herd v. State*, 99 S. W. 1119, 1120, 50 Tex. Cr. R. 600.

The word "into" carries the notion of entering, and in connection with the word "through" in a contract of subscription in aid of a railroad, conditioned on the construction and operation of the road "through or into" a certain city, definitely expresses that the road is intended to go inside the city limits. *St. Louis, Memphis & S. E. R. Co. v. Houck*, 97 S. W. 963, 966, 120 Mo. App. 634.

As to

See To.

As through

See Through.

## INTO COURT

See Payment Into Court.

The words "into court," as used in the Missouri Constitution, providing that private property shall not be taken or damaged for public use without just compensation, and, until the same shall be paid to the owner or "into court" for the owner, the property shall not be disturbed or the proprietary rights of the owner therein vested, means in the condemnation proceedings, and payment in an interpleader suit was not a payment into court for the benefit of the owner of the property. *Holmes v. Kansas City*, 108 S. W. 9, 14, 209 Mo. 513, 123 Am. St. Rep. 495.

V. S. 3921, inflicting a penalty if a person having control of a detached engine or engine with a passenger train attached runs it into or through a passenger depot at a speed exceeding four miles an hour, was intended to apply only to passenger depots covering the main tracks of the railroad into and through which trains running on such

tracks must pass; the word "into" being used in the sense of "inside of" or "within" and "through," meaning from end to end or from side to side of, into or out of at the opposite, or at another point. *Blodgett v. Central Vermont Ry. Co.*, 73 Atl. 590, 82 Vt. 269.

One who, while inside of an occupied dwelling, shoots a pistol at a floor thereof, is guilty of shooting "at" or "into" such dwelling, within the meaning of the act approved August 13, 1910 (Acts 1910, p. 137). *English v. State*, 74 S. E. 286, 10 Ga. App. 791 (citing 1 Words and Phrases, p. 596; *Blackwell v. State*, 17 S. W. 1061, 30 Tex. App. 416).

#### INTO EFFECT

See Put Into Effect.

#### INTOXICANTS

See Intoxicating Liquor.

#### INTOXICATED—INTOXICATION

See State of Intoxication; Under the Influence of Liquor; Which Produces Intoxication.

By reason of intoxication, see By Reason Of.

See, also, Drunkenness.

To judge that a man is "intoxicated" by liquor indicates nothing as to the degree, as that expression is commonly used. It may mean much, or it may mean very little. *Brehony v. Pottsville Union Traction*, 86 Atl. 1006, 218 Pa. 123.

The word "intoxicated" in an indictment charging a violation of Acts 1908, p. 294, c. 189, § 19, providing that no person shall knowingly sell intoxicating liquor to any intoxicated person, means a materially changed condition produced by the immoderate or excessive use of intoxicants, as contrasted with normal condition and conduct. *O'Donnell v. Commonwealth*, 62 S. E. 373, 374, 108 Va. 882.

When, in a homicide case, the court directed the attention of the jury to the question whether defendant was under the influence of intoxicating liquors, he sufficiently defined "intoxication" for all practical purposes, and the jury could not have misunderstood in their practical knowledge of human affairs what was meant, and the court, having told the jury to consider evidence that defendant was intoxicated in determining whether he was so far under the influence of intoxicating liquor as to deprive him of the power to deliberate and form a guilty intent, did not err in refusing an instruction specifically defining the term "intoxication." *State v. Pell*, 119 N. W. 154, 158, 140 Iowa, 655.

"Intoxication" excusing a criminal act must be such as to render the accused incapable of forming the felonious intent which

is a necessary element of the crime. *Collins v. State*, 92 N. W. 266, 268, 115 Wis. 596.

"Intoxication" within Code 1899, c. 32, § 16 [Code 1906, § 928] punishing sales of liquors to intoxicated persons is such a mental condition due to the use of liquor as attracts the observation of others or gives them reason to believe the person is intoxicated and testimony of a by-stander as to such a state will sustain a finding on the question of intoxication. *State v. Nethken*, 55 S. E. 742, 743, 60 W. Va. 673.

The word "intoxication," as used in Acts 33d Gen. Assem. Iowa, c. 78, §§ 1, 6, providing that any mayor shall be removed from office upon charges made in writing, and hearing, for intoxication, or upon conviction of being intoxicated, refers to one's private habits as well as his official duties. A contention that the word means intoxication in office, and that it can have no reference to one's private habits, or, in other words, that private misconduct cannot be made the ground of removal as distinguished from official conduct, is purely theoretical and not practical. It cannot be argued, of course, that an official could be privately intoxicated and officially sober, and the most that can be claimed is that an official might be intoxicated at a time and place and under circumstances when no official duties devolved upon him, and in that sense his private misconduct would not actively interfere with the performance of his official duties. *State v. Henderson*, 124 N. W. 767, 769, 145 Iowa, 657, Ann. Cas. 1912A, 1286.

"Intoxication" affects different men in different ways. In some it quickens the intellectual faculties and sharpens the physical senses, and in others the intellectual faculties are for a time destroyed and the physical senses blunted. The effects of intoxicating liquors depend on the character of the man and the nature of the liquor. It cannot be said, however, that drunkenness never places the person intoxicated beyond the protection of the law, nor gives another the right to injure or kill him. *Texarkana & Ft. S. Ry. Co. v. Frugla*, 95 S. W. 563, 565, 43 Tex. Civ. App. 48.

The word "intoxication" is comprehensive enough to include partial as well as total intoxication, and therefore where, in an action for injuries to plaintiff while walking on a railroad track, he testified that he was perfectly sober, and the engineer of the train that struck him also testified that he looked like a sober man—the court having charged that if plaintiff went on the track, and failed to exercise ordinary care for his own safety, or if he was intoxicated, and any one of such acts contributed to his injury, he could not recover—it was not error to refuse to charge that if plaintiff entered on and remained on the track "in a state of partial or total intoxication" he could not recover. *Interna-*

tional & G. N. Ry. Co. v. Davis (Tex.) 84 S. W. 669, 670.

#### Drugs

Intoxication from the voluntary use of any drug, taken to gratify the appetite, is considered in law the same as intoxication from the voluntary use of liquor. Commonwealth v. Detweiler, 78 Atl. 271, 272, 229 Pa. 304.

#### Drunkenness or inebriety

Though one may be said to be under the influence of liquor, he is not necessarily intoxicated, this being far short of "intoxication" which is the synonym of "inebriety" and "drunkenness"; the word "intoxicated" being synonymous with "drunk," and "drunk" being defined in the Standard Dictionary as to have lost the normal control of one's bodily and mental faculties. Freeburg v. State, 138 N. W. 143, 144, '92 Neb. 346, Ann. Cas. 1913E, 1101 (citing 4 Words and Phrases, pp. 3734, 3735).

"Intoxication" is a synonym of "inebriety" or "drunkenness," implying or evidenced by undue and abnormal excitation of the passions or the impairment of feelings, or an impairment of the capacity to think and act correctly and effectually. A man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquor that it so affects his acts or conduct or movement that the public or parties coming in contact with him can readily see and know that it is affecting him in that respect. O'Connell v. State, 62 S. E. 1007, 1008, 5 Ga. App. 234 (citing 4 Words and Phrases, pp. 3734-3736).

The words "intoxicated" and "drunk" mean under the influence of intoxicating liquor to such an extent as to lose the normal control to one's bodily and mental faculties, and, commonly, to evince a disposition to violence. Hughes v. State ex rel. Sutton, 98 N. E. 839, 841, 50 Ind. App. 617.

To prevent the intoxication of a passenger resulting in injuries from being contributory negligence barring recovery, the intoxication must have rendered the passenger mentally or physically incapable of protecting himself from danger or of appreciating his danger, which condition must be known to the carrier's agent whose negligence is alleged to have caused the injury; so that, in an action for decedent's death by falling from the platform where he went when intoxicated, alleged to have been caused by the railroad company's negligence in permitting him to go onto the platform in such condition, it was error to instruct that the jury should find for plaintiff if decedent was "drunk," and defendant's servants, knowing his condition, knowingly suffered him to go out upon the platform while the train was running at such a speed as to make it dangerous for him, being "drunk" to stand on the platform, the

word "drunk" being synonymous with "intoxicated," and indicating varying degrees of intoxication. Paris & G. N. R. Co. v. Robinson, 140 S. W. 434, 435, 104 Tex. 482 (quoting 3 Words and Phrases, p. 2208).

An instruction, in an action against a railroad company for wrongfully ejecting a passenger for alleged drunkenness, that for one to be in an "intoxicated condition" he must be under the influence of intoxicating liquors to such an extent as to have lost the normal control of his faculties, and show a disposition to violence, quarrelsomeness, and bestiality, was erroneous, since one may be intoxicated without being violent or quarrelsome, and a man may be said to be "drunk" whenever he is under the influence of intoxicating liquors so as to affect his acts or conduct, so that persons coming in contact with him could readily know that the intoxicants had affected him in that respect. St. Louis, I. M. & S. Ry. Co. v. Waters (Ark.) 152 S. W. 137, 139.

In an action on a fraternal benefit certificate, evidence held to support a finding that a negative answer to the questions asked the member in his application, "Have you ever been addicted to excessive or intemperate use of any liquors?" "If intoxicated during the last year, how many times?" was true; the word "intoxication" having a very broad meaning, and a different meaning to different persons, and being defined as a state of being drunk; inebriety; drunkenness. National Council of Knights and Ladies of Security v. Wilson, 143 S. W. 1000, 1002, 147 Ky. 293.

"Intoxication" is of varying degrees. A person so under the influence of liquor as not to be entirely at himself is intoxicated, yet he may not betray it by either movement or word, and his condition may not be discernible by his intimate friends. It would hardly be contended that as to such a person the carrier must resort to other than the ordinary means for his safety. Again, a person may be "staggering drunk," and yet be capable of transacting with intelligence important business, and with great foresight providing under given circumstances for his own safety and comfort. In the absence of knowledge on the part of the carrier that he was in or about to get in the place of danger, it could not with reason be insisted that the carrier, in the exercise of the high degree of care it owed to such a person as a passenger, should provide a guard for him or resort to other extraordinary means to insure his safety. Paris & G. N. Ry. Co. v. Robinson, 114 S. W. 658, 661, 53 Tex. Civ. App. 12.

In an action on a mutual benefit insurance policy, the insurer set up, as a breach of warranty, the falsity of insured's statement in his application that he had never been intoxicated. Upon defendant's request, the court defined "intoxication" as the con-



dition of a man whose physical and mental powers are affected by the use of intoxicating liquors. The court also charged the jury that the term "intoxicated" was defined as "inebriated," "made drunk," "excited to frenzy," and that "it is a pretty strong definition when you get it right down to the intoxication." Held that the latter definition of intoxicated was erroneous and prejudicial to defendant. *Gall v. Sovereign Camp of Woodmen of the World*, 132 N. W. 468, 469, 166 Mich. 690.

"A man becomes 'intoxicated'—that is, drunk—when he passes under the influence of alcoholic liquor. And there are degrees of 'intoxication' varying all the way from slight stimulation to complete coma. It is only at some point along the line between the two extremes that the loss of control of the mental faculties occurs. It follows that a defense to a crime involving intention cannot be established by merely showing that the perpetrator was at the time intoxicated; he must go farther and make it appear that his intoxication had progressed so far as to rob him of his mental faculties, and hence that he was no longer capable of forming an intent or purpose. Stated in another way, a man may be drunk, but his responsibility for crime continues while he retains control of his mental faculties sufficient to appreciate what he is doing." *State v. Yates*, 109 N. W. 1005, 1006, 132 Iowa, 475.

### INTOXICATING BITTERS

"Intoxicating bitters" include those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are present, so that it may be used as a beverage, notwithstanding the other ingredients it may contain; and if it can be used as a beverage, though the other ingredients are medicinal and predominate, and alcohol is used to preserve these medicinal ingredients and serve as a vehicle therefor, then it may or may not be included, depending on the evidence in each particular case—it being without the province of any court to declare as a matter of law that a particular bitters or beverage is or is not intoxicating, unless the statute or law so declares, or it be one the effect of which every one is presumed to know. *Marks v. State*, 48 South. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20.

### INTOXICATING LIQUOR

Keeper of, see Keeper.

Other intoxicating liquors, see Other.

Place where liquors are sold as disorderly house, see Disorderly House.

Sale of, see Sale; Sell.

Sale of as privilege of citizen, see Privileges and Immunities.

The Legislature cannot pass an act defining "intoxicating liquors" as used in the

Constitution. *Keller v. State (Tex.)* 87 S. W. 669, 675, 1 L. R. A. (N. S.) 489.

An "intoxicating liquor" is one which, when taken in such reasonable quantities as the human stomach will hold, will make drunk. *James v. State*, 91 S. W. 227, 49 Tex. Cr. R. 334.

The words "intoxicating liquors," as used in the Constitution, mean liquors which will intoxicate, and which are commonly used as beverages for such purpose, and all mixtures or substitutes for such liquors used as a beverage that possess intoxicating qualities. *Markinson v. State*, 101 Pac. 353, 354, 2 Okl. Cr. 323.

The act of 1902 does not exclude from the term "intoxicating liquor" fluid extracts and toilet articles, of which alcohol is the solvent principle. *State v. Krinski*, 62 Atl. 37, 38, 78 Vt. 162.

Toilet and culinary preparations recognized as such by standard authority, and not reasonably capable of use as intoxicating beverages, e. g., tincture of gentian, paregoric, bay rum, cologne, essence of lemon, wood alcohol, are not ordinarily to be regarded as being within the meaning of the expression "intoxicating liquors," though such articles are liquid, contain alcohol, and may produce intoxication. *Mason v. State*, 58 S. E. 139, 140, 1 Ga. App. 534.

### Alcohol

In a prosecution for violating a local option law, an instruction that alcohol was per se an intoxicant, and when sold as a concoction or as a beverage or alone in any quantity would constitute a violation of the law, was erroneous as a definition of intoxicating liquor, which is a liquor intended for use as a beverage, or capable of being so used, which contains alcohol in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk. *Walker v. State (Tex.)* 98 S. W. 265.

Under Local Option Act (Laws 1909, p. 14) § 15, providing that the act shall not be construed to prohibit the sale in a prohibition district of pure alcohol for medicinal, mechanical, manufacturing, or scientific purposes, provided that it shall not be sold, except upon a written application therefor, and providing that intoxicating liquors shall never be sold in prohibition districts as medicine, except upon the written prescription of a duly licensed physician, a sale in prohibition districts of pure alcohol for medicinal, mechanical, manufacturing, or scientific purposes, or wines for sacramental purposes, may be legally made upon the written application of the purchaser, and pure alcohol may be sold for medicinal purposes without the prescription of a duly licensed physician. The provision of Local Option Act (Laws 1909, p. 14) § 15, requiring a physician's pre-

scription before a legal sale can be made of intoxicating liquors, applies only to intoxicating liquors used as a beverage, and not to pure alcohol. Local Option Act (Laws 1909, p. 14) § 15, makes it a misdemeanor to sell pure alcohol, except on written application prescribed by the act, and also makes it a misdemeanor to sell intoxicating liquors that are used as a beverage, except on the prescription of a duly licensed physician. *State v. Osmer*, 120 Pac. 165, 166, 21 Idaho, 18.

Alcohol is judicially recognized as a spirituous and intoxicating liquor. *Cureton v. State*, 70 S. E. 332, 333, 135 Ga. 660.

Alcohol of 188 proof, expressly excepted from Acts 1909, c. 10, which prohibits the manufacture in this state, for purposes of sale, of any intoxicating liquor, including all vinous, spirituous, or malt liquors, is an "intoxicating liquor." *Motlow v. State* (Tenn.) 145 S. W. 177, 181.

#### As alcoholic beverage

The words "intoxicating liquor," as used in the title of the local option law, are broad enough to cover beverages dealt with therein which do not contain a sufficient percentage of alcohol to intoxicate those who drink the same, and hence such law is not violative of Const. art. 4, § 28, in that it deals with matters not expressed in its title. *State v. Hanson*, 137 S. W. 968, 969, 234 Mo. 583.

The words "intoxicating liquor," as used in the local option law, embrace every kind of beverage which contains any percentage whatever of alcohol. *State v. Burk*, 137 S. W. 969, 971, 234 Mo. 574.

Rev. Codes 1899, § 7598, defining intoxicating liquors, includes liquors that will produce intoxication, and it is error to instruct, on trial for keeping a liquor nuisance, that any liquors which contain any percentage of alcohol, if sold as a beverage, are intoxicating liquors under the law. *State v. Virgo*, 103 N. W. 610, 611, 14 N. D. 293.

Under Rev. St. 1899, § 3016, defining intoxicating liquor as any composition of which spirituous liquor is a part, and the local option law adding the phrase "or beverage containing alcohol in any quantity," "intoxicating liquor," within the dramshop act and the local option law, means any liquid containing alcohol in any quantity which is capable of being used as a beverage, and, on a trial for violating the local option law, the issues are whether or not the liquid sold contained alcohol and was of such a character that it could be used as a beverage, or whether it contained alcohol and was sold as a beverage. *State v. Wills*, 136 S. W. 25, 27, 154 Mo. App. 605.

Any liquor containing alcohol which is based on such other ingredients, or, by reason of the absence of certain ingredients, so that it may be drunk by an ordinary person

as a beverage, and in such quantities as to produce intoxication, is "intoxicating liquor." *Heintz v. Le Page*, 62 Atl. 605, 606, 100 Me. 542.

Under Code, § 2382, declaring that the term "intoxicating liquor" shall be construed to mean alcohol and all intoxicating liquors whatever, evidence is not admissible, on a prosecution for keeping a liquor nuisance, that a liquor sold as a beverage containing from 1 to 2 per cent. of alcohol is not intoxicating. *State v. Colvin*, 103 N. W. 968, 127 Iowa, 632.

Laws 1909, p. 277, c. 187, defining intoxicating liquors to include any kind of beverage whatsoever, which retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks, is intended to describe a beverage which contains alcohol or other drug having an intoxicating quality in a quantity reasonably appreciable, and in which such drug has not by chemical combination with others lost its intoxicating principle, which liquor according to ordinary experience will be resorted to by those accustomed to use intoxicating liquors as a beverage on inability to procure the ordinary intoxicating drinks in the usual way. In such liquor alcohol or other drug of kindred quality preserving its native characteristics must be present, but not necessarily in such quantity as to produce intoxication. *State v. Fargo Bottling Works Co.*, 124 N. W. 387, 389, 19 N. D. 396, 26 L. R. A. (N. S.) 872.

An intoxicating liquor is any liquor containing alcohol, which can be drunk as a beverage in such quantity as to produce intoxication. *Ex parte Townsend* (Tex.) 144 S. W. 628, 632.

The term "intoxicating liquor," as used in the local option law (Laws 1887, p. 179), embraces any beverage containing alcohol in any quantity whatever; it not being necessary that the beverage contain any particular per cent. of alcohol to make it an intoxicating liquor within the act. *State v. Burk*, 131 S. W. 883, 885, 151 Mo. App. 188.

Intoxicating liquor, as used in the local option law, is a liquor intended for use as a beverage, or capable of being so used, which contains alcohol, obtained by fermentation or by distillation, in such proportion that it will produce intoxication, when taken in such quantities as may practically be drunk. *Sandoloski v. State* (Tex.) 143 S. W. 151, 153.

An instruction that the law does not recognize any degree in intoxication, and any alcoholic liquor which will produce intoxication in any degree in the law would be "intoxicating liquor," was incorrect; an "intoxicant" being any liquor intended for use as a beverage, or capable of being so used,

which contains alcohol, obtained either by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk. *Murray v. State*, 120 S. W. 437, 56 Tex. Cr. App. 438.

It cannot be said, as a matter of law, that liquor which contains 3 per cent. or more of alcohol is "intoxicating." *State v. Piche*, 56 Atl. 1052, 1053, 98 Me. 348.

"Intoxicating liquor" is defined to be "any liquor intended for use as a beverage or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may be practically drunk as an intoxicant." In a prosecution for violating the local option law, a requested charge to acquit defendant if the beverage sold was not intoxicating liquor if drunk in reasonable quantities was incorrect, what is a reasonable quantity being left undefined, and the expression "reasonable quantities" not being equivalent to such quantities as may practically be drunk. *Murry v. State*, 79 S. W. 568, 569, 46 Tex. Cr. R. 128 (quoting *Decker v. State*, 44 S. W. 845, 39 Tex. Cr. R. 20).

"Intoxicating liquor" is a liquor intended for a beverage, or capable of being so used, which contains alcohol, either obtained by fermentation or by distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk. *Mason v. State*, 119 S. W. 852, 853, 56 Tex. Cr. R. 261; *Murray v. Same*, 120 S. W. 438, 56 Tex. Cr. App. 420; *Arbuthnot v. Same*, 120 S. W. 478, 56 Tex. Cr. R. 517; *Mason v. State*, 58 S. E. 139, 1 Ga. App. 534.

Under Laws 1891, p. 128, § 26, now Rev. St. 1899, § 3016 (Ann. St. 1906, p. 1728), defining the term "Intoxicating liquors" to mean fermented, vinous, and spirituous liquors, or any composition of which fermented, vinous, or spirituous liquors is a part, a beverage containing alcohol in any quantity is an intoxicating liquor, without regard to the quantity of alcohol present. *State v. Gamma*, 129 S. W. 734, 738, 149 Mo. App. 694.

#### **Ale and porter**

Porter and ale are taken to be "intoxicating liquors." *State v. Barr*, 77 Atl. 914, 915, 84 Vt. 38.

#### **Beer and near beer**

The courts will take judicial knowledge that beer is an intoxicating liquor. *Moreno v. State*, 143 S. W. 156, 158, 64 Tex. Cr. 660; *Lambie v. State*, 44 South, 51, 53, 151 Ala. 86; *State ex rel. Lyon v. City Club*, 65 S. E. 730, 731, 83 S. C. 509; *State v. Mitchell*, 114 S. W. 1113, 134 Mo. App. 540; *Vines v. State*, 116 Pac. 1013, 1016, 19 Wyo. 255.

Beer is not necessarily "intoxicating liquor," and an information for selling intoxicating liquor is not sustained by the mere proof of a sale of two bottles of beer, without proof that the beer was intoxicating. *Sullivan v. State*, 87 S. W. 150, 151, 48 Tex. Cr. R. 201.

To constitute a violation of the local option law (Rev. St. 1895, p. 657), the liquor sold must have been "intoxicating liquor," and proof of a sale of beer is not sufficient in the absence of a showing that it was intoxicating. *Harris v. State (Tex.)* 86 S. W. 763.

"The word 'beer,' without restriction or qualification, denotes an intoxicating malt liquor, and is within the meaning of the words 'intoxicating liquor' as used throughout the statute." *Feddern v. State*, 113 N. W. 127, 129, 79 Neb. 651.

A charge of unlawfully selling "intoxicating liquors" is sustained by proof that the liquor sold was beer, without any further description or testimony that it was intoxicating. *State v. Carmody*, 91 Pac. 446, 447, 448, 50 Or. 1, 12 L. R. A. (N. S.) 828.

When the word "beer" is used without restriction, it denotes an intoxicating malt liquor, and, being included by the constitutional provision among intoxicating liquors, one unlawfully handling it has the burden of showing that it is not intoxicating if he so claims. *Rochester Brewing Co. v. State*, 109 Pac. 298, 26 Okl. 309; *Antonelli v. State*, 107 Pac. 951, 953, 3 Okl. Cr. 580; *Id.*, 107 Pac. 953, 3 Okl. Cr. 585; *Pettitt v. Same*, 107 Pac. 954, 955, 3 Okl. Cr. 587.

"Beer," when employed in connection with sales in a place where intoxicating liquors are sold, means an "intoxicating" drink. *Hall v. People*, 134 Ill. App. 559, 560.

Beer is an "intoxicating liquor" as that term is used in the statutes. *Steinkuhler v. State*, 109 N. W. 395, 396, 77 Neb. 331.

"Intoxicating liquors" mean "fermented, vinous or spirituous liquors, or any composition of which fermented, vinous or spirituous liquor is a part." Hence, where an indictment alleged an illegal sale of "spirituous liquors, to wit, one pint of beer," and the proof showed sale of a pint of beer, the phrase "spirituous liquors" should be treated as surplusage, and there was no variance. *State v. Watts*, 74 S. W. 377, 101 Mo. App. 658 (quoting definition in Rev. St. 1899, § 3016).

In a prosecution for selling "intoxicating liquor, to wit, beer," under Const. art. 1, § 7, making it unlawful to sell "any intoxicating liquor of any kind including beer," and the state proves that accused sold beer, the presumption is that the beer sold was intoxicating, and the burden is on accused to rebut the presumption by evidence, and, if no evidence is produced on that question, by either side, the presumption that the beer sold

was intoxicating is conclusive on the jury. In a prosecution for selling intoxicating liquor, to wit, beer, under Const. art. 1, § 7, making it unlawful to sell "intoxicating liquor, including beer," in rebutting the presumption arising upon the state's proof that accused sold beer, that the beer sold was intoxicating, accused need produce only sufficient evidence to raise a reasonable doubt as to the intoxicating quality, when it devolves upon the state to show beyond a reasonable doubt that the beer sold was in fact intoxicating. *Moss v. State*, 111 Pac. 950, 954, 4 Okl. Cr. 247.

Code, § 2382, prohibits the sale of "intoxicating liquor," except as otherwise provided, and defines the same to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever. Held, that beverages regulated by such section are divided into two classes: First, all intoxicating liquors; and, second, certain described liquors including beer or malt liquor, whether intoxicating in their ordinary use as a beverage or not, and would include a malt liquor known as "justus beer," which contains but one-half of one per cent. of alcohol. *Sawyer v. Botti*, 124 N. W. 787, 788, 147 Iowa, 453, 27 L. R. A. (N. S.) 1007.

In a prosecution for selling "intoxicating liquor, to wit, beer," under Const. art. 1, § 7, forbidding the sale of "intoxicating liquor, including beer, ale and wine," it is necessary to allege that the liquor sold was intoxicating and to prove that fact either by evidence of its intoxicating quality or effect, or by evidence showing that the liquor sold was of that kind presumed by law to be intoxicating. *Moss v. State*, 111 Pac. 950, 954, 4 Okl. Cr. 247.

Under the decisions of the Texas courts, "beer" is not an intoxicant, and evidence of a sale of beer is not proof of the sale of an intoxicant. *Potts v. State* (Tex.) 89 S. W. 836.

Beer sold in prohibition territory is presumed to be an "intoxicant" within the penal statutes. Beer, whether bock, lager, or common beer, is an "intoxicating" beverage, and common beer is a malt liquor within Ky. St. § 2557 (*Russell's St.* § 3635), prohibiting the sale of malt liquors in local option territory, and its sale is prohibited irrespective of the label on the bottles or the name adopted. *Flanders v. Commonwealth*, 130 S. W. 809, 811, 140 Ky. 38.

"Near beer," being a malt liquor, falls within the definition of section 31 of the local option statute (*Sess. Laws* 1909, p. 18), and is as a matter of law an intoxicating liquor. *Ex parte Lockman*, 110 Pac. 253, 255, 18 Idaho, 465.

The expression "near beer" does not import an intoxicating liquor, and evidence of the sale of such a beverage, without proof

that, if drunk to excess, it will produce intoxication, will not support a conviction of violation of the prohibitory law contained in section 426 of the Penal Code of 1910. *Abbott v. State*, 74 S. E. 621, 622, 11 Ga. App. 43 (citing *Stoner v. State*, 63 S. E. 602, 5 Ga. App. 716; *Campbell v. City of Thomasville*, 64 S. E. 815, 6 Ga. App. 212).

#### Brandy

Brandy sold in prohibition territory is presumed to be an "intoxicant" within the penal statutes. *Flanders v. Commonwealth*, 131 S. W. 495, 140 Ky. 659.

#### Cider

Rev. Laws, c. 100, §§ 1, 2, provide that no person shall sell, expose, or keep for sale, spirituous or intoxicating liquor except as authorized by the chapter, and that ale, porter, lager beer, cider, all wines, any beverage which contains more than 1 per cent. of alcohol by volume at 60 degrees Fahrenheit, shall be deemed to be "intoxicating liquors" within the meaning of the chapter. Held, that the provision relating to the percentage of alcohol related to cider, and hence proof that defendant kept cider for sale containing more than 1 per cent. of alcohol was sufficient to sustain a conviction. *Commonwealth v. McGrath*, 69 N. E. 340, 185 Mass. 1.

V. S. 4460, regarding the sale of "intoxicating liquors," provides that the phrase shall be held to include fermented cider. Section 4463 provides that nothing in the chapter shall prevent the manufacture and sale of cider, but that no person shall sell it at an inn, grocery, or other public resort or at any place to an habitual drunkard. This section refers to unfermented cider such as is not by law within the term "intoxicating liquors." It follows that the provision in section 4465 as to "intoxicating liquors" includes fermented cider, and that the word "cider" as therein used has reference only to such cider as is not included in that phrase. Where an indictment charged defendant with selling intoxicating liquor and cider without authority, but did not allege the cider was sold at a public place, a conviction was proper on evidence that defendant had sold fermented cider irrespective of the character of the place of sale. *State v. Waite*, 47 Atl. 397, 72 Vt. 108.

The term "intoxicating liquors," in Rev. St. c. 29, § 40, declaring that wine, ale, porter, strong beer, lager beer or other malt liquors and cider when kept and deposited with intent to sell the same for tipping purposes or as a beverage as well as distilled spirits, are "intoxicating liquors," includes the enumerated liquors, and, in determining whether or not liquor is to be regarded as intoxicating under such enumeration, it is immaterial whether it is intoxicating in fact or not, and when a liquor comes within the scope of the enumeration it is intoxicating, and cider kept and deposited with intent to

sell for tippling purposes or as a beverage is an intoxicating liquor, though it may be unfermented and unintoxicating in fact. *State v. Frederickson*, 63 Atl. 535, 537, 101 Me. 37, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, 8 Ann. Cas. 48.

In a prosecution under the local option statute (24 Del. Laws, c. 65), making it unlawful to sell vinous liquors except for medicinal or sacramental purposes, under an indictment charging accused with selling to a specified person, not for medicinal or sacramental purposes, a certain vinous liquor, the correct name of which was to the grand jurors unknown, but which was then and there called "cider," the state must prove to the jury's satisfaction that accused sold the liquor in the county where the prosecution was had to the person named in the indictment, that the liquor was at the time vinous liquor commonly called "cider," and that it was not sold for medicinal or sacramental purposes. *State v. Coverdale* (Del.) 77 Atl. 754, 756, 1 Boyce, 555.

#### **Corn liquor**

In a prosecution for selling intoxicants, proof of the sale of corn liquor is sufficient to support an allegation that accused unlawfully sold intoxicating liquor. *Wilburn v. State*, 68 S. E. 460, 8 Ga. App. 28.

#### **Manhattan cocktail**

A "manhattan cocktail" is generally and popularly known to be intoxicating, and hence no proof of its intoxicating character is necessary in prosecutions under the prohibition law. *State v. Pigg*, 97 Pac. 859, 860, 78 Kan. 618, 19 L. R. A. (N. S.) 848, 130 Am. St. Rep. 387.

#### **As liquor**

See Liquor.

#### **As malt liquor**

See Malt Liquor.

#### **Medicinal preparations**

As Medicine, see Medicine.

The mere fact that a liquor sold was popularly known as a medicine, and its formula prescribed in the United States Dispensary or like standard authority, would not prevent it from being an intoxicating liquor; nor would the fact that the distinctive character and effects of intoxicating liquors had been eliminated, and its use as a beverage rendered undesirable by other ingredients, render it any the less an intoxicating liquor within the statute. *Arbuthnot v. State*, 120 S. W. 478, 479, 56 Tex. Cr. R. 517.

Patent medicines, cordials, bitters, tonics, and other articles are to be regarded as intoxicating liquors, if they are capable of being used as a beverage, and contain such a percentage of alcohol as that, if drunk to excess, they will produce intoxication. *Mason v. State*, 58 S. E. 139, 140, 1 Ga. App. 534.

The act of 1902, No. 90, does not exclude from the term "intoxicating liquor" medicinal preparations of which alcohol is the solvent principle. *State v. Krinski*, 62 Atl. 37, 38, 78 Vt. 162.

Medicinal preparations recognized as such by standard authority (such as the United States Dispensary), and not reasonably capable of use as intoxicating beverages—e. g., tincture of gentian, paregoric, bay rum, cologne, essence of lemon, wood alcohol—are not ordinarily to be regarded as being within the meaning of the expression "intoxicating liquors," though such articles are liquid, contain alcohol, and may produce intoxication. *Mason v. State*, 58 S. E. 139, 140, 1 Ga. App. 534.

#### **As property**

See Property.

#### **Spirituos, vinous, fermented, and malt liquors in general**

See, also, Spirituous Liquor.

Sess. Laws 1909, p. 18, § 31, defines intoxicating liquors as including spirituous, vinous, malt, and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication. Held, that it is unnecessary for the state to prove that any liquor or beverage falling within the enumerated class will in fact produce intoxication. Under Sess. Laws 1909, p. 18, § 31, the state must prove the intoxicating quality of all preparations used or intended to be used as beverages which do not fall within the class enumerated in such section as spirituous, vinous, malt, and fermented liquors. *Ex parte Lockman*, 110 Pac. 253, 255, 18 Idaho, 465.

"Intoxicating liquors," as used in Ky. St. § 2569a, and other local option legislation, means spirituous, vinous, or malt liquors, by whatever name called, that contain alcohol, and are intended to be or may be used as a beverage, and, when so used, will intoxicate. *Commonwealth v. Louisville & N. R. Co.*, 130 S. W. 798, 800, 140 Ky. 21.

Where a "beverage, liquid mixture or decoction of any kind, producing intoxication" is sold in local option territory, and the offense does not consist of a sale of spirituous, vinous, or malt liquor, the indictment must be under Ky. St. § 2557a, prohibiting the sale of a beverage, liquid mixture, or decoction of any kind producing intoxication in local option territory, and the indictment must charge, and the evidence show, the sale of a beverage, liquid mixture, or decoction producing intoxication though it is not necessary that it be known as a spirituous, vinous, or malt liquor. Ky. St. § 2557, provides that, after the adoption of county option in any county, city, town, district or precinct, it shall be unlawful to sell, barter, or loan spirituous, vinous, or malt

liquors to any person except as thereafter provided, and any person who shall sell, barter, or loan, directly or indirectly, any such liquors in such county, city, town, district, or precinct shall on conviction be fined, etc. Held, that such section does not prohibit the sale of every beverage, liquid mixture, or decoction producing intoxication, and hence, to sustain a conviction thereunder a sale of "spirituous, vinous, or malt liquors," that are intoxicating must be alleged and proved. *Sizemore v. Commonwealth*, 131 S. W. 37, 39, 140 Ky. 338.

"Vinous liquor" is liquor which has undergone fermentation. *State v. Coverdale* (Del.) 77 Atl. 754, 756, 1 Boyce, 555.

Laws 1907, p. 297, providing for the creation by popular vote of antisaloon territory, is not unconstitutional because it defines intoxicating liquors as liquors including distilled, spirituous, vinous, fermented, and malt liquors, without stating how much water might be mingled with the liquors without affecting their intoxicating quality. *People v. McBride*, 84 N. E. 865, 869, 234 Ill. 146, 123 Am. St. Rep. 82, 14 Ann. Cas. 994.

Rev. Pol. Code, § 2834, requires a license to engage in the business of selling any spirituous, vinous, malt, brewed, or other intoxicating liquors. The prior license law (Sess. Laws 1890, p. 229, c. 101, § 6) makes all spirituous, malt, etc., or other intoxicating liquors, or mixtures that will produce intoxication, intoxicating liquors within the act. Held that, in view of the omission of the definition of intoxicating liquors in section 2834, that section makes the liquors named therein intoxicating, and in a prosecution thereunder, upon showing that the liquors sold were of the class named, the state need not prove that they were intoxicating. *State v. Ely*, 118 N. W. 687, 689, 22 S. D. 487, 18 Ann. Cas. 92.

Laws Or. 1893, p. 574, § 48, subd. 18, empowered the common council to license, tax, regulate, or prohibit saloons and all places where spirituous, malt, or vinous liquors are sold. Act Feb., 1905 (Special Laws Or. 1905, p. 243), reincorporating the city of Eugene, repealed all acts and parts of acts in conflict therewith. The amendment (Sp. Laws Or. 1905, p. 252, § 48, subd. 18) empowered the common council to license, tax, regulate, or prohibit barrooms, etc., in all places where spirituous, malt, vinous, or intoxicating liquors are sold. Held, that the old charter was not amended in respect to the power to prohibit; the word "intoxicating" used in the new charter being a synonym of the kinds of liquor specified in the old. *Renshaw v. Lane County Court*, 89 Pac. 147, 148, 49 Or. 526.

A charge that the United States internal revenue license for selling "malt liquor" was prima facie proof that defendant was then and there engaged in selling "intoxicating

liquor" is erroneous, notwithstanding Acts 28th Leg. p. 57, c. 40, art. 402, providing that in prosecutions under the act an examined copy of the entries on the books of the internal revenue collector showing the issuance of a United States internal revenue or malt license shall be admissible and prima facie evidence that the person paying the tax is engaged in selling intoxicating liquors, where the evidence was conflicting as to whether the malt liquor alleged to have been sold was intoxicating. *Uloth v. State*, 87 S. W. 822, 823, 48 Tex. Cr. R. 295.

Under Act March 5, 1908 (99 Ohio Laws, p. 36) § 3, providing that the phrase "intoxicating liquor" as used in the local option statute shall be construed to mean any distilled, malt, vinous, or any intoxicating liquor whatever, it is unlawful to sell malt liquor as a beverage where the county local option law is in force, whether such malt liquor is in fact intoxicating or not. *State v. Walder*, 93 N. E. 531, 532, 83 Ohio St. 68.

The term "intoxicating liquor," in Rev. St. 1895, art. 5060a, regulating the sale of liquor in local option territory and imposing an annual tax on all persons selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, on prescription in such territory, refers to liquor possessing intoxicating quality, and, if the liquor sold is not of such quality, it is not an offense though the sale is made without a license. *Ex parte Gray* (Tex.) 83 S. W. 828, 829.

Circular No. 33, issued by the Commissioner of Internal Revenue May 10, 1910, instructing subordinates in his department that "all forms of distilled spirits from which the substances congeneric with ethyl alcohol have been removed for practical purposes altogether, and which have been heretofore marked as 'pure, neutral, or cologne spirits,' will be marked 'alcohol,'" under which the marking of any distilled product as "spirits" has been discontinued, is in violation of Rev. St. § 3287, which provides that "all distilled spirits shall be drawn from the receiving cisterns into casks or packages, \* \* \* and the particular name of such distilled spirits as known to the trade, that is to say, high-wines, alcohol, or spirits, as the case may be, shall be marked or branded on the head of such cask or package"; it being shown that one distinct product of alcoholic distillation is known to the trade as "spirits," while another product is known as "alcohol," the distinction being so well known and established that their being so marked does not constitute a misbranding, and therefore the provision therefor is not by implication repealed by Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768. *Union Distilling Co. v. Bettman*, 181 Fed. 419, 420.

In passing the local option law (Laws 1887, p. 179), the title of which is "An act

to provide for the preventing of the evils of intemperance by local option \* \* \* by submitting the question of prohibiting the sale of intoxicating liquors to the qualified voters of such county or city," the Legislature must be deemed to have had in mind the definition of "Intoxicating liquors" in the then existing general law, which was "fermented, vinous or spirituous liquors, or any composition of which fermented, vinous or spirituous liquors is a part." Therefore the provision in the local option law prohibiting the sale of beverages containing alcohol, in any quantity whatever, did not violate Const. art. 4, § 28 (Ann. St. 1906, p. 185), forbidding the bill to contain more than one subject which should be clearly expressed in its title. *State v. Martin*, 129 S. W. 931, 933, 230 Mo. 1, 139 Am. St. Rep. 628.

In view of Rev. St. 1909, § 7222, providing that the term "Intoxicating liquor," as used in this act, shall be construed to be fermented, vinous, or spirituous liquor or any composition of which vinous, fermented, or spirituous liquor is a part, the local option law, which deals with the same subject as the dramshop law, is not violative of Const. art. 4, § 28, providing that no statute shall contain more than one subject, in that it deals with intoxicating liquors and with beverages which do not contain a sufficient percentage of alcohol to intoxicate persons who drink the same, since liquors which actually intoxicate and those which contain an insufficient quantity of alcohol to produce intoxication are embraced within the term "Intoxicating liquor." *State v. Hanson*, 137 S. W. 968, 969, 234 Mo. 583.

"Intoxicating," as applied to liquor, is confined to spirituous, vinous, or malt liquors; that is, liquors containing alcohol, produced either by distillation or fermentation, capable of producing intoxication when taken into the human stomach in such quantities as it may reasonably contain. *Thompson v. State* (Tex.) 97 S. W. 316, 317.

"Intoxicating liquor" is defined by Act March 5, 1908 (99 Ohio Laws, p. 35, § 3), as any distilled, malt, vinous, or intoxicating liquor whatever. *Scheu v. State*, 93 N. E. 969, 971, 83 Ohio St. 146.

In a prosecution under Act March 24, 1908 (Laws 1907-08, c. 69, art. 3, § 1; Snyder's Comp. Laws, § 4180), forbidding the sale of any spirituous, vinous, fermented or malt liquors or any imitation or substitute therefor, it is not necessary to allege or prove that the liquor sold was intoxicating; the allegation and proof that the liquor sold was a spirituous, vinous, fermented, or malt liquor, as the case may be, or an imitation of or substitute for one, or the other of such liquors being sufficient. *Moss v. State*, 111 Pac. 950, 956, 4 Okl. Cr. 247.

Spirituous and vinous liquors are intoxicating beverages. Under Ky. St. § 2557 (Rus-

sell's St. § 3635), prohibiting the sale of spirituous, vinous, and malt liquors in local option territory, a sale of malt liquor whether it intoxicates some people or not or is only a mild intoxicant, or whether accused believed that it was an innocent soft drink, is an offense. *Flanders v. Commonwealth*, 130 S. W. 809, 811, 140 Ky. 38.

### Whisky

"Intoxicating liquor" and "whisky" are synonymous, and hence an instruction, that if defendant sold "intoxicating liquor" as charged he was guilty, applied the facts to the allegations of the information which alleged a sale of "whisky." *Wilcoxson v. State* (Tex.) 91 S. W. 581.

Whisky is an "intoxicating liquor" as that term is used in the statutes. *Steinkuhler v. State*, 109 N. W. 395, 396, 77 Neb. 331.

A charge that defendant bought "whisky" contrary to law is equivalent to charging that he bought intoxicating liquors, the word "whisky" being of equal import with the expression "intoxicating liquors." *Rutherford v. State*, 90 S. W. 172, 173, 49 Tex. Cr. R. 21.

Whisky is an "intoxicating liquor." *State v. Barr*, 77 Atl. 914, 915, 84 Vt. 38.

Whisky sold in prohibition territory is presumed to be an "intoxicant" within the penal statutes. *Flanders v. Commonwealth*, 131 S. W. 495, 140 Ky. 659.

### Wine

Wine sold in prohibition territory is presumed to be an "intoxicant" within the penal statutes. *Flanders v. Commonwealth*, 131 S. W. 495, 140 Ky. 659.

## INTOXICATING LIQUORS AND MIXTURES

An indictment, alleging that accused in a designated magisterial district unlawfully sold and delivered "intoxicating liquors and mixtures thereof," sufficiently charges a violation of Revenue Law (Acts 1904, p. 42, c. 20) § 141, forbidding the sale without a license of "wine, ardent spirits, malt liquors, or any mixture thereof," and further providing that "all mixtures, preparations, and liquors (except pure apple cider) which will produce intoxication shall be deemed 'ardent spirits' within the meaning of this section." *Fletcher v. Commonwealth*, 56 S. E. 149, 151, 106 Va. 840.

The legislative declaration contained in Code 1899, c. 32, § 1, that "intoxicating mixtures" shall be deemed spirituous liquors, is equivalent to a declaration that they are spirituous liquors for the purposes of the act, whether they are such in fact or not. *State v. Good*, 49 S. E. 121, 122, 56 W. Va. 215.

"Intoxicating liquors," or mixtures thereof, reasonably construed, mean liquors which will intoxicate, and which are commonly used

as beverages for such purpose, and also any mixtures of such liquors as, retaining their alcoholic qualities, may be used as a beverage, and become a substitute for the ordinary intoxicating drinks. *Roberts v. State*, 60 S. E. 1082, 1084, 4 Ga. App. 207.

Whisky, brandy, wine, or beer sold in prohibition territory are presumed to be intoxicants, within the penal statutes; but, to convict for selling concoctions or mixtures, the intoxicating effect of which is not established, such effect must be alleged and proved. *Flanders v. Commonwealth*, 131 S. W. 495, 140 Ky. 659.

## INTRALIMINAL

"Intrallminal," with reference to property rights conferred by a lode location, embraces all within its boundaries, down to the center of the earth. *Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co.*, 75 Pac. 1070, 1073, 32 Colo. 176, 64 L. R. A. 925.

## INTRICATE QUESTION

An action for damages to a holder of railroad bonds for breach of an agreement as to reorganization of the road, under which he deposited his bonds, the measure of damages depending on the value of the road with its various appurtenances as a going concern, involves questions of intricacy authorizing a trial by special jury under Laws 1901, p. 1465, c. 602, § 5. *Industrial & General Trust v. Tod*, 95 N. Y. Supp. 44, 46 Misc. Rep. 492.

## INTRINSIC

### INTRINSIC DANGER

The "intrinsic danger" of the undertaking on which the exception rendering the owner liable for the negligence of an independent contractor is based is the danger inherent in the performance of the contract resulting directly from the work to be done, and not from the negligence of the contractor. *Lafery v. United States Gypsum Co.*, 111 Pac. 498, 501, 83 Kan. 349, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A, 590.

### INTRINSIC FAIRNESS AND HONESTY

The terms "intrinsic fairness and honesty," as used in the definition of color of title in the statute of limitations relate to the means of proving the right of property in the land so as to make the title equitably equal to a regular chain. *Pearson v. Burditt*, 26 Tex. 157, 173, 80 Am. Dec. 649.

### INTRINSIC VALUE

While the term "market value" is not synonymous with "intrinsic value"—the one meaning the actual price at which the commodity is commonly sold and the other its true, inherent, and essential value, independent of accident, place or person, the same

everywhere and to every one—yet the latter is so generally a factor in the former that a thing which has no intrinsic value is generally without market value, and therefore, where a party was prepared to meet an issue as to the market value of animals, the refusal of a continuance to procure evidence to meet an issue as to their intrinsic value presented by a trial amendment was not prejudicial. *Chicago, R. I. & P. Ry. Co. v. Clements*, 115 S. W. 664, 666, 53 Tex. Civ. App. 143.

## INTRODUCE

The word "introduce," in an indictment alleging that accused "did \* \* \* introduce" from without the limits of Indian Territory intoxicating liquors, is synonymous with the words "carry or have carried into," as used in Act Cong. March 1, 1895, c. 145, § 8, 28 Stat. 697, punishing any person "who shall carry or in any manner have carried" into Indian Territory any intoxicating liquors. *United States v. Buckles*, 97 S. W. 1022, 1024, 6 Ind. T. 319.

## INTRODUCTION OF EVIDENCE

The word "evidence," as used in rule 3 of the Superior Court (66 S. E. xlii, 128 N. C. 655), providing that "in all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel," does not mean the tendering of a witness for the evident purpose of having his fees taxed as costs. The "introduction of evidence" includes something more than the mere tendering of a witness and is, as stated in *Starkie*, Ev. p. 8, § 3, "that which is legally submitted to a jury to enable them to decide upon the questions in dispute or issue as pointed out by the pleadings, and as distinguished from all comment and argument." Witnesses are vehicles or means of proof, while evidence is the proof itself. Unless the party tendering a witness examines such witness with the view of eliciting proof in support of his side of the controversy, he cannot be said to introduce evidence. *Brown v. Southern Ry. Co.*, 52 S. E. 198, 140 N. C. 154.

## INTRUDE

### INTRUDED INTO

The words "intruded into," in Code Civ. Proc. § 2232, subd. 4, authorizes the maintenance of summary proceedings to recover possession of real property where the defendant had "intruded into" or "squatting upon" any real property without permission of the person entitled to possession thereof, etc., refer to the original entry, and do not include an entry by a vendee under contract of sale. *Stockwell v. Washburn*, 111 N. Y. Supp. 413, 415, 59 Misc. Rep. 543.



**INTRUDER**

As de facto officer, see De Facto Officer.

An "intruder" is one "who attempts to perform the duties of an office without authority of law and without the support of public acquiescence. \* \* \* No one is under obligation to recognize or respect the acts of an intruder; and for all legal purposes they are absolutely void." *Oates v. State*, 121 S. W. 370, 381, 56 Tex. Cr. R. 571 (quoting and adopting definition in *Cooley*, Const. Lim. p. 751).

Where a lease was terminated by a warrant in summary proceedings for nonpayment of rent, an assignment of the lease without the landlord's consent, in violation of the covenants of the lease, did not confer any right upon the assignee, where his occupancy of the premises covered by the lease did not begin until after its termination; but such occupancy rendered him a mere "squatter" or "intruder," within Code Civ. Proc. § 2232, subd. 4, authorizing summary proceedings to recover possession of land from a person who has intruded into or squatted upon any real property without the permission of the person entitled to the possession thereof. *Mahoney v. Hoffman*, 109 N. Y. Supp. 13, 14, 58 Misc. Rep. 217.

**INTRUST**

Goods are not "intrusted" for sale within a statute providing that an agent to whom goods are "intrusted" for sale is the true owner thereof so far as to render valid a sale of them by him to a bona fide purchaser, where the person in whose hands they are has stolen them. *Prentice Co. v. Page*, 41 N. E. 279, 280, 164 Mass. 276 (citing *Rodliff v. Dallinger*, 4 N. E. 805, 141 Mass. 1, 55 Am. Rep. 439; *Thacher v. Moors*, 134 Mass. 156; *Stollenwerck v. Thacher*, 115 Mass. 224; *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. Ed. 214; *Soltan v. Gerdau*, 23 N. E. 864, 119 N. Y. 380, 16 Am. St. Rep. 843).

One to whom a child is given by its parent to expose is one to whom it had been "intrusted or confided," within Code, § 4766, declaring a punishment if a parent of a child under six years of age, or a person to whom such child has been intrusted or confided, expose such child with intent to abandon it. *State v. Sparegrove*, 112 N. W. 83, 84, 134 Iowa, 599.

In an action for injuries to a coal mine employé by the fall of the roof of the entry, the evidence held to show that a third person was intrusted with superintendence over the miners and the mine, within Code 1907, § 3910, subd. 2, making an employer liable for injuries to an employé caused by the negligence of a coemployé intrusted with superintendence. *Sloss-Sheffield Steel & Iron Co. v. Green*, 49 South. 301, 303, 159 Ala. 178.

A corporation of Baltimore, which was in possession of a steamer, registered elsewhere, under a contract of purchase, although it had not paid the purchase price, and the title was retained by the vendor, was a "person intrusted with management," within Act June 23, 1910, c. 373, § 2, 36 Stat. 604, and presumptively authorized to order repairs and supplies; and persons furnishing the same were entitled to a lien on the vessel therefor, in the absence of knowledge on their part, or anything to put them on inquiry, as to the terms of the contract, as required by section 3 of the act. *The City of Milford*, 199 Fed. 956, 959.

**INURE**

The word "inure" means "to take or have effect; to serve to the use, benefit or advantage of a person," and, as used within the organic act (Act May 2, 1890, c. 182, § 23), relating to vacation of highways, means that, when the easement is abandoned, the title to the strip abandoned becomes ipso facto again coupled with the use. *Mean v. Callison*, 116 Pac. 195, 28 Okl. 737.

As used in the United States Pension Laws (Rev. St. § 4747) providing that no money due or to become due to any pensioner shall be liable to attachment or seizure under any legal or equitable process, but shall inure wholly to the pensioner's benefit, the words "shall inure wholly to the pensioner's benefit" relate to the words "due or to become due" and have no force after delivery of the money to the pensioner; and under the statute pension money is only exempt "while due, or to become due." In re *Ferguson's Estate*, 123 N. W. 123, 140 Wis. 583, 17 Ann. Cas. 1189.

In the statute providing that no money due to any pensioner shall be liable to attachment, levy, or seizure, whether the same remains with the Pension Office, or any officer or agent thereof, or is in the course of transmission, but shall "inure wholly to the benefit of such pensioner," the words quoted mean only that the pension funds shall be protected until they come safely into the hands of the pensioner, after which they are liable for his debts; and hence pension money, in the hands of a bankrupt at the time of the adjudication, neither invested nor mingled with other funds, is not exempt. In re *Jones*, 166 Fed. 337, 338.

**INVALID**

The expression "invalid," used in Lien Law N. Y. § 235, providing that chattel mortgages should be invalid under certain circumstances, means not valid; null or void. In re *Thomas*, 199 Fed. 214, 227 (citing Cent. Dict.).

A holding that a paving ordinance was "invalid," because conferring certain dis-

cretionary powers on the engineer, did not render the ordinance void in toto, so as to render wholly void an ordinance amending the first ordinance in the particulars in which it was faulty. *Johnson v. People ex rel. Reed*, 66 N. E. 1081, 1083, 202 Ill. 306.

The word "invalid," as applied to a contract, does not always mean an absolute nullity, for a contract may be so imperfect as not to be enforceable, but not such an absolute nullity that it cannot be perfected. *Jones v. Bank of Cumming*, 63 S. E. 36, 40, 131 Ga. 614.

A sale under a power in a deed of trust, made after the death of the grantor or mortgagor, and before the expiration of the four years within which administration might be begun, but where no administration had been begun, was valid, and passed the title to the lands conveyed, subject only to be set aside by an administration for the payment of such preferred claims as might have existed under the law at the time, and is not invalid or void, nor in a state of suspense, except as subject to such administration; the terms "invalid" and "void," sometimes applied to such trust deeds, meaning nothing more than ineffectual to pass title; the term "void" being seldom regarded as implying a complete nullity, but as being, in a legal sense, and under certain circumstances, subject to qualification. *Wiener v. Zwieb*, 141 S. W. 771, 777, 105 Tex. 262.

The words "void" and "invalid," when used in regard to contracts not immoral or against public policy, usually mean voidable at the option of one of the parties or some one legally interested therein. *Doney v. Laughlin*, 94 N. E. 1027, 1028, 50 Ind. App. 38 (citing 8 Words and Phrases, pp. 7334, 7335).

#### INVALID LICENSE

As license, see License (Governmental Regulation).

#### INVALIDATE

See Suit to Invalidate Patent.

#### INVEIGLE—INVEIGLEMENT

To warrant a conviction under P. S. 5721, punishing one who forcibly seizes or inveigles or kidnaps another under the age of 16 years, it is not necessary to show that accused used actual force on the person of prosecutrix, a child 15 years old, and thus caused her to go out of the state. The word "inveigle," in P. S. 5721, punishing one who forcibly seizes or "inveigles" or kidnaps another, is used in its ordinary sense, and carries the idea of deception for the accomplishment of an evil purpose. *State v. Rivers*, 78 Atl. 786, 788, 84 Vt. 154.

On a trial for a violation of P. S. 5721, punishing one who forcibly seizes or inveigles

or kidnaps another, an instruction defining the word "inveigle" as to lead astray by making blind to the truth or consequences, to mislead by deception, enticing into a violation of duty, propriety or self-interest, to blind, to delude, to lead astray, to persuade to something evil by deception, to entice, to ensnare, to seduce, to wheedle, is not misleading because of the terms "to blind, to delude, to entice," when used in connection with the expressions "to mislead by deception," "to persuade to something evil by deception." *State v. Rivers*, 78 Atl. 786, 788, 84 Vt. 154.

#### INVENTION

See Known Invention; Model of Invention and Improvement; Patent (of Invention); Primary Inventions and Patents; Same Invention; Secondary Invention.

All inventions of like nature or similar thereto, see All.

As property, see Property.

Pioneer invention, see Pioneer.

See, also, Anticipation; Prior Public Use.

"A new combination with a new mode of operation may be 'inventive,' even if all the parts thereof are old, and even if the functions of the combination be also old." Where a new organization of old elements produces a new mode of operation and beneficial result, they may be a "patentable invention" whether that result be new or old. The combination of old devices in a new article without producing any new mode of operation is not invention. *Louden Machinery Co. v. Janesville Hay Tool Co.*, 141 Fed. 975, 978 (quoting and adopting *Walker, Patents*, §§ 26, 37).

"In determining the question of 'invention,' each case must depend upon its own facts; the inquiry always being whether what has been done required the exercise of the inventive faculties. Has a new or better result been obtained? Is it cheaper and more durable? Has it new capabilities? Does it perform new functions?" *Rumford Chemical Works v. New York Baking Powder Co.*, 134 Fed. 385, 388, 67 C. C. A. 367.

Where the idea of a machine has been conceived, and the conception carried into effect by the construction of the machine, which is used, or is capable of being used, for the purpose for which it was designed, it is no longer an "experiment," but an "invention," and the subsequent abandonment of the use of the machine does not render it an abandoned experiment, nor lessen its effect as an anticipation which will invalidate a subsequent patent to another for substantially the same machine. *Buser v. Novelty Tufting Mach. Co.*, 151 Fed. 478, 492, 81 C. C. A. 16.

"Invention" consists of the conception of the idea and of means for putting it in practice and producing the desired result. Until the latter conception is complete and ready to be put in some practical form, there is no available conception of the invention within the meaning of the patent law. *Burson v. Vogel*, 29 App. D. C. 388, 395.

Where a contract for the payment of royalty on a patented device provided that the royalty was to be paid on the "invention" above referred to, the use of the word "invention" did not open the state of the art and allow the defendant to meet the plaintiff's claim by proving that he had invented nothing new, but the royalty was to be paid on the "invention" described in the specified applications—on the contrivances there described—unless and until there was a final adverse action by the patent office. *Eclipse Bicycle Co. v. Farrow*, 26 Sup. Ct. 150, 152, 199 U. S. 581, 50 L. Ed. 317.

The coupling without modification of a motor that will run any kind of a machine to a machine that will run with any kind of a motor is not "patentable invention." *National Regulator Co. v. Powers Regulator Co.*, 160 Fed. 460, 463, 87 C. C. A. 444.

#### **Adaptation to new use**

A patent for a material for making steam packing may involve "invention," although a similar material had previously been used for other and wholly different purposes. *Forsyth v. Garlock*, 142 Fed. 461, 466, 73 C. C. A. 577.

#### **Aggregation or combination**

Merely bringing together old devices in a combination in which each performs its old function, without producing any new result by reason of the combination, is not "invention." *Self-Sealing Can Co. v. Hocker*, 136 Fed. 418, 420 (citing *Halles v. Van Wormer*, 20 Wall. [87 U. S.] 354, 22 L. Ed. 241).

The mere assembling of old parts to make a structure of a new design, although new lines and curves and a harmonious and novel whole are produced, does not involve "invention" so as to render the design patentable. *Crier v. Innes*, 160 Fed. 103, 106, 107.

The mere bringing together of old elements, which in their new places do no more than their original work and do not co-operate with other elements in doing something new and useful, is not "invention"; but, if they coact with each other in a new and unitary organization so as to produce a more beneficial result than by their separate operation, it may constitute a patentable combination. *National Tube Co. v. Aiken*, 163 Fed. 254, 261, 91 C. C. A. 114.

#### **Change of material**

The use of a different material in constructing an article previously patented involves invention where it produces a useful

result, increased efficiency, or a decided saving in operation. *George Frost Co. v. Samstag*, 180 Fed. 739, 740, 105 C. C. A. 37.

#### **Development of idea**

"Invention" is not confined to the concrete mechanical form into which an idea ultimately evolves. "Invention" is the idea itself, the burst of new thought, the discovery; and patentable invention is the conjunction of these with appropriate and efficient mechanical means. Confessedly, an old idea, carried out mechanically in a new form, is patentable invention. A new idea, carried out mechanically in an old form, ought equally to be regarded as patentable invention. To hold otherwise is to dethrone the head and enthrone the hands; to leave genuine genius unrecompensed, while placing the inventor's crown on mechanical skill. *Brown v. Crane Co.*, 133 Fed. 235, 237, 66 C. C. A. 676.

#### **Extension of original idea**

It is not "invention" to merely extend the use of an old combination of elements, where no new result is produced and no new method of producing the old result. *Volgtmann v. Wels & Ridge Cornice Co.*, 148 Fed. 848, 853, 78 C. C. A. 538.

The mere carrying forward or a mere extended application of the original thought is not "invention," even though it results in improvement in degree. *Volgtmann v. Wels & Ridge Cornice Co.*, 133 Fed. 298, 303 (citing *Consolidated Roller-Mill Co. v. Walker*, 11 Sup. Ct. 292, 138 U. S. 124, 34 L. Ed. 920; *Wright v. Yuengling*, 15 Sup. Ct. 1, 155 U. S. 47, 39 L. Ed. 64).

#### **Improvement**

"Invention," in the nature of improvements, is the double mental act of discerning, in existing machines, processes, or articles, some deficiency, and pointing out the means of overcoming it. *General Electric Co. v. Sangamo Electric Co.*, 174 Fed. 246, 251, 98 C. C. A. 154.

Not every improvement is "invention." If ordinary mechanical skill is adequate to make the selection of elements from machines in the prior art and their union or combination in a new machine, operating in the old way and accomplishing the same result, although it may be an improved result, and no new idea is involved in the process, there is no patentable "invention," however great the improvement. *American Laundry Machinery Mfg. Co. v. Troy Laundry Machinery Co.*, 171 Fed. 870, 877 (citing *Dodge Coal Storage Co. v. New York Cent. & H. R. R. Co.*, 150 Fed. 738-741, 80 C. C. A. 404; *Dunbar v. Eastern Elevating Co.*, 81 Fed. 201, 26 C. C. A. 330; *Atlantic Works v. Brady*, 2 Sup. Ct. 225, 107 U. S. 192, 199, 200, 27 L. Ed. 438).

#### **Mechanical skill**

"Invention" is not the offspring of mere mechanical skill, no matter how highly de-

veloped it may be; and, while it may be said to be the product of the intellect as against mere handiness in the use of tools, it is not every new mental conception in a useful art which marks an advance in such art that will raise the mechanic into an inventor under the patent laws. *Lord & Burnham Co. v. Payne*, 190 Fed. 172, 178.

It is not "invention" to produce a device which a skilled mechanic, upon suggestion of what was required, would produce, especially so when he is aided in the work of construction by devices and appliances in practical use pregnant with suggestions of larger and better use. *Ross v. Dowden Mfg. Co.*, 157 Fed. 681, 684, 85 C. C. A. 449 (citing *Tie-man v. Kraatz*, 85 Fed. 439, 29 C. C. A. 259).

#### **Mental conception**

A conception of the mind is not sufficient as an "invention," or a completed "invention," within section 4886, Rev. St. (U. S. Comp. St. 1901, p. 3382), requiring that, to be entitled to a patent, the person must have "invented" or "discovered" some new, etc., thing. *Westinghouse Mach. Co. v. General Electric Co.*, 199 Fed. 907, 916.

That which influences the mental conception, and leads one, step by step, until his device is successfully produced, is "invention," as distinguished from mere "mechanical skill." *Steiner & Voegtly Hardware Co. v. Tabor Sash Co.*, 178 Fed. 831, 841.

A conception alone, although first in time, is not patentable, but must be accompanied by mechanical embodiment, which, to make the invention patentable, must itself be unanticipated. *Voightmann v. Perkinson*, 138 Fed. 56, 57, 70 C. C. A. 482.

A theory or mental conception of a new device is not "invention" within the patent law, and the date of an invention cannot be carried back of the time when it was embodied in a model or drawing, or some concrete form would enable those skilled in the art to construct the device. *Corrington v. Westinghouse Air Brake Co.*, 178 Fed. 711, 715, 103 C. C. A. 479.

#### **INVENTIVE DISCOVERY**

"Inventive discovery" involves the intelligent apprehension of relations not before recognized by others, although actually existing, followed by the conception of how they can be practically utilized. *Eck v. Kutz*, 132 Fed. 758, 779.

#### **INVENTOR**

The general rule is that he who first reduces an invention to practice is ordinarily held to be the "inventor" as against another who claims to have previously conceived the idea which led to the invention, but made no practical application of it. *Killeen v. Buffalo Furnace Co.*, 140 Fed. 33, 36, 37.

## **INVENTORY**

See Complete Inventory.

A covenant in a policy issued to a corporation conducting a tobacco warehouse covering the tobacco therein, which required the insured to keep "a complete itemized inventory of stock on hand, showing grades and brands," did not require such inventory to contain a statement of values which were readily ascertainable from the statement of grades or brands. *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. 378, 384.

"Lexicographers say that 'inventory' is an itemized list of the various articles constituting a collection, estate, stock in trade, etc., with their values." Under an iron-safe clause requiring the keeping of a complete itemized inventory, an inventory which lumps bills of goods, without setting out the items or their quality or the stock thereof, is insufficient, especially where two inventories which more nearly comply with the clause had been started and never completed but destroyed and the books as kept were not sufficient without the clause. *Phoenix Ins. Co. v. Sherman*, 66 S. E. 81, 83, 110 Va. 435.

An inventory of a stock of merchandise, within the meaning of the term "inventory" as used in what is known as the "Iron-safe clause" of a fire insurance policy, means a list of all the articles of merchandise in the stock, sufficiently itemized to show the kinds and numbers or quantities thereof, together with their values at the time of making the same, as nearly as they can be ascertained. In the case of a store opening with an entirely new stock of goods, at or about the date of the issuance of the policy, the invoices of the first lot of goods put into it, giving the quantities thereof by items, with the cost prices, if preserved and kept for production, on the demand of the insurer, as and for an inventory, will constitute such a list, and the insurer will have substantially complied with so much of the policy as requires the taking of an inventory. In determining what constitutes such an inventory, regard must be had to the purpose for which it is required, and, in seeking this, all parts of the "Iron-safe clause" should be read and considered together. *Ruffner Bros. v. Dutchess Ins. Co.*, 53 S. E. 943, 944, 59 W. Va. 432, 115 Am. St. Rep. 924, 8 Ann. Cas. 866.

An inventory, in the sense used in an insurance policy, means an itemized list or enumeration of property, article by article, and is not intended merely to show the gross value of the property insured, but it is to enable the parties to ascertain the different articles which go to make up the entire stock in order that the insurance company may test the correctness of the claim for damages in two respects: First, whether the articles composing the stock belong to the class of property covered by the policy; second, whether

the valuation attached to the different items is reasonable. *Shawnee Fire Ins. Co. v. Thompson & Rowell*, 119 Pac. 985, 989, 30 Okl. 466.

An invoice of goods purchased is not an "inventory" of stock to be produced under the iron-safe clause of a fire policy, nor is a set of books such an "inventory." *Johnson v. Sun Fire Ins. Co.*, 60 S. E. 118, 120, 3 Ga. App. 430 (citing *Everett-Ridley-Ragan Co. v. Traders' Ins. Co.*, 48 S. E. 918, 121 Ga. 228, 104 Am. St. Rep. 99; *Southern Fire Ins. Co. v. Knight*, 36 S. E. 821, 111 Ga. 622, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Hester v. Scottish Union & National Ins. Co.*, 41 S. E. 552, 115 Ga. 454).

Invoices and entries in a ledger made from them, stating the aggregate value of goods sent from one store to another by the proprietor of both, not in all cases specifying the kind of goods, was not an inventory within the iron-safe clause of a policy of fire insurance making the taking of "inventory" at least once a year a condition precedent to the insurer's liability on the policy. An "inventory" is a "detailed and itemized enumeration of the articles composing the stock with the value of each." *Coggins v. Aetna Ins. Co.*, 56 S. E. 506, 508, 144 N. C. 7, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924 (quoting and adopting definition in *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 48 S. W. 559, 19 Tex. Civ. App. 344).

An "inventory," "One car load household furniture," is not such an inventory of attached goods as the statute requires to be made by a constable serving the attachment by which an action in a justice court is commenced, so that jurisdiction is not conferred on the justice by the service thereof, with the writ, on the person in whose possession the goods were found. *Knack v. Berlin*, 114 N. W. 342, 343, 150 Mich. 550.

The word "schedule" has a meaning as the equivalent to "inventory." An inventory is a list or catalogue of property merely, without attempt to describe the same in detail. A schedule of property for taxation is a list of assessable articles without attempt to describe the same in detail. A statement is defined to be "a formal, exact, detailed presentation." A statement would contain all that would appear in a schedule or list, but would contain minutiae and matter of description not necessary to a schedule or inventory. Section 49 of the revenue act (3 Starr & C. Ann. St. 1896, p. 3423, c. 120), prescribing a penalty for the failure of a railroad to file a statement with the county clerk, refers to the statement or schedule showing the property held for right of way and the length of tracks and turnouts and tracts of land through which the road runs (which property is afterwards described as "railroad track"), which is required to be filed by section 41 of the act, and cannot be

extended by implication to include the failure to report the value of the railroad track annually, or to return the lists of rolling stock required to be returned by section 44, or to the failure to make the list or schedule of personal property or real estate, which is required to be listed by section 46. *Chicago, R. I. & P. R. Co. v. People*, 75 N. E. 368, 370, 217 Ill. 164.

#### Invoice distinguished

Under a fire policy of insurance covering a stock of goods in a warehouse which contained a covenant for its avoidance unless an inventory should be taken within 30 days, an "inventory" meant a list made by the merchant of the goods in his store, and though an "invoice" is also a list of goods, it is made by the consignor at the point of shipment and does not show that the goods therein listed have reached the consignee or what portion thereof has been sold, and the requirement of the policy would not be met by the invoices of the insured plus his books. *Day v. Home Ins. Co.*, 58 South. 549, 551, 40 L. R. A. (N. S.) 652.

### INVEST—INVESTMENT

See Capital Invested; Money Loaned and Invested; Reinvest—Reinvestment; Splendid Investment.

Investments in bonds, stocks, or otherwise, see Otherwise.

It has been adjudged that general deposits in a bank are not "investments" within the meaning of a statute forbidding investments by a state treasurer. *Warren v. Nix*, 135 S. W. 896, 899, 97 Ark. 374 (citing *State v. McFetridge*, 54 N. W. 1, 998, 84 Wis. 473, 20 L. R. A. 223).

"To 'invest' means to lay out money or capital in business with a view of obtaining an income or profit, as to 'invest' money in bank stock; to employ for some profitable use; to convert into some other form of wealth, usually of a more or less permanent nature." In *re Curtis*, 60 Atl. 240, 241, 28 R. I. 580.

"The Century Dictionary defines the word 'invest' as follows: 'To employ for some profitable use; convert into some other form of wealth, usually of a more or less permanent nature, as in the purchase of property or shares, or in loans secured by mortgages, etc.; said of money or capital; followed by in; as, to invest one's means in lands or houses or in bank stock, government bonds, etc.; to invest large sums in books.' 'Investment' in the same dictionary is defined as: 'An investing of money or capital; expenditure for profits or future benefits; a placing or conversion of capital in a way intended to secure income or profit from its employment; as, an investment in active business, or in stocks, land, or the like; to make safe investment of one's principal.' In 23

Cyc. p. 348, 'invest,' 'as used in connection with money or capital, to give money for some other property; to lay out money for some other kind of property, usually of a permanent nature; literally, to clothe money in some thing; to lay out money in some permanent form so as to produce an income; to lay out money or capital in business with the view of obtaining an income or profit; to place money so that it will yield a profit.' Hence the carrying out of a proposed merger agreement, by which stockholders may surrender their shares and receive in exchange therefor the shares of the merged company, so far as such merger affects a life insurance company owning shares in the constituent companies upon expenditures of money, made when not prohibited by law, does not offend against the provisions of Insurance Law, § 100, as amended by Laws 1906, p. 797, c. 326, providing that life insurance companies shall not invest in any shares of the stock of any corporation other than a municipal corporation. *Morse v. Equitable Life Assur. Soc.*, 108 N. Y. Supp. 986, 988, 124 App. Div. 235.

"An 'investment' is some form of property into which money has been put with the intention of holding it for gain or increase or for permanent safe-keeping. In its common meaning the word 'investment' involves the idea of intended profit, and ordinarily the word implies a certain measure of permanence, in contrast to a speculation or temporary venture. A temporary deposit of money subject to call, though some interest is received for it, is not an 'investment' of the money, in the usual sense of the word (*Law's Estate*, 22 Atl. 831, 144 Pa. 490, 507, 14 L. R. A. 103), though it has been held to be so in a broader sense (*Jennings v. Davis*, 31 Conn. 134, 143). The purchase of a note or of corporate stock or of real estate yielding rent, or to be used in business, or to be held for an expected rise in value, is an 'investment' in the strictest sense." Testator's will devised the bulk of his estate to trustees for the benefit of grandchildren, and declared that it would be lawful for the trustees and their successors to change investments existing under the will, and that, in case of the death of any married granddaughter, if she left issue her portion should be paid to the guardian of any child or children, to be held in trust for its or their benefit. Held, that the term "investments," as used in such will, included real estate, and authorized the trustees to sell real estate belonging to the testator which had become unproductive. In *re Curtis*, 60 Atl. 240, 241, 26 R. I. 580 (quoting *Una v. Dodd*, 39 N. J. Eq. 173, 186; *Savings Bank of San Diego County v. Barrett*, 58 Pac. 914, 126 Cal. 413; *Colorado Sav. Bank v. Evans*, 56 Pac. 981, 12 Colo. App. 334, 342; *People v. Utica Ins. Co.* [N. Y.] 15 Johns. 358, 392, 8 Am. Dec. 243; *Lyon v. Zimmer*, 30 Fed. 410).

The retention of money in his own hands by the guardian of a ward and the giving of a note therefor cannot be said to amount to an "investment." The accepted definitions of that term, as well as its derivation, involve the idea of the clothing or investiture of the funds with new and different attributes. It is defined "to convert into some other form of wealth, usually of a more or less permanent nature," and "to be the laying out of money in the purchase of some species of property, especially a source of income or profit," and giving money for some other property, or the laying out of money in such manner that it may produce a revenue. *Fidelity & Deposit Co. of Maryland v. Freud*, 80 Atl. 603, 605, 115 Md. 29.

#### As lottery

Bond investment scheme as lottery, see *Lottery*.

#### As personal property

See *Personal Property*.

### INVEST AND MANAGE

In a will creating a trust in the residue, a power to "invest and manage" implies a power of sale. *Robinson v. Robinson*, 72 Atl. 883, 885, 105 Me. 68, 134 Am. St. Rep. 537.

### INVESTMENT COMPANY

A corporation organized to purchase land, and whose capital is invested therein, is not an investment company within Revenue Law, § 56, requiring the president or other officer to make a statement of the capital stock and to deliver the same to the assessor, and providing that such stock shall be assessed as property belonging to other corporations and individuals, and that, if the bank, association, or company shall have acquired land or other tangible property assessed separately, the assessed value thereof shall be deducted from the valuation of the stock. *Bressler v. Wayne County*, 122 N. W. 23, 24, 84 Neb. 774.

### INVESTMENT IN BONDS

Under Rev. St. Ohio 1890, § 2730, declaring that "investments in bonds" shall include all moneys in bonds or certificates of indebtedness or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, cities, counties, or other corporations, and section 2731, subjecting to taxation all investments in bonds, municipal bonds deposited by a foreign corporation with the superintendent of insurance for the security of policy holders, and which are not returned by either the company or the superintendent of insurance, may be listed for taxation by the auditor of the county in which they are held. *Western Assur. Co. v. Halliday*, 127 Fed. 830, 831.

**INVESTMENT SECURITY**

Such stock and evidences of indebtedness of private corporations as may be bought on the market are commonly referred to as "investment securities." *Robotham v. Prudential Ins. Co. of America*, 53 Atl. 842, 847, 64 N. J. Eq. 673.

**INVESTIGATE—INVESTIGATION**

See Due Investigation.

Any investigation, see Any.

As special proceeding, see Special Proceeding.

Fair and just investigation, see Fair and Just.

Subject to investigation, see Subject To.

Where a watchman employed by a railway company was authorized to "investigate" the matter of throwing sticks at passenger cars, his act in arresting plaintiff on a charge of throwing sticks at a train was within the scope of his authority so as to render the railway company responsible therefor. *Johnston v. Chicago, St. P., M. & O. Ry. Co.*, 110 N. W. 424, 426, 130 Wis. 492.

The word "investigation," in Acts 1897, c. 14, relative to the preservation of the purity of elections, and defining and punishing offenses against the elective franchise, and providing that a person offending against any provisions of the act is a competent witness against another person so offending and may be compelled to attend and testify on any trial, hearing, proceeding, or investigation, relates, when construed with reference to the words "trial, hearing, and proceeding," to proceedings and investigations before a grand jury when the state is proceeding by indictment or presentment, and all the words are terms pertaining to proceedings of a criminal nature and mark the different steps in a criminal prosecution, and an offender can be compelled to testify only in some criminal trial, hearing, proceeding, or investigation of some other offender, and cannot be compelled to testify or punished for failure to testify in a civil proceeding growing out of a fraudulent election. *Lindsay v. Allen*, 82 S. W. 648, 649, 113 Tenn. 517.

**INVIOULATE**

To be "inviolate" is to be unhurt, uninjured, unpolluted, or unbroken. *Ridgely v. Taylor*, 110 N. Y. Supp. 665, 667, 126 App. Div. 303.

Const. art. 1, § 7, declaring that the right of a trial by jury shall remain inviolate, does not withhold from the Legislature the power to pass general laws providing for the manner in which, and the persons by whom, jurors shall be selected, drawn, summoned or impaneled; the word "inviolate" meaning freedom from hurt, harm, defilement, profanation, or substantial impairment, but not im-

porting immunity from all regulation. *State v. De Lorenzo*, 79 Atl. 839, 840, 81 N. J. Law, 613, Ann. Cas. 1912D, 329.

The term "inviolate," as used in Const. art. 1, § 7, providing that "the right to trial by jury shall remain 'inviolate,'" means freedom from hurt, harm, defilement, profanation, or such other idea connoting partial destruction or substantial impairment, and it in no sense imports immunity from all regulation. *Humphrey v. Eakley*, 60 Atl. 1097, 1098, 72 N. J. Law, 424, 5 Ann. Cas. 929.

**INVITATION**

See Implied Invitation; Licensee by Express Invitation; Licensee by Implied Invitation.

The word "invitation," in the rule that a licensee who goes on the premises of another by the latter's invitation, and for purposes of the latter, is an invitee, includes enticement, allurement, and inducement, where the case holds such features, and the invitation may also be implied by a dedication, or it may arise from known customary use, or it may be implied by any state of facts on which it naturally and reasonably arises. *Glaser v. Rothchild*, 120 S. W. 1, 3, 221 Mo. 180, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

The word "invitation," within the rule that an owner of land who holds out any invitation for others to go thereon must keep his premises in a safe condition, imports that the person entering on the premises did not act merely for his own convenience and pleasure, and from motives to which no act of the owner contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors, and that such use was not only acquiesced in by the owner, but that it was in accordance with the intention and design with which the place was adapted and prepared or allowed to be so used. *Alabama Great Southern R. Co. v. Godfrey*, 47 South. 185, 190, 156 Ala. 202, 130 Am. St. Rep. 76.

The term "invitation," as used in determining the degree of care necessary to be extended toward one on the property of another, includes both an actual bidding or an express invitation, and also an allurement or enticement which amounts to an implied invitation. Such implied invitation may be inferred from some act or line of conduct or from a designation or dedication, but mere acquiescence in the use of one's land by another is not sufficient. *Baltimore & O. S. W. R. Co. v. Slaughter*, 79 N. E. 186, 189, 167 Ind. 330, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503 (quoting and adopting definitions in *Indiana, B. & W. R. Co. v. Barnhart*, 16 N. E. 121, 115 Ind. 399; citing *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Sweeny v. Old Colony R. Co.*, 10 Allen [92

Mass.] 368, 87 Am. Dec. 644; Carleton v. Franconia Iron & Steel Co., 99 Mass. 216; Toledo, W. & W. R. Co. v. Grush, 67 Ill. 262, 16 Am. Rep. 618; Doss v. Missouri, K. & T. Ry. Co., 59 Mo. 27, 21 Am. Rep. 371; Elliott v. Pray, 10 Allen [92 Mass.] 378, 87 Am. Dec. 653; Stratton v. Staples, 59 Me. 95; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21 L. Ed. 220; Bennett v. Louisville & N. R. Co., 102 U. S. 577, 26 L. Ed. 235; Lary v. Cleveland, C., C. & I. Ry. Co., 78 Ind. 323, 41 Am. Rep. 572; Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 364; Jeffersonville, M. & I. Ry. Co. v. Goldsmith, 47 Ind. 43; Hargreaves v. Deacon, 25 Mich. 1; Nicholson v. Erie R. Co., 41 N. Y. 525; Durham v. Musselman [Ind.] 2 Blackf. 96, 18 Am. Dec. 133; Gillis v. Pennsylvania Ry. Co., 59 Pa. 129, 98 Am. Dec. 317; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 707.

The word "invitation" has both a colloquial and a legal meaning. The former imports a fact of well-known signification; the latter a conclusion of law to which definite rights and liabilities attach. The averment in a declaration that a car came nearly to a standstill at the instance and request of the plaintiff, who then and there, at the instance and request of defendant, was then and there invited to become a passenger, is a statement of a conclusion drawn by the pleader from inadequate or undisclosed facts, and is bad on demurrer. In a pleading imputing legal liability, the word "invitation" must be given its legal, and not its colloquial, meaning. *Kennedy v. North Jersey St. Ry. Co.*, 60 Atl. 40, 72 N. J. Law, 19.

Where a complaint for injuries to a child on defendant's premises nowhere alleged that the child was on the premises by an express invitation, and in using the words "invitation of" always preceded them with the words "with the knowledge and consent," so that the word "invitation" thus used would not mean an express invitation or an implied one, the complaint could not be considered as alleging an express invitation. *Paolino v. McKendall*, 53 Atl. 268, 269, 24 R. I. 432, 60 L. R. A. 133, 96 Am. St. Rep. 736.

"Temptation" is not always "invitation." As the common law is understood by the most competent authorities, it does not excuse a trespasser because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen." Plaintiff's intestate, a boy 7½ years old, was killed on a Sunday afternoon by the falling of a brick chimney attached to a dwelling house which was being demolished by defendants. The bricks supporting the chimney were left in a safe condition by defendants at the close of work on Saturday, the day before, but were removed by deceased and another child while playing on the first floor of the house without

defendants' permission. The lot on which the house was situated was not fenced. The building was left unguarded, and no means were taken to prevent persons from trespassing on the land. Held, that though defendants might have contemplated that children would be attracted to the house, and that such accident might occur, they were not liable for the death of decedent, since, in the absence of a neglect of some legal duty, the duty was not imposed on them of protecting children from yielding to temptation to unlawfully enter the premises. *Wilmot v. McPadden*, 65 Atl. 157, 160, 79 Conn. 367, 19 L. R. A. (N. S.) 1101 (quoting and adopting the definition in *Holbrook v. Aldrich*, 46 N. E. 115, 168 Mass. 16, 36 L. R. A. 493, 60 Am. St. Rep. 364).

Where the porter or guard of a passenger train called out: "Jersey City! Last stop! All out!" and followed it by opening the vestibule door of the car, such statement and act did not constitute a positive assurance to passengers that the car had stopped, nor an "invitation" to passengers to alight before the car had in fact stopped. *Mearns v. Central R. R. of New Jersey*, 139 Fed. 543, 545, 71 C. C. A. 331.

Where plaintiff, by permission of defendant's janitor, went into defendant's cellar to use its grindstone, and was injured by the breaking of a defective floor, plaintiff was not there by "invitation," so that defendant owed him no duty except to refrain from intentional injury, and was not liable for his injuries. *Forbrick v. General Electric Co.*, 92 N. Y. Supp. 36, 45 Misc. Rep. 452 (citing *Larmore v. Crown Point Co.*, 4 N. E. 752, 101 N. Y. 391, 54 Am. Rep. 718; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175).

In pleas alleging that decedent, without invitation from defendant, boarded the car on which he was riding, the word "invitation" is a term of considerable breadth, including not only express invitation, but the invitation that may be implied from custom, usage, or conduct on the part of the carrier, or of its servants, if notorious or actually known to the carrier or its alter ego. *Lawrence v. Kaul Lumber Co.*, 55 South. 111, 113, 171 Ala. 300.

Where a city, in addition to approving a long and continuous usage of streets by the public as highways, extended its public sewer and lighting systems over such streets, its acts constituted an invitation to the public to use them as public thoroughfares which the city had undertaken to maintain in a reasonably safe condition for travel. *Twedell v. City of St. Joseph*, 152 S. W. 432, 433, 167 Mo. App. 547.

"Mere use by the public (of a path along a railroad right of way) without objection of the owner is not sufficient to authorize the inference of an 'invitation.'" *De La Pena*



v. International & G. N. R. Co., 74 S. W. 58, 59, 32 Tex. Civ. App. 241.

In an action to recover money lost in playing poker, the court instructed that if defendants invited or otherwise induced plaintiff to visit their place, and that a poker game was being carried on by defendants, and that while playing said game plaintiff lost at any time and within 24 hours \$5 or more, a verdict should be returned for the amount of plaintiff's losses not exceeding the sum sued for, and that by "inviting" or "inducing" is not meant merely personal application to the person invited, but any conduct that induces such person to visit such place. Plaintiff requested an instruction that by "inviting, persuading, or inducing," is not meant that personal application be made to such person visiting such place, but the mere setting up and furnishing such a place to carry on a game of chance is sufficient invitation." Held, that it was error to refuse this instruction. *Roberts v. Respass*, 114 S. W. 341, 343, 131 Ky. 10.

#### License distinguished

As respects the question whether a person is on premises as a licensee or by invitation, "'invitation' is inferred where there is a common interest or mutual advantage, while license is inferred where the object is the mere pleasure or benefit of the person using it." *Southern Ry. Co. v. Kentucky v. Goddard*, 89 S. W. 675, 676, 121 Ky. 567, 12 Ann. Cas. 116 (quoting and adopting distinction stated in 1 Whart. Neg. § 349).

"Invitation" is a term whose legal import is known and may be used to express the relation between an owner or occupier of land, and one who comes thereon under certain circumstances. The invitation which creates such relation may be express, as when the owner or occupier of lands by words invites another to come on it, or make use of it, or something thereon, or it may be implied, as when such owner or occupier by acts or conduct leads another to believe the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. There is a clear distinction between a "license" and an "invitation" to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation. Mere permission to enter the premises creates the relation of licensee; invitation, expressed or implied, is necessary to create the more responsible relation, and the consequent higher duty upon

the owner or proprietor. *Mandeville Mills v. Dale*, 58 S. E. 1060-1062, 2 Ga. App. 607 (quoting and adopting definition in *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [92 Mass.] 373, 87 Am. Dec. 644; *Turess v. New York, S. & W. R. Co.*, 40 Atl. 814, 61 N. J. Law, 314; *Beehler v. Daniels*, 18 R. I. 563, 565, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790).

A licensee who goes on the premises of another by that other's invitation and for that other's purposes is an "invitee," and the duty to take ordinary care to prevent injury is at once raised, and the word "invitation" in the rule covers and includes in it enticement, allurements, and inducement if the case holds such features, and the invitation may also be implied by dedication, or it may arise from known customary use, or it may be implied by any state of facts on which it naturally and reasonably arises. Where a proprietor of a store invited plaintiff to come to the store to advise him in a business transaction, and plaintiff on reaching the store found the proprietor busy and while waiting, as he was required to do, he asked permission to go to the basement to a closet and permission was granted, and while going he fell into an unguarded pit in the basement, plaintiff was on the premises in response to the proprietor's "invitation" and was not a bare licensee at the time, and the proprietor owed him the duty of exercising ordinary care for his protection. *Glaser v. Rothschild*, 120 S. W. 1, 3, 221 Mo. 180, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

"It is sometimes difficult to determine whether the circumstances make a case of 'invitation,' in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a "license" is inferred where the object is the mutual pleasure or benefit of the person using it.'" Defendant operated a railroad to the summit of Pikes Peak and leased certain buildings to H. for a hotel for 25 per cent. of H.'s gross receipts. The hotel was higher than the station platform, and a retaining wall protected the platform from loose stones which might roll down the side of the mountain. The wall was ascended by a flight of steps, and the buildings were located 16 feet from the top thereof. Plaintiff arrived at the hotel at about 10 o'clock p. m., and, after being informed that the beds were all full, he obtained an employee's bed. Later in the night he went out of doors for a private purpose, and, not keeping within the light reflection from the house, stepped off the retaining wall and was injured. Held, that plaintiff was not an "invited" guest of the railroad company, but was at most a mere licensee thereof, as to whom it owed no active duty to light or rail the wall. *Watson v. Manitou &*

Pikes Peak Ry. Co., 92 Pac. 17, 19, 41 Colo. 138, 17 L. R. A. (N. S.) 916.

An implied "invitation" to use dangerous premises, as distinguished from a mere license, arises when a benefit accrues to the owner from such use, or when the use is in the interest of both parties, or is connected with the owner's business. *Cleveland, C., C. & St. L. Ry. Co. v. Powers*, 88 N. E. 1073, 1077, 173 Ind. 105 (citing *Northwestern El. R. Co. v. O'Malley*, 107 Ill. App. 599; *Plummer v. Dill*, 31 N. E. 128, 156 Mass. 426, 32 Am. St. Rep. 463; *Dixon v. Swift*, 56 Atl. 761, 98 Me. 207, 29 Cyc. p. 454).

#### INVITED

Under a petition for certiorari to review proceedings of highways commissioners which averred that the appellants were "invited" to attend the trial before the justice, the word "invited" may be understood to mean that they were summoned, and, if nothing more appears in the petition to show that the justice had not jurisdiction, the petition would be insufficient. *Hegenbaumer v. Heckenkamp*, 67 N. E. 389, 202 Ill. 621.

#### INVITED ERROR

Invited error is in the nature of equitable estoppel, and arises where a party induces the trial court to take certain action, and then insists that the action was erroneous, and does not exist through making of the contention which is held against a party or where correctness of the contention has been consistently insisted upon. *Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Tex.)* 141 S. W. 1048, 1052.

A requested instruction cannot be regarded on appeal as having "invited error," where it appears that it was refused on the ground that it had already been given in the main charge. *Western Union Tel. Co. v. Bowen*, 81 S. W. 27, 28, 97 Tex. 621.

#### INVOICE

See Cuban Invoice.

Where a marine insurance policy covering importations fixed the value of the insured property at invoice, in the absence of anything to show that any other invoice was known or commonly employed in importations, the word "invoice" referred to the invoice required by Act Cong. June 10, 1890, c. 407, 26 Stat. 131, prohibiting importations exceeding \$100 in value, except on invoice and affidavit showing the actual cost or actual market value. *Insurance Co. of North America v. Willey*, 98 N. E. 677, 678, 212 Mass. 75.

Under a marine insurance policy covering an importation valuing the property at the invoice, an invoice, not stating the actual cost or actual market value, as required by Act Cong. June 10, 1890, c. 407, 26 Stat. 131, to be stated in the "invoice" accompanying im-

portations, was not such an invoice as the contract contemplated; and hence the policy was an open and not a valued one, and, the insured having paid in reliance on the valuations given in such invoice, might recover back the excess over the actual value. *Insurance Co. of North America v. Willey*, 98 N. E. 677, 679, 212 Mass. 75.

The statement of value on a "pro forma invoice" is wholly that of the importer made in order to effect an entry. An entry on a pro forma invoice remains open until the conditions of the bond for the production of the consular invoice have been fulfilled, or until the bond has become forfeited. The provision in Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134, that duty shall not be assessed on "less than the invoice or entered value," does not prevent assessment on less than the value stated in a "pro forma invoice" on which entry is made under section 4, 26 Stat. 131; and where a certified invoice is produced in accordance with the latter section, and the value stated therein is approved by the appraiser, duty may properly be assessed on that value, even though less than that given in the pro forma invoice. *United States v. Commercial Cable Co.*, 141 Fed. 473, 474.

#### As bill of lading

Where a contract of sale provided for a discount of 5 per cent. on receipt of cash on December 1st "from date of invoice" and that no deduction should be made nor allowed from the invoice for overcharge on freight, unless previously arranged, the word "invoice" was used in the sense of bill of lading, and did not render the clause ambiguous, and hence evidence of a custom of the fertilizing trade with reference to the allowance of discount was inadmissible. *A. D. Birely & Sons v. Dodson*, 68 Atl. 488, 490, 107 Md. 229.

#### As evidence of title

An "invoice" is a "list sent to a purchaser, factor, or consignee, etc., containing the items together with prices and charges of merchandise, sent, or to be sent, to him." An "invoice" is not a bill of sale nor is it evidence of a sale. *B. F. Sturtevant Co. v. Cumberland Dugan & Co.*, 68 Atl. 351, 355, 106 Md. 587, 14 Ann. Cas. 675 (quoting and adopting definition in 23 Cyc. p. 357).

#### Inventory distinguished

Under a fire policy of insurance covering a stock of goods in a warehouse, which contained a covenant for its avoidance unless an inventory should be taken within 30 days, an "inventory" meant a list made by the merchant of his goods in his store, and, though an invoice is also a list of goods, it is made by the consignor at the point of shipment and does not show that the goods therein listed have reached the consignee, or what portion has been sold, and the requirement of the policy would not be met by the in-

voice of the insured plus his books. Day v. Home Ins. Co. (Ala.) 58 South. 549, 551, 40 L. R. A. (N. S.) 652.

### INVOICED AS PER COST MARK

Where a contract provided for the exchange of a stock of merchandise for real estate, the cost "to be invoiced as per the following cost mark," it did not necessarily mean that the goods actually cost what they were marked, and the expression was sufficiently indefinite and ambiguous to justify the admission of evidence as to its meaning. Webb v. Steiner, 87 S. W. 618, 619, 113 Mo. App. 482.

## INVOLUNTARY

See Casual and Involuntary.

### INVOLUNTARY ALIENATION

"Involuntary alienation" is such alienation as would result from attachment, levy, and sale for taxes or other debts due from the owner. Manierre v. Welling, 78 Atl. 507, 523, 32 R. I. 104, Ann. Cas. 1912C, 1311.

### INVOLUNTARY BAILMENT

"Involuntary bailments" arise when the goods of one person have by an unavoidable casualty been lodged upon another's land; and a railroad company, which takes property of another temporarily stored upon its right of way, does not become an involuntary bailee, and liable to account only as such, by restoration of the property and damages for its use. Walker v. Norfolk & W. Ry. Co., 67 S. E. 722, 724, 67 W. Va. 273.

#### Involuntary deposit distinguished

"Involuntary bailments" and "involuntary deposits" may be contradistinguished from those which are necessary and voluntary, inasmuch as the latter presuppose some act of the depositor, whereas the former may be without his assent or knowledge. They arise whenever the goods of one person have by an unavoidable casualty or accident been lodged upon another's land, as where lumber floating in a river is cast upon a neighbor's land by a sudden freshet and left there, or where goods are blown upon another's land by a tempest. Walker v. Norfolk & W. Ry. Co., 67 S. E. 722, 724, 67 W. Va. 273.

### INVOLUNTARY CONVEYANCE

A sale of a part of the owner's tenement by the sheriff for debt is regarded as an "involuntary conveyance" by the owner of the parcel held and conveyed. Damron v. Damron, 84 S. W. 747, 748, 119 Ky. 806.

### INVOLUNTARY DEPOSIT

Involuntary bailment distinguished, see Involuntary Bailment.

### INVOLUNTARY EXPOSURE

A merely inadvertent and unintentional exposure to a known danger under peculiar

circumstances not affording opportunity for deliberate action is an "involuntary," not voluntary, "exposure," within the meaning of a clause in an accident insurance policy limiting the liability of the insurer in case of an injury resulting from voluntary exposure to unnecessary danger, etc. Diddle v. Continental Casualty Co., 63 S. E. 962, 964, 65 W. Va. 170, 22 L. R. A. (N. S.) 779 (citing Keene v. New England Mut. Acc. Ass'n, 36 N. E. 891, 161 Mass. 149; Fidelity & Casualty Co. v. Chambers, 24 S. E. 896, 93 Va. 138, 40 L. R. A. 432; Equitable Acc. Ins. Co. v. Osborn, 9 South. 869, 90 Ala. 201, 13 L. R. A. 267).

## INVOLUNTARY MANSLAUGHTER

Unlawful act as element, see Unlawful Act.

"Involuntary manslaughter" is where one doing an unlawful act not felonious or tending to great bodily harm, or doing a lawful act without proper caution or requisite skill, undesignedly kills another. According to the common-law writers, it is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to felony or from a lawful act negligently performed. At common law it included all those homicides which were below the grade of murder, and were neither justifiable nor excusable, and which were the accidental result of some unlawful act less than a felony, not aimed or directed against the person slain. "An unintentional killing in the commission of an unlawful act." Tyner v. United States, 103 Pac. 1067, 1058, 2 Okl. Cr. 689 (citing Whart. Homicide [3d Ed.] p. 6; Wharton, Cr. Law, p. 305; And. Law Dict.; Siberry v. State, 39 N. E. 936, 149 Ind. 684; Commonwealth v. Mink, 123 Mass. 422, 25 Am. Rep. 109; Jewell v. Territory, 43 Pac. 1075, 4 Okl. 53; McManus v. State, 36 Ala. 285).

The unintentional killing of another through carelessness, without criminal intent or design, is involuntary manslaughter. Ringier v. State, 85 S. W. 410, 412, 74 Ark. 262.

Involuntary manslaughter is the killing of another in doing some unlawful act, but without intent to kill. Commonwealth v. Couch (Ky.) 106 S. W. 830, 16 L. R. A. (N. S.) 327.

"Involuntary manslaughter" is an involuntary killing done without any design, intention, or purpose of killing, but in the commission of some unlawful act, or in the improper performance of some lawful act. Tharp v. State, 137 S. W. 1097, 1098, 99 Ark. 188.

The common-law definition of involuntary manslaughter is an unintentional killing resulting from an unlawful act on the part of the accused not amounting to a felony, or from a lawful act negligently performed. State v. Clifford, 52 S. E. 981, 985, 59 W. Va. 1.

"Involuntary manslaughter" is the unintentional killing of another in the performance by the slayer of an unlawful act, or by the doing of a lawful act in an unlawful manner." *Commonwealth v. Mosser*, 118 S. W. 915, 916, 133 Ky. 609.

"Involuntary manslaughter" occurs where one is doing an unlawful act, not felonious or tending to great bodily harm, or in doing a lawful act without proper precaution or requisite skill, undesignedly kills another. *State v. Underhill* (Del.) 69 Atl. 880, 882, 6 Pennewill, 491; *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479.

"Involuntary manslaughter" arises where one in committing an unlawful act, not felonious nor tending to great bodily harm, or in committing a lawful act without proper caution or without requisite skill, unguardedly or undesignedly kills another. *State v. Morahan* (Del.) 77 Atl. 488, 489, 7 Pennewill, 494.

To constitute involuntary manslaughter through commission of an unlawful act, accused must be engaged in the act when the killing occurs. If accused unlawfully assaulted decedent, and inflicted the injuries as charged, and such injuries caused decedent's death, he could be convicted of involuntary manslaughter. *State v. Woods* (Del.) 77 Atl. 490, 491, 7 Pennewill, 499.

"Involuntary," as applied to manslaughter means that the killing was committed by accident, or without intention to take life. *State v. Setson*, 119 Pac. 346, 347, 61 Or. 90 (quoting 4 Words and Phrases, p. 3762).

"Involuntary manslaughter" arises where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done." *State v. Turnage*, 49 S. E. 913, 138 N. C. 566 (quoting and adopting definition in 1 Whart. Cr. Law [10th Ed.] § 305; citing *Barnes v. State*, 32 South. 670, 134 Ala. 36).

"Involuntary manslaughter" is defined by Pen. Code 1895, § 67, as the killing of a human being without any intention to do so, in the commission of an unlawful act, or of a lawful act which might produce such a consequence in an unlawful manner. *Maughon v. State*, 67 S. E. 842, 845, 7 Ga. App. 660.

The term "involuntary" signifies inadvertence. It is inconsistent with the willful shooting of another with fatal effect. One may so willfully shoot, pointing a gun at another and discharging it purposely, and yet not aim the weapon on the vital part of the body in the sense of a mental and physical operation to that end, though the presumption, without explanation, would be to the contrary, and so not necessarily a specific design to effect death. *Johnson v. State*, 108 N. W. 55, 59, 129 Wis. 146, 5 L. R. A. (N. S.) 809, 9 Ann. Cas. 923.

Involuntary manslaughter is thus defined by 3 Greenl. § 128: "Where one doing an unlawful act, not felonious nor tending to great bodily harm, or doing a lawful act without proper caution or requisite skill, undesignedly kills another." Accused cannot be said to be guilty of that offense, where he handled a pistol carelessly and recklessly, which tended to great bodily harm. *Selby v. Commonwealth* (Ky.) 80 S. W. 221, 222.

Where one doing an unlawful act, not feloniously nor tending to great bodily harm or doing a lawful act without proper caution or requisite skill, undesignedly kills another, it is "involuntary manslaughter." *Thomas v. Commonwealth* (Ky.) 86 S. W. 694, 695 (quoting and adopting definition in 3 Greenl. Ev. § 128; citing 1 Roberson's Ky. Cr. Law & Proc. § 198; 4 Bl. Comm. \*191; *Conner v. Commonwealth*, 13 Bush [76 Ky.] 714; *Buckner v. Same*, 14 Bush [77 Ky.] 602).

Involuntary manslaughter is the killing of another in doing some unlawful act, but without an intent to kill, and the offense may arise either when the act is directed against the person killed, or when it is directed against another person or thing, and one is killed who was not intended to be hurt. If accused did not exercise reasonable care in carrying his pistol, and from such cause fired the shot which killed decedent, he would be guilty of involuntary manslaughter, though he did not intentionally fire the shot that killed decedent. *Lewis v. Commonwealth*, 131 S. W. 517, 518, 140 Ky. 652.

If one willfully points and discharges a pistol at another, in violation of Ky. St. 1903, § 1308, and death ensues, he is at least guilty of involuntary manslaughter. *Ewing v. Commonwealth*, 111 S. W. 352, 355, 129 Ky. 237.

"Involuntary manslaughter" is the killing of another person in doing some unlawful act not amounting to a felony, nor likely to endanger life, but without an intention to kill, or where one kills another while doing a lawful act in a lawful manner." A criminal intent is not necessary in involuntary manslaughter. It is said that any person neglecting to discharge a duty required of him either by law or contract, thereby causing the death of another, is guilty of involuntary manslaughter. Thus, if a husband neglects to provide necessities for his wife or medical attention in case of her illness, he will be guilty of involuntary manslaughter if she dies, provided it appear that she was in a helpless state and unable to appeal elsewhere for aid, and that the death, though not intended nor anticipated by him, was the natural and reasonable consequence of his negligence. *Westrup v. Commonwealth*, 93 S. W. 646, 123 Ky. 95, 6 L. R. A. (N. S.) 685, 124 Am. St. Rep. 316 (quoting and adopting *Roberson's Ky. Cr. Law & Proc.* § 198, and citing *Conner v. Commonwealth*, 13 Bush [76 Ky.] 718; *Trimble v. Commonwealth*, 78 Ky. 177; *York*

v. Commonwealth, 82 Ky. 368; Whart. Cr. Law, § 332).

Where accused killed decedent by the discharge of a pistol of his own volition, without any element of accident or inadvertence, the case did not involve an "Involuntary killing," within St. 1898, §§ 4355, 4362, defining manslaughter in the third and fourth degrees. *Duthey v. State*, 111 N. W. 222, 224, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

The crime of voluntary and involuntary manslaughter is defined by Burns' Rev. St. 1901, § 1981, as whoever unlawfully kills any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act is guilty of manslaughter. That a pistol, by the accidental discharge of which deceased was killed while defendant was playing with him, was carried by defendant in violation of law, does not make him guilty of involuntary manslaughter. *Potter v. State*, 70 N. E. 129, 130, 162 Ind. 213, 64 L. R. A. 942, 102 Am. St. Rep. 198, 1 Ann. Cas. 32.

Where a homicide occurs in the commission of an act not in itself wrongful, and the attendant circumstances, showing no intent to kill, authorize an inference that the killing resulted from the negligence, the homicide is involuntary manslaughter in the commission of a lawful act without necessary caution. *Flannigan v. State*, 70 S. E. 1107, 1108, 136 Ga. 132.

A statute making it manslaughter to involuntarily kill another while engaged in the commission of an unlawful act or a lawful act without due caution follows in substance the common-law definition of "involuntary manslaughter," and an indictment under the statute must allege facts showing an unlawful act or a lawful act negligently committed, but need not allege malice or an intention to kill. *State v. Whitney*, 102 Pac. 288, 289, 54 Or. 438 (citing Whart. Homicide, p. 879).

Under Cr. Code, § 145, defining "involuntary manslaughter" as a killing without intent in the commission of an unlawful act, or of a lawful act which might produce such consequence in an unlawful manner, provided that if, in commission of an unlawful act, its consequences naturally tended to destroy life, the killing was murder, defendant, in striking deceased with his fist without intent to kill, for an insult just offered to defendant's niece, was not guilty of murder, but of involuntary manslaughter. *People v. Mitchell*, 98 N. E. 236, 239, 254 Ill. 53.

While under Pen. Code, § 192, subd. 2, providing that a person is guilty of involuntary manslaughter where death results in the commission of an unlawful act not amounting to a felony, and that the aider and abettor can be guilty of no greater offense than the

principal, an instruction in a murder trial that if defendant was present, aiding and abetting in the commission of an unlawful act, and that if in the commission thereof one R. was killed, a verdict of murder in the first degree should be rendered, was erroneous, abstractly considered, it was not prejudicial, the only unlawful act of which there was any evidence being a deliberate attempt to take the life of R. and his associates, unless it would be held that there was some evidence of an attempt to commit robbery, which latter contingency would bring the instruction within the contemplation of the statute. *People v. Petruzo*, 110 Pac. 324, 327, 13 Cal. App. 569.

Rev. Codes, § 6565, defines involuntary manslaughter as an unlawful killing in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection. Held, that the statute does not circumscribe the means or agency causing the death, but includes any and all means and mediums by which a death is caused by one engaged in an unlawful act, and a prosecution of manslaughter may be had where the death has been caused by fright, fear, or nervous shock produced by one while in commission of an unlawful act, though he made no hostile demonstration and directed no overt act at decedent's person, *Ex parte Helgho*, 110 Pac. 1029, 1032, 18 Idaho, 566, 32 L. R. A. (N. S.) 877, Ann. Cas. 1912A, 138.

"Involuntary manslaughter" is defined as the unlawful killing of a human being without malice, either express or implied, and without intent to kill or inflict an injury causing death, committed accidentally in the commission of some unlawful act not felonious. This definition includes homicides resulting from negligent performance without actual criminal intent of a lawful act, and the common-law rule is undoubtedly that criminality may be affirmed of a lawful act carelessly or negligently done. The negligence, however, must be aggravated, culpable, gross; that is, it must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as evidences a disregard of human life or indifference to consequences. The negligence in such cases supplies in a measure the direct criminal intent. *State v. Clardy*, 53 S. E. 493, 500, 73 S. C. 340 (quoting and adopting note in 90 Am. St. Rep. 571-581).

Where there was no evidence that a killing was unintentional or lawful, but, on the contrary, it appeared without dispute that it was intentional and not lawful, there was no necessity for a charge on "involuntary manslaughter." *Ware v. State*, 41 South. 181, 147 Ala. 699 (citing *Johnson v. State*, 10 South. 667, 94 Ala. 41).

An instruction on a trial for murder that if the weapon used was not a deadly weapon, or if a deadly weapon was not used in a deadly manner, then, if decedent used opprobrious words and epithets to defendant, it was for the jury whether defendant was justified in the use of the weapon and if the jury believed he was justified, but used it without due caution and circumspection, defendant would be guilty of involuntary manslaughter in the commission of a lawful act, but, that if the weapon was a deadly weapon in the manner in which it was used, words would not justify the use of it, and if the killing was done in that way without intent to kill, and there was no malice, defendant was guilty of involuntary manslaughter in the commission of an unlawful act, fully and properly presented the law of involuntary manslaughter. *Dorsey v. State*, 58 S. E. 477, 478, 2 Ga. App. 228.

In a prosecution for manslaughter, the court instructed that manslaughter is the unlawful killing of a human being without malice, and that it is of two kinds—voluntary (that is, upon a sudden quarrel or heat of passion); involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution and circumspection. The instruction was in the language of Pen. Code, § 192. Held, that the portion of the section defining involuntary manslaughter might well have been omitted, but could not have misled the jury, as they were fully instructed elsewhere as to the rights of self-defense and of defendant to act upon appearances. *People v. Lee*, 108 Pac. 738, 739, 13 Cal. App. 48.

If defendant had the right to interfere to prevent decedent striking defendant's brother, even though he thought decedent intended only to assault and beat and not to seriously injure his brother, and he struck suddenly and killed decedent with no intention to kill, his offense would be "involuntary manslaughter in the commission of a lawful act without due caution and circumspection." *Warnack v. State*, 60 S. E. 288, 290, 3 Ga. App. 590.

Under Mansf. Dig. Ark. § 1532 (Ind. T. Ann. St. 1899, § 875), defining manslaughter as the unlawful killing of a human being, without malice or deliberation; section 1533 (section 876), providing that it must be voluntary under a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, and section 1534 (section 877), describing the killing to be manslaughter if it be in the commission of an unlawful act without due caution, there is no such thing as "involuntary manslaughter." *Carney v. United States*, 104 S. W. 606, 7 Ind. T. 247.

## INVOLUNTARY NONSUIT

An "involuntary nonsuit" is one that is taken by reason of some adverse ruling of the court which prevents a recovery by plaintiff. *Grattan v. Suedmeyer*, 129 S. W. 1038, 1040, 144 Mo. App. 719.

An "involuntary nonsuit," is where the plaintiff, by some adverse ruling of the court, which precludes his recovery, is compelled to take nonsuit; and, until there is an actual ruling which puts a complete stop to any further progress by plaintiff, he must continue despite adverse rulings. *Diamond Rubber Co. v. Wernicke*, 148 S. W. 160, 166 Mo. App. 128.

## INVOLUNTARY PAYMENT

See, also, Voluntary Payment.

The power of the city to withhold water placed the parties on unequal terms, and the law would have regarded as involuntary any payment made to secure a restoration of service. *Holly v. City of Neodesha*, 127 Pac. 616, 620, 88 Kan. 102.

To constitute "involuntary payment" there must be some actual or threatened exercise of power possessed, or supposed to be possessed by the person exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money. *Wheeler v. Plumas County*, 87 Pac. 802, 804, 149 Cal. 782 (citing *Brumagin v. Tillinghast*, 18 Cal. 272, 79 Am. Dec. 176).

The duress which will render a payment "involuntary" must in general consist of some actual or threatened exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another from which the latter has no other means or reasonable means of immediate relief except by making payment. "The payment must have been made upon compulsion—as, for example, to prevent the immediate seizure of his goods or the arrest of the person—and not voluntary." *Monaghan v. Lewis* (Del.) 59 Atl. 948, 950, 5 Pennewill, 218, 10 Ann. Cas. 1048 (quoting 2 Dillon, Munic. Corps. § 940).

An action may be brought to recover an illegal tax paid where the tax is void and the payment is involuntary, as where made through coercion of law or fact. *Fifth Ave. Coach Co. v. State*, 131 N. Y. Supp. 62, 64, 73 Misc. Rep. 498.

A payment of taxes in order to be involuntary, so as to entitle the taxpayer to recover them for illegality, must be made on compulsion to prevent an immediate seizure of the taxpayer's goods or the arrest of his person; mere threats of litigation or apprehension of levy of distress warrants being insufficient. *Cincinnati, N. O. & T. P. R. Co.*

v. Hamilton County, 113 S. W. 361, 363, 120 Tenn. 1.

Where a bank, in an attempt to comply with a tax law requiring every bank to collect the tax due on the shares of its stock from the owners thereof and pay the same to the receiver of taxes, paid without the authority and against the will of a stockholder, an illegal tax imposed on the stock, the tax was involuntarily paid, authorizing the stockholder to recover it from the municipality in an action for money had and received. *Guaranty Trust Co. of New York v. City of New York*, 95 N. Y. Supp. 770, 772, 108 App. Div. 192.

To make a payment of taxes involuntary, it must appear that the officer authorized to collect the same had in his hands process authorizing the seizure of the person or property of the taxpayer, that such seizure was imminent, and that there were no other legal means of protecting the person or property than by payment; and under such circumstances payment under protest saves the rights of a taxpayer to recover if the taxes are illegal. *Nashville, C. & St. L. Ry. Co. v. Marion County*, 108 S. W. 1058, 1059, 120 Tenn. 347.

Plaintiff was appointed an assistant district attorney by the county commissioners to collect bonds in criminal cases. He had property of defendant's surety sold under execution to satisfy a judgment of \$275.85 for fees and costs, and plaintiff bought in the property as trustee for the county. Subsequently the county commissioners compromised the judgment for \$25, and requested plaintiff to assign the certificate of purchase to the surety's wife. Plaintiff refused to do so at first, and only complied when the district attorney was requested to direct him to do so; and after his salary had been withheld for two months, and then at the same time he paid to the county treasurer the balance of the judgment and costs against defendant. It did not appear that the payment to the county treasurer was in any manner coerced, requested, or even known to defendant, or to the board of county commissioners. Held, that the payment was not an "involuntary payment," made under duress, which could be recovered, since to constitute the coercion or duress sufficient to make a payment involuntary there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the person exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. *Taylor v. Kelleher*, 97 Pac. 253, 254, 43 Colo. 424.

#### INVOLUNTARY PEONAGE

Voluntary peonage distinguished, see Voluntary Peonage.

#### INVOLUNTARY SELF-DESTRUCTION

"Voluntary self-destruction" obviously can mean nothing more than the taking of one's life purposely and intentionally. 'Involuntary self-destruction' would then include all those cases where a person, without intending to accomplish his own death, carelessly and negligently does acts which may naturally and probably result, and do in fact result, in death." *Courtemanche v. Supreme Court*, 1 O. O. F., 98 N. W. 749, 751, 136 Mich. 30, 64 L. R. A. 668, 112 Am. St. Rep. 345.

#### INVOLUNTARY SERVITUDE

The word "servitude," as used in Const. U. S. Amend. 13, is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms as it has been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word "slavery" had been used. It is, however, clear that the words "involuntary servitude" include something more than slavery in the strict sense of the term. They include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the benefit or pleasure of others. *Ex parte Drayton*, 153 Fed. 986, 990 (quoting and adopting definitions in the Slaughterhouse Case, 16 Wall. 36, 21 L. Ed. 394).

The word "servitude," as used in Const. U. S. Amend. 13, providing that neither slavery nor involuntary "servitude," except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, etc., means a condition of enforced compulsory service of one to another; "servitude" being defined by Webster as "the state of voluntary or compulsory subjection to a master." *Hodges v. United States*, 27 Sup. Ct. 6, 8, 203 U. S. 1, 17, 51 L. Ed. 65.

#### INVOLUNTARY TESTIMONY

The evidence of a witness subsequently prosecuted for manslaughter, taken at a coroner's inquest pursuant to a subpoena, where such witness was not at the time under arrest, or accused of the crime, and where there is nothing indicating that the testimony was involuntarily given, it is not deemed "involuntary" merely because it was given in response to a subpoena. *State v. Finch*, 81 Pac. 494, 495, 496, 71 Kan. 793.

#### INVOLUNTARY TRUST

Under Civ. Code, §§ 2217, 2219, 2223, 2224, 2228, 2235, 3529, defining an "involuntary trust" as one created by operation of

law, etc., a person occupying fiduciary relations will be held to the strictest good faith, and trusts will arise in vindication of right, not only in the absence of a valid declaration, but even against the desires and intention of the involuntary trustee. *Sanguinetti v. Rossen*, 107 Pac. 560, 562, 12 Cal. App. 623.

Where a person procures a mortgage as a preference from a bankrupt, there is the creation of a trust of which he is the trustee under Rev. Civ. Code, § 1609, providing that an "involuntary trust" is one created by operation of law, and section 1615, providing that one who wrongfully detains a thing is an "involuntary trustee" for the benefit of the owner. *Bowler v. First Nat. Bank of Pipestone*, 113 N. W. 618, 622, 21 S. D. 449, 130 Am. St. Rep. 725.

A trust imposed on one against his will by equity law, because he has done a wrong thing in taking property bought with trust property, is a trust sometimes called an "involuntary trust." *Newman v. Newman*, 55 S. E. 377, 379, 60 W. Va. 371, 7 L. R. A. (N. S.) 370.

#### INVOLUNTARY TRUSTEE

One who gains a thing by fraud is, unless he has some other and better right thereto, an "involuntary trustee" of the thing gained for the benefit of a person who would otherwise have had it. *Muller v. Palmer*, 77 Pac. 954, 955, 957, 144 Cal. 305.

Under Civ. Code, § 2224, providing that one gaining a thing by wrongful act is an involuntary trustee thereof for the benefit of the person who would otherwise have had it, a grantee under a deed of land by a grantor, not possessing legal capacity to execute a deed, is an "involuntary trustee" of the land for the benefit of the owner thereof. *Clapp v. Vatcher*, 99 Pac. 549, 551, 9 Cal. App. 462.

Where money was deposited in bank under the mistaken belief of the depositor that it belonged to a partnership composed of the depositor and a decedent, and it was subsequently judicially determined that the partnership never existed, and that the money belonged to the estate of the decedent, the bank in which the money was deposited was an "involuntary trustee" thereof for the benefit of the decedent's estate, under Civ. Code, §§ 2223, 2224, defining an involuntary trustee as one who wrongfully detains a thing or gains the same by fraud, accident, mistake, or other wrongful act. *First Nat. Bank of Modesto v. Wakefield*, 83 Pac. 1076, 1077, 148 Cal. 558.

Where a person procures a mortgage as a preference from a bankrupt, there is the creation of a trust of which he is the trustee under Rev. Civ. Code, § 1609, providing that an "involuntary trust" is one created by operation of law, and section 1615, providing that one who wrongfully detains a thing is

an "involuntary trustee" for the benefit of the owner. *Bowler v. First Nat. Bank of Pipestone*, 113 N. W. 618, 622, 21 S. D. 449, 130 Am. St. Rep. 725.

Where the receiver of a corporation sold certain of its property, and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary trustees for the corporation, and the receiver held the purchase price as an "involuntary trustee" for the purchasers, under Civ. Code, §§ 2958, 2959, declaring that one who wrongfully detains a thing is an "involuntary trustee" for the benefit of the owner, and that one who gains a thing by fraud, accident, mistake, or other wrongful act, unless he have some other or better right thereto, is an "involuntary trustee" for the benefit of the person who should otherwise have had it. *Lutey v. Clark*, 77 Pac. 305, 307, 31 Mont. 45.

Civ. Code, § 2224, declares that one who gains a thing by fraud, accident, or undue influence, violation of trust, or other wrongful act, is an "involuntary trustee." One who fraudulently obtained his wife's money and applied it to the purchase of property held title as an "involuntary trustee" for her benefit. *Heinrich v. Heinrich*, 84 Pac. 326, 327, 328, 2 Cal. App. 479.

#### INVOLUNTARY UNDERLETTING

"A sale made in the enforcement of a mechanic's lien on a leasehold is an 'involuntary underletting,'" and, in the absence of collusion or fraud, is not prohibited by a provision in a lease that the lessee will not underlet the whole or any part of the premises without the written consent of the lessor. *Reed v. Estes*, 80 S. W. 1086, 1087, 113 Tenn. 200.

#### INVOLVE

See Subject-Matter Involved.

The word "involve" means "to imply"; "to include"; or "necessitate as a result or legal consequence." *Baltimore & O. S. W. R. Co. v. Evans*, 82 N. E. 773, 779, 169 Ind. 410 (citing Stand. Dict.; 23 Cyc. pp. 352, 353).

A suit to restrain the defendant from setting up title to certain gold mines in the Philippine Islands, or interfering with the same, and to obtain an accounting, in which the meaning and effect of the provisions of Act July 1, 1902 (32 Stat. 703, c. 1369) § 45, concerning mining titles, are in question, is one in which a statute of the United States is "involved," within the meaning of section 10 of the act (32 Stat. 695), defining the appellate jurisdiction of the Supreme Court of the United States over the Supreme Court of the Philippine Islands. *Reavis v. Fianza*, 30 Sup. Ct. 1, 2, 215 U. S. 16, 54 L. Ed. 72.



Cases "involving the construction of the revenue laws," in which the Supreme Court has jurisdiction on direct appeal from the circuit courts under Const. art. 6, § 12, and Const. Amend. 1884, § 5, must involve state laws, as distinguished from special city charters, but it is not material whether the provision appears under the title "revenue" or not, if revenue is directly and primarily, and not merely incidentally, concerned, and laws relating to preservation and disbursement of revenue are within the clause as well as those relating to its assessment, levy, and collection; but, where a question in a case relates merely to general practice of the court, revenue is not involved in a constitutional sense, though the case relates to collection of taxes. *State ex rel. Attorney General v. Adkins*, 119 S. W. 1091, 221 Mo. 112.

A determination by the Supreme Court of the territory of Arizona, in a habeas corpus case, as to which custodian a child of tender years shall be committed, is not appealable to the Supreme Court of the United States, under Rev. St. U. S. § 1909, as a case "involving the question of personal freedom," within the meaning of that section. *New York Foundling Hospital v. Gatti*, 27 Sup. Ct. 53, 54, 203 U. S. 429, 51 L. Ed. 254.

#### Relate synonymous

Laws 1891, p. 118, § 1, provides that limitation of the right of appeal in cases where the judgment exceeds \$2,500 shall not apply where the matter in controversy "relates" to a franchise or freehold. Section 4, subd. 3, provides that the Court of Appeals shall have jurisdiction in cases where the controversy "involves" a franchise or freehold. Held, in view of section 15, and Code 1887, p. 206, § 388, the word "involve" was synonymous with the word "relate," and that the Supreme Court has jurisdiction of appeals in cases which relate to a freehold. Note to *Beverlin v. Casto*, 57 S. E. 411, 420, 62 W. Va. 158.

The answer, in an action for the release or reconveyance of land, conveyed to defendant's intestate by absolute deed, alleged to have been a mortgage, defended by the mortgagee's administrator and sole heir at law, admitted that the deed was a mortgage, but insisted that it was so held by defendant administrator as security for a larger indebtedness claimed to be due from the plaintiff to the estate of the mortgagee, and prayed judgment therefor, but asserted no claim to the property described in the deed as sole heir at law. Held, that the words "relates to a \* \* \* freehold," as used in the act establishing the Court of Appeals, should be given the same construction as the like expression found in the provision of the Code of Civil Procedure for appeals to the Supreme Court; that the terms "relate to" and "involve" were synonymous in this connection; and

that a judgment for plaintiff with a money judgment for defendant for the balance found due did not involve a freehold, so that the Court of Appeals, as well as the Supreme Court, was without jurisdiction. *Fehringer v. Martin*, 126 Pac. 1131, 1133, 22 Colo. App. 634.

The words "relate" and "involve," in the act creating the Court of Appeals (Laws 1911, p. 269) and providing for the retransfer by the Court of Appeals to the Supreme Court of cases which involve the construction of the federal or state Constitutions or relate to a freehold, are synonymous. *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 123 Pac. 831, 832, 22 Colo. App. 364.

#### Involving freehold

See, also, *Freehold*.

Where the only question involved in partition proceedings was whether defendant had a lien by reason of a mortgage or of having advanced money or paid taxes superior to plaintiff's interests, under a levy of execution on the property, as belonging to the judgment debtor, an heir of the owner, a freehold was not "involved" within *Mills' Ann. Code*, § 388, so as to give the Supreme Court jurisdiction of an appeal from a judgment for plaintiff. *Hallett v. Alexander*, 114 Pac. 490, 492, 50 Colo. 37, 34 L. R. A. (N. S.) 828, Ann. Cas. 1912B, 1277.

A freehold is "involved," within the meaning of the Constitution and statute providing for appeals directly to the Supreme Court in such case, only where the necessary result of the decree or judgment is that one party gains or the other loses a freehold estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves such issue. In *re Ross' Estate*, 77 N. E. 126, 127, 220 Ill. 142.

A freehold is "involved" within the contemplation of the Constitution, fixing the jurisdiction of the Supreme Court only in cases where either the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue. Where a suit to construe a will involved only the power of the executors to invest and reinvest the residue in real property both within and without the state of Illinois, and also to invest in stocks of corporations in which the testator was interested, the suit did not "involve" a freehold, and was not appealable direct to the Supreme Court. *Merchants' Loan & Trust Co. v. Northern Trust Co.*, 92 N. E. 308, 310, 245 Ill. 511.

A freehold is not "involved" within the Constitution giving the Supreme Court jurisdiction of appeals where "freehold is involved," where the litigation may on certain contingencies result in its loss, but will not nec-

essarily have that effect. *Van Tassell v. Wakefield*, 73 N. E. 340, 342, 214 Ill. 205.

A freehold is "involved" within the Constitution, giving the Supreme Court jurisdiction of appeals where a freehold is involved, in cases where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate. *Wachsmuth v. Penn Mut. Life Ins. Co.*, 83 N. E. 85, 86, 231 Ill. 29.

A suit to enjoin the issuance of a tax deed, on the ground that it will cloud the title to the land involved, does not "involve a freehold," so as to make a writ of error lie directly to the Supreme Court. *Glos v. Sanitary Dist. of Chicago*, 79 N. E. 562, 224 Ill. 272 (citing *Gage v. Busse*, 94 Ill. 590; *Kronenberger v. Heinemann*, 60 N. E. 64, 190 Ill. 17; *Johnson v. McDonald*, 63 N. E. 730, 196 Ill. 394; *First Nat. Bank of Denver v. Gibson*, 77 N. E. 562, 221 Ill. 295).

A freehold is "involved," within the meaning of the statute relating to jurisdiction of appeals, where the necessary result of the judgment or decree is that one party gains and the other loses an estate in land, or where the title to the estate is so put in issue by the pleadings that the determination of the case necessarily involves a decision of that issue. The necessary result of a decree, in an action by a husband to set aside for fraud and conspiracy a conveyance of land to his wife prior to their marriage, involves the freehold. *Hursen v. Hursen*, 70 N. E. 904, 905, 209 Ill. 466.

#### Involving real estate

If defendant was the owner of a farm which was sold to A. and later to a bank, whereupon it was agreed between A., defendant, and the bank, that A. would execute to the bank a note for \$2,000 to procure defendant's overdraft at the bank, the balance of such sum to be credited to defendant's account, such agreement between the bank and defendant would not be one involving real estate within the statute of frauds, precluding parol evidence thereof. *Burns v. Vaught*, 113 Pac. 906, 907, 27 Okl. 711.

#### Involving title

Title to land is not "involved," so as to give the Court of Appeals appellate jurisdiction, where the judgment for the recovery of money recites that on plaintiff's motion the lien created by the levy on real estate under the attachment sued out in the action is waived. *Rhodes v. Frankford Chair Co.* (Ky.) 79 S. W. 768.

An action to collect delinquent real estate taxes does not "involve" title to real estate, so as to confer appellate jurisdiction on the Supreme Court, under Const. art. 6, § 12. The suit necessarily assumes that the title to the land is in the defendants. The purpose of the suit is not to divest title out of defendants, but to enforce the lien of the

taxes on the land, and to sell the land to satisfy the judgment. The plaintiff does not claim any title to the land. He seeks only to charge it with a lien. The enforcement of the judgment by a sale under the execution may have the effect to pass the title to some one other than the defendants, but that does not make the case one which involves title to real estate, any more than any judgment in personam, enforced by execution, would involve title. *State ex rel. Reed v. Elliott*, 79 S. W. 696, 698, 180 Mo. 658.

A suit to set aside a deed in the chain of title as fraudulent "involves" title to real estate within Const. art. 6, § 12 (Ann. St. 1906, p. 218), conferring on the Supreme Court jurisdiction of appeals in "cases involving title to real estate." A proceeding to establish a lost deed under Rev. St. 1899, § 4565 (Ann. St. 1906, p. 2480), involves title to real estate within Const. art. 6, § 12 (Ann. St. 1906, p. 218), conferring on the Supreme Court jurisdiction of appeals in "cases involving title to real estate"; a judgment establishing the deed conclusively destroying the rights of the adversary party, and a judgment denying relief conclusively establishing that the title remains in the adversary party. *Thomas v. Scott*, 113 S. W. 1093, 1095, 1096, 214 Mo. 430.

Under Const. art. 6, § 12 (Ann. St. 1906, p. 218) giving the Supreme Court jurisdiction of appeals in "cases involving title to real estate," in order for title to real estate to be so involved, the title must be directly affected by the judgment, and though a widow's right to dower was put in issue by the pleadings, yet where the relief prayed was merely a money award in lieu of dower, and the judgment was for a sum of money and a lien on the land therefor, the title to real estate was not so involved as to give the Supreme Court jurisdiction of an appeal. *Kennedy v. Duncan*, 123 S. W. 856, 857, 224 Mo. 661.

An action to quiet title to a mining claim, where plaintiff recovered judgment for only part of the land in controversy and defendant denied plaintiff's title and ownership to all the land, "involves the title" within the meaning of Code Civ. Proc. § 1022, providing that costs are allowed of course to plaintiff on a judgment in his favor in an action for the recovery of real property or "involving the title" to real estate. *Sierra Water & Mining Co. v. Wolff*, 77 Pac. 1038, 1039, 144 Cal. 430.

A suit to enforce a mechanic's lien, the judgment in which establishes the lien, does not "involve title to real estate," within Const. art. 6, § 12, so as to give the Supreme Court jurisdiction on appeal, though there is a side issue of who was the owner, for determining whether notice was given the owner, as required by Rev. St. 1899, § 4221. The judgment itself must affect the title to

the land. *P. M. Bruner Grantfold Co. v. Klein*, 70 S. W. 687, 170 Mo. 255.

Where a plaintiff alleged in his petition that the defendant was the assignee of a note of \$200 secured by a deed of trust, and that the same had been paid, and praying that the interests of each party be determined, and plaintiff's title was admitted, as was the validity of the deed, the suit does not involve the title to land within Rev. St. 1899, § 650; the only issues involved being the assignment of the note and its payment, and the Supreme Court has not jurisdiction. *Vandeventer v. Florida Sav. Bank*, 135 S. W. 23, 25, 232 Mo. 618.

#### **Involving treaty**

Judgments of the Supreme Court of the Philippine Islands denying any liability of the present city of Manila upon municipal obligations incurred prior to the cession of the Philippine Islands to the United States by treaty with Spain (Act Dec. 10, 1898, 30 Stat. 1754), are rendered in cases in which a treaty of the United States is "involved," within the meaning of Act July 1, 1902, c. 1369, § 10, 32 Stat. 695, governing the appellate jurisdiction of the federal Supreme Court, although no distinct claim under that treaty was made in the pleadings. *Vilas v. City of Manila*, 31 Sup. Ct. 416, 417, 220 U. S. 345, 55 L. Ed. 491.

#### **INVOLVING THE MERITS**

See Merits.

### **IODINE**

As medicine, see Medicine.

### **IRIDECTOMY**

An operation by which a piece of the iris was taken from each eye and the crystalline lens removed from the right was called "Iridectomy." *Knorpp v. Wagner*, 93 S. W. 961, 964, 195 Mo. 637.

### **IRISH MOSS**

See Sea Moss.

### **IRON**

See Bar Iron; Grab Iron; Plate Iron; Scrap Iron; Structural Iron.

Articles of, see Articles within Tariff Act.

Manufactures of, see Manufactures—Manufactured Articles.

#### **IRON AND MANGANESE ALLOY**

Merchandise, consisting of an alloy in the form of pigs, invoiced as "iron and manganese alloy" which is used chiefly in hardening manganese bronze, and which, in order to produce that effect, must be melted and mixed with other metals, comes within paragraph 183, Schedule C, § 1, c. 11, Tariff

Act July 24, 1897, 30 Stat. 166, relating to "metallic mineral substances in a crude state, and metals unwrought," rather than paragraph 193, 30 Stat. 167, relating to articles composed of metal, or paragraph 122, 30 Stat. 159, by similitude to the "ferro-manganese" there enumerated. *Thomas v. William Cramp & Sons' Ship & Engine Bldg. Co.*, 142 Fed. 734, 735, 74 C. C. A. 66.

#### **IRON FITTERS**

It appears that on railroad tracks at certain points there are what are called guard rails, which are short rails laid near the main rails which run for a distance parallel to the main track and then curve inward, leaving open spaces at the ends where these curves occur. Persons passing under or across the tracks and switches at those points are liable to have their feet caught in these open spaces and have some difficulty in withdrawing the feet from them. The danger arising from the same, has been greatly lessened, if not entirely done away with by closing spaces with blocks of wood or with what are spoken of as "iron fitters." *Ray v. Vicksburg, S. & P. R. Co.*, 37 South. 43, 46, 113 La. 502.

#### **IRON HUNTER**

An "iron hunter" is a sawmill employé whose duty it is to inspect logs before they come to the carriage, for the purpose of removing spikes driven in the logs for rafting. *Covington Sawmill & Mfg. Co. v. Clark*, 76 S. W. 348, 349, 116 Ky. 461.

#### **IRON ORE**

Hematite iron ore in a form in which it cannot be used as a pigment is dutiable as "iron ore," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 121, 30 Stat. 159. *Hill v. Francklyn & Ferguson*, 162 Fed. 880, 882, 89 C. C. A. 570.

#### **IRON SAFE**

As furniture, see Furniture.

#### **IRON-SAFE CLAUSE**

As promissory warranty, see Promissory Warranty.

An "iron-safe clause" in an insurance policy is one requiring insured to keep books clearly and plainly presenting a complete record of business transacted, including purchases, sales, and shipments. *Everett-Ridley-Ragan Co. v. Traders' Ins. Co.*, 48 S. E. 918, 121 Ga. 228, 104 Am. St. Rep. 99.

What is known as an "iron-safe clause" of a policy of fire insurance is a provision by which the insured binds himself to keep specified books and an inventory securely locked in a fireproof safe at night and at all times when the store or other place of keeping the property insured is not actually open for the prosecution of business. *Powell v. Commonwealth Ins. Co.*, 60 S. E. 120, 121, 3 Ga. App. 436.

An "iron-safe clause," in an insurance policy providing that the assured will take a complete itemized inventory of the stock on hand, will keep a set of books, clearly presenting a complete record of business transacted, which books shall be securely locked in a fireproof safe at night, and in the event of failure to produce such books for the inspection of the insurer the policy shall become void, is frequently attached to policies of insurance and is generally upheld by the courts as a reasonable limitation on the liability of the insurer, and, when such clause is properly made a part of the contract of insurance, it will be enforced as a valid and binding stipulation. *Coggins v. Aetna Ins. Co.*, 56 S. E. 506, 507, 144 N. C. 7, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924 (citing *Southern Fire Ins. Co. v. Knight*, 36 S. E. 821, 111 Ga. 622, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Sowers v. Mutual Fire Ins. Co.*, 85 N. W. 763, 113 Iowa, 551; *Lozano v. Palatine Ins. Co.*, 78 Fed. 278, 24 C. C. A. 85; *Liverpool & London & Globe Ins. Co. v. Kearney*, 94 Fed. 314, 36 C. C. A. 265; *Fire Ass'n of Philadelphia v. Calhoun*, 67 S. W. 153, 28 Tex. Civ. App. 409; *North British Mercantile Ins. Co. v. Kemendo*, 61 S. W. 1102, 94 Tex. 367; *Black's Law Dict.* 643).

A clause in a fire insurance policy that the insured make an inventory of his stock of goods and keep books correctly detailing purchases and cash and credit sales and keep them in an "iron-safe" or away from the store building when closed for business is called "an iron-safe clause," and such a clause is reasonable and valid. *Maupin v. Scottish Union & National Ins. Co.*, 45 S. E. 1003, 1004, 53 W. Va. 557.

Under the "iron-safe clause" in an insurance policy, the insured agrees to keep a set of books, showing a record of the business transacted, including all purchases and sales, both for credit, cash, and exchange, as well as the last inventory of the stock, taken within 12 months prior to the happening of the loss, and to keep books and inventory securely locked in a fireproof safe at night and when the store is not actually open for business. *German Ins. Co. v. Allen*, 77 Pac. 529, 69 Kan. 729.

An "iron-safe clause" in an insurance policy provides that the insured shall take a complete itemized inventory of the stock once a year, keep a set of books which shall present a complete record of the plaintiff's credit, including all purchases, sales, and shipments, from date of inventory and during the continuance of the policy, and will keep such books and inventory securely locked in a fireproof safe at night, and at all times when the building is not open for business, or, failing in this, the assured will keep such books and inventory in some place not exposed to fire which would destroy the

building. *McMillan v. Insurance Co. of North America*, 58 S. E. 1020, 1021, 78 S. C. 433.

#### IRON SAND

So-called "iron sand," a completed article produced by a series of manufacturing processes from cast iron and steel scrap, is not within the provision for "all iron in \* \* \* forms less finished than iron in bars, and more advanced than pig iron," in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule C, par. 124, 30 Stat. 150, but is dutiable as "iron manufactured," under paragraph 193, 30 Stat. 167. *Harrison Supply Co. v. United States*, 164 Fed. 155, 156.

#### IRON SHEETS

Sheets consisting of a plate of iron or steel or with a sheet of nickel welded thereto, the material being rolled to the desired thickness after welding, are not "sheets of iron or steel, common or black," within the meaning of *Tariff Act July 24, 1897*, c. 11, § 1, Schedule C, par. 131, 30 Stat. 160. *Boker v. United States*, 180 Fed. 959, 960.

#### IRON WALL

See Self-Supporting Iron Wall.

#### IRRATIONAL—IRRATIONALITY

A question to a witness as to whether a person was acting "rational" or "irrational" did not call for the opinion of the witness as to the mental sanity of the defendant, but for the result of his observations, at the various times he came in contact with the defendant, as to his appearance in the respects suggested. "To say that a man acts 'rational' or 'irrational' is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be like drunkenness—easy of detection, and difficult of explanation." *People v. Manoogian*, 75 Pac. 177, 179, 141 Cal. 592.

#### Insanity synonyms

While the word "irrationality" is sometimes used as a synonym of "insanity," the admission of evidence of the irrationality of a defendant did not cure the rejection of evidence of his insanity. *Territory v. McNabb*, 120 Pac. 907, 912, 16 N. M. 625.

#### IRREDEEMABLE GROUND RENT

"Irredeemable ground rent" is defined to be a rent reserved to himself and his heirs, by the grantor of land, out of the land itself. It is not granted like an annuity or rent charge, but is reserved out of a conveyance of the land in fee. It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descend-

ible, devisable, alienable. *Wilson v. Isenminger*, 22 Sup. Ct. 573, 574, 185 U. S. 55, 46 L. Ed. 804 (citing *Bosler v. Kuhn* [Pa.] 8 Watts & S. 185; *Wallace v. Harmstad*, 44 Pa. 495; *McQuigg v. Morton*, 39 Pa. 31).

## IRREFRAGABLE

"Irrefragable" means that cannot be refuted or overthrown, incombustible, undeniable. *Tracy v. Frey*, 88 N. Y. Supp. 874, 878, 95 App. Div. 579 (quoting and adopting the definition in *Webst. Dict.*).

## IRREGULAR

### IRREGULAR DEPOSIT

Technically, a bailment which is solely for the benefit of receiver is more in the nature of a deposit than a loan, and, where the thing deposited was money, was what was known in the civil law as an "irregular deposit." *Woods v. Latta*, 88 Pac. 402, 406, 35 Mont. 9.

### IRREGULAR JUDGMENT

An "irregular judgment" is one rendered contrary to the course and practice of the courts. *Currie v. Golconda Min. & Mill. Co.*, 72 S. E. 980, 983, 157 N. C. 209.

An "irregular judgment" is one entered contrary to the method of procedure and the practice of the court. *Glisson v. Glisson*, 69 S. E. 55, 56, 153 N. C. 185.

### IRREGULAR PROCESS

Void process distinguished, see *Void Process*.

### IRREGULAR RECORDS

"Irregular records" made by a workman's time recorder are those records which are made when a workman enters or leaves before or after the regular time fixed by the rules of employment. Where the work hours of the forenoon are from 7 to 12 o'clock, a workman who enters and records his time after 7 has made an "irregular record," and one who leaves and records his time before 12 also makes an "irregular record." *Dey-Time-Register Co. v. W. H. Bundy Record-Ing Co.*, 169 Fed. 807, 814.

## IRREGULARITY

An "irregularity" is the failure to observe that particular course of proceeding which, conformable with the practice of the court, ought to have been observed in the case. *Griggs v. Hanson*, 121 Pac. 1094, 1096, 86 Kan. 632, Ann. Cas. 1913C, 242.

An "irregularity" is a want of adherence to some prescribed rule or mode of proceeding, and consists in either omitting to do something necessary for the due and orderly conducting of a suit, or doing it at an unreasonable time or in an improper manner. *Ex parte Cooks* (Tex.) 135 S. W. 139, 140.

The term "irregularity" is defined: "The want of adherence to some prescribed rule or mode of proceeding, and consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or in doing it in an unreasonable time or improper manner; the technical term for every defect in practical proceedings; a comprehensive term including all formal objections to practical proceedings; the want of adherence to some prescribed rule or mode of proceedings; the doing or not doing that in the conduct of a suit at law which, conformable with the practice of the court, ought or ought not to be done; \* \* \* a deviation from certain minor provisions of the statutes, designed to procure method and convenience in procedure." 23 Cyc. 355. "When a proceeding (judicial or extrajudicial) is done in the wrong manner, or without the proper formalities, it is said to be irregular or an irregularity, as opposed to a proceeding which is legal or ultra vires." *State v. Lazarus*, 65 S. E. 270, 272, 83 S. C. 215.

The court, in *Treasurers v. Bourdeaux's Representatives* (S. C.) 3 McCord, 142, says: "In *Tidd*, Prac. 434, it is said: 'An "irregularity" may be defined to be the want of adherence to some prescribed rule or mode of proceeding, and consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner.'" *State v. Norton*, 48 S. E. 464, 465, 69 S. C. 454.

An "irregularity" is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unseasonable time or improper manner. It is a departure from some prescribed rule or regulation. Under *Ballinger's Ann. Codes & St. § 5583* (*Pierce's Code*, § 1228), providing that sales of real estate in partition proceedings shall be in the manner required for sales of real estate on execution, and *Laws 1890*, p. 88, c. 53, § 6, subd. 2, providing that, though objections to confirmation of an execution sale be filed, the sale shall be confirmed unless it appear there was a substantial irregularity, the irregularity must be in the proceedings concerning the sale itself, so that it is not ground for refusing confirmation that a higher or better bid is submitted after sale. *Merritt v. Graves*, 100 Pac. 164, 165, 52 Wash. 57 (citing 4 Words and Phrases, pp. 3763-3771; 8 Words and Phrases, p. 7693).

The term "irregularity," as used in the street bond act of 1893, declaring that bonds for street work assessment, after their issuance, shall be conclusive evidence of the regularity of all proceedings thereto, includes the failure to perform a required proceeding, as well as the defective or imperfect

performance of such proceedings as were taken, excepting those necessary to constitute due process of law or to comply with other constitutional mandates. *Chase v. Trout*, 80 Pac. 81, 84, 146 Cal. 350.

A motion to set aside a judgment for irregularity, as contemplated by a statute providing that judgment shall not be set aside for irregularity on motion unless made within three years after judgment, is available only where there is some irregularity in the judgment itself or on the face of the proceeding antecedent thereto, and, while the irregularity need not be such as would render the judgment absolutely void, it must show that the judgment was contrary to the established form and mode of procedure, an irregularity, in the sense of the statute, being a want of adherence to some prescribed mode of procedure, which may consist either in omitting something necessary to the orderly conduct of the suit, or in doing it at an unseasonable time or in an improper manner. *Cross v. Gould*, 110 S. W. 672, 675, 131 Mo. App. 585.

Under Gen. St. 1901, § 5054, subd. 3, providing that a judgment may be set aside at a subsequent term for mistake, neglect of the clerk, or irregularity in obtaining it, the court may vacate a judgment on the pleadings for misapprehension as to their allegations. *Cooper v. Rhea*, 107 Pac. 799, 800, 82 Kan. 109, 29 L. R. A. (N. S.) 930, 136 Am. St. Rep. 100, 20 Ann. Cas. 42.

The absence of a seal to a writ of venire is an "irregularity," within the meaning of Civ. Code 1902, § 2947, providing that no irregularity in a writ of venire facias shall be sufficient to set aside the verdict, unless the accused was injured thereby or an objection was made before the return thereof. *State v. Benton*, 67 S. E. 143, 85 S. C. 107.

Failure of a city tax collector to return to the city council the delinquent list within the time prescribed by the city charter is an "irregularity" only within, and cured by, Code 1899, c. 31, § 25 (Code 1906, § 884), and hence not a fatal objection to a tax deed. *Ritchie Lumber Co. v. Nutter*, 66 S. E. 646, 649, 66 W. Va. 444.

Code 1899, c. 31, § 25 (Code 1906, § 884) provides that no "irregularity, error or mistake" in the delinquent list, or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the recordation of such list or affidavit, shall, after deed made, invalidate the sale. Held, that the irregularity, error or mistake in the recordation of such list or affidavit, intended by the statute to be provided against, did not refer to the delinquent list, but to the list of sales filed with the clerk. *Ritchie Lumber Co. v. Nutter*, 66 S. E. 646, 647, 649, 66 W. Va. 444.

Personal misconduct of the judge having a case under advisement may be an "irregu-

larity in the proceedings of the court" for which a new trial may be granted under Code Civ. Proc. § 657, subd. 1. *Gay v. Torrance*, 78 Pac. 540, 543, 145 Cal. 144.

## IRRELEVANCY—IRRELEVANT

The term "irrelevant" means not relevant; not relating to or applicable to the matter in issue; not supporting the issue. *Berry v. Geiser Mfg. Co.*, 85 Pac. 699, 700, 15 Okl. 364 (quoting and adopting the definition in *Black Law Dict.* p. 644).

An allegation or pleading is "irrelevant" when it has no connection with the issues involved. *Bank of Timmons v. Fidelity & Casualty Co.*, 121 Fed. 934, 935.

"An allegation is 'irrelevant' when the issues formed by its denial can have no connection with nor reflect upon the cause of the action." *Guignard v. Eyans*, 61 S. E. 1003, 1005, 80 S. C. 491 (quoting *Pom. Rem.* [2d Ed.] § 551).

A pleading is "irrelevant" only where it has no substantial relation to the controversy between the parties to the action, and not where it states facts that tend to and might by proper averment constitute a cause of action or defense. *Ellison v. Branstrator*, 88 N. E. 963, 965, 45 Ind. App. 307.

An "irrelevant allegation" in pleading is one which has no substantial relation to the controversy between the parties to suit, and which cannot affect the decision of the court, because it has no bearing upon the subject-matter of the controversy. *Bell v. Clarke*, 92 N. Y. Supp. 411, 412, 45 Misc. Rep. 275.

"Irrelevant" allegations are those which have no substantial relation to the controversy and which cannot affect the result, and the test of any allegation is whether it tends to constitute a cause of action or a defense. *Kolb v. Mortimer*, 120 N. Y. Supp. 543, 544, 135 App. Div. 542.

The answer, in an action for injury to an employé, raising the question of the employment, a material allegation of the complaint, is not "irrelevant," within Code Civ. Proc. § 545, allowing the striking out of irrelevant matter in a pleading. *Johnston v. Simpson Crawford Co.*, 115 N. Y. Supp. 141, 143.

Where a claim under a special contract for services is united with one for the reasonable value of the services, the allegation as to reasonable value of the services is not surplusage, neither is it redundant nor irrelevant; "redundancy" being an excessive statement or a representation, and an "irrelevant" allegation being one that does not relate to or affect the matter in controversy. *E. D. Metcalf Co. v. Gilbert*, 116 Pac. 1017, 1021, 19 Wyo. 331.

Within Code Civ. Proc. 1902, § 181, providing that redundant or "irrelevant matter"

in a pleading may be stricken out on motion of any party aggrieved, matter is "irrelevant" which has no substantial relation to the controversy. *Alexander v. Du Bose*, 52 S. E. 786, 788, 73 S. C. 21 (citing *Smith v. Smith*, 27 S. E. 545, 50 S. C. 67; *Pom. Code Rem.* § 551; *Bliss, Code Pl.* § 214).

#### As impertinence

Offered evidence not pertinent to any issue made by the pleadings is certainly "irrelevant." *Morehouse v. Morehouse*, 73 Pac. 738, 739, 140 Cal. 88.

"Irrelevant" and "redundant" was said in *Carpenter & Wilcox v. West & Vanthuyesen*, 5 How. Prac. (N. Y.) 53, 55, to mean what is usually understood as impertinent; for a pleading in equity is "impertinent" when it is stuffed with long recitals or long digressions which are altogether unnecessary and totally immaterial to the matter in hand. In an action for injuries, an order striking out from the complaint allegations involved in a common-law action, unless plaintiff serve an amended complaint separately stating his common-law action, and action under the employers' liability act, is not authorized by the Code, authorizing the striking out of irrelevant and redundant matter. *Acardo v. New York Contracting & Trucking Co.*, 102 N. Y. Supp. 7, 8, 116 App. Div. 793.

#### IRRELEVANT, IMMATERIAL, AND INCOMPETENT

The words "irrelevant, immaterial, and incompetent," commonly employed in connection with an objection to a question, are a meaningless formula, and are tantamount to no objection at all. *Shandrew v. Chicago, St. P., M. & O. Ry. Co.*, 142 Fed. 320, 322, 73 C. C. A. 430.

#### IRREPARABLE

##### IRREPARABLE DAMAGES

"'Irreparable damages' to warrant issuance of an injunction does not mean that complainant must show that all his financial transactions will be ruined unless the relief sought is granted; it means that, with reference to the particular right or property referred to in the bill of complaint, the complainant will be irreparably deprived of it unless the relief sought is granted." *Oliphant v. Richman*, 59 Atl. 241, 242, 67 N. J. Eq. 280.

"Whether damages are to be viewed in equity as 'irreparable' depends more upon the nature of the right which is injuriously affected than upon the pecuniary measure of the loss suffered. Where plaintiffs' land was drained by a ditch which they were entitled to maintain, the fact that such land had been damaged to the extent of \$15 only by defendant's unauthorized obstruction of the ditch was no defense to plaintiff's right to

enjoin such obstruction on the ground that the damages were trifling." *Robertson v. Lewie*, 59 Atl. 409, 77 Conn. 345.

Where a landlord reserved the right to enter upon premises for inspection and improvement, and the tenant, by threats of personal violence, prevented him from entering for that purpose, where the tenant had agreed to give a chattel mortgage on the crop to secure the rent, but refused to do so and threatened to remove a large part of the crops and allow the remainder to stand unharvested, and where the defendant was insolvent, the landlord's injuries could not be adequately compensated in damages, and were difficult if measured by any pecuniary standard, and as such were "irreparable" within the meaning of the law authorizing an injunction. *Cole v. Manners*, 107 N. W. 777, 778, 76 Neb. 454 (citing *Eldemiller Ice Co. v. Guthrie*, 60 N. W. 717, 42 Neb. 238, 28 L. R. A. 581).

"Irreparable damage" which may be prevented by injunction includes damage "irreparable" in the sense that it cannot be estimated by any accurate standard, but only by conjecture. *Columbia College of Music & School of Dramatic Art v. Tunberg*, 116 Pac. 280, 282, 64 Wash. 19.

#### IRREPARABLE INJURY

"When 'irreparable injury' is spoken of, it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law." *Donovan v. Pennsylvania Co.*, 26 Sup. Ct. 91, 99, 199 U. S. 279, 50 L. Ed. 192 (quoting and adopting definition in *Chicago General Ry. Co. v. Chicago, B. & Q. R. Co.*, 54 N. E. 1026, 181 Ill. 605).

By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation or damages, but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which because it is so large on the one hand, or so small on the other, or is of such constant or frequent recurrence that no fair or reasonable redress can be had therefor in a court of law. *Heine v. Roth*, 2 Alaska, 416, 421.

An injury is "irreparable" so as to authorize an injunction, where it consists of a serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed, and when the property has some peculiar quality or use, so that its pecuniary value will not fairly recompense the owner for the loss thereof. *Dunker v. Field & Tule Club*, 92 Pac. 502, 504, 6 Cal. App. 524.

"An injury is 'irreparable' when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." *Eau Claire Water Co. v. City of Eau Claire*, 106 N. W. 679, 681, 127 Wis. 154 (quoting definition in *Wilson v. City of Mineral Point*, 39 Wis. 160).

"Irreparable injury" which may be prevented by injunction includes damage "irreparable" in the sense that it cannot be estimated by any accurate standard, but only by conjecture. *Columbia College of Music & School of Dramatic Art v. Tunberg*, 116 Pac. 280, 282, 64 Wash. 19.

An injury is "irreparable" when there is no legal remedy furnishing full compensation or adequate redress because of the ineffectiveness of such legal remedy, or when, owing to the delay incident to the prosecution and enforcement of an action at law, a judgment would be fruitless. *Gorham v. City of New Haven*, 72 Atl. 1012, 1014, 82 Conn. 153.

"An injury is 'irreparable' either from its own nature, as when the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or when it is shown that the party who must respond is insolvent, and for that reason incapable of responding in damages." *Cleveland v. Martin*, 75 N. E. 772, 777, 218 Ill. 73, 3 L. R. A. (N. S.) 629 (quoting and adopting definition in *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335).

"By 'irreparable injury' is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and because it is so large on the one hand, or so small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law. *Melvin v. E. B. & A. L. Stone Co.*, 94 Pac. 390, 391, 7 Cal. App. 327 (quoting and adopting *Wahle v. Reinbach*, 76 Ill. 322); *Central of Georgia R. Co. v. Americus Constr. Co.*, 65 S. E. 855, 858, 133 Ga. 392 (citing *Wood*, Nuis. § 770).

A city actually appropriating a narrow strip of land of an individual, and casting on his land the entire sewage of the city, having a population of 5,000, causes "irreparable injury," justifying relief in equity. *Onen v. Herkimer*, 138 N. W. 198, 200, 172 Mich. 593 (citing 4 Words and Phrases, p. 3772).

An "irreparable injury" justifying the granting of an injunction is one for which the complainant cannot be adequately com-

pensated in damages. The inadequacy of damages as the compensation may be due to the nature of the injury itself, or to the nature of the right of property injured, or may be due to the insolvency or want of responsibility of the person committing it. *Devou v. Pence* (Ky.) 106 S. W. 874, 875 (citing 22 Cyc. p. 764).

"Irreparable injury," as used in the law of injunctions, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great, and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one. *Espenscheid v. Bauer*, 85 N. E. 230, 232, 235 Ill. 172.

"An injury to be 'irreparable' need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages or when there exists no certain pecuniary standard for the measurement of the damages." The preventing of one from hunting upon an arm of the Great Lakes from a rowboat one half mile from shore, such water being navigable water of the state, is an "irreparable injury," the threatening of which justifies an injunction. *Ainsworth v. Munoskong Hunting & Fishing Club*, 116 N. W. 992, 994, 153 Mich. 185, 17 L. R. A. (N. S.) 1236, 126 Am. St. Rep. 474, 15 Ann. Cas. 706.

"The phrase 'irreparable injury' is apt to mislead. It does not necessarily mean, as used in the law of injuries, that the injury is beyond the possibility of compensation in damages, nor that it must be very great, and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one. If the nuisance is merely temporary in its nature, and there is no danger that it will affect any substantial rights of the complainant in such a manner that he cannot be compensated therefor in damages, courts of equity will generally refuse to interfere; but if the nuisance is a continuing one, invading substantial rights of the complainant in such a manner that he would thereby lose such rights entirely but for the assistance of a court of equity, he will be entitled to an injunction upon a proper showing, notwithstanding the fact that he might recover some damages in an action at law." *Tise v. Whitaker Harvey Co.*, 57 S. E. 210, 211, 144 N. C. 507 (quoting and adopting definition in *Elliott, Roads & S.* § 665).

In the case of a nuisance such as a barn so managed as to give off noxious odors,



where the damages to adjoining property owners cannot well be measured from a pecuniary standpoint, the injury is irreparable within the meaning of the law, and equity will interpose, though the pecuniary damage be not shown to be great. *Lead v. Inch*, 134 N. W. 218, 220, 116 Minn. 467, 39 L. R. A. (N. S.) 234, Ann. Cas. 1913B, 891.

"Irreparable injury" from a nuisance is some such injury which causes a loss of health or destruction of means of subsistence or permanent ruin to property, and, when such injury will follow the building of a street railway constructed under a void staff ordinance, the construction may be enjoined. *Ward v. Colorado Eastern R. Co.*, 125 Pac. 567, 573, 22 Colo. App. 332.

#### IRREPARABLE LOSS

In *Ladd v. Oxnard*, 75 Fed. 703, Judge Putnam, at page 732, in considering what "loss" is "irreparable" within the meaning of the law as affecting the right to a preliminary injunction, when the word "irreparable" is held to cover cases "where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue." *Sampson & Murdock Co. v. Seaver-Radford Co.*, 129 Fed. 761, 772 (citing *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 2 Black, 545, 17 L. Ed. 333).

### IRRESISTIBLE

#### IRRESISTIBLE FORCE

By "irresistible force" is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. It may result also from a cause beyond human control. *Cook & Laurie Contracting Co. v. Denis*, 49 So. 1014, 1015, 124 La. 161.

#### IRRESISTIBLE IMPULSE

The distinction between the doctrine of "irresistible impulse" and the "right and wrong test" is that in the latter case the person committing the act is unable, by reason of mental infirmity, to comprehend that the act is wrong, while the doctrine of "irresistible impulse" applies where the person knows that the act is wrong, but is driven by an irresistible impulse to commit it. *State v. Riddle*, 150 S. W. 1044, 1045, 245 Mo. 451, 43 L. R. A. (N. S.) 150.

### IRREVOCABLE

#### IRREVOCABLE LICENSE

As easements, see Easement.

The irrevocability of a parol license proceeds upon the ground of preventing fraud, and depends upon some conduct of the licensor which, if permitted to deny, will amount to fraud upon the licensee. The Supreme Court of Oregon has frequently defined an irrevocable license, recognizing three essential elements, viz.: The license must be upon

some consideration paid by the licensee or some benefit accruing to the licensor; there must be an oral agreement therefor; and improvements or expenditure in reliance thereon. *Falls City Lumber Co. v. Watson*, 99 Pac. 884, 886, 53 Or. 212 (citing *Lavery v. Arnold*, 57 Pac. 906, 58 Pac. 524, 30 Or. 84; *Miser v. O'Shea*, 62 Pac. 491, 37 Or. 231, 82 Am. St. Rep. 751; *Ewing v. Rhea*, 62 Pac. 790, 37 Or. 583, 52 L. R. A. 140, 82 Am. St. Rep. 783; *Brown v. Gold Coin Mining Co.*, 86 Pac. 361, 48 Or. 277).

### IRRIGATE

#### IRRIGATION

As public use, see Public Use (In Eminent Domain).

#### IRRIGATION COMPANY

See Mutual Irrigation Company.

As trading corporation, see Trading Corporation.

#### IRRIGATION DISTRICT

As municipal corporation, see Municipal Corporation.

#### IRRIGATION PURPOSES

"Regardless of technical definitions, the phrase 'irrigation purposes' or 'purposes of irrigation' is a common expression in the legislation of this state, and has acquired a well-defined meaning, which is synonymous with 'agricultural purposes,' or, at least, the former is included within the latter." Under a statute providing punishment for persons making any aperture in any structure erected to conduct water for "agricultural purposes," with intent to destroy the same, an information is sufficient which charges that the structure was erected to conduct water for "irrigation purposes" or "purposes of irrigation." *State v. Tiffany*, 87 Pac. 932, 934, 44 Wash. 602.

#### IRRIGATION SEASON

The "irrigation season" is defined by law (Sess. Laws Idaho 1899, p. 382) as extending from April 1st to November 1st; but, in a contract for water for irrigating purposes beginning July 6th and providing that water shall be delivered free during the first irrigating season, the purchaser is entitled to free use of water during the irrigating period for one year from the date on which water was first delivered to him. *Twin Falls Land & Water Co. v. Lind*, 94 Pac. 164, 165, 14 Idaho, 348.

### IS

Code 1868, c. 31, § 25, as re-enacted by Acts 1882, p. 387, c. 130, provides that no sale or deed of any real estate under the provisions of this chapter shall be set aside or in any manner affected by reason of the failure of any officer to perform any duty herein required to be done or performed by him after

such sale "is" made. Held, that the word "is" does not relate to past sales, and the statute is to be given a prospective operation only. *State v. Harman*, 50 S. E. 828, 832, 57 W. Va. 447.

When the Constitution of a state says that the Legislature "is invested" with a certain power, it invests it with that power and does so none the less that in the absence of those words a more or less similar power would be implied by more general expressions in the same instrument. *Tampa Waterworks Co. v. City of Tampa*, 26 Sup. Ct. 23, 24, 199 U. S. 241, 50 L. Ed. 170.

#### As has been

"The word 'is' supports the argument. It is the present tense, not the perfect, 'has been.'" *State v. Boner*, 49 S. E. 944, 57 W. Va. 81.

In Civ. Code Prac. § 337, subsec. 5, providing that, if the judge who presided at the trial did not preside when a motion for a new trial "is" overruled, the bill of exceptions may be certified by bystanders, and be controverted and maintained pursuant to the provisions of subsections 3 and 4, the word "is" was intended as an equivalent to the words "has been." *Louisville Southern R. Co.'s Receivers v. Lewis*, 41 S. W. 3, 4, 101 Ky. 296 (citing *Hayden v. Ortkeiss' Adm'r*, 83 Ky. 396).

#### As shall or may be

As used in a constitutional provision that where an old county is reduced for the purpose of forming a new one the seat of justice in the old county shall not be removed without the concurrence of two-thirds of both branches of the Legislature, and two-thirds of the qualified voters of the county, etc., but that the provision requiring a two-thirds majority shall not apply to certain counties, the word "is" is used in the sense of "shall" or "may be." *Lindsay v. Allen*, 82 S. W. 171, 173, 112 Tenn. 637.

#### As will be

The word "is" is used in a city water supply contract, providing that the water proposed to be furnished is pure and wholesome, in the sense of "will be." It was not the affirmation of a then existing fact. *Jersey City v. Flynn*, 70 Atl. 497, 510, 74 N. J. Eq. 104.

## ISLAND

An "island" is defined by the authorities to be a body of land surrounded by water. A body of land which was originally a part of the main land, but which had been cut off by a ditch through which the tide flowed, which body of land was about 3 miles in length and 600 or 700 yards in width, the stream which was gradually formed by the washing of the wind and tide ranging in width from 48 to 60 feet and being navigable by small boats, was an "island," though the

land composing the tract belonged to the person who owned it before it was cut off. *State v. Barco*, 63 S. E. 673, 675, 150 N. C. 792 (citing 23 Cyc. p. 357).

In determining whether a formation in a river is an "island" or a part of the shore land, account should be taken of the size and stability of the formation, its physical features, and the relative size and permanence of the channels around it. *McBride v. Steinweden*, 83 Pac. 822, 824, 72 Kan. 508.

"A mussel-bed over which the water flows at every tide cannot properly be called an 'island.' Such formations constitute what are called 'flats.'" *Fowler v. Wood*, 85 Pac. 763, 776, 73 Kan. 511, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534 (quoting and adopting definition in *King v. Young*, 76 Me. 76, 49 Am. Rep. 596).

Revisal 1905, § 3474, forbids the anchoring of a floathouse for fishing or hunting in shoal water not more than 300 yards from the mainland on the west side of Currituck Sound. A floathouse was anchored off a body of land originally a part of the mainland, but had been cut off by a ditch through which the tide flowed. This land was about 3 miles in length and 600 or 700 yards in width, and the stream which was gradually formed by the washing of the wind and tide ranged in width from 48 to 60 feet and was navigable by small boats. Held that, though the land belonged to the person who owned it before it was cut off, it was an "island," defined to be "a body of land surrounded by water." *State v. Barco*, 63 S. E. 673, 675, 150 N. C. 792.

To constitute an "island" in the river, the same must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river, and not a sandbar subject to overflow by a rise in the river and connected with the land when the water is low. *McBride v. Steinweden*, 83 Pac. 822, 824, 72 Kan. 508.

## ISOLATED

"In the federal law, the carrying on of business within a state means something more than a casual or occasional purchase of goods; the business must be continuous or at least of some duration." *St. Louis Wire-Mill Co. v. Consolidated Barbed-Wire Co.*, 32 Fed. 802. The conclusion would have fitted the facts if the judge in writing that opinion had used the word "isolated" instead of the words "casual or occasional." *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.*, 130 Fed. 605, 609.

## ISSUE

See Bond Issue; Contract in Issue; Duly Issued; For Successive Issues; Person to Whom Issued.

Date of Issue, see Date.

"Issue" is defined by Webster to mean to send out, to put into circulation. *Cunningham v. Royal Neighbors of America*, 124 N. W. 434, 435, 24 S. D. 489, 140 Am. St. Rep. 793.

**Of bank bill or note**

The word "issue" and the word "issued" have many different meanings depending on the subject-matter of the writing or discourse, or on the context, or both; but, when the word "issue" is used with reference to the giving out of obligations by banks, it has a restricted, special, and almost technical meaning relating exclusively to the money currency of the country. *Lusk v. Stoughton State Bank*, 115 N. W. 813, 815, 135 Wis. 311.

**Of bonds, negotiable instruments, etc.**

Under Hurd's Rev. St. 1905, c. 38, § 124, providing that whoever fraudulently utters any receipt or other written evidence of the delivery of any grain, etc., when the quantity specified has not in fact been delivered, etc., shall be imprisoned as therein prescribed, a writing evidencing the depositing in a building of grain belonging to the owner of the building would be regarded as "issued" when assigned, transferred, or delivered by the owner of the building to some other person. *McReynolds v. People*, 82 N. E. 945, 948, 230 Ill. 623.

The word "issue," in its ordinary sense, means send out, emit, deliver. The word "issue," as used in the North Carolina statute, directing railroad aid bonds of a county to be "issued" by a board of trustees, is used in its ordinary sense, and the statute should not be construed as requiring that the bonds should be executed by the trustees. The statute being silent in the subject of execution, such bonds are properly executed by the county's board of commissioners. *Board of Com'rs of Onslow County v. Tollman*, 145 Fed. 753, 769, 76 C. C. A. 317 (quoting 4 Words and Phrases, p. 3779).

"Bonds are sometimes said to be 'issued' when they are merely authorized. Again, they are said to be 'issued' when they are executed and delivered for value." The word "issued" is used in the former sense in the provision of the Wright Act (St. Cal. 1887, p. 35, c. 34) that "if a majority of the votes cast are, 'Bonds—Yes,' the board of directors shall immediately cause bonds in such amount to be issued." *Wright v. East Riverside Irr. Dist.*, 138 Fed. 313, 323, 70 C. C. A. 603.

"Issue" of a bill or note is its first delivery, complete in form, to a person who takes it as holder. *Vander Ploeg v. Van Zunk*, 112 N. W. 807, 810, 135 Iowa, 350, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275.

Under Negotiable Instrument Law 1905, pp. 244, 245, 246, 265, §§ 6, 12, 13, 17, 191, declaring that the validity of a note is not affected by the fact that it is undated, that

the instrument is not invalidated because antedated or postdated, providing that, where an instrument expressed to be payable at a fixed date after date is issued undated, any holder may insert therein the true date of issue, but the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, and defining the word "issue" to be the first delivery of the instrument complete in form to the one taking it as a holder, the original holder of an undated accommodation note may not postdate the note and bind the accommodation indorsers; and, where the original holder postdates the note, he cannot recover from the accommodation indorsers, especially where when the indorsers notified the holder when delivering the note that they would not lend their credit to a further extension of the debt. *Bank of Houston v. Day*, 122 S. W. 756, 760, 145 Mo. App. 410.

**Same—As deliver or put in circulation**

The word "issue" is defined in the Century Dictionary as to send out, deliver for use, deliver authoritatively. A county warrant is not issued until it is actually delivered into the hands of the person authorized to receive it. *American Bridge Co. v. Wheeler*, 76 Pac. 534, 535, 35 Wash. 40.

In financial parlance the term "issue" seems to have two phases of meaning: "Date of issue," when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. The other sense or the other phase of meaning is, "when the bonds are delivered to the purchaser, they will be issued to him." *State Nat. Bank v. Board of Com'rs of Port of New Orleans*, 46 South. 307, 310, 121 La. 269 (quoting and adopting definition in *Yessler v. Seattle*, 25 Pac. 1014, 1 Wash. 308).

A bond is "issued" when it comes into the hands of the holder so executed and delivered as to bind the obligor. *Zimmermann v. Timmermann*, 86 N. E. 540, 543, 193 N. Y. 486.

As used in a city charter providing that, when bonds were "issued," a fund should be provided to pay the interest and for a single fund, the word "issued" referred to the time of the sale of the bonds, or when they passed into the hands of some one who claimed them as a debt against the city. *City of Austin v. Valle (Tex.)* 71 S. W. 414, 416.

Under Sess. Laws 1909, c. 146, providing for the creation of irrigation districts with power to issue bonds, and declaring in sections 42, 43, 44, that the bonds shall be issued and negotiated under the direction of the board of commissioners, that bonds shall be signed by the president and attested by the secretary of the board, under the corporate seal of the district, and shall be a lien

on the lands in the district, bonds executed and sealed by the president and secretary of the board of commissioners of a district are valid, though not negotiated until after the expiration of their term of office, and their successors need not re-execute the bonds to make them valid, though the word "issue" means the delivery of the bonds to the purchaser, and has no reference to the arbitrary date fixed as the beginning of the time for which they run. *O'Neill v. Yellowstone Irr. Dist.*, 121 Pac. 283, 290, 44 Mont. 492.

City bonds are not "issued" until actually or constructively delivered under a contract of sale, so that even if Const. art. 8, § 7, providing for the issuing of bonds by cities or towns, and requiring them, on issuing such bonds, to create a sinking fund for their redemption, required such fund to be created before the bonds could be legally issued, unsold bonds still in the hands of a town council were not invalid on that ground, though dated after the creation of the sinking fund. *Black v. Fishburne*, 68 S. E. 681, 682, 84 S. C. 451, 19 Ann. Cas. 1104.

Laws 30th Leg. 1907, p. 78, approved March 23, 1907 (sections 1-21, inclusive), provide the steps by which a drainage district may be created, and for the issuance of bonds, etc. Section 22 directs the county commissioners' court to make an order directing the issuance of drainage bonds. Section 23 provides that all bonds "issued" under the act shall be signed by the county judge and attested by the county clerk. Section 24 provides that any drainage district desiring to "issue" bonds in accordance with this act shall, before such bonds are offered for sale, forward to the Attorney General a "copy" of the bonds to be "issued," a certified copy of the order of the commissioners' court levying the tax to pay interest and provide a sinking fund, and a statement of the total indebtedness of the district, etc.; whereupon the Attorney General shall examine the bonds in connection with the facts and laws on the subject, and, if he finds that the bonds are valid and binding, shall so certify. Section 25 provides that, when the bonds have been examined and his certificate attached thereto, they shall be registered by the State Comptroller in a book kept for that purpose and the certificate preserved for use in litigation. Held, that the word "issued" in section 23 meant bonds executed by signing and attesting them, etc., but the word "issue," as used in section 24 in the phrase "desiring to issue bonds," meant to put bonds into circulation by selling them, while the phrase "the bonds to be issued" meant those to be offered for sale, and not those to be prepared and executed, and the word "copy" meant one of a set or number of reproductions or imitations containing the same matter and of the same form and appearance, the purpose of the law being that, after the bonds were ready for sale, one of them should

be submitted to the Attorney General for examination in order to determine the validity of the whole issue, so that the Attorney General was not required to pass upon bonds until they were actually printed and signed by the proper officials as required by statute. *Hidalgo County Drainage Dist. No. 1 v. Davidson*, 120 S. W. 849, 851, 102 Tex. 539 (citing 4 Words and Phrases, pp. 3778-3781).

#### Of corporate stock

As sale, see Sale.

The word "issue," as used in the Missouri Constitution, declaring that no corporation shall "issue" stock except for money paid, labor done, or property actually received, is obviously used in its ordinary commercial or financial sense, meaning to "emit," "put into circulation," or "dispose of" securities already authorized and prepared for disposition. *Scott v. Abbott*, 160 Fed. 573, 577 (citing *Black's Law Dict.*; *Century Dict.*; *Folks v. Yost*, 54 Mo. App. 55, 59).

Stock Corporation Law, § 54, provided that stockholders should be liable to creditors to an amount equal to the stock held by them until the capital stock issued and outstanding should have been fully paid. In an action to enforce the liability of a stockholder, it appeared that a stock of goods had been transferred to the corporation under an agreement whereby, in consideration therefor, it was to issue to the owner and to defendant a certain amount of stock, and that defendant had forgiven certain indebtedness owing him by the transferee of the goods on account of the issue of the stock, and that defendant had been one of the directors of the corporation, his only qualification being the ownership of the stock in question. Held, that the stock was "issued" and was "held" by the parties, though no certificate or scrip representing the same had been issued. *Flour City Nat. Bank v. Shire*, 72 N. E. 1141, 179 N. Y. 587.

Const. art. 12, § 3, provides that each stockholder of a corporation shall be individually liable for such portion of the debts incurred while he was a stockholder as the amount of stock owned by him bears to the whole of the subscribed capital stock. Held, that a complaint to enforce stockholders' liability under such section, alleging that the whole capital of the corporation was divided into 60,000 shares, of which about 37,735 shares were "issued," was not equivalent to an allegation that only that number of shares were "subscribed," and that the complaint was therefore fatally defective for failure to allege the whole number of shares subscribed. *San Francisco Commercial Agency v. Miller*, 87 Pac. 630, 631, 4 Cal. App. 291 (citing *San Joaquin L. & W. Co. v. Beecher*, 35 Pac. 349, 101 Cal. 70; *California Southern Hotel Co. v. Callender*, 29 Pac. 859, 94 Cal. 127, 28 Am. St. Rep. 99;

*Mitchell v. Beckman*, 28 Pac. 110, 64 Cal. 121; *Tulare Sav. Bank v. Talbot*, 63 Pac. 172, 131 Cal. 49).

**Of execution**

The term "issue," as applied to an execution, means more than the mere clerical preparation and attestation of the writ, and includes its delivery to an officer for its enforcement. *Bourn v. Robinson*, 107 S. W. 873, 875, 49 Tex. Civ. App. 157 (citing 1 Freem. Ex'n. § 9a; *Schneider v. Dorsey*, 74 S. W. 527, 96 Tex. 544).

Under Code 1904, § 3577, providing that, where execution "issues" within a year from judgment, an action may be brought on the judgment within 10 years from return of execution, an execution regular in all respects, duly attested by the clerk, and marked "to lie," though never delivered to an officer, was "issued" within the statute. *Davis v. Roller*, 55 S. E. 4, 5, 106 Va. 46, 117 Am. St. Rep. 977.

**Of insurance policy or certificate**

The legal definition of "issuance" is the act of sending out officially, delivering for use, and putting into circulation; and the issuance of an insurance policy is the date of its delivery to insured, and a provision therein requiring an inventory of insured goods within 30 days of the issuance of the policy meant 30 days from its delivery, and not from its date. *Homestead Fire Ins. Co. v. Ison*, 65 S. E. 463, 465, 110 Va. 18.

A certificate is not "issued," within the meaning of a proviso in the constitution of a beneficial society to the effect that a member shall be liable for dues, etc., for the month in which his benefit certificate is "issued or dated by the supreme secretary," until it has been delivered to and accepted by the member. *Logsdon v. Supreme Lodge of Fraternal Union of America*, 76 Pac. 292, 293, 34 Wash. 666.

The word "issued" in an application for insurance, reciting that the policy shall not take effect until it was signed by the secretary of the company and issued, was used as indicative of the completed signing and execution of the instrument, making it ready for delivery. *Stringham v. Mutual Life Ins. Co.*, 75 Pac. 822, 825, 44 Or. 447.

Where the point in controversy in an action on a policy was whether the policy had been in fact "issued," an instruction that the company admits that the insured applied for a policy, and that "they issued a policy, but never delivered it to him," is not erroneous, as the word "issue" was used in the sense of preparing and signing the policy, but did not include delivery. *Dargan v. Equitable Life Assur. Soc. of United States*, 51 S. E. 125, 126, 71 S. C. 356.

An allegation of the answer in an action on a fire policy that "defendant issued to the plaintiff its policy of insurance" on the

goods insured, admitted the unconditional delivery of the policy to insured; the word "issue" meaning to deliver for use, and, as used in an allegation in an answer that plaintiff procured a policy of insurance to be issued to him, is equivalent to an allegation that it was delivered to and accepted by plaintiff. *De Michele v. London & Lancashire Fire Ins. Co. (Utah)* 120 Pac. 846, 848.

**Of notice**

The verb "to issue" includes among its meanings "to deliver by authority." The charter of a mutual insurance company, requiring the payment of assessments "within thirty days after the issuing of said notice" of assessment, means within 30 days after the giving or delivery of such notice. *Miner v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie and Mason Counties*, 117 N. W. 211, 212, 153 Mich. 594 (citing 23 Cyc. p. 358; *Thomas v. Abbott*, 63 N. W. 984, 105 Mich. 687).

**Of patent**

The term "issuance of patent," as used in Act July 1, 1902, c. 1362, 32 Stat. 643, § 16, under the law as it then stood, referred to the time when the patent was delivered to the allottee, there being no provision making its record necessary to the passing of title; but under Act April 26, 1906, c. 1876, 34 Stat. 139, § 5, which provides that "all patents or deeds to allottees \* \* \* shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title," and repeals all acts and parts of acts inconsistent therewith, the recording of a patent is equivalent to its issuance under former acts so far as it affects the period of restriction. In re *Lands of Five Civilized Tribes*, 199 Fed. 811, 820.

**Of process, summons, or writ**

A summons is not "issued," within *Burns' Ann. St.* 1908, § 317, providing that a civil action shall be commenced by filing a complaint, and causing a summons to be issued thereon, until it is delivered to the officer charged by law with its service. *Marshall v. Matson*, 86 N. E. 339, 342, 171 Ind. 238.

Garnishee summons is issued under Rev. Laws 1905, § 4229, when delivered by the plaintiff or his attorney to the proper officer for service on the garnishee, and when the writ is sent to the officer by mail delivery is not completed until received by him. *Webster Mfg. Co. v. Penrod*, 114 N. W. 257, 103 Minn. 69.

While the date of a writ is prima facie evidence of the time it was actually issued, a suit is not commenced by writ until the writ is delivered or transmitted to an officer with the bona fide intention of having it served. *People ex rel. McCallum v. Gebhardt*, 118 N. W. 16, 17, 154 Mich. 504.

Under Rev. St. § 2730, providing that attachment shall be issued on plaintiff's request by the clerk either at the time of the "issuing" of the summons in the action or at any time thereafter before final judgment, the word "issuing," when considered with statutes as a whole, refers to the actual delivery of the writ of attachment or summons to the sheriff to be executed. *Barth v. Burnham*, 81 N. W. 809, 810, 105 Wis. 548.

Code 1896, § 2667, provides that civil suits before justices of the peace, must be commenced by a summons "issued" by him, etc., and section 2814 declares that the suing out of a summons for the commencement of a suit shall have that effect, whether it be executed or not, if the suit be continued by an alias or recommenced at the next term of the court. Held, that where there was no constable in the justice's precinct, and the justice was also a deputy sheriff, a summons signed by him as justice while in his hands, whether as justice or deputy sheriff, was not "issued" so as to stop the running of limitations, as the issuance of summons under such circumstances contemplates a delivery to and acceptance by an officer having power to execute it. *Southern Ry. Co. v. Dickens*, 50 South. 109, 163 Ala. 114.

#### Of trading stamps

The phrases "issued in the regular way" and "collected in the regular way," in a contract providing for the redemption of trading stamps so issued and collected, have the same meaning and describe the same transaction. *Sperry & Hutchinson Co. v. Hertzberg*, 60 Atl. 368, 370, 99 N. J. Eq. 264.

#### ISSUE (Descendants)

See *Die Leaving No Issue*; *Die Without Issue*; *Die Without Leaving Issue*; *Immediate Issue*; *In Default of Issue*; *Lawful Issue*; *Legal Issue*; *Legitimate Issue*; *Lineal Issue*; *Should They Leave Issue*.

"Issue" primarily means descendants of whatever degree. *Perry v. Bulkley*, 72 Atl. 1014, 1017, 82 Conn. 158.

The word "issue," when used in a will and unexplained by the context, means all descendants of each of the sisters and brother of decedent. *In re Bauerdorf*, 138 N. Y. Supp. 682, 77 Misc. Rep. 655.

Unless the language of the will or the external circumstances afford a strong reason for a contrary construction, the word "issue" is ordinarily given its primary meaning of "descendants." *Seitz v. Faversham*, 126 N. Y. Supp. 801, 802, 141 App. Div. 903.

In its legal sense as used in statutes and wills and deeds and other instruments, "issue" means descendants, lineal descendants, offspring. *Schafer v. Ballou*, 128 Pac. 498, 499, 35 Okl. 169.

"Issue" embraces lineal descendants of every generation, and must be so construed when used in a will, unless the testator by expression or necessary inference has shown an intent to use the word in a restricted sense. *Bassett v. Wells*, 106 N. Y. Supp. 1068, 1069, 56 Misc. Rep. 81 (citing *Kingsland v. Rapelye* [N. Y.] 3 Edw. Ch. 1. See, also, *Adams v. Law*, 17 How. [58 U. S.] 421, 15 L. Ed. 149; *Palmer v. Horn*, 84 N. Y. 516; *Rodine v. Brown*, 42 N. Y. Supp. 202, 12 App. Div. 335, affirmed, 49 N. E. 1093, 154 N. Y. 778; *Drake v. Drake*, 32 N. E. 114, 134 N. Y. 220, 225, 17 L. A. R. 664; *Soper v. Brown*, 32 N. E. 768, 136 N. Y. 244, 32 Am. St. Rep. 731; *N. Y. Life Ins. & Trust Co. v. Viele*, 55 N. E. 311, 161 N. Y. 11, 19, 20, 76 Am. St. Rep. 238; *Chwatal v. Schreiner*, 43 N. E. 166, 148 N. Y. 683; *Bisson v. West Shore R. R. Co.*, 38 N. E. 104, 143 N. Y. 128; *Phelps v. Cameron*, 96 N. Y. Supp. 1014, 109 App. Div. 798; *Price v. Sisson*, 13 N. J. Eq. 168, 178; *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475; *Hilliker v. Bast*, 72 N. Y. Supp. 301, 64 App. Div. 552; *Emmet v. Emmet*, 73 N. Y. Supp. 614, 67 App. Div. 183; *Wilson v. Wilson*, 78 N. Y. Supp. 408, 76 App. Div. 232; *U. S. Trust Co. v. Tobias*, 21 Abb. N. C. 392).

In construing statutes, the word "issue," as applied to descent of estates, includes all lawful lineal descendants, pursuant to the rule of construction in Code, § 48, par. 7. *Rice v. Burkhart*, 107 N. W. 308, 130 Iowa, 520.

A legacy to the "issue" of decedent's brothers and sisters goes to the descendants of such brothers and sisters of every degree where a different intention is not shown by the context and the distribution is per capita, and not per stirpes. *In re Bauerdorf*, 138 N. Y. Supp. 673, 678, 77 Misc. Rep. 656.

Rev. St. c. 1, § 6, par. 9, provides that "the word 'issue' applied to the descent of estates includes all lawful lineal descendants of the ancestor." *Healey v. Cole*, 49 Atl. 1065, 1066, 95 Me. 272.

The word "issue" should be construed, "where its meaning is unrestricted by the context, as including all lineal descendants and importing representation, and certainly, when the issue take as of a particular time after the death of the testator, and only the issue living at that time take, the issue of deceased issue take by a certain substitution for their ancestors." *Coates v. Burton*, 77 N. E. 311, 191 Mass. 180 (quoting and approving *Jackson v. Jackson*, 26 N. E. 1112, 153 Mass. 374, 11 L. R. A. 305, 25 Am. St. Rep. 643).

The primary meaning of "issue" is descendants, and, in the absence of the use of the word in a will in another sense, it will be so construed. Under a residuary bequest to testator's stepmother and half-sister, in equal portions, and, in the event of either

dying without issue, the share of the one so dying to the survivor, the stepmother dying before testator, he does not die intestate as to the share given, but there is an implied bequest of it to her issue. In re Disney's Will, 103 N. Y. Supp. 391, 392, 118 App. Div. 378 (quoting and adopting definition in New York Life Ins. & Trust Co. v. Viele, 55 N. E. 311, 161 N. Y. 11, 76 Am. St. Rep. 238; Chwatal v. Schreiner, 43 N. E. 166, 148 N. Y. 683).

The word "issue" means lineal descendants, though it may appear from the context of the deed to have been used in the limited meaning of children, or children and grandchildren, and the word when used in its primary sense, and not affected by any indication of a contrary intention, includes lineal descendants generally and indefinitely; but where the failure of issue is restrained to some particular time, and the word is used as descriptive of the class to take at that time, it imports a definite failure of issue, and refers to lineal descendants in being at the time specified, so that, if at the time fixed there are lineal descendants in being, a limitation over on failure of issue is void. Robeson v. Cochran, 99 N. E. 649, 651, 255 Ill. 355.

Where a will devised the income of real estate for life, and, upon the death of the first life tenant, to his son for life, and then in equal proportions to named brothers and sisters of the testatrix, and, if any of such brothers and sisters were dead at the termination of the life estates, to the children of such deceased brother or sister, taking the parent's share by representation, and, in the event of the brothers and sisters dying before the termination of the life estates leaving no children living, then equally between the brothers and sisters then living, and the issue then living of any deceased brother or sister, the limitation over to the brothers and sisters and to the children of any deceased brother or sister was not repugnant to the statute against perpetuities; but the limitation over to the issue of a deceased brother or sister in the event that any of them should have died without a child living at the termination of the life estates was repugnant to the statute; the word "issue," read with the context, not meaning immediate issue or children, but issue of a more remote degree. Sumner v. Westcott, 84 Atl. 921, 86 Conn. 217.

The phrase "their living issue" in a contract of life insurance, directing the payment of the amount of the policy at the death of the insured to his brothers and sisters or their living issue, according to the right of representation, means and refers to living lineal descendants of deceased brothers and sisters. Hemenway v. Draper, 97 N. W. 874, 91 Minn. 235.

### Adopted children

P. S. 2936, subd. 1, provides that the estate of an intestate shall descend in equal shares to his "children," or the legal representatives of deceased children, and subdivision 2 provides that, if the deceased is a married person and leaves no "issue," the surviving husband or wife, if such survivor does not take dower or testamentary provision, shall be entitled to one-half of the estate of deceased forever if it does not exceed \$2,000, otherwise the \$2,000 and one-half of the remainder, etc. Held, that the word "children," as used in subdivision 1, and the word "issue," in subdivision 2, were not limited to natural children, but included as well children by adoption. In re Walworth's Estate, 82 Atl. 7, 11, 85 Vt. 322, 37 L. R. A. (N. S.) 849.

Under St. 1876, p. 210, c. 213, providing that a person adopted shall take the same share of the property which the adopted parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and that he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in such position as if so born to him, a child adopted after the enactment of such statute, whose adopted father died in 1903, was not entitled to take as the "issue" or "heir" of her adopted father under the will of her adopted grandfather. Blodgett v. Stowell, 75 N. E. 138, 139, 189 Mass. 142.

Under Pub. St. 1901, c. 195, §§ 10-13, providing that a widow by waiving the provisions of her husband's will in her favor may obtain after the payment of his debts one-third of his property where he leaves "issue" surviving him, and one-half where there is no surviving "issue," the same provisions being made for the husband in case of his wife's death, an "adopted child" cannot be considered as "issue," even though it be the child of the deceased husband by a former wife, and the adopting parents take the same part of the other's estate upon the death of either that they would have taken had the child not been adopted. Morse v. Osborne, 77 Atl. 403, 404, 75 N. H. 487, 30 L. R. A. (N. S.) 914, Ann. Cas. 1912A, 324.

Shannon's Code, § 4163, provides that an intestate's land shall descend equally to all the sons and daughters, and that if intestate died "without issue" his lands shall descend equally to his brothers and sisters of the whole or half blood, born before his death or afterwards. Held, that such provisions must be construed in connection with Shannon's Code, § 5411, regulating adoption, and declaring that the adopted child shall have all the privileges of a legitimate child to the applicant, with capacity to inherit and succeed to the real and personal estate as the applicant's heir or next of kin, so that, where a foreign adoption is recognized in

Tennessee by comity, to the extent that such status was fixed by the foreign statutes conferring the same power of inheritance, a nonresident foster parent, dying intestate in another state, owning lands in Tennessee, and leaving a duly adopted child there, did not "die without issue" within section 4163. *Finley v. Brown*, 123 S. W. 359, 363, 122 Tenn. 316, 25 L. R. A. (N. S.) 1285.

#### After-born children

A devise to the "issue" of testatrix's niece as joint tenants, when the youngest should become 21 years old, etc., is properly construed as a valid devise to issue existing at testatrix's death, and as not including after-born children, since the latter construction would make the clause void under the statute against perpetuities (Real Property Law [Consol. Laws 1909, c. 501] § 42). *Seitz v. Faversham*, 98 N. E. 385, 386, 205 N. Y. 197.

#### As children

Children as including, see Child—Children.

"Issue" is an ambiguous term. "It may mean descendants generally or merely children, and whether in a will it shall be held to mean the one or the other depends on the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as can be considered." In re *Tenney*, 93 N. Y. Supp. 811, 816, 104 App. Div. 290 (quoting and adopting the definition in *Palmer v. Horn*, 84 N. Y. 516).

The word "issue" is to be interpreted according to its primary signification as importing descendants, unless it appears that testator used the word in its secondary or restricted meaning of children. The word "issue" may be restricted to children only, or include descendants generally, or descendants taking by right of representation, and the meaning depends upon the intention of testator as gathered from the whole will. *Union Safe Deposit & Trust Co. v. Dudley*, 72 Atl. 166, 170, 104 Me. 297.

"The word 'issue,' which is coextensive with 'descendants' and includes every degree, has been restrained to the sense of 'children.'" *Snyder v. Greendale Land Co.*, 91 N. E. 819, 821, 48 Ind. App. 178.

Where it is apparent from extrinsic circumstances or the provisions of a will that testator intended to use the word "issue" in the sense of "children," its meaning will be so limited. *Clark v. Kittenplan*, 118 N. Y. Supp. 404, 405, 409, 63 Misc. Rep. 122.

In a bequest "to the issue of my sister M." and their heirs, the word "issue" is used to denote children. *Logan v. Cassidy*, 50 S. E. 794, 798, 71 S. C. 175.

The use of the word "issue," in Code, § 1386, prescribing the rules of inheritance, does not limit the right of inheritance to the natural children only, as the word "issue"

is there used in the same sense as the words "child" and "children." In re *Winchester's Estate*, 74 Pac. 10, 140 Cal. 468 (citing In re *Newman's Estate*, 16 Pac. 887, 75 Cal. 219, 7 Am. St. Rep. 146).

The word "issue," when used in a will and unexplained by context, means descendants of every degree of remoteness, and, when employed in that sense, the descendants of the different degrees take in equal shares per capita and not per stirpes; but the word may be, and frequently is, explained by the context to mean "children." *Rasquin v. Hamersley*, 137 N. Y. Supp. 578, 580, 152 App. Div. 522.

#### Same—When used with "child or children"

Where testator uses the words "children" and "issue" interchangeably for "children," in two clauses of his will in construing a third clause, where there is a doubt as to the meaning of the word "issue," it would be construed as meaning "children." In re *Duckett's Estate*, 63 Atl. 830, 832, 214 Pa. 362.

Testator gave the residue of his estate to his daughter during her natural life, "and to her issue but should she die without issue then I direct" that the estate of which she shall die possessed shall be divided among the children of my son. Held, that the word "issue" meant "children." In re *Nice's Estate*, 75 Atl. 1025, 1026, 227 Pa. 75.

If it is apparent from the reading of a will that the testator has used the words "heirs," "issue," and "children" interchangeably or synonymously, the court is warranted in construing them in like manner so as to carry out the testator's intention. *Stisser v. Stisser*, 85 N. E. 240, 241, 235 Ill. 207 (citing *Gannon v. Peterson*, 62 N. E. 210, 193 Ill. 327, 55 L. R. A. 701; *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Leiter v. Shepard*, 85 Ill. 242).

A will directed the trustees to pay over the annual income of a part of the residue to his daughter H. for life, and "upon her decease leaving issue, my said trustees shall appropriate so much of such annual income as shall be necessary for the support and education of her children" until they become of age, and then pay over the principal to the children, and further provided that, if the daughter die leaving no issue, the trustees should pay over the funds equally among her heirs at law, and the subsequent provision gave to the trustees a sixth part of the residue to pay over the net income thereof to daughter M. during her life, and at her "decease leaving issue" then under age the trustees should appropriate so much thereof as was necessary for the support and education of the children until they arrived at age, and pay over the principal "to and among said issue, as they respectively arrive at that age in equal portions," and that if



the daughter "shall de cease without issue" the trustees should pay over the income to the daughter's husband for life, and the principal should be divided among her heirs at law at his de cease. Held, that the word "issue," in the devise to daughter M., meant "children." *Silsbee v. Silsbee*, 97 N. E. 758, 759, 211 Mass. 105.

**Same—In gift to one for life with remainder to issue**

Where testatrix bequeathed the income of a trust fund to her son for life, the remainder on his death to be transferred to his issue in the proportion they would have received had he died intestate, and if he died, without issue the remainder to go to other persons named, the word "issue" means descendants, and not children only. *Metropolitan Trust Co. v. Rankin*, 134 N. Y. Supp. 462, 463, 74 Misc. Rep. 542.

A testator devised land to his nephew during his natural life, and at his death to his surviving issue. He also provided that, if his nephew died without surviving issue, "the land herein bequeathed to his children" should be disposed of as directed. Held that, although "surviving issue" without qualification ordinarily means heirs of the body, the subsequent provision of the will showed that the testator meant surviving children, and hence that the issue of a child of the nephew who died before the nephew would take no interest in the land. *Guy v. Osborne*, 74 S. E. 617, 618, 91 S. C. 291.

**Same—In expression leaving issue, etc.**

Testator devised his residuary estate in trust for his wife for life, and directed that at her death the same should be divided equally, share and share alike, between his three children, "or such of them as shall survive my said wife, but if any of my said children shall have died, leaving issue, such issue shall take the share the parent would have taken if living." A child died after the death of the testator and before the wife, leaving children and children of a deceased child. Held, that the word "issue" was equivalent to "children," and the grandchildren of the deceased child of the testator took nothing. *Coyle v. Coyle*, 68 Atl. 224, 225, 73 N. J. Eq. 528.

Where a testator in one paragraph devised certain real estate to his son, to have and to hold the same to him for life, and, in case he should die leaving lawful male issue, then to such male issue his or their heirs and assigns forever, and in another paragraph directed his executors to pay the legacies to his children within three years and to release all claims and demands which he had against any of his children, the word "issue" was used in its legal sense as synonymous with "descendant," and not as synonymous with "children," and therefore included children of a deceased child of the devisee.

*Wilson v. Wilson*, 78 N. Y. Supp. 408, 409, 76 App. Div. 232.

A testatrix left all her real property to her husband for life, or until his remarriage, and, upon his death or remarriage, she devised it to her brothers "in fee simple and share alike," with the qualification that if either brother should die before testatrix, or before the death or remarriage of her husband, "not leaving lawful issue him surviving, then the survivor of them shall have and take the share of the said real and personal estate which the deceased if living would have taken, but if the deceased shall leave lawful issue, then I give and devise and bequeath to such issue their parent's share in said real and personal estate." The will further directed that the executor take charge of her estate during the life, or until the remarriage, of her husband, pay the rents and income to her husband, and, after the death or remarriage of her husband, to deliver said real estate to her brothers "or to such other person or persons as shall be entitled to same" under the will. Held, that "issue," as used in the will, meant descendants, and was not limited to the children of the deceased brothers, and therefore, where one of the brothers died before the death or remarriage of the husband, leaving a bankrupt child surviving, and such child conveyed his interest in the real property to his mother, and died before the death or remarriage of the husband, the conveyance was void, as his interest vested in his children under the will on the death of the bankrupt. *Riker v. Gwynne*, 124 N. Y. Supp. 124, 125, 139 App. Div. 423.

Sess. Acts 1815-16, p. 32, abolished estates tail, and Rev. St. 1825, p. 216, and Rev. St. 1899, § 4592, provide that in cases where by the common law or the statute law of England any person might become seised in fee tail of any lands, etc., he shall have only a life estate, and the remainder in fee simple shall pass to the person next in line, and Rev. St. 1899, § 4593, provides that where a remainder in lands shall be limited to take effect on the death of any person without heirs or without issue, or, on failure of issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. Testator devised lands to his two sons, and to their heirs and assigns forever, and provided that the same, should not be sold before the younger of the two should become of lawful age, and that, should either of them die without issue, the survivor, his heirs and assigns, should take the part bequeathed to the son so dying, and that, in the event both should die without issue, then testator's surviving heirs should take. Held, that, by the use of the word "heirs" in connection with the word "issue," testator created what would have been at common law or by the statute *de bonis an estate tail*, or, Rev. St.

1899, § 4593, not being applicable to an executory devise, even if the estate was a fee simple in the first instance, it was cut down to a fee tail by the clause declaring that in case of the death of both sons without leaving issue the estate was to revert to the heirs of testator—the failure of issue referred to being an indefinite failure of issue—and hence, under section 4592, the two sons took a life estate, with remainder in fee to their children. *Gannon v. Pack*, 83 S. W. 453, 457, 183 Mo. 265.

#### Children of living parent

The word "issue" is a word of broader import than the word "descendant" and may include the children of a living parent, as well as the children or descendants of one who is dead. But, in an accurate sense, one cannot have a living ancestor, nor can a living person, although he may have children, have descendants. *Parrish v. Mills* (Tex.) 102 S. W. 184, 188 (quoting and adopting definition in *Hillen v. Isellin*, 39 N. E. 368, 144 N. Y. 374).

"Issue," as used in Rev. St. § 4200, providing that no estate in lands shall be granted by deed or will to any person but such as are in being at the time of making such deed or will, and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donor in tail," is limited by the word "immediate" to the children of a person in being. *Dungan v. Kline*, 90 N. E. 938, 940, 81 Ohio St. 371 (citing *Turley v. Turley*, 11 Ohio St. 173).

A deed conveyed property in trust for the use of F. for life, and, after her death, in trust to her lawful issue living at the time of her death, taking per stirpes, and not per capita, as tenants in common. Held that, while the word "issue" was a broader term than "children" or "grandchildren" and generally included all lineal descendants, its meaning might be restricted by other words and the limitation in the deed to those taking per stirpes confined those taking at death to the immediate issue and the children of such of them who were deceased, so that the children of living children at F.'s death took nothing. *Vale Royal Mfg. Co. v. Santee River Cypress Lumber Co.*, 65 S. E. 955, 956, 84 S. C. 81.

#### As descendants

See *Descendant*.

#### Grandchildren

The word "issue," in its ordinary legal meaning embraces grandchildren and remoter descendants, as well as children. When used in a will, a more restricted meaning may be attributed to it, if, from the terms of the testamentary disposition, it appears that the testator used the word in a particular meaning less general than the ordinary mean-

ing. *Coyle v. Coyle*, 68 Atl. 224, 73 N. J. Eq. 528.

"The word 'issue,' in its ordinary legal meaning, embraces grandchildren and remoter descendants, as well as children. When used in deeds, it has been adjudged to have a technical sense to that effect. But when used in a will a more restricted meaning may be attributed if, from the terms of the testamentary disposition, it clearly appears that the testator used the word in a particular meaning less general than its ordinary meaning." Where, by his will, a testator gave one half of his residuary estate to trustees for the use of his wife for life, and upon her death to divide the same among his lawful issue or to trustees for their use respectively, as his wife should direct by any will duly executed, in default of which he gave the same to the persons then entitled to the other half of his residuary estate, to be distributed in the same proportions and held upon the same trusts and with like powers as were mentioned in another clause of his will, the phrase "lawful issue" includes testator's grandchildren, although children of a living child. *Inglis v. McCook*, 59 Atl. 630, 635, 68 N. J. Eq. 27 (quoting *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475; *Emans v. Emans*, 3 N. J. Law, 968; *Den ex dem. Van Middlesworth v. Schenck*, 8 N. J. Law, 39; *Ballentine v. De Camp*, 39 N. J. Eq. 87).

"As used in a devise of a life estate to the lawful 'issue' of testator's daughter Eliza, if more than one, share and share alike, the word 'issue' was not synonymous with children, but included grandchildren as well." *In re Tenney*, 93 N. Y. Supp. 811, 816, 104 App. Div. 290 (quoting and adopting the definition in *Soper v. Brown*, 32 N. E. 768, 136 N. Y. 244, 32 Am. St. Rep. 731).

Devise of a remainder to a daughter and the "issue" of her body living at her death extends to the daughter of such devisee and the children of a deceased daughter of such devisee, the grandchildren of testator. *Dixon v. Pendleton*, 72 S. E. 501, 502, 90 S. C. 8.

Testator directed that after the termination of a life estate his property should be divided among his 11 children and four named grandchildren, children of a deceased child, and that, if either of the children died, leaving issue, the portion given to such child or children should be equally divided between their "issue." Held that there being nothing in the will to indicate a contrary intention, the word "issue" would be given its ordinary meaning to include children and grandchildren. *Security Trust Co. v. Lovett*, 79 Atl. 616, 618, 78 N. J. Eq. 445.

Testator directed his executors to hold his real estate until a designated date and then divide it into shares, and he gave one share to his son, and provided that it was his purpose to distribute his property equally between his children and to the heirs of those

of his children who were dead. By a codicil he declared that the devise to the son should be for his sole use, independent of his wife, and that on his death without issue living at his death the devise should go to persons designated. Held, that the word "issue" in the codicil included grandchildren. *Love v. Walker*, 115 Pac. 296, 302, 59 Or. 95.

In the second clause to his will, testator made a bequest to children of a deceased sister and the issue then living of any deceased child; the issue of such deceased child to take by representation the share that the parent would have taken if living. By the fourth and seventh clauses the word "issue" was used in the same connection. By the sixth clause testator created a trust in favor of a niece, and provided that on her death the fund should be transferred to her issue, and in default of issue to her next of kin. Held, that in view of the use of the word "issue" in other clauses, and in the absence of evidence that the niece's grandchildren were alive when the will was made, or of any facts from which an intent to benefit her grandchildren at the expense of her children could be inferred, the word "issue" would be construed to include only her children. *In re Tenney*, 93 N. Y. Supp. 811, 814, 104 App. Div. 290.

#### As heirs at law

Heirs as including, see Heirs.

The words "children" and "issue" in a deed will not be read as meaning "heirs," where not to do so will carry into effect the lawful intention of a grantor that the grantee take only a life estate, and his children living at his death the remainder; while to do so would defeat such intention. *Hopkins v. Hopkins*, 122 S. W. 15, 17, 103 Tex. 15.

Where a will, after a devise to two persons, provides that, in case either should die leaving no heirs, the other shall be entitled to all, and the will as a whole shows a fixed purpose to devolve the entire estate upon these two devisees to the exclusion of all other direct descendants of the testatrix, the word "heirs" in the limitation over will be construed as meaning "issue" or direct descendants of the persons named; the words "heirs" and "issue" being convertible when such a construction is necessary to carry out the paramount intent of the testatrix. *Brown v. Tuschoff*, 138 S. W. 497, 499, 235 Mo. 449.

#### As heirs of the body

Heirs of the body as including, see Heirs of the Body.

"Issue," as used in a will, prima facie means heirs of the body. *Beckley v. Riegert*, 61 Atl. 641, 642, 212 Pa. 91; *Stayman v. Paxson*, 70 Atl. 803, 221 Pa. 446; *Graham v. Abbott*, 57 Atl. 178, 179, 208 Pa. 68 (citing *Wistar v. Scott*, 105 Pa. 200, 51 Am. Rep. 197).

The words "their issue" in a devise mean the same as the heirs of "the body." *Wright v. Gaskill*, 72 Atl. 108, 100, 74 N. J. Eq. 742.

The primary meaning of the word "issue" in a will is heirs of the body, and "dying without issue," standing alone, means an indefinite failure of issue; but this general rule does not apply where the devise over of land to take effect is expressly or impliedly for a period of a life or lives in being and 21 years thereafter. *Todd v. Armstrong*, 62 Atl. 1114, 1115, 213 Pa. 570 (citing *Beckley v. Riegert*, 61 Atl. 641, 212 Pa. 91).

The word "issue" is one of limitation and means lineal descendants indefinitely; hence heirs of the body. *Lamb v. Medsker*, 74 N. E. 1012, 1013, 35 Ind. App. 662 (citing 3 Jarm. Wills, 200).

The term "issue" in its primary and more usual meaning means an indefinite succession of lineal descendants who are to take by inheritance, and hence heirs of the body. *Harrel v. Hagan*, 60 S. E. 909, 911, 147 N. C. 111, 125 Am. St. Rep. 539.

The words "heirs of the body" and "issue" in a will are generally equivalent, and the word "issue" is one of limitation, and not less extensive in its import than the words "heirs of the body." *Rembert v. Vetoe*, 71 S. E. 950, 965, 89 S. C. 198.

#### Illegitimate child

"Issue," in a will bequeathing property to the issue of the testator's daughter, means legitimate issue. *Kemper v. Fort*, 67 Atl. 991, 995, 219 Pa. 85, 13 L. R. A. (N. S.) 820, 123 Am. St. Rep. 623, 12 Ann. Cas. 1022.

"The decisions are unanimous that, in the absence of statutory provisions modifying the common law with respect to illegitimate children, the words 'issue,' 'child,' or 'children,' found in a will or statute, whether qualified by the word 'lawful' or not, are to be construed as only those who are legitimate, and, if others are intended, this must be deduced from the language employed, without resort to extrinsic facts. This is on the ground that at the common law a bastard child had no inheritance blood, was kin to no one, could have no ancestor, nor be an heir, and could have no heirs, save those of his own body. But this rule has been greatly modified by the enactment of statutes ameliorating his condition, and in different degrees conferring the rights of legitimate children. The bastard was nullius filius mainly in the matter of inheritance. In many other respects his status was the same as others. He could not marry within the levitical degrees, and was held to be within the act requiring the consent thereto of parent or guardian. His settlement was that of his mother." In a will providing for the distribution of an income to the lawful issue of testator's children, the words "lawful issue" mean children, and include only the lawful

children of testator's children, and an illegitimate child would not share in the income, although recognized by its father. *Brisbin v. Huntington*, 103 N. W. 144, 147, 128 Iowa, 166, 5 Ann. Cas. 931.

A will, dated and which took effect in 1872, gave property in trust for the testator's son, with remainder to his "lawful issue." The son was then married and had children. After the death of his then wife, he married the mother of certain illegitimate children. Laws 1895, c. 531, providing that illegitimate children whose parents had theretofore intermarried or should thereafter intermarry should thereby become legitimized. Held, that the illegitimate children were not entitled to share in the remainder, since, while all children, whether legitimate or not, are the "issue," of their parents, that word, when qualified by the adjective "lawful," which is the antithesis of unlawful or illegitimate, is ordinarily understood to mean those only begotten and born in lawful wedlock, and it cannot be assumed that the testator considered the contingencies of the birth of illegitimate children, the enactment of a statute by which they might be legitimized, and the marriage of their parents. *Central Trust Co. of New York v. Skillin*, 138 N. Y. Supp. 884, 886, 154 App. Div. 227.

#### As issue living at death of ancestor

Though in many cases it has been held that "death without issue" may mean death without issue born, such construction has been excluded except when clearly intended by Rev. St. 1898, § 2046, which provides that "when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." *Korn v. Friz*, 107 N. W. 659, 662, 128 Wis. 428.

The word "issue" is defined by Real Property Law (Laws 1896, c. 547) § 38, providing that where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. *Schlereth v. Schlereth*, 66 N. E. 130, 132, 173 N. Y. 444, 93 Am. St. Rep. 616.

#### As taking per capita

Under a gift to "issue," using the word without qualification, the ancestor's children and issue of such children, though the parent is living, as well as issue of deceased children, take in equal shares per capita and not per stirpes, as primary objects of the disposition. *Schmidt v. Jewett*, 88 N. E. 1110, 1111, 195 N. Y. 486.

"It is settled that under a gift to 'issue,' where the word is used without any terms

in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares, per capita and not per stirpes, as primary objects of the disposition. It might well be doubted whether a testator actually contemplated that the children of a living parent would take an equal interest with the parent under the word 'issue,' or that the issue of a deceased child should not take by representation the share of its parent. Lord Loughborough referred to this in *Freeman v. Parsley*, 3 Ves. 421, and, while he held that all were entitled equally per capita, said that he expected that it was contrary to the intention, and regretted that there was no medium between the total exclusion of the grandchildren and admitting them to share with their parents." *Phelps v. Cameron*, 96 N. Y. Supp. 1014, 1016, 109 App. Div. 798 (quoting *Soper v. Brown*, 32 N. E. 768, 136 N. Y. 244, 250, 32 Am. St. Rep. 731).

While the word "issue" in a strictly technical meaning is equivalent to the word "descendants," and when used in a will, in the absence of other words or extrinsic circumstances requiring a different meaning, entitles remaindermen to take per capita and not per stirpes, it will not be given that meaning where the language of the will shows a different intention, and hence where a will provided for a per capita taking in equal portions by all living grandchildren, "including the issue of any grandchild or grandchildren then deceased leaving issue then alive who shall take the same share together, if more than one, which such deceased parent or parents would have taken if living," thus clearly showing the testator's intention to apply the term only to descendants of a particular class at a particular time and to treat the child or children of each grandchild as one class, the remainder will be equally divided among the different classes. *Kernochan v. Whitney*, 109 N. Y. Supp. 721, 722, 125 App. Div. 371.

Testator gave to his executors in trust the residue of his estate, one-third of the income to be paid to his wife for life, and the remaining two-thirds to his three children during their lives, and, after the death of his wife and his children, the executors were to hold the estate in trust for the use of the "lawful issue of my said children," with a provision that, if there should be no "lawful issue," then the same to be divided between his heirs. The testator had used the word "issue" in two other clauses of his will as the equivalent of "children." On the death of the wife and the three children, there survived three children of one of the sons, and nine children of a daughter. Held, that the word "issue" should be construed as meaning "children," and that the estate should be divided per capita among the

grandchildren. In re Duckett's Estate, 63 Atl. 830, 832, 214 Pa. 362.

A will of one who died survived by a widow and one daughter, to whom 11 children were born, gave one-third of a residue of the estate in trust for the widow's life, one-third in trust for the daughter's life, and one-third in trust for the support of the grandchildren, and provided that at the widow's death the trust income should be divided between the daughter and the grandchildren, and that at the daughter's death the estate should "then" go to the grandchildren "and to the issue" of any grandchild who might have died leaving issue, per stirpes, share and share alike. The widow predeceased a grandchild, who died without issue, but leaving a will, and the daughter still lives. Held, that the deceased grandchild took a vested remainder in one-eleventh of the estate, and not jointly with the other grandchildren, nor as a member of a class; the gift to the "issue" of grandchildren being substitutional, and not original, "and" in the quoted phrase being subject to construction as meaning "or," if necessary. *Staples v. Mead*, 137 N. Y. Supp. 847, 849, 152 App. Div. 745.

#### As within rule in Shelley's Case

Under a deed to F. in trust, to hold for the use of L., A., and E. in fee, and to the survivors of them, "provided, however, that if the said A. or E. shall die leaving issue, then to the use of such surviving issue who shall take the same per stirpes and not per capita," the word "issue" includes grandchildren of A. and E. whose parents predecease them, so that under the rule in Shelley's Case the fee would not, on the death of L., vest absolutely in A. and E.; but on the death of either the use shifts to her issue. *Campbell v. Cronly*, 64 S. E. 213, 217, 150 N. C. 457.

Testator devised and bequeathed to his son M. and his heirs, in trust for the use of his son E. for life, certain described lands, and after the death of E., to his issue forever, and in case of his death without "issue," testator devised the lands to E.'s surviving brothers and their heirs, and in case of their death before him, and leaving children, to such issue and their heirs. Held, that the word "issue" was used as a correlative term for "children," and was not sufficient to indicate a purpose to create an estate of inheritance in E., and hence the latter took a life estate in the lands, remainder to his children in fee, and not a fee under the rule in Shelley's Case. *Faison v. Odum*, 56 S. E. 793, 794, 144 N. C. 107 (citing *Brinton v. Martin*, 47 Atl. 841, 197 Pa. 618; *Hauser v. Craft*, 46 S. E. 756, 134 N. C. 329; *Starnes v. Hill*, 16 S. E. 1011, 112 N. C. 1, 22 L. R. A. 598; *Rollins v. Keel*, 20 S. E. 209, 115 N. C. 68).

#### As word of purchase or limitation

"The word 'Issue' may be a word either of purchase or limitation, and will be construed the one or the other as may be necessary to effectuate the intent with which it appears to have been used in the instrument where it is employed." In re Tenney, 93 N. Y. Supp. 811, 816, 104 App. Div. 290 (quoting and adopting the definition in *Drake v. Drake*, 32 N. E. 114, 134 N. Y. 220, 17 L. R. A. 664).

"Issue" is primarily a word of limitation, and will not be construed as a word of purchase, unless other language of the will requires it to carry out testator's manifest intent. *Arnold v. Muhlenberg College*, 76 Atl. 30, 31, 227 Pa. 321.

The primary and usual meaning of the term "issue," when used as a word of purchase, is descendants of every degree, and is not equivalent to "immediate issue," which, by the settled construction of the statute against perpetuities, means only children. *Bartlett v. Sears*, 70 Atl. 33, 35, 81 Conn. 34.

The word "issue," as a word of purchase, in the absence of any indication of a contrary intention, includes descendants generally; but where it is apparent, from extrinsic circumstances or the provisions of the will, that testator intended to use the word in the sense of "children," it will be so limited. *Clark v. Kittenplan*, 118 N. Y. Supp. 404, 408, 68 Misc. Rep. 122.

"The word 'issue' in a deed or will, when used as a word of purchase, and where its meaning is not otherwise defined by the context, and there are no indications that it was used in any other than its legal sense, comprehends all persons in the line of descent from the ancestor, and has the same meaning as 'descendants.' While it embraces the children of the ancestor, it is because they are descendants in common with all other persons who can trace direct descent from a common source. It is common learning that this has been the accepted meaning of the word 'issue' in that large class of limitations to 'issue' of the first taker, accompanied with a gift over in default of 'issue.'" In re Tenney, 93 N. Y. Supp. 811, 818, 104 App. Div. 290 (quoting and adopting the definition in *Soper v. Brown*, 32 N. E. 768, 136 N. Y. 244, 82 Am. St. Rep. 731).

Where a deed in the granting clause conveys to A. "for her sole and separate use during her life and at her death to her issue," and the habendum clause reads "to A. and her issue," the word "issue" is one of limitation, and not of purchase, and hence does not convey a fee to A. *Arledge v. Arledge*, 68 S. E. 549, 550, 86 S. C. 237.

Under a deed to the grantee and "his lawful issue and their lawful issue forever," the grantee took a fee conditional estate; the word "issue" being one of limitation, and not

of purchase. *Williams v. Gause*, 65 S. E. 241, 242, 83 S. C. 265.

Testator devised all her property to L. and her four children named in trust for the sole benefit "of the lawful issue" of L.'s children named, "without power to sell"; the said L. and her children "having a life interest, share and share alike, in the annual products of said farm." The will provided that "when the youngest devisee of the real estate shall attain the age of 21 or marry there shall be a division of said real estate." At the time of testator's death two of L.'s children were dead; one dying unmarried and without issue, and the other leaving four children. The other two children of L. were living; neither of them being married. Held that the word "issue" is either a word of purchase or of limitation, and its use in one sense excludes the other; that it was used in the will as a word of purchase; that the children named took life interests and their children took in fee on testator's death; and that grandchildren of the children named took nothing under the will. *Carolina Bond & Investment Co. v. Caldwell*, 68 S. E. 640, 641, 86 S. C. 331.

Testator gave his estate to trustees to invest the same in real estate and pay the income to his two daughters and granddaughter until they respectively reached the age of 30, and provided that, as each reached that age, she could demand and receive a third of the estate as her distributive share, and, if either died without issue and before receiving her distributive share, her share should go to the survivors. By a codicil he provided that lapsed legacies should revert to the estate. Held, that the provision for a devise over, in the event of the death of a beneficiary without issue and before receiving her distributive share, raised a devise by implication in favor of the children of the granddaughter dying before attaining the age of 30; the word "issue" in the devise over being a word of purchase and implying a devise to the issue, who thereby took as purchasers under the will. *In re Blake's Estate*, 108 Pac. 287, 297, 157 Cal. 448.

#### ISSUE (In Practice)

See Feigned Issue; General Issue; Matter in Issue; Put in Issue.

Any issue in the case, see Any,

"The term 'issue' is collective, and, in a case where there was several issues, it is sufficient merely to swear the jury to try the issue." *First Nat. Bank of New Martinsville v. Lowther-Kaufman Oil & Coal Co.*, 66 S. E. 713, 717, 66 W. Va. 505, 28 L. R. A. (N. S.) 511 (citing 24 Cyc. 371; *White v. Clay*, 7 Leigh [34 Va.] 68; *Mackey v. Fuqua*, 3 Call [7 Va.] 19; *Hatcher v. Fowler*, 1 Bibb. [4 Ky.] 337; *Bate v. Lewis*, 1 J. J. Marsh. [24 Ky.] 816; *Pointer v. Rust*, 7 Humph. [26 Tenn.] 532).

"An 'issue' is defined as a single, certain, and material point arising out of the allegations or pleadings of the parties, which would generally be made up by an affirmative or negative. The object of pleadings is to bring out this 'issue' between the parties, and to this end certainty is one of the most common requirements." *Schwindt v. Lane Poeter Lumber Co.*, 107 Pac. 818, 819, 40 Mont. 537, 135 Am. St. Rep. 639.

The office of pleading is the formation of an "issue," which is a specific point or matter affirmed on one side and denied on the other, and the Code of Civil Practice accomplishes this purpose by requiring that pleadings shall set forth the facts in a plain and concise manner. *National Stamping & Electric Works v. Wicks*, 108 S. W. 598, 129 Mo. App. 382.

The pleadings, and not the evidence, must be looked to in determining the issues made; an "issue" being a question of fact or law raised by the pleadings. *Providence Nat. Bank v. Webb (Tex.)* 128 S. W. 426, 428.

It is proper for the court to include in an interlocutory judgment adjudging a divorce a determination as to the disposition of the homestead; such question having been an "issue in the cause," within the meaning of such words as used in Civ. Code, § 147, requiring the court in rendering a decree of divorce to make disposition of the homestead; section 146, providing that if a homestead has been selected from the property of either spouse it shall on divorce be assigned to the former owner; and section 181, providing that all issues shall be tried and determined at the time when the court determines whether the divorce shall be granted. *John v. Superior Court of Los Angeles County*, 90 Pac. 53, 5 Cal. App. 262.

In an action on a judgment, an answer denying any knowledge or information sufficient to form a belief as to the existence of the judgment in question does not make an "issue," for, the judgment being a public record and presumably within defendants' knowledge, they should have made an investigation, and if it did not exist they should have denied in positive terms the existence thereof. *Gravitt v. Mountz (Ky.)* 87 S. W. 304.

#### Cause synonymous

Where "issue" and "cause," as used in the definition of perjury as false swearing in a matter material to the issue or cause in question, are synonymous, as in a divorce action based upon a single specific act of adultery, evidence could not be material on the "cause" and not on the "issue." *People v. Teal*, 89 N. E. 1086, 1089, 196 N. Y. 372, 25 L. R. A. (N. S.) 120, 17 Ann. Cas. 1175.

#### As matter in dispute

The issues in a cause are the points in dispute between the parties on which they put their cause to trial, and the matter in

issue is that matter on which plaintiff proceeds by his action, and which defendant controverts by his pleading. *Abner T. Bowen v. W. O. Eaton & Co.*, 89 N. E. 961, 964, 46 Ind. App. 65.

### ISSUE AT LAW

The words "issue at law," as used in the act to quiet title to real estate, providing that upon the application of either party an issue at law shall be directed to try the validity of the claim of title or to settle the facts, mean such an issue as had been always known and employed in the administration of equity jurisprudence. The only additional force to be given to the verdict is that so long as it is permitted to stand the Court of Chancery is bound by it. A defendant in a suit to quiet title is not entitled, as a constitutional right, to a trial by jury in an action at law, as distinguished from a trial of an "issue at law" directed by the Court of Chancery. *Brady v. Carteret Realty Co.*, 64 Atl. 1078, 1079, 70 N. J. Eq. 748, 8 L. R. A. (N. S.) 866, 118 Am. St. Rep. 778.

### ISSUE OF FACT

The terms "issue of fact" in Rev. Codes, § 673, defining a new trial as a re-examination of an issue of fact after a trial, when considered in connection with section 6723, refers only to an issue arising on formal pleadings, and though, under section 7712, the provisions as to new trials apply to probate proceedings, a motion for new trial in such proceedings does not lie in the absence of formal pleadings raising an issue of fact. *In re Antonioli's Estate*, 111 Pac. 1033, 1034, 42 Mont. 219.

Under Wilson's Rev. & Ann. St. of Okl. 1903, an "issue of fact" arises where there is a material allegation in the petition controverted by the answer, or where there is new matter in the answer controverted by the reply, or where there is new matter in the reply which is considered as controverted by the defendant without further pleading. Where the action is for the recovery of a money judgment on notes and an issue is joined as to the amount due, the trial must be had before a jury, as an "issue of fact" is involved. *Sherman v. Randolph*, 74 Pac. 102, 103, 13 Okl. 224.

It is expressly provided by B. & C. Comp. § 1375, that an "issue of fact" arises (1) upon a plea of not guilty, or (2) upon a plea of former conviction or acquittal of the same crime and, in the absence of a plea or opportunity to plead, a conviction cannot stand. *State v. Walton*, 91 Pac. 490, 491, 50 Or. 142, 13 L. R. A. (N. S.) 811.

Municipal Court Act (Laws 1902, c. 580) § 332, subd. 2, provides that where, after trial of an issue of fact raised by answer, plaintiff recovers 400 or over, he shall have \$30 as costs. Subdivision 3 declares that where, upon nonappearance of defendant or

failure to answer, plaintiff recovers \$400 or over, he shall have \$15 as costs. Held, that where a verified complaint and answer were served, and the issue adjourned for trial, and defendant defaulted, and plaintiff had judgment for over \$400, he was entitled to \$30 costs; there being a trial of an "issue of fact raised by appearance and answer" of defendant, within subdivision 2. *Pape v. To-moor*, 123 N. Y. Supp. 924, 925.

An "issue of fact" arises when an allegation of one party is actually or impliedly denied by the other, but the issue may sometimes relate to a fact capable of being resolved into two or more essential elements, and a failure to prove either of which will leave the issue unproven, in which case a special finding on any single essential element inconsistent with a general verdict will be as fatal as a special verdict on the broader issue. *Plyler v. Pacific Portland Cement Co.*, 92 Pac. 56, 60, 152 Cal. 125.

### ISSUE OF LAW

"A demurrer to a complaint interposes an 'issue of law' the determination of which constitutes a 'trial by court.'" *State v. Richardson*, 85 Pac. 225, 228, 48 Or. 309, 8 L. R. A. (N. S.) 362.

It is expressly provided by B. & C. Comp. § 1376, that an "issue of law" arises upon a demurrer to the indictment. *State v. Walton*, 91 Pac. 490, 491, 50 Or. 142, 13 L. R. A. (N. S.) 811.

### ISSUES (Of Property)

Where, under a will, corporate stock was placed in trust, "the dividends, issues, and profits thereof" to be paid to the beneficiaries, the words "dividends, issues, and profits" were interchangeable with income, and referred to the earnings paid over by the officers of the corporation in the form of dividends to the trustees. *In re Stevens et al* 95 N. Y. Supp. 297, 305, 46 Misc. Rep. 623.

## IT

### IT BEING UNDERSTOOD

See Being Understood.

### IT WAS SO UNDERSTOOD

In *detinue* for a mule claimed by plaintiff under a mortgage, plaintiff testified that he sold the mule to the mortgagor, who had had possession prior to the sale and execution of the mortgage, and that the mule was his up to the time that the mortgage was executed, and that it was "so understood." Held, that it was not error to refuse to exclude the expression "it was so understood," since, as used, it should be taken as synonymous with "agreement" and the statement of a fact, and not a condition. *Holman v. Clark*, 41 South. 765, 767, 148 Ala. 286.

**ITEM**

See Made Out in Items; Proper Cash Item.

All items, see All.

An "item" means an article, an entry; anything which can form part of a detail; the particulars of an account. United States v. Young, 128 Fed. 111, 114.

**ITEMS OF ACCOUNT**

Bill of particulars synonymous, see Bill of Particulars.

**ITEMIZE**

To itemize an account, within Civ. Code 1902, § 806, requiring itemization of all claims against counties, means merely to state in detail the particulars of the claim so that the account may be examined and its correctness tested. State ex rel. People's Bank of Greenville v. Goodwin, 62 S. E. 1100, 1105, 81 S. C. 419.

An estimate of the cost under a paving resolution as follows: "Granite concrete combined curb and gutter on cinders, 7,126 lineal feet at 70 cents, \$4,988.20; paving with asphalt on six inches of Portland cement concrete swept with natural hydraulic cement, 11,349 square yards at \$2.50, \$28,372.50; adjustment of sewers, catch-basins and man-holes, \$1,139.30; total, \$34,500.00"—is sufficiently "itemized" under Local Improvement Act, § 7 (Hurd's Rev. St. 1903, p. 392), providing that, when the board of local improvements shall originate an improvement to be paid for by special assessment, it shall adopt a resolution describing the improvement, and shall cause an estimate of the cost thereof to be made in writing by the engineer of the board, "which shall be 'itemized' to the satisfaction of said board." Hulbert v. City of Chicago, 72 N. E. 1097, 1098, 213 Ill. 452.

Where, in an action by a bank on an account, the petition contained a specific statement of the account, consisting of checks for money drawn and deposits, a balance being stated as the sum due plaintiff, the petition was in itself a sufficiently itemized "statement of account," as provided by Rev. St. 1899, § 630, and was not objectionable for failure to have attached thereto an itemized statement thereof. Citizens' Bank of Laredo v. Lowder, 125 S. W. 1180, 141 Mo. App. 603.

**ITINERANCY—ITINERANT**

"Itinerancy," in the doctrines of the Methodist Church, means that no preacher having charge of a congregation shall remain at any one place longer than a brief period, ranging at different times from three months to three years. People ex rel. Griffin v. Steele (N. Y.) 2 Barb. 397, 407.

**ITINERANT DEALER**

Agents, who traveled through the country with teams, selling machines in regularly established places of business, and by means of such teams going through the country were "itinerant dealers." Singer Sewing Mach. Co. v. Brickell, 199 Fed. 654, 656.

**ITINERANT OPTICIAN**

As merchant, see Merchant.

**ITINERANT PHYSICIAN**

Under Code, § 2579, defining a "physician" as one who publicly professes to be a physician and assumes the duties, or who makes a practice of prescribing and furnishing medicine for the sick, or who publicly professes to cure diseases, and section 2580, providing a penalty for the practice of medicine without having obtained a certificate, and section 2881, defining an "itinerant physician" as a physician practicing medicine or professing to heal diseases, "by any medicine, appliance, or method," who goes from place to place and provides for a license for so doing, a nonresident who professed to cure diseases by dieting his patients, prescribing exercises, and furnishing them with glasses, and who went from place to place and by advertisement solicited persons to meet him at other places than his residence, and who for a money consideration attempted while so practicing to cure diseases, is an "itinerant physician"; the term any "medicine, appliance or method" not meaning a medicine or something administered as a medicine merely, but covering any or every kind of public professions to cure by the use of any method or device. State v. Edmunds, 101 N. W. 431, 433, 127 Iowa, 333.

**ITINERANT TRADER**

An "itinerant trader" is a person who actually travels or passes from place to place for the purpose of trading by sample or otherwise. Smith v. Whiddon, 75 S. E. 635, 138 Ga. 471.

**ITINERANT VENDOR**

See, also, Hawker.

Pub. Acts 1897, p. 855, c. 152, making it an offense for an itinerant vender to expose goods for sale without having obtained a license, and defining an itinerant vender as a person who engages in a temporary business, either in one locality or in traveling, selling goods, etc., and who for such purpose hires or occupies any structure, does not include a transient sale by any person who engages in the sale solely as a single transaction, and does not forbid any transient sale, unless made by one of a class of wandering, intermittent traders. State v. Feingold, 59 Atl. 211, 212, 77 Conn. 328.

Laws 1905, p. 275, c. 114, § 3, requires a license from itinerant vendors, except as pro-



vided. Section 1 defines an itinerant vendor as a person engaged in either a temporary or transient business in the state in one locality, or by traveling from place to place selling merchandise, and also those who, for the purpose of carrying on their temporary or transient business, occupy a building, etc., for the sale of manufactured goods. Section 2 exempts commercial travelers or agents selling to merchants in the usual course of business. Held, that the act in effect imposes a tax upon nonresidents bringing merchandise into the state for the privilege of selling to a customer, and it is violative of Const. U. S. Amend. 14, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws. *Leonard v. Reed*, 104 Pac. 410, 411, 46 Colo. 307, 133 Am. St. Rep. 77.

A soliciting agent taking orders for goods similar to samples carried by him, subject to the approval of his principal, a corporation which prepares the goods for delivery by him and keeps accounts with all customers, is not an "itinerant vendor," within a statute defining peddlers to include such vendors selling by sample, or by taking orders for immediate or further delivery. *State v. Bristow*, 109 N. W. 199, 200, 181 Iowa, 664.

Laws 1905, p. 275, c. 114, § 3, requires a license of a person engaged in the business of an itinerant vender, except as otherwise provided. Section 1 (page 274) defines "itinerant vender" to include any person who engages in either a temporary or transient business in the state, either in one locality or in traveling about the country selling manufactured goods or merchandise. Held, that the statute does not apply to those maintaining a permanent place of business in the state to dispose of their merchandise through

agents soliciting orders therefor. *Eaton v. People*, 104 Pac. 407, 408, 46 Colo. 361.

Laws 1905, p. 222, prohibiting any itinerant vender or hawker of any drug, nostrum, etc., for the treatment of any disease or injury, to offer the same for sale without securing a license from the board of pharmacy, as amended by Laws 1907, p. 281, defining the term "itinerant vender" to include all persons who carry on the business described, by passing from house to house or by haranguing the people on public streets or in public places, or use the customary devices for attracting crowds, and therewith recommending their wares and offering them for sale. Held, that an information in the language of the statute charging that defendant, while being a traveling vender of a drug, offered to sell the same without securing a license, etc., was not demurrable, as alleging a mere conclusion of law concerning defendant's occupation; defendant being required to take notice that it was intended to charge that he was an "itinerant vender" as defined in the amendment. *State v. Miller*, 103 Pac. 519, 520, 54 Or. 381.

## ITS

Where a railroad company was in possession of tracks and of the yard in which they were laid, and was engaged in switching cars on such tracks, the use of the possessive word "its," in an allegation that the company had or permitted a telegraph pole to be on the south side of its main switch track in its switch yard, does not necessarily indicate ownership in fee, as the possessive word "its" may as well designate a right by arrangement to use the track and switch yard as an absolute ownership thereof. *Illinois Terminal R. Co. v. Thompson*, 71 N. E. 328, 331, 210 Ill. 226.

## J

**J. P.**

The letters "J. P.," following the name of a person affixed to the jurat of an affidavit, are sufficient to designate the official character of such person as a justice of the peace, and if the name is of one who is commissioned justice of the peace of the state it is immaterial that it does not appear from the face of the affidavit where the same was executed; until the contrary appears from the affidavit or otherwise the presumption would be that it was executed in the state and at such a place where such an officer would be authorized to administer such an oath. *Abrams v. State*, 48 S. E. 965, 966, 121 Ga. 170.

**JACK**

As mechanical contrivance, see Mechanical Contrivance.

**JACQUARD FIGURED GOODS**

Silk goods woven on Jacquard looms, with broad and narrow stripes, the body between having a watered effect, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, 30 Stat. 187, for "Jacquard figured goods" of silk. *United States v. Johnson & Faulkner*, 139 Fed. 55, 56, 142 Fed. 1039, 71 C. C. A. 686.

In regard to a fabric of two colors, one of which is produced by threads introduced by the swivel process to form figures, and not extending across the cloth from selva to selva, held, that the swivel threads are not a part of the filling, and that the goods are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, 30 Stat. 187, for Jacquard figured silks containing two or more colors "in the filling." *Wimpfheimer v. United States*, 142 Fed. 849, 850; *Id.*, 149 Fed. 1022, 79 C. C. A. 532.

**JACTITATION**

An action of "jactitation" is one to force the defendant to sue for the recovery of real property and to throw on him the burden of his assertion, and can be maintained only where defendant has slandered plaintiff's title. *Bossier's Heirs v. Jackson*, 38 South. 525, 526, 114 La. 707.

**JADE**

As precious stone, see Precious Stones.

**JAGGER**

A "jagger" is a point of iron projecting from the end of an iron shaft and produced

by the blow of a hammer on the end of the shaft. *Persinger's Adm'x v. Alleghany Ore & Iron Co.*, 46 S. E. 325, 102 Va. 350.

**JAIL**

See County Jail.

See, also, Prison.

A "jail" is a prison appertaining to a county or municipality in which are confined, for punishment, persons convicted of misdemeanors committed in the county or municipality. *Denham v. Commonwealth*, 84 S. W. 538, 539, 119 Ky. 508.

A building used as a jail, and in which a prisoner is confined for a violation of law, is within the protection of a statute punishing jail deliveries, though it is not situated in an incorporated town, and is not the property of the county. *Irvington v. State*, 78 S. W. 928, 929, 45 Tex. Cr. R. 559.

Revised St. §§ 1042, 5296, provide that when a poor convict, sentenced to imprisonment, or to pay a fine, or a fine and costs, has been confined in prison 30 days solely for the nonpayment of such fine or fine and costs, he may apply to take a poor debtor's oath, on which he shall be discharged, and the commissioner shall give to the keeper of the "jail" a certificate setting forth the facts. Held, that the word "jail" did not imply that no prisoner should be held in a penitentiary for nonpayment of a fine or a fine and costs, but was used merely to indicate the place of confinement, and hence a federal prisoner could be properly retained in the same institution where he had served his term of imprisonment for the nonpayment of a fine, or a fine and costs, assessed as a part of the sentence, until the fine was paid, or the prisoner applied to take the poor debtor's oath after the expiration of 30 days from the completion of his term. *Haddox v. Richardson*, 168 Fed. 635, 639, 94 C. C. A. 99.

**As inhabited dwelling house**

See Inhabited Dwelling House.

**As public house**

See Public House.

**As public work**

See Public Work.

**JAIL BREAKING**

See, also, Prison Breach.

Gen. St. 1901, § 2178, provides that if any person lawfully imprisoned or in the custody of any officer upon a criminal charge, before conviction of the violation of any penal statute, shall break such authority, he shall upon conviction be adjudged guilty of a felony. One who is arrested under a warrant naming him as John Dow, his real name

being unknown, is guilty of "jail breaking" if escaping from that custody; the arrest being warranted despite Bill of Right, § 15, and Code Cr. Proc. § 36. *State v. King*, 80 Pac. 606, 607, 71 Kan. 287.

**JAIL CELL**

As building, see Building.

**JAIL PHYSICIAN**

As county officer, see County Officer.

**JAILER**

As peace officer, see Peace Officer.

**JANITOR**

As employé, see Employé.

As officer, see Officer.

As position, see Position.

As public officer, see Officer.

**JANNEY COUPLER**

A "Janney coupler" is a car coupler of the Janney type. It had at the end of, and integral with, a rigid drawbar, a drawhead having a bifurcated jaw with a vertical rotating hook adapted to engage and interlock with a similar hook on another car and so form a coupled joint. In one sense, the Janney coupler was automatic, in that after it was properly set the brakeman did not, as in the old link and pin device, stand between the cars and guide at the dangerous instant of coupling. *Coup v. McConway & Torley Co.*, 127 Fed. 351, 352.

**JAPANESE**

As Indians, see Indian.

As white person, see White Person.

**JAPANESE FILATURES**

"Japanese filatures" is one of the raw materials used in manufacturing silk, and consists of threads of silk reeled off from the cocoon and imported from Japan. In re Liberty Silk Co., 152 Fed. 844, 845.

**JAPANESE LAUREL**

*Aucuba japonica*, sometimes called the "Japanese laurel," is one of the best known species of *aucuba*, "a small genus of Asiatic evergreen shrubs of the dogwood family." "*Aucuba*," "*Laurel*," Standard and Century Dictionaries. English botanical works speak of *aucuba* as fine, hardy evergreen shrubs, thriving better than any others in the smoky atmosphere of dense cities. *United States v. Ouwerkerk*, 153 Fed. 916, 917 (citing Paxton's Botanical Dict. p. 60; Nicholson's Dict. of Gardening, vol. 1, p. 145; Lindley's Treasury of Botany, p. 110).

**JAPANESE NAPKINS**

As printed matter, see Printed Matter.

**JAPANNED CALF-SKINS**

Japanned skins used for uppers are within the provision in paragraph 456, Tariff Act October 1, 1890, c. 1244, § 1, Schedule N, 26 Stat. 601, for "dressed upper leather, including \* \* \* japanned leather," rather than under the provision in the same paragraph for "japanned calf-skins," the latter provision being limited to japanned skins, which are not upper leather. *United States v. Bittel, Tepel & Ellers*, 155 Fed. 554.

**JAR**

See Bottles, Jars, or Similar Packages.

Bottle-like containers of glass, used in chemical operations, and known as "Koch flasks," and certain so-called "Wolf flasks," shaped like bottles, but having two or three necks apiece, are "bottles or jars," within Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156. *Elmer & Amend v. United States*, 126 Fed. 439, 441.

**JAW**

See Correction of Malposition of the Jaw.

**JELLY**

Marmalade is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, relating to "sweetmeats and preserved fruits," rather than as "jelly," under the same paragraph. Berry jams are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, as sweetmeats or preserved fruits, rather than as "jelly" under the same paragraph, or as "edible fruits prepared," under paragraph 262, 30 Stat. 171. *Bogle v. United States*, 175 Fed. 889, 891.

**JENNY**

When a female of the species ass is meant, the word "Jenny" is used. *Teal v. State*, 45 S. E. 964, 965, 119 Ga. 102.

"It is a matter of common knowledge and observation that among our people the word 'mare,' when used without a word of qualification, is understood to mean a female of the horse species. We apprehend that one rarely, if ever, hears the expression 'a mare horse' employed to describe a female of the species horse, but that the term universally used in this state for this purpose is the single word 'mare.' On the other hand, when a female of the species mule is intended, the expression used is 'a mare mule,' and, when a female of the species ass is intended, the word 'Jenny' is used." *McLamb & Co. v. Lambertson*, 62 S. E. 107, 109, 4 Ga. App. 553 (quoting *Teal v. State*, 45 S. E. 964, 119 Ga. 104).

## JEOPARDY

### JEOPARDY (In Criminal Law)

See, also, Same Offense.

The Constitution does not undertake to give the word "jeopardy" a different definition from that in which it was ordinarily understood when placed in that instrument, and the Legislature could not change the meaning of the word as understood when the Constitution was adopted. *Keller v. State* (Tex.) 87 S. W. 660, 675, 1 L. R. A. (N. S.) 489.

Acts 31st Leg. c. 50, § 1, in force March 17, 1909, provides that if any person by promise of marriage shall seduce an unmarried female under 25, and if, after prosecution is begun, the parties marry before the defendant pleads to the indictment, and the defendant, within two years after said marriage, without his wife's fault, such as would entitle him to a divorce, shall abandon her, he shall be guilty of a penitentiary offense. Held, that the act does not provide for putting one twice in jeopardy for the same offense, within Const. art. 1, § 14. *Thacker v. State*, 136 S. W. 1095, 1096, 62 Tex. Cr. R. 294.

#### Acquittal in general

"Jeopardy" attached where accused was tried in a court of competent jurisdiction on a valid information for attempting to bribe a witness and was acquitted by a verdict. *People v. Hill*, 79 Pac. 845, 146 Cal. 145.

One is in "jeopardy" within the meaning of Const. U. S. Amend. 5, protecting all persons from being twice put in jeopardy for the same offense, when put on trial before a court of competent jurisdiction on an indictment sufficient to sustain a conviction, and a jury has been impaneled and sworn to try him, and a formal judgment of acquittal after a trial regularly conducted is rendered. *Nordlinger v. United States*, 24 App. D. C. 406, 409, 70 L. R. A. 227.

"A person has been in 'jeopardy' when he is regularly charged with a crime, before a tribunal properly organized and competent to try him"; certainly so after acquittal, and hence no appeal would lie by the government from a judgment of the court of first instance in the Philippine Islands, acquitting one accused of embezzlement. *Kepner v. United States*, 24 Sup. Ct. 797, 804, 195 U. S. 100, 49 L. Ed. 114, 1 Ann. Cas. 655.

#### Acquittal or conviction for distinct offense

Where defendants break into a house at night with intent to steal money, which they abstract from the householder's pocket, and on his awakening shoot him, the burglary and the shooting do not constitute a single transaction, out of which two offenses

cannot be carved, so as to render a conviction of the shooting a bar to a prosecution for the burglary. *Mann v. Commonwealth*, 80 S. W. 438, 439, 118 Ky. 67, 111 Am. St. Rep. 289.

"A person is in legal 'jeopardy' when he is put upon trial before a court of competent jurisdiction upon indictment or information sufficient in form to sustain the conviction, and the jury has been charged with his deliverance; consequently an acquittal under an indictment charging burglary is not a bar to a prosecution for larceny where the conviction of larceny could not have been charged thereunder." *Thomas v. Commonwealth* (Ky.) 150 S. W. 876, 877 (quoting *Williams v. Commonwealth*, 78 Ky. 93).

An accused is not placed "twice in jeopardy for the same offense," within the meaning of Act July 1, 1902 (32 Stat. 692, c. 1369) § 5, because the Supreme Court of the Philippine Islands, upon reversing the judgment below in a criminal case, on an appeal taken by the accused, convicted him, on the same facts, of a different offense, carrying an increased sentence. Nor does the treating as two different offenses assaults on two different individuals place the accused "twice in jeopardy for the same offense," even if these assaults occurred very near each other, in one continuing attempt to defy the law. *Flemister v. United States*, 28 Sup. Ct. 129, 207 U. S. 372, 52 L. Ed. 252.

A person is not placed twice in "jeopardy" within the meaning of Act July 1, 1902, c. 1369, 32 Stat. 691, for the government of the Philippine Islands, by a conviction of homicide in the Supreme Court of those islands, on an appeal taken by the accused from a judgment of the trial court, which, after acquitting of murder, convicted the accused of assault, which is included in the crime of murder charged in the complaint. *Trono v. United States*, 26 Sup. Ct. 121, 124, 199 U. S. 521, 50 L. Ed. 292, 4 Ann. Cas. 773.

The rule has frequently been enunciated that the test of once in "jeopardy" is whether if what is set out in the second indictment, had been proved under the first, there could have been a conviction, or whether the first indictment was such that the accused might legally be convicted under it by proof of the same facts as those by which the second is to be sustained. While this rule may determine a great number of cases, it seems not always applicable, as, for instance, in larceny and embezzlement cases, where different articles or sums of money have been taken, and evidence of the other offenses is introduced for some particular purpose. In such cases, the test of identity of transactions is the controlling consideration. Where a county treasurer was charged with several misappropriations in different years, the conviction or acquittal of one act of embezzlement is not a bar to a prosecution

for another. *Storin v. Territory*, 94 Pac. 1099, 1101, 12 Ariz. 26.

An acquittal upon the charge of having received the compensation forbidden by Rev. St. U. S. § 1782, from a specified person, described in the indictment as an officer and employé of a corporation, will not sustain a plea in bar of a prosecution upon the charge of having received such compensation from the corporation, where the accused declined to plead further after his demurrer to the answer, alleging that the two offenses are not, in legal effect, identical, was overruled. *Burton v. United States*, 26 Sup. Ct. 688, 698, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

Where one is put on trial on a valid criminal charge in a court having jurisdiction, a dismissal of the cause over his objection is equivalent to acquittal within Const. art. 1, § 14, relating to "former jeopardy." Where the facts necessary to conviction on a second prosecution would not necessarily have convicted on the first prosecution, the first prosecution is dismissed, after jeopardy has attached, and will not bar the second prosecution. A plea of one charged with selling intoxicating liquors to a person intoxicated in violation of Acts 1905, p. 720, c. 169, § 573, making it an offense to sell, barter, or give away intoxicating liquor to a person intoxicated, which alleges that before the commencement of the prosecution he had been placed on trial on the charge of giving away intoxicating liquors to the same person when intoxicated, and that over his objections the case, on motion of the prosecuting attorney, was dismissed, does not set forth a "former jeopardy," though the plea alleges that the former charge was for the same offense as that charged as a sale. *State v. Reed*, 81 N. E. 571, 572, 168 Ind. 588 (citing *Hensley v. State*, 8 N. E. 692, 107 Ind. 587, 589, 590; *Boswell v. State*, 11 N. E. 788, 111 Ind. 47, 49; *Gillespie v. State*, 80 N. E. 829, 168 Ind. 298; *State v. Elder*, 65 Ind. 282, 285, 286, 32 Am. Rep. 69; *Smith v. State*, 85 Ind. 553, 557; *Davidson v. State*, 99 Ind. 366, 368).

A person who has been put in jeopardy for an offense which includes others has been in jeopardy as to each of the included offenses; and this may be so where he has been put in jeopardy for the lowest of the offenses, and such "jeopardy" will bar a prosecution for the others. *Commonwealth v. Browning*, 143 S. W. 407, 408, 146 Ky. 770.

For "jeopardy" to attach according to 4 BL 336, the prosecution must be for the same identical offense, and using the words of Chief Justice Shaw, it must appear that the offense charged was the same in law and in fact. *Thomas v. United States*, 156 Fed. 897, 912, 913, 84 O. C. A. 477, 17 L. R. A. (N. S.) 720.

### Bringing indictment or information

The filing of an information for manslaughter does not preclude a subsequent indictment for murder. Until "jeopardy" has begun, the prosecution is at liberty to nolle prosequi and begin over again, and the pendency of an indictment or information does not constitute "jeopardy." *State v. Ruffin*, 41 South. 647, 648, 117 La. 357 (citing *State v. Hornsby* [La.] 8 Rob. 589, 41 Am. Dec. 314).

### Disagreement and discharge of jury

A disagreement of the jury coupled with a failure to find a verdict and their discharge, do not bring defendant within the constitutional provisions that no person shall be twice put in "jeopardy" for the same offense. *State v. Keerl*, 85 Pac. 862, 863, 866, 33 Mont. 501.

In a prosecution for a felony, the accused has the right to be present at every stage of the trial; and where the court, in such a case, without the consent of the accused and during his enforced absence, he being confined in jail, ordered a mistrial because of the inability of the jury to agree, on a subsequent trial of the same case it was error, requiring a reversal, to strike a plea setting up such unauthorized mistrial and the "former jeopardy" of the accused. *Bagwell v. State*, 58 S. E. 650, 652, 129 Ga. 170 (overruling *Lester v. State*, 33 Ga. 329).

Where a jury in a criminal case is discharged because of bias or prejudice of the jurymen, which was not discovered on the voir dire examination or because of influence subsequently brought to bear on them, the accused may be retried and is not thereby twice put in "jeopardy." *State v. Hansford*, 92 Pac. 551, 553, 76 Kan. 678, 14 L. R. A. (N. S.) 548 (citing *Simmons v. United States*, 12 Sup. Ct. 171, 142 U. S. 148, 35 L. Ed. 968).

### Dismissal of prosecution

Where a jury was impaneled and sworn to try accused, and the cause was dismissed after the evidence was all introduced, he was thereby placed in "jeopardy," and cannot be tried again for the crime charged in the information, or any other offense included therein. *State v. Hows*, 87 Pac. 163, 164, 31 Utah, 168.

One is acquitted if, after he has been arraigned and the trial has been begun upon a valid indictment he is discharged by a competent court before verdict. He has then been "in jeopardy." *State v. Keerl*, 85 Pac. 862, 864, 33 Mont. 501.

Where one is put on trial on a valid criminal charge in a court having jurisdiction, a dismissal of the cause over his objection is equivalent to acquittal within Const. art. 1, § 14, relating to "former jeopardy." Where the facts necessary to conviction on a second prosecution would not necessarily have convicted on the first prose-

cution, the first prosecution, if dismissed after jeopardy has attached, will not bar the second prosecution. A plea of one charged with selling intoxicating liquors to a person intoxicated in violation of Acts 1905, p. 720, c. 169, § 573, making it an offense to sell, barter, or give away intoxicating liquor to a person intoxicated, which alleges that before the commencement of the prosecution he had been placed on trial on the charge of giving away intoxicating liquors to the same person when intoxicated, and that over his objections the case on motion of the prosecuting attorney was dismissed, does not set forth a "former jeopardy," though the plea alleges that the former charge was for the same offense as that charged as a sale. *State v. Reed*, 81 N. E. 571, 572, 168 Ind. 588 (citing *Hensley v. State*, 8 N. E. 692, 107 Ind. 587, 589, 590; *Boswell v. State*, 11 N. E. 788, 111 Ind. 47, 49; *Gillespie v. State*, 80 N. E. 829, 168 Ind. 298; *State v. Elder*, 65 Ind. 282, 285, 286, 32 Am. Rep. 69; *Smith v. State*, 85 Ind. 553, 557; *Davidson v. State*, 99 Ind. 366, 368; *Durham v. People*, 4 Scam. [5 Ill.] 172, 39 Am. Dec. 407).

#### Impaneling and swearing jury

A person is in legal jeopardy when he is put on trial before a competent court on a sufficient indictment and the jury has been charged with his deliverance, and the jury is so charged when they have been impaneled and sworn. *Allen v. State*, 41 South. 593, 52 Fla. 1, 120 Am. St. Rep. 188, 10 Ann. Cas. 1085 (citing 1 Bish. New Cr. Law, §§ 1013, 1014, et seq.; *Robinson v. Commonwealth*, 11 S. W. 210, 88 Ky. 386; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Ex parte Clements*, 50 Ala. 459; *Bell v. State*, 44 Ala. 398; *Ex parte Maxwell*, 11 Nev. 428; *Commonwealth v. Fitzpatrick*, 15 Atl. 466, 121 Pa. 109, 1 L. R. A. 451, 6 Am. St. Rep. 757; *Weinsorpfm v. State* [Ind.] 7 Blackf. 186; *Miller v. State*, 8 Ind. 325; *McCorkle v. State*, 14 Ind. 39; *State v. Callendine*, 8 Iowa, 288; *State v. Webster*, 105 S. W. 705, 708, 206 Mo. 558 (quoting and adopting *Cooley*, Const. Lim. [7th Ed.] p. 267).

An accused is in "jeopardy" when he is put upon his trial upon a valid information before a jury duly impaneled and charged with his deliverance. *Schultz v. State*, 116 N. W. 259, 571, 135 Wis. 644.

After a person has once been put on his trial before a court of competent jurisdiction upon an indictment which is sufficient to sustain a conviction and the jury has been charged with his deliverance, he is in "jeopardy." *State v. Brown*, 34 South. 698, 699, 110 La. 591.

The general rule is that the prisoner has been put in "jeopardy" when he has been put upon trial before a court of competent jurisdiction, upon an indictment or information sufficient to sustain a conviction, and the jury has been impaneled and sworn to

try the case, and the jury is discharged without sufficient cause, and without the defendant's consent; and such discharge of the jury, although improper, results in an acquittal of the defendant. *Schrieber v. Clapp*, 74 Pac. 316, 317, 13 Okl. 215.

Where, after a jury is sworn and testimony is introduced, the court learns and determines from an inquiry judicially conducted that a juror is prejudiced and unfit to sit in the case, and that the disqualification is such as would vitiate a verdict, the jury may be discharged and another jury impaneled to try the case, and the accused will not be deemed to have been thereby twice put in "jeopardy" for the same offense. *State v. Hansford*, 92 Pac. 551, 553, 76 Kan. 678, 14 L. R. A. (N. S.) 548.

"The courts of Pennsylvania and North Carolina differ from those of New York as to the meaning of the maxim and constitutional provision that a man shall not be put twice in 'jeopardy' for the same offense. The latter courts understand it to mean that he shall not be twice 'tried,' and they view the 'test by which to decide whether a person has been once tried' to be a plea of *autrefois acquit*, or *autrefois convict*. The former courts considered the hazard, danger, or peril in which a man shall not be twice placed, as having been once incurred by giving him in charge, on a legal indictment, to a regular jury which has been unnecessarily discharged without rendering a verdict. And this is the interpretation which we give to that clause of our Constitution which privileges an accused person from being 'twice put in jeopardy for the same offense.' " The jeopardy contemplated, as our decisions affirm, attaches from the very moment the trial is begun, and the trial is deemed to have commenced at the time the jury is impaneled. *Gillespie v. State*, 80 N. E. 829, 833, 168 Ind. 298 (quoting *Weinsorpfm v. State* [Ind.] 7 Blackf. 186).

"When a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned, and has pleaded, and a jury has been impaneled and sworn, he is in 'jeopardy'; but, until these things have been done, jeopardy does not attach." Defendant was not put in jeopardy where the information against him for homicide was dismissed on motion of the prosecuting attorney before he was brought to trial under it. *State v. Taylor*, 71 S. W. 1005, 1006, 171 Mo. 465.

One is in legal jeopardy when he is put on trial before a court of competent jurisdiction on an indictment sufficient to sustain a conviction, and a jury has been impaneled and sworn, unless the jury is discharged with the consent of accused, or when, after verdict of guilty, the same has been set aside on accused's motion for a new trial or the judgment arrested. *State v. Keating*, 122 S. W. 699, 701, 223 Mo. 86.

When a jury is full, sworn, and all the preliminary things of record are ready for trial, jeopardy attaches, provided the court is so clothed with authority, and the prior proceedings are such, that judgment on a verdict duly returned would be valid. Hence where a jury was impaneled and sworn, and the state had commenced the examination of prosecutrix when accused moved to dismiss because he had not been arraigned and had not pleaded to the information, and the motion was denied, whereupon accused was arraigned and entered a plea of not guilty, and the jury was then discharged over accused's objection, and a new jury was impaneled and sworn, and he was convicted notwithstanding the plea of former jeopardy, "jeopardy" had attached, and accused was entitled to a dismissal. *State v. Kinghorn*, 105 Pac. 234, 235, 56 Wash. 131, 27 L. R. A. (N. S.) 136.

Under Const. § 13, providing that no person shall be twice put in jeopardy for the same offense, an actual acquittal, though on improper grounds raised by defense, is a "former jeopardy" and a bar to further prosecution. *Commonwealth v. Ball*, 104 S. W. 325, 126 Ky. 542.

#### **Invalid indictment or information**

The dismissal of an indictment by the court, before submission of the case to the jury, but after they were sworn, on the ground that it did not charge a crime, will not support a plea of former "jeopardy" to a second indictment for the same offense attempted to be charged in the first; the court in the first proceeding never having had jurisdiction of the offense. *United States v. Rogoff*, 163 Fed. 311, 312.

#### **Same—Conviction**

A trial and verdict of guilty on an insufficient information did not constitute "jeopardy." *State v. Riley*, 78 Pac. 1001, 1002, 86 Wash. 441.

One is in legal "jeopardy" when he is put on trial before a court of competent jurisdiction on an indictment sufficient to sustain a conviction, and a jury has been impaneled and sworn, unless the jury is discharged with the consent of accused, or when, after verdict of guilty, the same has been set aside on accused's motion for a new trial or the judgment arrested. Where accused was convicted on a second count of the information, and the court, on appeal, determined that the information was insufficient as to both counts, accused had not been put in jeopardy by reason of the conviction on the second count and the acquittal by inference on the first count. *State v. Keating*, 122 S. W. 699, 701, 223 Mo. 86.

## **JERSEY**

"Jersey" is a name commonly given to a wagon (as in this case a grocery wagon)

having a covered top. *Lexington St. Ry. v. Strader* (Ky.) 89 S. W. 158.

## **JETTY**

A "jetty" is in the nature of a dam, usually built in the manner that a dam is constructed, and intended to deflect the current so as to deepen the channel or to form an eddy below the obstruction in which sediment may be deposited, thereby extending and protecting the bank. *Morton v. Oregon Short Line Ry. Co.*, 87 Pac. 151, 153, 48 Or. 444, 7 L. R. A. (N. S.) 344, 120 Am. St. Rep. 827.

## **JEWEL—JEWELRY**

Articles of "jewelry" have been generally defined by the courts to be such articles as are made of precious metal, silver, gold, diamonds, sapphires, rubies, pearls, etc. *William Fine & Bro. v. Southern Exp. Co.*, 73 S. E. 35, 38, 10 Ga. App. 161 (citing 4 Words and Phrases, p. 3811).

The word "jewelry," as used by a revenue agent in the statement filed by him of property belonging to a person omitted from taxation, includes the rings, pins, and other ornaments worn by the taxpayer, his wife, and other members of his family dependent upon him and for whose taxes he is responsible. *Commonwealth v. Glover*, 116 S. W. 769, 774, 132 Ky. 588.

#### **As baggage**

See Baggage; Personal Baggage.

#### **Buckles**

Slides or buckles made of steel or base metal some ornamented with rhinestones and some colored in imitation of precious metal and used in ornamenting slippers, are not dutiable as articles commonly known as "jewelry." *E. H. Bailey & Co. v. United States*, 135 Fed. 917, 918.

#### **As chattel**

See Chattel.

#### **Metal purses and handbags**

Chatelaine purses of metal, gilded or plated in imitation of gold and silver, and set with imitation precious stones, which range in value from 34 marks per gross to 30 marks per dozen, are not within the provision in paragraph 434, Schedule N, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 192, for "articles commonly known as jewelry." *A. Steinhart & Co. v. United States*, 148 Fed. 512.

Women's silver hand bags or purses, used for holding money, articles of wearing apparel, etc., are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192, for articles commonly known as "jewelry," but are dutiable as articles of silver, under paragraph 193 of said act, c. 11, § 1, Schedule C, 30 Stat. 167. *Tiffany v. United States*, 131 Fed. 398, 399.

**Millinery ornaments**

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192, providing a duty of 60 per cent. ad valorem on articles commonly known as "jewelry" and parts thereof, does not include so-called "millinery ornaments" used in trimming hats, which are flimsy articles intended for ephemeral use, are not made by jewelers, and contain no gems or precious metals, but are made of base metal either wholly or in combination with imitation jet or imitation precious stones. *United States v. S. Schiff & Co.*, 139 Fed. 549, 550, 71 C. C. A. 533.

**Miniature frames**

Miniature frames composed of precious metals set with diamonds and pearls, which are not used as articles of personal adornment but for utility, are not dutiable as articles commonly known as "jewelry." *United States v. M. Knoedler & Co.*, 154 Fed. 928.

**Pearls**

Pearls which, though they had been tentatively worn as a necklace abroad, were imported loose and were increased by the addition of others after importation for completion into a necklace, are not dutiable as "jewelry," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192, but as "pearls in their natural state," by similitude, under paragraph 436, 30 Stat. 192. *Citroen v. United States*, 166 Fed. 693, 694, 92 C. C. A. 365.

Drilled pearls, which had been assembled and matched abroad and were ordered to be made into a necklace in New York, but had never been strung as a necklace, except temporarily, for purposes of display, are not "jewelry" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192, but are dutiable either directly or by similitude as "pearls in their natural state," under paragraph 436, 30 Stat. 192. *United States v. Tiffany & Co.*, 172 Fed. 300.

Imitation whole or half pearls, mounted on wire for purposes of manufacture, are not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192, as parts of "jewelry," but under paragraph 435 as imitations of precious stones. *United States v. Weinberg*, 139 Fed. 1006.

**Watch and chain or fob**

A watch and fob is within the phrase "jewels and ornaments" in a statute providing that whenever the proprietor of a hotel shall provide a safe for the keeping of any jewels and ornaments belonging to a guest, and the guest does not deposit them there, the proprietor shall not be liable for their loss. *Rains v. Maxwell House Co.*, 79 S. W. 114, 117, 112 Tenn. 219, 64 L. R. A. 470, 2 Ann. Cas. 488.

If a watch or watch movement is not included in the general term "jewelry," it

is so closely associated therewith that the public in general regard the dealing therein as a part of the jewelry business, and they are generally handled by jewelers, and in fact are branch of the jewelry trade, so that the Elgin Jewelry Company might easily be mistaken by the public for the Elgin National Watch Company, the maker of what are generally known as the Elgin watches. *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. 41, 51.

A watch or chain, being each an article of use, and not worn for ornament, is not a "jewel" or "ornament," within the statute relieving an innkeeper from liability for loss of money, jewels, or ornaments, where he provides a safe, posts notice thereof, and the guest neglects to deposit the same in the safe. *Jones v. Hotel Latham Co.*, 115 N. Y. Supp. 1084, 1085, 62 Misc. Rep. 620.

**As wearing apparel**

See Wearing Apparel.

**JNO**

The sufficiency of an information was not affected by the abbreviating of the accused's name, "John," by use of the letters "Jno." *State v. Granger*, 102 S. W. 498, 499, 203 Mo. 586.

**JOB**

See Employés on the Job; Good and Workmanlike Job; On the Job.

**JOBBER**

See Landjobber; Sharejobber; Stockjobber.

New York City Sanitary Code, § 68, providing that no person shall have or offer for sale adulterated food within the city, is applicable to a "jobber," a middleman in the sale thereof; criminal intent not being an element of the offense. *People v. Greenberg*, 119 N. Y. Supp. 325, 326, 134 App. Div. 599.

**JOCK STRAPS**

"Jock straps" are similar to the common swimming trunks made of cotton cloth and which are extensively in use for the purpose of a suspensory bandage, and are designed to hold the male private organs in position of greatest safety for athletes, etc., and, though a "jock strap" may be loosely called a suspensory, there is an important distinction between them, and a "jock strap" must be so made and the material must be of such a sort that, when the parts are placed in the position shown by experience to be the best adapted for safety, they will be maintained in this position in spite of any movements of the body. *Sharp & Smith v. Physicians' & Surgeons' Appliance Co.*, 174 Fed. 424.



## JOGGING ALONG

The phrase "jogging along," as used by a witness testifying that decedent was going very slowly, just "jogging along," held to mean a slow trot. *Queen Anne's R. Co. v. Reed*, 59 Atl. 860, 864, 5 Pennewill, 226, 119 Am. St. Rep. 301.

## JOHN DOE

In an indictment charging "John Doe," a Chinese person, whose true name is to the grand jurors unknown, the name "John Doe" is used only as a fictitious designation because the grand jurors were unable to identify the person whom they were indicting. With no other description it was not possible to say what particular Chinese person the grand jury intended to indict, and for that reason the indictment was insufficient. *United States v. Doe*, 127 Fed. 982, 983.

## JOIN

The word "join," as used in the rule that all the defendants must join in an application to remove a cause to a federal court, merely means that, where there are several defendants, all of them must concur in applying to remove the cause, and does not authorize a removal by joint defendants who do join in case one or more of them is not entitled to remove. *Texas & P. Ry. Co. v. Huber*, 92 S. W. 832, 834, 100 Tex. 1.

## JOINDER

See Misjoinder.

## JOINT

See Low Joint.

The word "joint" is defined in general to mean "produced by or involving the combined action of two or more; united in or having a common relation, action, or interest; participated in or used by two or more; held or shared in common." But, as a legal term, the word is generally used to mean joined together in unity of interest or liability. *Hill v. Wadley Southern Ry. Co.*, 57 S. E. 795, 799, 128 Ga. 705 (citing following dictionaries: Standard, Webster, Century, and Worcester).

Under a deed to a man and his wife, "for their joint lives and the life of the survivor of them," and "to their joint heirs," the first takers take a joint estate in fee simple, to the exclusion of their heirs. It was contended that the use of the word "joint" before "heirs" was word of explanation indicating that the grantor meant to use the word in a qualified sense as a mere descriptio personarum, and that as thus used it explained who was to take after the termination of the life estate and prevented the operation of the rule in *Shelley's case*. *Waller v. Pollitt*, 64 Atl. 1040, 1041, 104 Md. 172.

## JOINT ADVENTURE

A "joint adventure" may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit and have the right to demand and expect from their associates good faith in all that relates to their common interests. *Jackson v. Hooper*, 74 Atl. 130, 136, 76 N. J. Eq. 185.

A "joint venture" is a limited partnership not limited in a statutory sense as to liability, but as to scope and duration, and under the New York law joint adventures and partnerships are governed by the same rules. *Jones v. Walker*, 101 N. Y. Supp. 22, 23, 51 Misc. Rep. 624 (quoting and adopting definition in *Ross v. Willett*, 27 N. Y. Supp. 785, 76 Hun, 211).

Where plaintiff and defendant's testator engaged in buying, training, and selling horses on the understanding that testator should advance the money and that the profits should be shared equally, there was a "joint adventure," authorizing plaintiff to compel an accounting. *Rice v. Peters*, 113 N. Y. Supp. 40, 41, 128 App. Div. 776.

Where plaintiff advanced money to another to be used solely in carrying on of a specified business under the latter's name, the venture to continue five years, and plaintiff to be paid one-fourth of the net profits, and provision being made that, upon the death of the other, or the expiration of the stipulated period, the amount advanced, or so much thereof as should remain in the business, must be paid back to plaintiff, with a proportionate share of profits, plaintiff and the other stood towards each other in a "quasi partnership" or "joint adventure" relation. *Kirkwood v. Smith*, 95 N. Y. Supp. 926, 929, 47 Misc. Rep. 301.

Defendant, being the owner of a play and a patented air reservoir, contracted with plaintiff and another to give to each one-third interest in both the play and the patent, and that, on securing a contract satisfactory to him, the three as joint owners would share equally all receipts, expenses, and profits in connection with the development of plays and the use of the reservoirs. Held, that such arrangement constituted a joint adventure, and made the parties liable as partners between themselves. *Voegtlin v. Bowdoin*, 104 N. Y. Supp. 394, 395, 54 Misc. Rep. 254.

## JOINT AGENT

An interpreter who is selected by persons speaking different languages as the medium of their communication with each other is regarded as their "joint agent" for that purpose. *Kelly v. Ning Yung Benev. Ass'n*, 84 Pac. 321, 324, 2 Cal. App. 460.

## JOINT AND MUTUAL WILL

See Mutual Will.

**JOINT AND SEVERAL TRESPASSERS**

Joint trespassers distinguished, see Joint Trespasgers.

**JOINT CAUSE OF ACTION**

"Joint causes of action" include causes of action against joint wrongdoers as well as causes of action against joint parties to a contract. *Williamson v. Howell*, 17 Ala. 830, 832.

**JOINT CONTRACT AND CONTRACTOR**

A contract for street improvement recited that whereas plaintiff, as contractor, had offered to do the work for \$1,154, "the undersigned property owners" agreed one with the other, and with each other, that they would forthwith have the street graded and would pay therefor on completion and acceptance of the work by the city surveyor the total sum of \$1,154, pro rata, as the frontage of their real property bore to the whole work, and that they jointly and severally contracted and agreed with plaintiff that he, with all convenient dispatch and in a good workmanlike manner and to the satisfaction of the city surveyor, etc., should grade the street for the sum of \$1,154, payment of which was to be made on the acceptance of the work by the city surveyor. The specifications obligated plaintiff to pay the engineer's fee in amounts proportioned to the payments made by the property owners, or their agents, in the ratio of payments to the contract price, plus such fee. Held, that the signers of the contract, as to the contract, were jointly and severally liable for the entire price of the work, and not each separately liable for his pro rata share according to his ownership of frontage. *Moreling v. Weber*, 84 Pac. 220, 221, 8 Cal. App. 14.

"Where two or more persons execute an instrument at the same time, upon the same consideration, and for the same purpose, they are all, in legal effect, 'joint contractors or obligors' so far as their liability to the other contracting party is concerned, although one may be designated thereon as surety, and sign it as such." *White v. Savage*, 87 Pac. 1040, 1042, 48 Or. 604 (quoting and adopting definition in *Bowen v. Clarke*, 37 Pac. 75, 25 Or. 595).

**JOINT CONVENTION**

"'Joint convention' is a body as different and with as distinct power and functions from those of the two separate houses as a partner is from the members composing it." "Joint conventions" are not composed of the Senate and the House of Representatives, but of the members of the General Assembly without regard to the houses to which they were elected. *Richardson v. Young*, 125 S. W. 664, 680, 122 Tenn. 471 (quoting and adopting language of *Prouty v. Stover*, 11 Kan. 256).

**JOINT DEBTORS**

The term "joint debtor," used in Civ. Code 1902, § 2841, providing that a creditor may release a separate joint debtor by an instrument exonerating him therefrom, is broader and more comprehensive than that of "surety" or "guarantor." A statute was enacted to prevent an injustice which had followed a technical and strict construction of the mutual rights of the makers of an obligation. Where one signs a note as surety and for a valuable consideration, and he and another guarantee its payment, and judgment is obtained against the three, they are "joint debtors." *Symmes v. Cauble*, 51 S. E. 862, 863, 72 S. C. 330.

**JOINT DEFENDANT**

The right given by Civ. Code 1910, § 5971, to one joint defendant paying off the execution to control the judgment and execution against his codefendants to compel contribution, applies to judgments against partners based on service upon all. *Higdon v. Williamson*, 73 S. E. 528, 529, 10 Ga. App. 376.

**JOINT INDORSEES**

Burns' Ann. St. 1894, § 8136, provides that the survivor of persons holding personal property in joint tenancy shall have the same right only as the survivors of tenants in common unless otherwise expressed in the instrument. Held, that a corporation may be one of several joint indorsees or bearers of a negotiable instrument using the term "joint" in its general sense, and not in its restricted sense, as when applied to a tenancy of real property, and hence may sue thereon as one of several co-obligees joined as plaintiffs. *Thomas v. Green County*, 159 Fed. 339, 343, 89 C. C. A. 405.

**JOINT INTEREST**

Civ. Code Cal. § 683, defines a "joint interest" as one owned by several persons in equal shares, by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy. *Conde v. Dreisam Gold Mining & Mill. Co.*, 86 Pac. 825, 828, 3 Cal. App. 583.

Where a husband and wife deposited money in a savings bank in their joint names and accepted in lieu thereof a passbook and writing reciting that the money should be paid on demand of either producing the book, the deposit was community property, and not owned by them as joint tenants, under Civ. Code, § 683, defining a "joint interest" as one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. *Lynam v. Vorwerk*, 110 Pac. 355, 356, 13 Cal. App. 507.

**JOINT MAKER**

The rule that when one, in order to give the maker of a note credit with the payee, writes his name on the back of the note before delivery and acceptance thereof by the payee he is to be considered a "joint maker" of the note, and liable as such, applies, although the parties so signing told the payee that they would "indorse" the note. *Lake v. Little Rock Trust Co.*, 90 S. W. 847, 848, 77 Ark. 53, 3 L. R. A. (N. S.) 1199, 7 Ann. Cas. 394.

**JOINT OBLIGATION**

"A 'joint obligation' is one by which several obligors promise to the obligee to perform the obligation." *United States v. Green*, 136 Fed. 618, 647 (citing *Bouv. Law Dict.*).

"Whenever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a 'joint obligation or right.'" Where a note, signed by ten makers, states that the liability of each is limited to one-tenth of the amount of the note, an indorsee of the note cannot maintain a joint action thereon against the makers. *National Bank of Phoenixville v. Buckwater*, 63 Atl. 689, 690, 214 Pa. 289 (quoting and adopting definition in 1 *Parsons*, Cont. p. 11).

**JOINT OWNERS**

As owner, see *Owner*.

**JOINT OWNERSHIP**

To constitute "joint ownership" the shares must generally extend to the whole estate and be such as that neither of the owners would have an interest in the proceeds set apart to the other joint owner. *Fullenwider v. Johnson*, 139 S. W. 1096, 1097, 145 Ky. 19.

**JOINT RATE**

A "joint rate" within the meaning of Act Oct. 14, 1879 (Acts 1878, p. 125) § 5, as amended by Acts 1889, p. 131, and Civ. Code 1895, § 2189, declaring that the railroad commissioners shall have power to make just and reasonable joint rates for all connecting railroads as to traffic passing from one road to the other, is a rate charged for the transportation of goods or passengers over connecting lines of two or more railroads and divided among them for the services rendered by each respectively, and may be made by deducting some prescribed per cent. from each of the local rates and adding together the two rates thus reduced, but such method is not exclusive. *Hill v. Wadley Southern Ry. Co.*, 57 S. E. 795, 798, 128 Ga. 705.

Where the railroad commissioners declared that a continuous mileage rate should apply to two connecting railroad companies, the stock and bonds of one of which were owned by the other, though each had its

separate directors and was operated separately, applying the rate previously fixed for the owning company, such rate was a "joint rate" within the meaning of the statute, and the action of the commissioners was not *ipso facto* illegal on the ground that it was not a joint rate and not authorized by the statute, if the rate so fixed was reasonable and just. *Hill v. Wadley Southern Ry. Co.*, 57 S. E. 795, 799, 128 Ga. 705.

**JOINT RESOLUTION**

An act of Congress governs all persons under the jurisdiction of the enacting power; whereas, a "joint resolution" is merely a rule for the guidance of the agents and servants of the government. *S. H. Hawes & Co. v. Wm. R. Trigg Co.*, 65 S. E. 538, 552, 110 Va. 165.

**JOINT SESSION**

Code Supp. 1907, § 1989a29, requiring notice to the landowners when and where the boards of supervisors of the several counties will meet in joint session to consider a petition for the establishment of a drainage district including lands in more than one county, and providing that the boards shall sit and act jointly in all matters to be disposed of by the joint action of the several boards, the boards of supervisors of two counties, in proceedings for the establishment of a district including lands in two counties, must act jointly, and not concurrently as separate bodies; the word "joint" meaning united or combined, and the law contemplating that the boards must act as one body. *Schumaker v. Edgington*, 132 N. W. 966, 969, 152 Iowa, 596.

"The term 'joint session' \* \* \* implies the meeting together, a mingling of the two houses, which when so held and mingled act as one body." *Richardson v. Young*, 125 S. W. 664, 681, 122 Tenn. 471.

**JOINT-STOCK COMPANIES AND ASSOCIATIONS**

A joint-stock association owes its existence, not to the state but to the contract of its members, and, though it may have some of the rights of a corporation and may sue and be sued in the name of its president, it does not exist as an entity distinct from its members and it exists wherever it does business or owns property. *In re Willmer's Estate*, 138 N. Y. Supp. 649, 651, 153 App. Div. 804.

A "joint-stock association" is an association of individuals in the nature of a partnership and possessing the element of personal liability. Almost the full measure of corporate attributes have been bestowed upon them according to the courts of New York until the difference, if there be one, is obscure, elusive, and difficult to see and describe. *Bishop v. Bishop*, 71 Atl. 583, 589, 81 Conn. 509 (*People ex rel. Luckemeyer v.*

Coleman, 30 N. E. 1150, 133 N. Y. 625; People ex rel. Platt v. Wemple, 22 N. E. 1046, 117 N. Y. 136, 6 L. R. A. 303).

#### **Corporations and partnerships distinguished**

As person, see Person.

As within term corporation, see Corporation.

Where diversity of citizenship was the basis of federal jurisdiction in a suit to restrain defendant from prosecuting an action in the state court, and a bill alleged that complainant was a "joint-stock company" duly organized and existing under the laws of the state of New York and a citizen of that state, and that defendant was a citizen of Missouri, where the suit was brought, jurisdiction was not shown, since a "joint-stock company" is not a corporation but a partnership, and it could not be presumed that the members were all nonresidents of Missouri. *Rountree v. Adams Express Co.*, 165 Fed. 152, 154, 91 C. C. A. 186.

An unincorporated joint-stock company carrying on the business of a savings bank in this district is a copartnership. *Norwood v. Francis*, 25 App. D. C. 463, 466, 4 Ann. Cas. 865.

The history of "joint-stock associations" both in England and this country is interesting. When unincorporated companies, with a joint stock divided into numerous transferable shares, began to assume importance and to force themselves upon the attention of the legislative and judicial departments of the state, the reception they met with was by no means encouraging. Owing to the then established rules relating to parties to actions at law and suits in equity, a joint-stock company could not practically sue its own debtors, nor could disputes between its members be readily, if at all, adjusted. At the same time the doctrine that each member was answerable for the whole of the debts of the company was studiously promulgated and rigorously enforced. A joint-stock company is like a corporation, but not the same. More or less they crowd upon and overlap each other, but without losing their identity, and so, while it cannot be said that a joint-stock company is a corporation, it can be said that a joint-stock company is a partnership with some of the powers of a corporation. A joint-stock company derives its existence from the contract of individuals, a corporation from the sovereignty of the state. In *re Jones' Estate*, 65 N. E. 570, 571, 172 N. Y. 575, 60 L. R. A. 476 (quoting and adopting definition in *Lindley Law of Companies* [5th Ed.] p. 2; *People ex rel. Winchester v. Coleman*, 31 N. E. 96, 133 N. Y. 279, 16 L. R. A. 183; *Van Aernam v. Bleistein*, 7 N. E. 538, 102 N. Y. 360).

A "joint-stock company" is defined in the text-books to be "an association of individuals for purposes of profit, possessing a

common capital, which is divided into shares, of which each member possesses one or more, and which are transferable by the owner. These associations, formed for business purposes, were at common law, and as a general rule still are, considered merely as partnerships, and their rights and liabilities are in the main governed by the same rules and principles which regulate commercial partnerships. While it is true that many companies called joint-stock companies have many of the essential characteristics of a corporation, yet there is a distinction between such companies and regularly organized corporations so called. It is said: "In respect to their formation there is a broad distinction between a corporation, technically so called, which always owes its existence to the sovereign power of the state, and a joint-stock company, which, being essentially a partnership, is brought into being by the contract of its members *inter sese*." Counsel refer to cases in other states and in the federal courts holding that joint-stock companies possess many of the characteristics of corporations, but the definition which characterizes them as partnerships has been recognized as correct, if not actually adopted, by the decisions of the Illinois courts. *People v. Rose*, 76 N. E. 42, 43, 46, 219 Ill. 46.

"Joint-stock associations" are not in all essential aspects, except the personal liability of the stockholders, like corporations. They have an artificial name, in which their contracts are made and their business transacted. They have a seal. They have officers. The interests of the partners are represented by shares of stock. They survive the death of their shareholders, and, quite like corporations, they have for all practicable purposes an existence apart from the shareholders and thereby may have perpetual succession. The interests of the stockholders in the assets of the association are analogous to that of the stockholders in the corporation. The practicable difference is that ordinarily the creditor of a corporation can only have recourse to the corporate property for the satisfaction of his claim, while the creditor of the 'joint-stock association,' after first exhausting his remedy against the association and its assets, may recover any deficiency of the shareholders; but in many instances there is a qualified statutory personal liability of stockholders of corporations. There can be no doubt, however, that it is competent for the members of a 'joint-stock association' to have the contracts so drawn as to confine the liability to the assets, and thus create the same situation as to their rights and liabilities as if the 'joint-stock association' were a corporation and they were stockholders." *Hibbs v. Brown*, 98 N. Y. Supp. 353, 357, 112 App. Div. 214 (citing chapter 235, p. 412, Laws 1894; Code Civ. Proc. §§ 1919, 1924; *Matter of Jones*, 65 N. E. 570, 172 N. Y. 575, 60 L. R. A. 476;

*Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *People ex rel. Winchester v. Coleman*, 81 N. E. 96, 133 N. Y. 279, 16 L. R. A. 183).

In "joint-stock companies" the death of a member, or the withdrawal or transfer of his interest, does not dissolve the company, as there is no *delectus personæ*; and, while a joint-stock company is a partnership, it is different from an ordinary partnership, and all who have dealings with such a company know that the directors have authority to manage the business and that a shareholder has no power to contract for the company whether it is incorporated or unincorporated. *Spotswood v. Morris*, 85 Pac. 1094, 1102, 12 Idaho, 360, 6 L. R. A. (N. S.) 665 (citing the definition in 4 Cyc. pp. 308, 310; *Willis v. Greiner* [Tex.] 26 S. W. 858).

A "joint-stock company" at common law was a hybrid, midway between a corporation and a partnership, e. g., it had directors and officers, articles of association, a common capital divided into shares; these shares represented the interests of the members and were transferable without the consent of the other members; hence there was no *delectus personæ*, and the death of a member did not dissolve the company, but, on the other hand, each member was liable for the debts of the concern so that such company had characteristics of both a corporation and a partnership. *State ex rel. Pearson v. Louisiana & M. R. R. Co.*, 94 S. W. 279, 282, 196 Mo. 523 (citing *Hunnewell v. Willow Springs Canning Co.*, 53 Mo. App. 245; *Laney v. Fickel*, 83 Mo. App. 60).

A "joint-stock company" is a partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the copartners. *Bradford v. National Ben. Ass'n*, 26 App. D. C. 268, 273.

A "joint-stock company," whatever else may be said about it, is certainly for most, if not all practical, purposes, a legal entity, capable in law of acting and assuming legal obligations quite independent of the shareholders. *Hibbs v. Brown*, 82 N. E. 1108, 1115, 190 N. Y. 167.

## JOINT TENANCY

See Tenants in Common.

To create a "joint tenancy" there must exist unity of interest, unity of title, unity of time, and unity of possession. Where tenants in common of land made a deed directly to one of the tenants and a third person as joint tenants, it created a joint tenancy, so that the surveyor of the grantees took all the land. *Colson v. Baker*, 87 N. Y. Supp. 238, 239, 42 Misc. Rep. 407.

A "joint tenancy" is where two or more persons have any subject of property jointly in which there is unity of interest, unity of

title, unity of time, and unity of possession. 2 Black. Com. 180. At common law a grant or devise to two or more persons without limitations created a joint tenancy, and words or circumstances of negation were necessary to avoid this result. The chief characteristic of joint estates is the doctrine of survivorship. 2 Black. Com. 184. The doctrine of survivorship is not in accordance with the genius of our institutions. Hence this incident of estates has been generally abolished in the United States except in a few instances, and in those jurisdictions where joint estates are still recognized they are very much restricted by statutes. *Gaunt v. Stevens*, 89 N. E. 812, 813, 241 Ill. 542 (citing *Burnett v. Pratt*, 22 Pick. [39 Mass.] 557; *Freeman, Cotenancy*, § 118; *Warvelle, Abstracts of Title*, § 247).

The meaning of "four unities" required as essential to the existence of a "joint tenancy" is: That the interest of each of the joint tenants must be equal, the same; one cannot have a life estate and the other an estate for years. Second, the estate of joint tenancy must be created by the same act or instrument. Third, the estate of joint tenancy must arise in each at the same time. Fourth, each must have possession of the whole. *Colson v. Baker*, 87 N. Y. Supp. 238, 239, 42 Misc. Rep. 407.

An estate in "joint tenancy" does not exist unless there is unity of interest, title, time, and possession; "unity of interest" meaning that the interests must accrue by one and the same conveyance, "unity of time," that they must commence at one and the same time, and it must also appear that the interests of the joint holders remain the same until the death of one of them, when the survivor takes it all. *Staples v. Berry*, 85 Atl. 303, 304, 110 Me. 32.

An estate in "joint tenancy" is one held by two or more tenants jointly, with an equal right in all to share in the enjoyment of the land during their lives, and on the death of any one of the tenants his share vests in the survivors. *Sharp v. Baker* (Ind.) 96 N. E. 627, 628.

An estate in "joint tenancy" can only be created by purchase. To create an estate in "joint tenancy," the tenants must have one and the same interest which must accrue by one and the same conveyance, must commence at the same time, and must be held by the same undivided possession. *Sharp v. Baker* (Ind.) 96 N. E. 627, 628.

A "joint tenancy" by the common law is one where the interests are created by one and the same person, and by one and the same conveyance and commence at the same time, and are held by the same possession. *Bassler v. Rewodlinski*, 109 N. W. 1032, 1033, 130 Wis. 26, 7 L. R. A. (N. S.) 701.

**Estate by entirety distinguished**

An estate in entirety is not a "joint tenancy" in which each holds an individual right. A joint tenant may destroy the joint tenancy and thereby destroy the right of survivorship by conveying his right to a third person. But neither the husband nor the wife in an estate of entirety can so destroy the character of the estate as to prevent the survivor becoming the sole owner. An estate in entirety owned by husband and wife remains, as at common law, an estate in which neither has an interest to the exclusion of the other, but each owns the whole while both live, and, at the death of either, the other continues to own the whole free from the claim of any heirs of the deceased, and *Rev. St. 1899, § 4340*, declaring what shall be the separate property of a married woman, and saying that it shall be under her sole control, does not apply to estates in entirety. *Frost v. Frost, 98 S. W. 527, 528, 200 Mo. 474, 118 Am. St. Rep. 689.*

In passing on the effect of a statute providing that all joint tenants might be compelled to make partition, the court stated the distinction between the estates as follows: "Now, although these laws use the broadest terms, 'all joint tenants that be, or hereafter shall be, of estates of inheritance,' etc., may be compelled to make partition, etc., yet it is most certain that they have never been supposed to reach the case of lands given in fee (or for any lesser estate) to husband and wife; for all the books, from the oldest I have been able to examine down to the present day, agree, *una voce*, in this: That husband and wife not only cannot compel each other to make partition, but that, even if they concur in the wish, they have not the power to sever the tenancy. It is a sole and not a joint tenancy. They have no moieties. Each holds the entirety. They are one in law, and their estate one and indivisible. If the husband alien, if he suffer a recovery, if he be attainted, none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place where by the death of one joint tenant the survivor receives an accession, something which he had not before, the right of the deceased. But husband and wife have the whole from the moment of the conveyance to them, and the death of either cannot give the survivor more." *Kunz v. Kurtz, 68 Atl. 450, 451, 8 Del. Ch. 404* (quoting and adopting definition in *Thornton v. Thornton, 3 Rand. [24 Va.] 179, 183*).

**Tenancy in common distinguished**

Under *Burns' Ann. St. 1901, § 3341*, providing that all conveyances and devises made to two or more persons shall be construed to create estates in common and not in "joint tenancy," unless it shall be expressed therein that the grantees or devisees shall hold the

same in joint tenancy, and to the survivor of them, or it shall manifestly appear that it was intended to create an estate of joint tenancy, a will devising property in remainder, to be owned equally and jointly by testator's children, "or in case of the decease of any of said children his or her share to descend to the heirs of their body" "creates a tenancy in common and not a 'joint tenancy,'" notwithstanding the use of the word "jointly." *Taylor v. Stephens, 74 N. E. 980, 983, 165 Ind. 200; Id. (Ind.) 72 N. E. 609, 611.*

**JOINT TENANT**

A widow, to whom dower has been assigned and set off by metes and bounds, is not a "joint tenant," with the owner of the fee, within *Gen. Laws 1909, c. 330, § 4*, authorizing joint tenants, coparceners, and tenants in common to sue for partition, since her estate is a life estate in severalty in the entire premises within the metes and bounds, and she may not sue for partition. *Newell v. Willmarth, 76 Atl. 433, 30 R. I. 529, 19 Ann. Cas. 807.*

"If an estate in fee be given to a man and his wife, they are not properly 'joint tenants'; for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." *Green v. Cannady, 57 S. E. 832, 834, 77 S. C. 193* (quoting definition in 1 *Shars. Bl. Comm.* 181).

**JOINT TORT-FEASORS**

As privies, see *Privy—Privy*.

"Joint tort-feasors" are those who contribute to the tort with the common intent. *Adler & Co. v. Pruitt, 53 South. 315, 318, 169 Ala. 213, 32 L. R. A. (N. S.) 889.*

Where two railroads and defendant city were alleged to have jointly contributed to detain surface water so as to flood plaintiff's land, they were all "joint tort-feasors" and properly joined as defendants in a suit for the damages sustained, as authorized by *Civ. Code Prac. § 83. Pickerill v. City of Louisville, 100 S. W. 873, 875, 125 Ky. 213.*

To make tort-feasors liable jointly, there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work; but it is not necessary that they be acting together or in concert, if their concurring negligence occasions the injury. *Straubal v. Asiatic S. S. Co., 85 Pac. 230, 233* (citing *Consolidated Ice Machine Co. v. Kelfer, 25 N. E. 799, 134 Ill. 481, 10 L. R. A. 696, 23 Am. St. Rep. 688; Brown v. Cox Bros. & Co., 75 Fed. 689*).

**JOINT TRESPASSERS**

Where an agent commits an active trespass on behalf of his principal, such principal is a "joint trespasser" with the agent. *Williams v. Inman*, 57 S. E. 1009, 1010, 1 Ga. App. 321.

"Persons engaged in committing the same trespass are 'joint and several trespassers,' and not 'joint trespassers' exclusively. Like persons liable on a joint and several contract, they may all be sued in one action, or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages." The executive officers of a corporation, who were large stockholders, and had full management of its affairs, and instigated and controlled its action in willfully infringing complainant's trade-mark and simulating her labels, are jointly and severally liable with it for the infringement; and, where they directed and controlled its defense when sued therefor, the final decree in the suit is conclusive on them as to the matters adjudicated, including the damages found due complainant, on an accounting, and a suit will lie against them to recover the amount of such decree from them individually, when, through their control and influence, they caused the corporation to transfer its property and to declare and pay dividends pending the suit against it, by which it was rendered insolvent. *Saxlehner v. Elsner*, 140 Fed. 938, 941 (quoting and adopting the definition in *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129).

**JOINT WILL**

A "joint will" is a single instrument containing the wills of two or more persons. A mutual will, or more strictly speaking a reciprocal will, is one by which each testator makes testamentary disposition in favor of the other. *Bower v. Daniel*, 95 S. W. 347, 357, 198 Mo. 289 (citing *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *In re Dietz*, 50 N. Y. 88; *Cawley's Estate*, 20 Atl. 567, 136 Pa. 628, 10 L. R. A. 93).

A testamentary disposition contained in one writing disposing of property held jointly is a "joint will"; whereas, the same document, if it refers to and deals with property held separately, would be a "mutual will." *Deseumeur v. Rondel*, 74 Atl. 703, 705, 76 N. J. Eq. 394.

A "joint will" is one where the same instrument is made the will of two or more persons and is jointly signed by them, being not necessarily either mutual or reciprocal. A will that is both joint and mutual is one executed jointly by two or more persons, the

provisions of which are reciprocal, and which shows on its face that the devisees are made one in consideration of the other. A joint will which is not reciprocal is simply the individual personal will of each of the persons signing it and is subject to the same rules as apply to several wills. *Frazier v. Patterson*, 90 N. E. 216, 217, 243 Ill. 80, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003.

**JOINTLY**

The word "jointly," in a finding that plaintiff, jointly with others, should have a perpetual right to use the waters of a ditch for irrigating purposes, means only that his right to such use is in no degree exclusive or superior to the rights of others interested therein, but that he, with the others interested, have the right together as a common right. *Blankenship v. Whaley*, 76 Pac. 235, 237, 142 Cal. 566.

The word "equally" in a conveyance to two or more persons equally unaccompanied by any controlling word implies a tenancy in common. "Under a statute providing that all conveyances and devises made to two or more persons shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy, and to the survivor of them, or it shall manifestly appear that it was intended to create an estate of joint tenancy, a will devising property in remainder to be owned equally and jointly by testator's children or in case of the decease of any of said children his or her share to descend to the heirs of their body, creates a tenancy in common and not a joint tenancy, notwithstanding the use of the word "jointly." *Taylor v. Stephens*, 74 N. E. 980, 983, 165 Ind. 200 (citing 2 Powell, *Devises*, 370; *Freeman, Co-Tenancy & Partition*, § 23).

In an action by a tenant in common against his several cotenants for partition of the land in which defendants interposed the statute of limitations, an instruction that if defendants held possession of the land "jointly, openly, and exclusively," as against plaintiff, plaintiff was not entitled to recover, was not objectionable in using the word "jointly," since it was obviously used in the sense that it was necessary for all of the defendants to have concurred or united in the adverse holding in order that plaintiff's interest in the land should be defeated as to each of them. *Wrighton v. Butler (Tex.)* 128 S. W. 472, 474.

Under highway law (Laws 1890, p. 1201, c. 568) § 130, as amended by Laws 1895, p. 265, c. 416, providing that, when public free bridges are constructed over streams forming the boundary lines of towns, such towns shall be "jointly liable" to pay the expenses of construction, the expense must be divided equally between the towns. Peo-

ple ex rel. Canton Bridge Co. v. Board of Town Auditors of Town of Horicon, Warren County, 120 N. Y. Supp. 696, 699, 136 App. Div. 166.

### JOINTLY AND SEVERALLY

In a depository's bond running to the head banker of a fraternal insurance society, and to the society "jointly and severally," and conditioned in a penal sum to be paid to him as banker and to the society "or either him or it," the words "jointly and severally" do not refer to the obligation of the makers of the bond, rather than to the rights of the obligees. *Bort v. E. H. McCutcheon & Co.*, 157 Fed. 182, 185, 84 C. C. A. 630.

### JOINTER

A "jointer" is a machine used for planing boards which are held with the hands flat side down and pushed over the revolving knives, and consists of knives about 16 inches long, fastened into a square iron bar operated by a belt conveying power from an engine. *Heightman v. Sammons*, 107 S. W. 31, 127 Mo. App. 703.

### JOINTURE

See Equitable Jointure.

The term "jointure" means such an estate as may be conveyed or devised to a wife in lieu of dower. It must be ~~in~~ satisfaction of it; and, if transferred to her without any intention or purpose that it shall be so, it does not operate to bar her claim. If, however, the grantor or deviser intends the estate conveyed or devised as in lieu of dower, then it is a jointure and so operates. The bar arises not by operation of law, but from the express or implied intention of the husband. *Morgan v. Sparks* (Ky.) 108 S. W. 233, 234 (quoting *Pepper v. Thomas*, 4 S. W. 297, 85 Ky. 539).

### JOS.

The letters "Jos." are recognized as a common abbreviation for Joseph, a name in common use, and a proceeding by or against a party designated by such an abbreviation is not a nullity. *Feld v. Loftis*, 88 N. E. 281, 283, 240 Ill. 105.

### JOSS LIGHT

A dried paste of sandalwood dust and clay, in the form of sticks, cones and coils, which, when lighted, yields a fragrant odor and is burnt at the altars and shrines of joss houses and temples in China and Japan, is "joss light," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 587, 30 Stat. 198. *Yamanaka & Co. v. United States*, 172 Fed. 249, 250.

### JOSS STICK

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 587, 30 Stat. 198, for "joss stick," held to include articles used in setting off fireworks, other than those well known as joss sticks and used for incense. *Champion & Staudinger v. United States*, 150 Fed. 239.

### JOURNAL

See Official Journal.

Under Ky. St. § 3274, which provides that the common council of third-class cities shall cause a journal of its proceedings to be kept, the journal of the clerk is intended merely as an index that will fairly show what the council did, rather than to give a complete report of its proceedings, and a notation therein of the passage of an ordinance for a street improvement, which described with certainty the location of the improvement, is a sufficient entry as against an objection that the ordinance was void because not entered by the clerk of the council in the journal. *Meacham Contracting Co. v. Kleiderer*, 142 S. W. 720, 146 Ky. 441.

A purported official journal of the Senate made in conformity to the rules of the Senate, being a printed book containing the record of each day's proceedings, signed and attested by the officers of the Senate showing corrections made from day to day, and in which nothing could be inserted, and from which nothing could be abstracted without affording internal evidence of the fact, of which there was none, and the original of which was approved by the Senate, preserved by the Secretary of State as its official journal, and published as such, was the Senate "journal," and where it contained no record of the final passage of a bill or entry of the ayes and noes of the senators voting thereon, as required by Const. art. 5, §§ 13, 22, the act was invalid, though original memoranda made by Senate clerks and stenographers, but not approved or certified as the journal, purported to show the roll call of the Senate on the act in question. *People v. Leddy*, 123 Pac. 824, 826, 53 Colo. 109.

### JOURNEY

Under the statute against carrying weapons, except by persons when on a journey, a "journey" means where one travels a distance from home sufficient to carry him beyond the circle of his neighbors and general acquaintances; and where defendant drove from his home, a distance of 15 miles from the town whose ordinance he was charged with violating, and to which he had been only once or twice, and in which he knew only one person, and started to return home in the evening, accompanied by a lady and a girl, carrying a pistol in the foot of the buggy, he was on a journey, and was not vio-



lating the law. *Ellington v. Town of Denning*, 138 S. W. 453, 90 Ark. 236.

One who is going from home by a highway to a definite point far enough distant to carry him beyond the circle of his neighbors and to detain him throughout the day, and not within the routine of his daily business, is on a "journey," within *Mausf. Dig. Ark. § 1907*, providing that any person who shall carry as a weapon any dirk, sword, etc., shall be guilty of a misdemeanor, provided that nothing in the act shall be construed to prohibit any person from carrying any weapon when upon a "journey" or upon his own premises; and it cannot be said as a matter of law that one whose daily business as a mail carrier takes him to a point 30 miles distant is not so engaged on a "journey." *Easlick v. United States*, 104 S. W. 941, 942, 7 Ind. T. 707.

### JOURNEYMAN

The term "journeymen" does not include a subcontractor who excavated the cellar for a building with his teams and laborers at a specified price per cubic yard. *McNab & Harlin Mfg. Co. v. Paterson Bldg. Co. (N. J.)* 63 Atl. 709, 717.

"Master plumbers" and "employing plumbers" are one and the same; those who do not hold themselves out as personally doing the work, but as contracting to furnish the materials and to do the work through others, while "journeyman plumbers" are those skilled in the calling and holding themselves out as able and willing to do the work themselves. *Felton v. City of Atlanta*, 61 S. E. 27, 28, 4 Ga. App. 183.

### JR.

The word "junior" or "Jr.," or words of similar import, are ordinarily mere matters of description and form no part of a person's legal name. *Teague v. State*, 40 South. 812, 314, 144 Ala. 42.

The suffix "Jr." is no part of a man's name and, except in a few instances, may be disregarded. *Ross v. Berry (N. M.)* 124 Pac. 342, 343.

### JUDGE

#### JUDGE (In Law)

See Circuit Judge; County Judge; Court and Judges Thereof; De Facto Judge; Police Judge; Presiding Judge. Interest of judge, see Interest (In suit or Action).  
Prejudice of, see Prejudice.  
Proceeding to remove, as criminal action, see Criminal Action.

As used in an act relating to the taking of testimony in criminal cases which provides that when any witness is present who shall desire to have his or her evidence taken on any prosecution he shall apply to the

judge of the court in which such prosecution is pending to have his or her testimony taken in writing, and thereupon the judge shall order said testimony to be taken in writing before him, etc., the word "judge" means the trial judge. *State v. Jackson*, 35 South. 503, 598, 111 La. 343.

The commission provided for by Acts 1893, p. 386, c. 231, § 13, providing that if a municipal corporation, after deciding to establish a municipal lighting plant, refuses to purchase a private plant operated by a corporation incorporated by the General Assembly, it may be compelled to do so, and a commission appointed by the superior court to adjudicate whether the plant should be purchased and what the price and conditions of sale should be, is not a court, nor its members judges, within the meaning of the Constitutional provision prescribing the mode by which judges are to be appointed. The functions of the commission are but quasi judicial. *Norwich Gas & Electric Co. v. City of Norwich*, 57 Atl. 746, 749, 76 Conn. 565 (citing *State v. New Haven & Northampton Co.*, 43 Conn. 351; *New Milford Water Co. v. Watson*, 52 Atl. 947, 53 Atl. 57, 75 Conn. 237).

"A 'register' is a 'judge,' and the admission of a will to probate is a 'judicial decision.'" In *re Kern's Estate*, 61 Atl. 573, 575, 212 Pa. 57 (quoting with approval from *Holliday v. Ward*, 19 Pa. 485, 57 Am. Dec. 671).

Under Bankr. Act. July 1, 1898, c. 541, § 1, subd. 16, 30 Stat. 544, the judge who must make the adjudication, reference, and dismissal of petitions is defined to be a judge of the bankruptcy court, and, where there are two judges, either may hold a court of bankruptcy and perform all the duties thereof in the same place or at a different place within the district while the other judge is also holding a court of bankruptcy. *Ex parte Steele*, 162 Fed. 694, 714.

The word "judges," as used in a statute providing that courts and judges may issue attachments for contempts and punish them summarily, contemplates the action of the judges in vacation and confers upon a judge in whose court an injunction is pending power in vacation to punish a refusal to obey as contempt. *Powhatan Coal & Coke Co. v. Ritz*, 56 S. E. 257, 263, 60 W. Va. 395, 9 L. R. A. (N. S.) 1225.

*Cities and Villages Act*, art. 11 (*Hurd's St. 1909*, p. 359) § 5, provides that any 30 legal voters residing within a proposed village may petition the county judge to submit to the legal voters whether they will organize as a village under the act, and if the territory described shall be situated in more than one county, the petition shall be addressed to the judge of the county court of the county where a greater part of such territory is situated, and such petition shall be addressed to the county judge. Section 6

declares that, on the filing of the petition in the office of the county clerk, it shall be the duty of the judge to perform the same duties as are required to be performed by the president and trustees in towns already incorporated; the returns of the election to be made to the county judge who shall cause the result to be entered on the records of the county court. Section 7 provides that, if a majority of the votes cast at such election are for organization, such proposed village shall be deemed an organized village, and the county judge shall fix a time and place for the election of officers. Held, that the terms "county judge" and "judge of the county court" were used interchangeably and synonymously, and that a petition to organize a village should be addressed to the judge of the county court and be filed with the clerk of that court. *People v. Shaw*, 97 N. E. 1090, 1091, 253 Ill. 597.

Under Acts 1909, p. 62, amending Code 1907, § 6262, providing for bail in all cases where the imprisonment does not exceed five years, and directing that the judge or court must also direct the clerk of the court in which conviction was had to admit the defendant to bail, held, that the judge or court mentioned refers to the Supreme judge or court issuing the writ of error. *Ex parte Byrd*, 55 South. 203, 204, 172 Ala. 179.

#### Court

The words "judge" and "court" are often used as practically synonymous terms. *Vial v. Elfer*, 45 South. 545, 546, 120 La. 673.

The term "judge," as distinguished from "court," denotes the individual; the latter denoting the judicial tribunal. *Hartshorn v. Illinois Valley Ry. Co.*, 75 N. E. 122, 126, 216 Ill. 392.

Congress at times interchanges the words "court" and "judge." The word "courts" in Act March 3, 1899, c. 424, 30 Stat. 1116, providing for pay of bailiffs and criers, and that persons employed under Rev. St. § 715, shall be deemed to be in actual attendance when they attend on the order of the courts, etc., was intended to cover not only courts in session but absent judges. *United States v. McCabe*, 129 Fed. 708, 711, 64 C. C. A. 286.

A "court" is not a "judge," nor a "judge" a "court," a "judge" is a public officer, who, by virtue of his office, is clothed with judicial authorities. A "court" is defined to be a place in which justice is judicially administered. *Chow Loy v. United States*, 112 Fed. 354, 359, 50 C. C. A. 279 (citing *United States v. Clarke*, 1 Gall. 497, 499, 25 Fed. Cas. 441).

A "judge" is not necessarily a court, though a court necessarily includes the "judge," and an act required to be performed by the "judge" may be lawfully performed by him sitting as a court. *Salinger v. West-*

*ern Union Telegraph Co.*, 126 N. W. 362, 365, 147 Iowa, 484.

In Code Prac. La. art. 86, providing that in matters of jurisdiction the right given to a judge to take cognizance of certain causes against certain persons within his jurisdiction is termed competency, the word "judge" is to be construed as synonymous with the word "court." *Bailey v. Janvier*, 45 South. 932, 934, 120 La. 893.

As used in Act 1879, amendatory of Act 1875, providing that on complaint in certain proceedings being filed before the county judge in vacation he shall issue his warrant, etc., the word "judge" is a synonym of "court." *Dobson v. State*, 63 S. W. 796, 797, 69 Ark. 376.

The word "court" is often used interchangeably with the word "judge." Where a statute authorized the court to extend the time for filing a bill of exceptions, an order granting such exception may be made by the judge during vacation. *Louisville & N. R. Co. v. McDonald*, 31 South. 417, 418, 79 Miss. 641.

The appeal to "the judge of the district court of the district," authorized by Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479, where a Chinese person has been convicted before a United States commissioner of being unlawfully in the United States, is in effect an appeal to the district court, and not to the district judge as an individual; and the commissioner's transcript and other papers pertaining to the cause may therefore be filed in that court, and the final order of the judge be entered as the final order of the court. *In re United States*, 24 Sup. Ct. 629, 630, 194 U. S. 194, 43 L. Ed. 931.

Rev. St. 1895, art. 1293, provides that the parties may submit the matter in controversy between them to the court upon an agreed statement of facts made out and signed by counsel and filed with the clerk, and in such case the statement so agreed to and assigned and certified by the "court" to be correct, and the judgment rendered thereon, shall constitute the record of the case. Held, construing the section in view of the prior statutes on the subject (Acts 7th Leg. c. 92, § 12, Rev. St. 1879, arts. 1293, 1379, and Rev. St. 1895, art. 1381), and in view of article 3268, requiring the court to look for the legislative intention keeping in view the old law, the evil and the remedy, that article 1293 did not authorize a statement of facts to be authenticated by the "judge," the term "court" as used therein not being equivalent to "judge," so that a certificate, by the trial judge attached to a purported agreed statement of facts long after the term and after the "court" had ceased by the expiration of the term, was not a compliance with the statute. *Chickasha Mill. Co. v. Crutcher* (Tex.) 141 S. W. 355, 357.

In Pub. St. tit. 25, entitled "Courts of Probate and Estates of Deceased Persons," the words "judge" and "judge of probate" are constantly used when it is apparent the probate court is intended. *Carr v. Corning*, 62 Atl. 168, 169, 73 N. H. 362.

The Legislature often uses the words "court" and "judge," "district court" and "district judge," without discrimination. "Court" will be construed to mean "judge," and "judge" will be construed to mean "court," wherever either construction is necessary to carry into effect the obvious intent of the Legislature. It is held, therefore, that by the words "district court," as used in section 1 of the act in question (Gen. Stat. 1909, § 2282), the Legislature meant to confer upon the judge of the district court, in certain counties, authority to appoint a county auditor. *Sartin v. Snell*, 125 Pac. 47, 49, 87 Kan. 485, Ann. Cas. 1913E, 384.

"Judge of the district court" and "district court" are not strictly speaking convertible terms, but they are so in a popular sense," and under section 6 of the Act of March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. 828, c. 517), which gives such courts the power to review by appeal or writ of error final decisions in the district court, an appeal lies to such court from a judgment of a district court rendered on appeal from an order of a commissioner for the deportation of a Chinese person arrested under section 13 of Exclusion Act Sept. 13, 1888, c. 1015, 25 Stat. 479, which authorizes an appeal from a conviction before a commissioner "to the judge of the district court for the district." *Tsoi Yil v. United States*, 129 Fed. 585, 586, 64 C. C. A. 153 (quoting and adopting definition in *United States v. Gee Lee*, 50 Fed. 271, 1 C. C. A. 516).

#### Justice of the Peace

The word "judge," as used in Code Civ. Proc. § 46, disqualifying a judge for certain reasons, includes a justice of the peace. *Truesdell v. Winne*, 90 N. Y. Supp. 155, 44 Misc. Rep. 451.

The word "judge," as used in Code Civ. Proc. § 1778, which provides that in an action against a corporation to recover for nonpayment of a note or other evidence of a debt due on demand at a particular time, unless defendant serves with a copy of his answer or demurrer an order of a judge directing that the issues be tried, plaintiff may take judgment as by a default after 20 days after service of the complaint, does not include a justice of the peace, since Laws 1892, c. 667, § 6, declares that the term "judge" includes every judicial officer authorized, alone or with others, to hold or preside over a court of record. *Center v. Hoosick River Pulp Co.*, 88 N. Y. Supp. 548, 549, 43 Misc. Rep. 247.

#### Magistrate

A police magistrate of the city of New York, not being a judge, within Laws 1892, p. 1487, c. 677, declaring the term to mean a judicial officer authorized to hold or preside over a court of record, and not being within any of the other classes authorized by Laws 1896, p. 609, c. 547, § 248, to take an acknowledgment of a conveyance of real estate, an acknowledgment to an instrument before such a magistrate does not authorize its admission in evidence, under Code Civ. Proc. § 937. *Tully v. Lewitz*, 93 N. Y. Supp. 829, 833, 50 Misc. Rep. 350.

Magistrates are within Const. art. 5, § 26, providing that judges shall not charge juries in respect to matters of fact, but shall declare the law; they being included in the word "judge" in section 6, and there being nothing to show a different intention in section 26. *Marchbanks v. Marchbanks*, 36 S. E. 438, 58 S. C. 92.

#### As municipal officer

See *Municipal Officer*.

#### As public officer

See *Officer*.

#### Referee

Section 1 of the Bankruptcy Act defines "judges" as meaning a judge of a court of bankruptcy not including the referee. *Mueller v. Nugent*, 22 Sup. Ct. 269, 273, 184 U. S. 1, 46 L. Ed. 405.

Since the word "judge," wherever used in the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544), signifies the judge of the District Court, and not the referee, the provision that an application for confirmation of a composition may be filed in the court of bankruptcy, after the consideration and the cost of the proceedings have been deposited in a place designated by and subject to the order of the judge, requires these matters to be presented to the judge, rather than the referee. In *re Bloodworth-Stembridge Co.*, 178 Fed. 372, 374.

Under Bankruptcy Act July 1, 1898, c. 541, § 18d, 30 Stat. 551, which provides that, when the facts alleged in a petition for involuntary bankruptcy are controverted, "the judge shall determine as soon as may be the issues presented by the pleadings," and section 1a(16), which defines "judge" to mean "a judge of a court of bankruptcy not including the referee," a judge has no authority to make a general reference of such issues to a referee, but is required to exercise his personal judgment in their determination, and where direct issue is joined on the jurisdictional averments, and it appears that the facts for the solution of such primary issues are readily ascertainable, such issues should be determined by the judge, on direct hearing if possible, as a condition precedent to inquiry upon the other issues raised. In *re King*, 179 Fed. 694, 695, 103 C. C. A. 240.

Where an answer is interposed to an involuntary petition in bankruptcy the judge may refer the proceeding to a special commissioner to take the testimony and return the same to the judge, with his opinion, notwithstanding Bankr. Act July 1, 1898, c. 541, § 18, subd. "d," 30 Stat. 551, providing that the judge shall determine as soon as may be the issues presented by the pleadings without the intervention of a jury, except in cases where a jury trial is given by the act, and section 1a, cl. 16, 30 Stat. 544, defining "judge" to mean a judge of a court of bankruptcy, not including a referee. In re Lacov, 134 Fed. 237, 67 C. C. A. 19.

#### Register

"A 'register' is a judge, and the sentence of his court is the judgment of a tribunal of exclusive and peculiar jurisdiction." *Boyd v. Cloud* (Del.) 62 Atl. 294, 299, 5 Pennewill, 479 (quoting and adopting the definition in *Rash v. Purnel* [Del.] 2 Har. 451).

"A register having exclusive jurisdiction of the probate of wills is a 'judge' and the admission of a will to probate is a judicial decision." In re Kerns' Estate, 61 Atl. 573, 575, 212 Pa. 57 (quoting with approval from *Holliday v. Ward*, 19 Pa. 485, 57 Am. Dec. 671).

#### As state officer

See State Officer.

#### JUDGE PRO TEMPORE

Where a district judge is assigned by the Chief Justice of the Supreme Court to hold court in another district than his own, such judge while so acting is a judge pro tempore of the district in which he is sitting. *Dobbs v. State*, 115 Pac. 370, 371, 5 Okl. Cr. 475.

#### JUDGMENT

See Best Judgment; Prejudgment.

The word "judgment," in Rev. St. 1890, § 7900, providing that, where a policy shall be surrendered to the company for a consideration adequate in the "judgment" of the holder, the article of which the section is a part shall not be applicable, implies deliberate action or knowledge of the fact and implies conscious consent. Where a life insurance company, having foreclosed its lien as pledgee of a policy and applied part of its surrender value to the payment of the debt for which the policy stood as security, sent the residue of such surrender value to the beneficiary and insured by its check, which was never received by either, the policy, was not surrendered to the company by the transaction for a consideration adequate in the judgment of the holder. *Burridge v. New York Life Ins. Co.*, 109 S. W. 560, 566, 211 Mo. 158.

The expression, "in the judgment of such commission," in Laws 1895, p. 373, c. 570, providing for the incorporation of associa-

tions for the improvement of the breed of forces and establishing a state racing commission and authorizing the commission to issue licenses for running races if "in the judgment of such commission" a proper case for the issuance of a license is shown, etc., implies a discretion as absolute to grant or refuse an application for a license as do the provisions authorizing the commission to revoke a license if for any reasons the continuance thereof shall not be deemed conducive to the interests of legitimate racing express an absolute discretion to revoke. *People ex rel. Empire City Trotting Club v. State Racing Commission*, 103 N. Y. Supp. 955, 961, 57 Misc. Rep. 331.

As used in a stipulation of facts stating that in the "judgment" of the respondents the bridge in question was not a practical bridge, the word "judgment" was used as synonymous with "opinion" and "belief." *State ex rel. Ellis v. Switzer*, 112 N. W. 297, 300, 79 Neb. 78.

It is not error to instruct the jury to act on their 'judgment;' the law requiring them so to do and their verdict being the expression of their judgment—the word being defined by the *Standard Dictionary* as "the act of judging; the mental operation by which facts are weighed, comparisons and deductions made, and conclusions reached; the result of judging; the decision or conclusion reached, as after consideration or deliberation." *State v. Tedder*, 65 S. E. 449, 451, 83 S. C. 437.

#### JUDGMENT (In Law)

See Arrest of Judgment; Conclusive Judgment; Consent Judgment; Docketing Judgment; Dormant Judgment; Final Decree or Judgment; General Judgment; Integral Part of Judgment; Interlocutory Judgment; Irregular Judgment; Money Judgment; Necessarily Affect Judgment; Proper Judgment; Punitive Judgment; Rendition of Judgment; Signed Judgment; Special Judgment; Stay Proceedings on a Judgment; Valid Judgment; Void Judgment.

Direct attack in judgment, see Direct Attack.

Entry of judgment, see Enter—Entry (In Practice).

Error in judgment as error of fact, see Error of Fact.

Such judgment, see Such.

Suit on judgment distinguished from scire facias, see Suit.

Tender of, see Tender.

Voluntary payment of, see Voluntary Payment.

See, also, Decree; Full Faith and Credit.

A "judgment" is what the court pronounces. *Groton Bridge & Mfg. Co. v. Clark*.

Pressed Brick Co., 136 Fed. 27, 30, 68 C. C. A. 577.

A judgment is a judicial act, being what is considered and ordered by the court. *McKnight v. Ballif*, 100 Pac. 433, 434, 45 Colo. 138.

A judgment is the judicial determination or sentence of a court rendered in a cause within its jurisdiction. *Peter v. Parkinson*, 93 N. E. 197, 198, 83 Ohio St. 38, Ann. Cas. 1912A, 751.

A "judgment" of a court is a final determination and adjudication of a controversy or proceeding, and may be formally entered in a so-called judgment book, orally announced by the court and recorded in the minutes by the clerk, or in the form of an order signed by the presiding judge finally disposing of the case. *State ex rel. Engelhard v. Weber*, 105 N. W. 490, 492, 96 Minn. 422, 113 Am. St. Rep. 630.

The "judgment" of the court is the pronouncement of the judge on the issue submitted to him; the record being merely historical and evidentiary. *Montgomery v. Viers*, 114 S. W. 251, 252, 130 Ky. 694.

A "judgment" is an adjudication by a court, whereby the merits of a cause are determined. *Melton v. St. Louis, I. M. & S. R. Co.*, 139 S. W. 289, 291, 99 Ark. 433.

"Judgment" is a judicial determination of a cause adjudicating between real parties upon which a real interest has been settled. *McNair v. Toler*, 21 Minn. 175, 185.

That only is a "judgment" which is pronounced between the parties to an action upon the matters submitted to the court for decision; a judgment being the final determination of the rights of the parties in an action. *Judge v. Powers* (Iowa) 136 N. W. 315, 317 (quoting 4 Words and Phrases, 3828, 3829).

At law a "judgment" is a unit as to all defendants against whom it is rendered, and cannot be reversed as to part of them and affirmed as to others. *Seymour v. O. S. Richardson Fueling Co.*, 68 N. E. 716, 718, 205 Ill. 77 (quoting and adopting the language of *Janson v. Varnum*, 89 Ill. 100).

Under the Code, "judgment" is the apt word in proceedings of an equitable nature as well as in those which are strictly legal. *Gray v. Eurich*, 96 N. W. 343, 2 Neb. (Unof.) 194; but the word "judgment," as used in Code W. Va. 1899, c. 106, providing that, when any action at law or suit in equity is about to be or is instituted, the plaintiff at the commencement of the action or suit, and at any time thereafter and before judgment, may have an order of attachment, is used in its restricted sense as relating alone to suits at law. *Craddock v. Fulton*, 140 Fed. 426, 429, 430.

A "judgment" against an executor merely ascertaining the debt is a "judgment quan-

do." *Whitaker v. Whitaker*, 50 S. E. 630, 631, 138 N. C. 205.

According to 3 Bouvier's Inst. § 3297, a "judgment" is something more than the finding of the facts in controversy, but is a solemn sentence of the law pronounced by the court upon the facts found. According to Black on Judgments, § 1, a "judgment" is always a declaration that a liability recognized as within the jural sphere does or does not exist; and, as an action is instituted for the enforcement of a right or the redress of an injury, a "judgment" as the culmination of the action declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other, but, as no right can exist without a correlative duty, nor any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms or else denies that such a duty rests upon the person against whom the aid of the law is invoked. From these definitions, it follows that no matter how clearly and decisively the entries in the record may indicate what the ultimate "judgment" or the sentence of the law when pronounced will be, until it is so pronounced, there is no "judgment," and even though the court has fully found the facts and stated the conclusions of law, or the jury has returned a complete verdict which has been accepted, neither of these acts will constitute a "judgment." *Neyens v. Flesher*, 79 N. E. 1087, 1088, 39 Ind. App. 399 (citing *Needham v. Gillaspay*, 49 Ind. 245; *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220; *Mahoning Bank's Appeal*, 32 Pa. 160; *Murray v. Scribner*, 35 N. W. 311, 70 Wis. 228; *Black, Judgm.* § 8; *Putnam v. Crombie* [N. Y.] 84 Barb. 232; *Warran v. Shuman*, 5 Tex. 441; *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782; *Lisle v. Rhea*, 9 Mo. 172; *Northcutt v. Buckles*, 60 Ind. 577; *City of Jeffersonville v. Tomlin*, 35 N. E. 29, 7 Ind. App. 681; *James v. Lake Erie & W. Ry. Co.*, 43 N. E. 876, 144 Ind. 630).

As used in Rev. St. 1896, art. 996, providing that a county court has appellate jurisdiction when the judgment or amount in controversy, or the judgment rendered, shall exceed \$100, exclusive of costs and interest, the word "judgment" and the words "judgment rendered" have the same meaning. *Gulf, C. & S. F. Ry. Co. v. Cunnigan*, 67 S. W. 888, 889, 95 Tex. 439.

#### As conclusion of facts or law

A "judgment" is the conclusion of the law on the facts regularly and properly established in the course of judicial proceedings. *Beasley v. Aberdeen & R. R. Co.*, 61 S. E. 453, 455, 147 N. C. 302.

A "judgment" is "the conclusion of law upon facts found or admitted by the parties or upon their default in the course of a suit." *Smith v. Whaley*, 61 Atl. 173, 175, 27 R. I. 185 (citing 2 Bouv. Law Dict. p. 25).

A "judgment" is the conclusion of the law on the pleadings and evidence. *Rutter v. Carothers*, 122 S. W. 1056, 1059, 223 Mo. 631.

A "judgment" is the conclusion of law on the pleadings, and, if there are no pleadings on which to found the judgment, there can be no judgment. *Long Acre Colliery Co. v. Creel*, 50 S. E. 430, 431, 57 W. Va. 347.

#### As decision or matter in record

Unless the statute gives it a different meaning, a "judgment" is the decision pronounced by the court upon the matter contained in the record. *Burke v. Burke*, 119 N. W. 129, 131, 142 Iowa, 206.

"A 'judgment' to be valid and binding must be the decision or sentence of the law pronounced by a court or other competent tribunal, upon a matter contained in the record." *Hanley v. City of Medford*, 108 Pac. 188, 190, 56 Or. 171 (citing 1 Freeman, *Judg.* § 2).

#### As final determination

A "judgment" at common law is the final determination pronounced by the court upon the matters submitted to it. *Allis-Chalmers Co. v. United States*, 162 Fed. 679, 680, 89 C. C. A. 471 (citing 23 Cyc. p. 665).

The statutory definition of a "judgment" is the "final determination of the rights of the parties in the action." *Conradt v. Lepper*, 78 Pac. 1, 2, 13 Wyo. 99, 3 Ann. Cas. 627; *Forrester & MacGinniss v. Boston & M. Consol-Copper & Silver Min. Co.*, 74 Pac. 1088, 1093, 29 Mont. 397; *Blohme v. Schmancke*, 61 S. E. 1060, 1062, 81 S. C. 81; *Callanan v. Votruba*, 74 N. W. 13, 104 Iowa, 672, 40 L. R. A. 375, 65 Am. St. Rep. 538.

The term "judgment" in the statutory sense means a "final adjudication of the rights of the parties in an action." It is so used in the statute providing that a defendant against whom a judgment has been rendered or any person interested therein may have it discharged. *Dunton v. McCook*, 94 N. W. 942, 944, 120 Iowa, 444.

A "judgment" within Ballinger's Ann. Codes & St. § 5080 (Pierce's Code, § 719, providing that a judgment is the final determination of the rights of the parties, is the determination of the court on the issues, which finally ascertains and fixes the rights of the parties in the particular suit in relation to the subject-matter of the litigation, and puts an end to the suit by specifically granting or denying the remedy sought in the action. *McGuire v. Bryant Lumber & Shingle Mill Co.*, 102 Pac. 237, 238, 53 Wash. 425.

In Black's Law Dict., a "judgment" is defined as "the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a le-

gal duty or liability does or does not exist." It is the final consideration and determination of a court of competent jurisdiction on the matters submitted to it. Though pronounced or awarded by the judges, it is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judge, but the settled and invariable principles of justice. It is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. A so-called "judgment," to the effect that, the grand jury having failed to indict a certain person, it was ordered, in accordance with the statute, that all costs be taxed against the prosecuting witness, did not amount to a judgment under Rev. St. 1899, § 766, defining a "judgment" as a final determination of the right of the parties. *State v. French*, 93 S. W. 295, 296, 118 Mo. App. 15 (quoting and adopting 1 Black, *Judgm.* [2 Ed.] pp. 2, 6).

Code, § 4100, gives the Supreme Court appellate jurisdiction over all judgments except as otherwise provided by law, and section 3769 provides that every final adjudication of the rights of the parties is a judgment. Held, that the word "judgment," in section 4100, meant a final judgment, so that a judgment for costs, which does not finally determine the rights of the parties, is not final and appealable; costs being merely incidental to the main action. *Keller v. Harrison* (Iowa) 129 N. W. 57, 58.

Under Kirby's Dig. § 4665, providing for appeals from justices of the peace to the circuit court, section 6228, defining a "judgment" as the final determination of the rights of the parties in an action, and sections 3224-3226, which expressly authorize a proceeding to quash a void execution in actions before justices of the peace, a ruling of a justice, refusing to quash an execution in a proceeding on account, and on an order of general attachment entered against a garnishee therein, is final and appealable. *Metcalf v. St. Louis, I. M. & S. Ry. Co.*, 141 S. W. 1167, 1168, 101 Ark. 193.

A "judgment" being the final determination in a judicial controversy, issues of fact cannot be tendered thereon, if valid, so that, where the replication admitted the validity of a judgment against a subtenant in attachment to enforce a landlord's lien, allegations of a waiver of the landlord's lien were not a defense against the judgment. *Hudson v. Wright*, 51 South. 389, 391, 164 Ala. 390, 137 Am. St. Rep. 55.

A "judgment" implies the final sentence or decision reached by a court of competent jurisdiction in due course of legal proceedings, wherein the rights of the parties have been judicially settled, and it is conclusive against all parties, except on appeal or direct attack. *West v. State*, 79 N. E. 361, 363, 168 Ind. 77.

A deposit of money in court by a party to a suit pending therein, to abide the "judgment" of the court and to be applied in satisfaction of such judgment as the court may direct, is a deposit to abide the final judgment of the Supreme Court, and a judgment rendered by the superior court from which an appeal is pending is not a "judgment" prescribing the condition of the deposit. *Higgins v. Keyes*, 90 Pac. 972, 973, 5 Cal. App. 482.

A "judgment" is the final determination of the rights of the parties in action. Consequently, on the rendition of a judgment, the right of action to sue for malicious prosecution accrues, and the running of limitations is not tolled by the suing out of the writ of error; such writ not being a continuation of the old suit. *Levering v. National Bank of Morrow County*, 100 N. E. 322, 324, 87 Ohio St. 117, 43 L. R. A. (N. S.) 611, Ann. Cas. 1913E, 917 (citing General Code, § 11,582).

A "judgment" is the final determination of the rights of the parties in an action. Section 5916, Comp. Laws 1909. *Fooshee & Brunson v. Smith*, 124 Pac. 1070, 1071, 1072, 34 Okl. 247.

#### Same—Interlocutory judgments

Code Civ. Proc. N. Y. § 1200, provides that a "judgment" is either interlocutory or the final determination of the rights of the parties in the action. The "judgment" referred to in section 547, added by Laws 1908, p. 462, c. 166, authorizing judgment on the pleadings after issue joined where one is entitled thereto, may be either an interlocutory or final judgment, though the Code does not define an "interlocutory judgment," which is an intermediate or incomplete judgment, where the rights of the parties are settled, but something remains to be done. *White v. Gibson*, 113 N. Y. Supp. 983, 985, 61 Misc. Rep. 436.

Under Acts 30th Leg. c. 133, authorizing an appeal from a judgment sustaining a plea of privilege, such a "judgment," though interlocutory, is final for the purpose of an appeal. *Luter v. Ihnken* (Tex.) 143 S. W. 675.

#### As sentence of the law

"At common law a 'judgment' is the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in or before such court or judge, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist. It is 'an adjudication of the rights of the parties in respect to the claim involved.'" *Marsh v. Johnston*, 108 N. Y. Supp. 161, 123 App. Div. 596 (quoting and adopting definition in 23 Cyc. p. 665; citing *McNulty v. Hurd*, 72 N. Y. 518, 521; In re *Lyman*, 14 N. Y. Supp. 198, 60 Hun, 82, 84).

A "judgment" is the sentence of the law decreed and pronounced after due inquiry

and deliberation. In re *Lance*, 106 N. Y. Supp. 211, 214, 55 Misc. Rep. 13.

A "judgment" is the application of the law to the facts found, the sentence of the law upon the record, the determination of the cause, the act of the whole court to effectuate the reasoning and findings of the opinion. *Donnell v. Wright*, 97 S. W. 928, 932, 199 Mo. 304.

"A 'judgment' is a decision or sentence of the law." *Fay v. Sullens*, 81 Pac. 426, 427, 15 Okl. 171.

A "judgment" is the sentence of the law upon the record. *Howell v. Sherwood*, 147 S. W. 810, 819, 242 Mo. 513; *State ex rel. McManus v. Muench*, 117 S. W. 25, 29, 217 Mo. 124, 129 Am. St. Rep. 536.

A "judgment" is the sentence of the law, pronounced by a court of competent jurisdiction, as the result of proceedings instituted. It is a judicial act, and, to be valid, must be pronounced by the court at a time and place appointed by law, and in the form it requires. *People ex rel. Board of Com'rs of Montrose County v. Hebel*, 76 Pac. 550, 19 Colo. App. 523 (citing *Cooper v. American Cent. Ins. Co.*, 3 Colo. 318); *O'Brophy v. Era Gold Min. Co.*, 85 Pac. 679, 683, 36 Colo. 247 (quoting and adopting the definition in *Cooper v. American Cent. Ins. Co.*, 3 Colo. 318).

A "judgment" is but the conclusion in a syllogism having for its major and minor premises the issues raised by the pleadings and the proofs thereon. A judgment is the sentence of the law upon the record. *Spindle v. Hyde*, 152 S. W. 19, 24, 247 Mo. 32.

#### Entry

The "judgment" of a court is that which it pronounces, that is, the judicial act by which it declares the decision of the law upon the matter at issue; its entry being a ministerial act affording permanent evidence of the judicial act. *Coleman v. Zapp*, 151 S. W. 1040, 1041, 105 Tex. 491.

The rendition of a judgment is a judicial act, but its entry is purely ministerial, and, in absence of statute, an entry is not essential, though a judgment is essential to the validity of the entry; but, in the absence of statute, there is a distinction between a judgment and a decree, in that a "judgment" can only speak by the record, while a "decree" takes effect immediately, and its enrollment adds nothing to its force. *Burke v. Burke*, 119 N. W. 129, 130, 142 Iowa, 206.

A "judgment" is a judicial act of the court, and it is as final when pronounced by the court as when it is entered and recorded by the clerk as required by the statute; the entry being the ministerial act of the clerk. *Central Trust Co. of California v. Holmes Min. Co.*, 97 Pac. 390, 391, 30 Nev. 437.

A "judgment" is a decision or sentence of the law, pronounced by the court and en-

tered upon its docket, minutes, or record. A mere oral decision is not a "judgment," from which an appeal can be entered, until it has been put in writing and entered as such. *Easterling v. State*, 74 S. E. 899, 900, 11 Ga. App. 134 (citing 4 Words & Phrases, p. 3832).

The judgment issues from the court, not from the attorneys or the clerk of the court. It precedes a formula and is authority for which the formula is prepared; but the formula constitutes no part of the judgment. It is only the evidence of the existence of a judgment that enables plaintiff to have it enforced. The rendition of a judgment is a judicial act of the court pronouncing the sentence of law upon the facts in controversy as ascertained by the pleadings and verdict. *Blohme v. Schmancke*, 61 S. E. 1060, 1062, 81 S. C. 81 (quoting *Clark v. Melton*, 19 S. C. 498; 1 Black, Judgm.).

Comp. Laws 1907, § 3195, provides that the clerk must enter judgments in a book "called the judgment book." Section 3197 provides that, immediately after entering the judgment, the clerk must attach and file certain papers including "a copy of the judgment," which constitutes the judgment roll. Section 3301 provides that an appeal may be taken within six months from the entry of the judgment appealed from. Held that, before an appeal can be taken from a judgment, it must be entered in the judgment book. *Robinson v. Salt Lake City*, 109 Pac. 817, 819, 37 Utah, 520.

#### Form

An entry in the docket of a justice that I "find" that there is due the plaintiff the sum of \$58, was a "judgment" notwithstanding the use of the word "find." *Fowler v. Thomsen*, 94 N. W. 810, 811, 68 Neb. 578.

The "judgment" of a court is its pronouncement from the bench, the written order being merely the evidence of what the court decided, and the requirement that the judge sign it is directory. *United States v. Stoller*, 180 Fed. 910, 913.

An oral opinion of a judge sustaining a motion for a preliminary injunction is not a "judgment," either under the Ohio statutes or the rule of the federal courts, nor does it become effective as an order and binding on the parties until reduced to writing and entered of record, nor, in Ohio, until bond has been given and approved. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, 141.

The "judgment" contemplated as the indispensable prerequisite to a final judgment against a garnishee is a formal, duly entered judgment—one capable of present enforcement. A mere verbal announcement by a justice of the peace after the trial of a cause as to what conclusions he has reached does not in law constitute a "judgment." Such an announcement is not a judgment upon which an execution can issue, or which can

be enforced in any way save by its being properly reduced to writing and signed by the justice. *Nashville, C. & St. L. Ry. v. Brown*, 60 S. E. 319, 320, 3 Ga. App. 561 (citing *Hargrove v. Turner*, 34 S. E. 1, 108 Ga. 580, 582).

Entry of ruling on a motion to strike or quash or on demurrer to a complaint, "Being considered by the court overruled," is but a memorandum of the ruling, and not a sufficient "judgment" to authorize review. *Ferrell v. City of Opelika*, 39 South. 249, 250, 144 Ala. 135 (citing *Morgan v. Flexner*, 16 South. 716, 105 Ala. 356; *Hereford v. Combs*, 28 South. 582, 126 Ala. 369; *Cartledge v. Sloan*, 26 South. 918, 124 Ala. 596; *Bessemer Land & Improvement Co. v. Dubose*, 28 South. 380, 125 Ala. 442; *Dantzler v. Swift Creek Mill Co.*, 30 South. 674, 128 Ala. 410).

Where a court ordered, adjudged, and decreed that defendant within 10 days pay plaintiff a certain sum, instead of adopting the expression "that plaintiff do have and recover," etc., the determination was a judgment within the meaning of Code Civ. Proc. § 577, defining a "judgment" as a final determination of the rights of the parties in an action, and it was not merely an interlocutory order, for, no particular form being prescribed by the Code, the test of the sufficiency of a judgment must be the substance, rather than its form. *Hentig v. Johnson*, 96 Pac. 390, 391, 8 Cal. App. 221.

A "judgment" is the final determination of the rights of the parties in an action or proceeding, as expressly provided by Rev. Codes, § 6710, and while, when there is an answer, any relief may be awarded consistent with the complaint and within the issues, as expressly provided by section 6713, yet the award may not extend further, and, when trial is to a jury, the judgment must be in conformity with the verdict, as expressly provided by section 6800, and hence in ejectment, where plaintiff sought to recover only part of a tract, which part was all that the verdict awarded him, when properly construed, a judgment adjudicating title to the undisputed portion and awarding plaintiff restitution thereof was erroneous. *Consolidated Gold & Sapphire Mining Co. v. Struthers*, 111 Pac. 152, 155, 41 Mont. 565.

A sentence, reciting that "it is therefore ordered that defendant be confined in the penitentiary for a term of ten years," is a final "judgment," though the term "considered" is not used. *State v. Branton*, 87 Pac. 535, 538, 49 Or. 86.

A judgment of conviction for violating a municipal ordinance, reciting that accused stood "committed to house of correction" until a fine and costs should be "worked out at 50 cents per day," was not bad as failing to show what house was meant, or whether the fine was to be worked out outside or inside



the house. *City of Chicago v. Coleman*, 98 N. E. 521, 522, 254 Ill. 388.

The entry of "judgment satisfied" is not a part of the judgment of the court. It is an entry of record, to be used as evidence in case there is a question about plaintiff's right afterwards to collect the judgment. This entry has no effect on plaintiff's right to appeal from the judgment itself. *Preston v. Henshaw*, 77 N. E. 1153, 192 Mass. 34.

Under Code Civ. Proc. § 1007, providing that a final "judgment" dismissing the complaint either before or after trial does not prevent a new action for the same cause of action unless it expressly declares or it appears by the judgment roll that it is rendered upon its merits, a "judgment" to be a bar to another action for the same cause of action must be a judgment on the merits, and the fact that it is on the merits must appear by express declaration, either from the judgment or elsewhere in the judgment roll. *Glass v. Basin & Bay State Min. Co.*, 90 Pac. 753, 755, 35 Mont. 567.

Under Code Cr. Proc. 1895, art. 831, defining a "judgment," and declaring what it shall contain, a judgment consists of the facts judicially ascertained, together with the manner of ascertaining them, entered of record, and the recorded declaration of the court pronouncing the legal consequence of the facts thus judicially ascertained, and both of these parts are equally essential. *Robinson v. State*, 126 S. W. 276, 279, 58 Tex. Cr. R. 550.

An instrument headed, "Account made by R.," indorsed, "Within account approved," over the signature, "B., County Judge of P. County, Chickasaw Nation," and "recorded" over the signature of the clerk, is not a "judgment," defined by Mansf. Dig. Ark. § 5163 (Ind. T. Ann. St. 1899, § 3368), as the final determination of the rights of the parties in an action. *Howell v. Brown*, 83 S. W. 170, 177, 5 Ind. T. 718.

"No technical form is required to constitute an appealable 'judgment or decree.' Its effect determines its appealability, and, if it concludes the litigation in the trial court, it is sufficient." *Willis v. Maysville & B. S. R. Co.*, 92 S. W. 604, 606, 122 Ky. 658, 13 Ann. Cas. 74.

#### Power to enforce

The word "judgment," as used in Rev. St. 1895, art. 218, authorizing the issuance of a writ of garnishment without bond, where plaintiff has judgment, means a judgment unsatisfied; a judgment actually satisfied is in the sense of a statute no longer a judgment for it is *functus officio*. Neither would a judgment lacking the elements of finality satisfy the definition, for in such case something would remain to be determined. For a like reason, a judgment marked "satisfied" by an official entry true at the time, duly authoriz-

ed and duly made and evidenced by an execution duly returned "satisfied" by an official entry true at the time, legally authorized and duly made, would not satisfy the requirement, because such a judgment is not *prima facie* enforceable. *Masterson v. Keller*, 89 S. W. 803, 804, 40 Tex. Civ. App. 333.

#### Award for costs

Under Code Civ. Proc. §§ 779, 1251, providing for the collection of awards for costs out of personal property of the person against whom they are granted, such awards are not "judgments," and constitute no liens against the debtor's real estate. *Clinton v. South Shore Natural Gas & Fuel Co.*, 113 N. Y. Supp. 289, 290, 61 Misc. Rep. 339.

#### Adjudication in probate

The "judgment" referred to in Rev. Codes 1899, § 6296, providing that the probate court must render judgment either rejecting a will or admitting it to probate, is the same as or a part of the decree or final order defined in section 6233 as the final determination of the rights of the parties, which in the county court is the document signed by the judge and filed, embracing findings, conclusions, and statement of relief awarded. In *re Lemery's Estate*, 107 N. W. 865, 966, 15 N. D. 312.

#### Allowance of claim in probate

An allowance by a probate court of a claim against an estate is a "judgment." *Owsley v. Central Trust Co. of New York*, 196 Fed. 412, 415.

#### Allowance of claim in bankruptcy

Though the rule that a creditor who has not stipulated for interest and accepts payment of the indebtedness in full cannot subsequently recover interest thereon is applicable to the payment of claims by a trustee in bankruptcy, allowed claims proved in bankruptcy proceedings as required by Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560, § 57, and General Order 21 (89 Fed. ix, 32 C. C. A. xxii)), are entitled to be treated as judgments, and, as such, to interest before and after allowance. In *re John Osborn's Sons & Co.*, 177 Fed. 184, 186, 100 C. C. A. 392, 29 L. R. A. (N. S.) 887.

#### Allowance of claim in insolvency

In proceedings in the county court under Cobbey's St. 1907, §§ 3500-3545, relating to assignments for benefit of creditors, if the deed of assignment is void, an order allowing claims of creditors is not a judgment, and the distribution of the assigned property and the discharge of the assignee do not amount to a judicial exhaustion of the property of the assignor. *Talmage v. Minton-Woodward Co.*, 118 N. W. 1099, 1100, 83 Neb. 29.

#### Allowance of damages in highway establishment proceedings

Allowances made to property owners as damages in highway establishment proceed-

ings are not "judgments" against the county; the county not being a party to the proceedings, and no relief being asked against it. *Lortz v. Davis*, 97 N. E. 200, 203, 50 Ind. App. 337.

#### As cause of action

A "judgment" on which execution has been issued is not a cause of action within the purview of Rev. St. 1895, art. 3367, providing that limitations shall not run on a cause of action if the defendant shall be without the limits of the state; for, even though the judgment debtor be without the state and leave no property therein, execution may be issued and the judgment be kept alive and is efficacious as a second judgment. Where no execution has been issued on a judgment within 12 months from its rendition, and none can be issued because of the inhibition of Rev. St. 1895, art. 2326a, and the judgment can only be revived under *scire facias* provided by article 3361, the judgment is a cause of action within the purview of article 3367, stopping the running of limitations during the absence of the defendant from the jurisdiction. *Spiller v. Hollinger* (Tex.) 148 S. W. 338, 339.

A "judgment" is a cause or right of action of the highest nature and an action thereon accrues when the judgment is rendered. *Snell v. Rue*, 101 N. W. 10, 11, 72 Neb. 571, 117 Am. St. Rep. 813.

Rev. St. 1895, art. 2326a, provides that, if no execution is issued within 12 months after the rendition of a judgment, the judgment shall become dormant, and no execution shall be issued unless it shall be revived, but, where the first execution has issued within 12 months, it shall not become dormant unless 10 years shall have elapsed from the issuance of execution thereon. Article 1664 applies the same provisions to judgments of justices of the peace. Held, that as a dormant judgment is one on which execution was not issued within 12 months or one which has not been satisfied nor extinguished by lapse of time, but which has remained so long unexecuted that execution cannot now be issued upon it without first reviving the judgment, a judgment upon which judgment was first issued within 12 months after its rendition still subsists after the lapse of 10 years from execution, being the same sort of judgment as one on which execution was not issued within 12 months, and no time being prescribed in which it can be revived, it is within article 3358, providing that every action other than for the recovery of real estate shall be brought within 4 years after accrual of the right of action, and so such dormant judgment is a cause of action within the purview of article 3367, providing for a stoppage of the running of limitations on any cause of action during defendant's absence from the jurisdiction. *Spiller v. Hollinger* (Tex.) 148 S. W. 338, 341.

2 Wds. & P. 2D SER.—79

#### As chose in action

See Chose in Action.

#### Claim distinguished

The word "claim," as used in the Code, relating to the liability of stockholders of a corporation, cannot be intended to be synonymous with the word "judgment"; hence a creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself and other creditors to enforce stockholders' liabilities, as defined by Rev. Codes 1899, § 2902, §§ 5767-5770, authorizing such an action. *Marshall Wells Hardware Co. v. New Era Coal Co.*, 100 N. W. 1084, 1086, 13 N. D. 396.

Under Kirby's Dig. §§ 6169, 6228, declaring that the rights of parties are determined by a judicial examination of the issues, and defining a "judgment" as the final determination of the rights of the parties in an action, an assessment for benefits received by the public roads in a drainage district established in pursuance of section 1414 et seq. is not a judgment against the county, though the assessment has been approved by the county court, but it is only a claim the legal right to recover which can only be determined on a presentation thereof to the county court for allowance. *Rolfe v. Spybuck Drainage Dist. No. 1*, 140 S. W. 988, 990, 101 Ark. 29.

#### As a contract

See Contract.

#### As debt in general

See Debt.

#### As a debt of record

"It is a well-settled proposition that a 'judgment' for money rendered by a court of competent jurisdiction creates a debt of record for which the person against whom it is rendered is liable, and an action may be maintained thereon against the judgment debtor. Such a judgment, rendered either in an action arising out of contract or tort, until set aside by some legal method, is conclusive evidence of a fixed, ascertained, and legitimate debt of the person against whom it is rendered." *Heini v. Terre Haute*, 66 N. E. 450, 452, 161 Ind. 44 (citing *Davidson v. Nebaker*, 21 Ind. 334, 83 Am. Dec. 350; *Gould v. Hayden*, 63 Ind. 443; *Becknell v. Becknell*, 10 N. E. 414, 110 Ind. 42; *City of Hammond v. Evans*, 55 N. E. 784, 23 Ind. App. 501; *Black, Judg. §§ 1, 7, 11; Freeman Judgm. § 217*).

#### As decision of court

See Decision (Of Court).

#### Decision distinguished and synonymous

See Decision.

#### Decision in criminal proceeding

The "judgment" is the sentence of the court upon the verdict or finding of guilty. *People v. Markham*, 99 N. Y. Supp. 1092,

1093, 114 App. Div. 387 (citing *People v. Bradner*, 13 N. E. 87, 91, 107 N. Y. 1, 11; *People v. Bork*, 78 N. Y. 346, 350; *People v. Canepi*, 74 N. E. 473, 474, 181 N. Y. 398, 402); *People ex rel. Dauchy v. Pitts*, 103 N. Y. Supp. 258, 259, 118 App. Div. 457.

The time at which a judgment or sentence of imprisonment shall be carried into execution, forms no part of the "judgment" which is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution, so that, where the penalty is imprisonment, the sentence may be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or some legal authority. In *re Collins*, 97 Pac. 188, 190, 8 Cal. App. 367; *Ex parte Eldridge*, 106 Pac. 980, 981, 3 Okl. Cr. 499, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967 (quoting and adopting definitions in *Ex parte Ridley*, 106 Pac. 553, 3 Okl. Cr. 350, 26 L. R. A. [N. S.] 110, and In *re Collins*, 97 Pac. 188, 8 Cal. App. 367).

In common parlance the words "conviction" and "judgment" are used interchangeably, and this is done in Acts 27th Gen. Assm. p. 58, c. 109, authorizing a longer term of imprisonment for burglary and larceny in case of two prior convictions referred to in the indictment. *State v. Smith*, 106 N. W. 187, 188, 129 Iowa, 709, 4 L. R. A. (N. S.) 539, 6 Ann. Cas. 1023.

Since the Code of Criminal Procedure requires judgment to be entered in criminal cases as a matter of course on the return of a verdict, the incompetency of a witness based on his conviction of crime cannot be established by producing only such a judgment. To show such incompetency the record of a conviction showing sentence must be produced. If that which is called the judgment in the criminal procedure of the state were, in its legal effect, the same as a judgment of conviction at common law, such judgment would be proper evidence of incompetency; but at common law the judgment was the final act of the court adjudging the guilt, and included that which is now treated separately as the sentence. It was pronounced after the court had heard what the accused could say in bar of it, and, when it had been rendered, the sanction of both the court and jury was given to the conviction. Under the statutory procedure the judgment adjudges accused to be guilty and fixes the punishment, and is merely the consequence of the verdict, and the court in rendering it finally determines nothing as to the sufficiency of the procedure and evidence to justify the conviction. *Gulf, C. & S. F. R. Co. v. Johnson*, 81 S. W. 4, 5, 98 Tex. 76.

Court and Practice Act 1905, § 473, provides that the Supreme Court may, on petition within one year, grant to a person aggrieved by any order, decree, decision, or

judgment of the superior court, who has failed to file or prosecute a petition for a new trial because of lack of evidence newly discovered, the right to file a motion for a new trial. Gen. Laws 1896, c. 251, § 3, for which such section was substituted, affords such remedy in the case of "indictment or other criminal prosecutions in which verdict or judgment shall have been rendered against petitioner." Held, that the word "judgment" in section 473 was used in its broad sense, and included a sentence in a criminal prosecution, and the fact that the application of the remedy to criminal prosecutions might cause inconvenience in cases in which the sentence had been wholly or partly executed would not be ground for not applying it to such prosecutions. *State v. Lynch*, 68 Atl. 315, 28 R. I. 463.

#### Decree

The final "decree" of a court of equity is often alluded to as its "judgment"; the word "judgment" being used as synonymous, whether applied to a decree in chancery or a judgment at law. *Hudson Trust Co. v. Boyd*, 84 Atl. 715, 717, 80 N. J. Eq. 267.

Since by the Code distinctions are abolished, judgments at law and decrees in equity are all "judgments." *Matthews v. Wilson*, 67 N. E. 280, 282, 31 Ind. App. 90.

The terms "judgment" and "decree," while strictly speaking applicable to suits at law, and to suits in chancery, are usually employed as convertible terms, especially as the statute provides that all general provisions, phrases, and expressions shall be liberally construed in order that the true intent and meaning of the Legislature may be fully carried out. *Lamson v. Hutchings*, 118 Fed. 321, 323, 55 C. C. A. 245.

As used in B. & C. Comp. § 59, permitting a defendant, against whom service of summons by publication is ordered, to defend after judgment upon good cause shown, and section 396, providing that chapter 5, which includes section 59, shall apply to suits in equity, the term "judgment" includes "decrees," so that a decree of mortgage foreclosure, based on service by publication, may be vacated, and the defendant therein allowed to defend. *Waymire v. Shipley*, 97 Pac. 807, 808, 52 Or. 464 (citing 4 Words and Phrases, p. 3835).

The rendition of a judgment is a judicial act, but its entry is purely ministerial, and, in absence of statute, an entry is not essential, though a judgment is essential to the validity of the entry; but, in the absence of statute, there is a distinction between a judgment and a decree, in that a "judgment" can only speak by the record, while a "decree" takes effect immediately, and its enrollment adds nothing to its force. *Burke v. Burke*, 119 N. W. 129, 130, 142 Iowa, 206.

A claim evidenced by a final decree in equity is a debt established by "judgment,"

within Court and Practice Act, § 1027, giving judgment creditors a right of action on administration bonds. *Probate Court of City of Pawtucket v. Williams*, 73 Atl. 382, 386, 30 R. I. 144, 19 Ann. Cas. 554.

While decrees in equity often extend to matters beyond the purview of judgments at law, they are nevertheless judgments within Code Civ. Proc. § 1000, defining a judgment as the final determination of the rights of the parties in an action or proceeding, and, so far as the decree awards a recovery of money, it is in nowise different from judgments at law. *Raymond v. Blancgrass*, 93 Pac. 648, 651, 36 Mont. 449, 15 L. R. A. (N. S.) 976.

A decree of divorce, which required the husband to pay to the wife a specified sum as a part of her share of the community property of the parties and attorney's fees, and a specified sum per month for the support of the children of the parties, is a "judgment" within Rem. & Bal. Code, § 457, making judgments bear interest and the sums awarded bear interest; there being no distinction under the Code between "decrees" and "judgment." *Smith v. Smith*, 115 Pac. 166, 167, 63 Wash. 288.

In view of code, § 2998, declaring that all decrees for money may be enforced by execution, and sections 3002-3007, requiring clerks of courts to issue executions on judgments rendered in their respective courts and section 2970, declaring the word "judgment" to include decrees, a master authorized to sell land under a decree to enforce a vendor's lien thereon is authorized to issue an execution for unpaid balance, though such decree does not, in terms, provide therefor. *Hyder v. Butler*, 52 S. W. 876, 877, 103 Tenn. 289.

Gen. St. 1887, § 1145, provided that writs of error from judgments and decrees of the superior court might be brought to the Supreme Court of Errors to review matters of law only, and by Pub. Acts 1897, c. 194, the words "and decrees" were dropped from section 1145. Held, that such amendment did not prevent the suing out of a writ of error to review a decree in equity, since the words "judgments of the superior court," as used in section 819, Gen. St. 1902, include final decisions of that court in equity. *Cary v. Phoenix Ins. Co.*, 78 Atl. 426, 429, 83 Conn. 690.

#### **Discharge in bankruptcy**

A discharge in bankruptcy is nothing more than a "judgment" of the federal court by which it is granted and must be proved when offered in evidence in the same manner as any other judgment. *Hamon v. Foust*, 150 S. W. 418, 127 Tenn. 32.

#### **As evidence of indebtedness**

See Evidence of Indebtedness.

#### **Exclusion of alien**

A certificate, made by a United States commissioner, that a certain Chinese person

was tried before him for being unlawfully in the United States and discharged, is not a "judgment," nor copy of a judgment, and is not admissible in evidence to prove the fact so recited. *Ex parte Hung Foot*, 174 Fed. 70, 71.

#### **Findings of court**

A "judgment" is a final determination of the rights of parties in an action, and a finding of facts by the court corresponding to the verdict of a jury is not a judgment. *Nelson v. Schmoller*, 110 N. W. 658, 659, 77 Neb. 717.

#### **Same—Finding and certificate on inquisition of insanity**

An inquest of insanity held by two justices of the peace upon the alleged insanity of any person or inhabitant of their county, and their certificate that said person therein named is insane and a proper subject for treatment in the hospital for the insane, is not a judgment of a court or equivalent thereto, nor is such finding and certificate equivalent to a verdict of a jury or a finding of a court that such person is of unsound mind and incapable of managing his own estate, its purpose being to establish the fact that such person is entitled to admission to a hospital for the insane for treatment. *Leinss v. Weiss*, 71 N. E. 254, 255, 256, 33 Ind. App. 344.

#### **Fine**

See Fine.

#### **As instrument**

• See Instrument.

#### **As in the breast of the court**

See Breast of the Court.

#### **Judgment in special proceeding**

Since a summary proceeding is a special proceeding and not an action, there can, properly speaking, be no "judgment" in summary proceedings, although the final order is in effect a judgment and is frequently referred to as such. *Seymour v. Hughes*, 105 N. Y. Supp. 249, 250, 55 Misc. Rep. 248.

In Code Civ. Proc. § 1340, authorizing an appeal to the Appellate Division from a final judgment rendered by a county court in certain cases, the word "judgment" means a judgment in an action which is clearly distinguishable from a special proceeding, such as a summary proceeding to recover possession of lands. *Barrus v. Parsons*, 96 N. Y. Supp. 359, 361, 109 App. Div. 634.

The word "judgments," as used in Code Civ. Proc. N. Y. § 190, subd. 1, providing that appeals may be taken to the Court of Appeals from judgments or orders finally determining actions or special proceedings and from orders granting new trials or exceptions where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them, referred only to a judgment in an action, and the words "special proceed-

ings" relate to the antecedent word "orders," and hence a final order to be reviewed must be an order in special proceedings. Strictly speaking, there can be no judgment absolute in a special proceeding at all, because a special proceeding is terminated by an order and not by a judgment *eo nomine*. Thus a final termination of the rights of the parties to a special proceeding in the Surrogate's Court is styled indifferently "final order" or a "decree," but not a "judgment." In *re Gibson*, 88 N. E. 1100, 1102, 195 N. Y. 466 (quoting *Van Arsdale v. King*, 49 N. E. 866, 155 N. Y. 325).

#### Same—Condemnation proceedings

A "judgment" confirming the award in a condemnation proceeding and vesting the title in plaintiff therein is a "judgment" within the statutes requiring the payment of interest on judgments. *Brunn v. Kansas City*, 115 S. W. 446, 448, 216 Mo. 108.

#### Judgment by default

A garnishee petitioned the Supreme Court, under Court and Practice Act 1905, § 471, and Gen. Laws 1909, c. 297, § 1, for trial as to the question of its liability as garnishee in a case in which no trial had been had, but in which judgment was rendered by default, and showed that, by mistake, an officer of the corporation garnishee failed to set out in his account or return that he was an officer of the corporation garnishee, and that because of such mistake in the filing of its account it was charged as garnishee with the amount of judgment against defendant in the action. Held that, as the garnishee became liable by force of statute and not by an adjudication of the court, the fact that he was "charged by his default" could not be regarded as a "judgment," and it might show the filing of the return, or any defense it had in the pending action. *Premium Tea Co. v. Malloville*, 79 Atl. 825, 826, 32 R. I. 335.

#### As judgment lien

The word "Judgment," in Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565, providing that all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent within four months prior to the filing of the petition in bankruptcy against him shall be void in case he is adjudged a bankrupt, refers only to the lien of the judgment, the judgment remaining an assignable claim against the estate. *Davis v. Jewett Bros. & Jewett*, 97 N. W. 16, 17, 17 S. D. 410.

#### Justice court judgment

In Code, art. 93, § 114, providing that in paying the debts of a decedent an administrator shall pay all taxes in preference to other debts, and next claims for rent in arrear for which a distress might be levied by law, and then judgments and decrees shall next be wholly discharged, the priority provision is not limited to judgments or de-

crees of courts of record, but extends to and includes a judgment of a justice of the peace. *Newcomer v. Beeler*, 82 Atl. 460, 116 Md. 647.

#### Judgment against contractor as judgment against subcontractor

A "judgment" against a contractor for injuries to a pedestrian falling over an obstruction in a street caused by a subcontractor in the performance of his contract is not a judgment against the subcontractor within a policy stipulating that insurer will indemnify the subcontractor against loss for injuries to employes and the public, since a loss is not sustained until liability has been established against the subcontractor by a judgment, and the fact of notice to defend the action against the contractor merely makes the judgment against him conclusive evidence as against the subcontractor as to the issues actually litigated. *Creem v. Fidelity & Casualty Co. of New York*, 126 N. Y. Supp. 555, 560, 141 App. Div. 493.

#### As liability

See Liability.

#### As a lien

See Lien.

#### As judgment establishing mechanic's lien

The word "judgment," in an undertaking given to discharge a mechanic's lien under Lien Law (Laws 1897, p. 523, c. 418, § 20), conditioned to pay any judgment which may be recovered in an action to enforce the lien, means a judgment that a valid lien exists, and hence the sureties on an undertaking given to discharge a mechanic's lien, and conditioned to pay any judgment which may be recovered in an action to enforce the lien, are not liable, unless the judgment establishes the validity of the lien. *Casey v. Connors Bros. Const. Co.*, 108 N. Y. Supp. 1103, 53 Misc. Rep. 101.

#### License

"The order of a county court granting a license to keep a dram shop is a 'judgment.'" *Weber v. Lane*, 71 S. W. 1099, 1102, 99 Mo. App. 69.

#### Naturalization

"It is settled by the authorities that an order admitting an alien to citizenship is a 'judgment' of the same dignity as any other judgment of a court having jurisdiction. This being so, such judgment must possess the same qualities as any other judgment of a court having jurisdiction, and consequently it cannot be set aside, except in some recognized lawful mode." Hence, under Code Civ. Proc. § 473, authorizing a motion to set aside a judgment only in case it is made within ten months after judgment is taken, where a motion to annul an order admitting an alien to citizenship was made more than three years after the original order, the

appearance of the naturalized citizen and his consent to the granting of the motion would not give the court jurisdiction. In re Tinn, 84 Pac. 152, 148 Cal. 773, 113 Am. St. Rep. 354.

#### Nisi judgment

While a nisi judgment is in some senses a "judgment," it is not a judgment within Code Cr. Proc. 1911, art. 1193 (Code Cr. Proc. 1895, art. 1143), which allows district and county attorneys and clerks of courts a 5 per cent. commission on all fines, forfeitures, etc., collected for the state or county on judgments; and hence the incumbent in the office of clerk of a district court when final judgment was rendered under forfeiture of a bail bond, and not his predecessor, who was the incumbent when nisi judgment was obtained, is entitled to the commission. McHugh v. Reese (Tex.) 149 S. W. 743, 745.

#### Opinion and reasons

"A 'judgment' or decree is a declaration of the law applicable to the facts upon the issue involved, and, when the court rendering it has jurisdiction of the subject-matter and of the parties, it is binding upon them until modified or set aside in the manner prescribed for that purpose. \* \* \* The opinion forms no part of the judgment." Where the terms of a decree are in conflict with recitals of fact in the opinion, the decree is controlling. State v. Gray, 71 Pac. 978, 979, 42 Or. 261.

#### Order

An order, which takes the form of a final judgment in a cause, is termed a "judgment," as distinguished from an "order" made during the pendency of the suit. City of Chicago v. Coleman, 98 N. E. 521, 522, 254 Ill. 338.

An order by which the findings and conclusions of a special master, to whom was referred a contested application for a discharge, were affirmed, and his report "adopted as the opinion, conclusions, and judgment of the court," is not a "judgment granting or denying a discharge," within Bankr. Act July 1, 1898, c. 541, § 25a (2), 30 Stat. 553, and is not appealable. Ragan, Malone & Co. v. Cotton & Preston, 195 Fed. 69, 70, 115 C. C. A. 576.

An order of the district court, quashing a resolution of county commissioners designating a newspaper as the official county newspaper and as the one in which the notice and delinquent tax list shall be published, is not a "judgment," the entry by the clerk of a judgment signed by him being a necessary step, and is not appealable. Darby v. Board of Com'rs of Steele County, 123 N. W. 662, 663, 109 Minn. 258.

An order staying an action to foreclose a mortgage on which interest and part of the principal are overdue, as authorized by Rem. & Bal. Code, § 1126, on payment into court of

amount due with costs, determines the action and provides a final judgment therein, and is appealable within section 1716, subd. 8, authorizing appeals from an order determining the action and preventing a final judgment. Knisell v. Brunet, 111 Pac. 894, 895, 60 Wash. 610.

A "judgment" is the decision or sentence and law pronounced by a court or other competent tribunal on the matter contained in the record. It is the final consideration and determination of a court of competent jurisdiction on the matters submitted to it. It includes an order of the probate court on an administrator to pay over a sum of money, or to sell property belonging to the estate to pay debts. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S. W. 486, 504, 225 Mo. 414, 20 Ann. Cas. 1072.

An order of a recorder in the city of New Orleans, in a proceeding under an ordinance relating to juvenile vagrants for the commitment of such a person to the House of the Good Shepherd, is not a "judgment." State ex rel. Caillouet v. Marmouget, 35 South. 529, 533, 111 La. 225.

An order of notice is not a judgment, so as to preclude a probate court from amending its records by inserting an order of notice of appointment of executors. Smith v. Whaley, 61 Atl. 173, 175, 27 R. I. 185.

An order denying motions for findings and judgment on the ground that there has been a settlement of the controversy is an order striking the cause from the calendar, and is not a judgment, though such order recited the facts, and ordered and adjudged that the action was fully settled, as a judgment, as defined by Rev. St. 1898, § 2882, is the final determination of the rights of the parties in the action. Dr. Shoop Family Medicine Co. v. Schowalter, 98 N. W. 940, 941, 120 Wis. 663.

An unconditional order made under Cobbey's Ann. St. 1903, § 1228, that a garnishee pay money into court, is a "judgment," within the meaning of the statutes, making judgments, when docketed in the office of the clerk of the district court, a lien on the land of the debtor situated in the county. Johnson v. Samuelson, 117 N. W. 470, 471, 82 Neb. 201, 130 Am. St. Rep. 666.

The words "judgment or final order," in Comp. Laws 1897, § 10642, providing that any "judgment or final order" in a suit in garnishment may be set aside or removed to the Supreme Court in like manner and with the same effect as other personal actions, include an order adjudging that a writ of garnishment be quashed and the garnishee defendant released from liability with costs to defendant, since the order is in effect and in fact a judgment against plaintiff and in favor of garnishee defendant finally disposing of the garnishment proceedings with costs

and attorneys' fees against plaintiff to be taxed, and the order is reviewable by the Supreme Court on error. *Recor v. St. Clair Circuit Judge*, 102 N. W. 643, 644, 139 Mich. 156.

Under Code Civ. Proc. § 1003, defining an "order" as every direction of a court or judge made or entered in writing and not included in a judgment, the determination by the judge of a superior court to dismiss proceedings to compel a witness to answer questions and complete his deposition, contained in an order virtually denying the motion, was not a "judgment," within the meaning of section 577, defining a "judgment" as a final determination of the rights of the parties in the action or proceeding. In *re Scott*, 96 Pac. 385, 389, 8 Cal. App. 12.

In legal parlance an order of court which apparently finally determines the rights of parties in the action or suit is spoken of as a "judgment" or decree. In fact, so general are these terms in the common understanding that the word "valid," "voidable," or "void" is usually prefixed to them in order to mark their relative value. *Schlarb v. Castaing*, 97 Pac. 289, 291, 50 Wash. 331.

The words "judgment" and "order," in Code, § 542, subd. 3, which provides that the Supreme Court may reverse, vacate, and modify a judgment of a district court for errors appearing on the record, and in reversing such "judgment" or order may reverse, vacate, or modify any immediate order involving the merits of the action or any part thereof, are used somewhat indiscriminately, so much so as to suggest that any specific independent part of a "judgment" is appealable. *Kremer v. Kremer*, 90 Pac. 998, 999, 76 Kan. 134.

Motions are not original and independent proceedings, but are only incidental steps taken in all classes of cases pending; and the rulings of the court thereon are not "judgments." *State ex rel. Shackelford v. McElhinney*, 145 S. W. 1139, 1143, 241 Mo. 592.

Under L. O. L. § 549, providing that any party to a judgment or decree may appeal therefrom, and section 548, defining a "judgment" as an order affecting a substantial right and determining the action or suit, or an order setting aside a judgment and granting a new trial, an order denying a motion for new trial is not appealable. *Macartney v. Shipherd*, 117 Pac. 814, 815, 60 Or. 133, Ann. Cas. 1913D, 1257.

In view of *Mills' Ann. Code*, § 371, providing that "every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order," and section 442 providing that a judgment includes "all final orders, decrees and determinations in an action," a certificate of a clerk of the district court authenticating the record of a judgment appealed from,

which states it to be a "true, perfect, and complete transcript of all the files and of all 'orders' of court made and entered in the" case, is sufficient as including the record of the "judgment." *State Bank of Chicago v. Plummer*, 102 Pac. 1082, 1083, 46 Colo. 71.

Code Civ. Proc. § 577, defines a "judgment" as a final determination of the rights of the parties in an action or proceeding. Section 1716 declares that all issues of fact joined in probate proceedings must be tried in conformity with the requirements of article 2, c. 2, of this title, and that judgments therein on issues joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions; and section 963 authorizes an appeal from a judgment or order against or in favor of setting apart property or making an allowance to a widow. Held, that an order denying an alleged widow's petition for a homestead allowance, based on her claim of widowhood, on which issue is joined, is not a mere order made on a motion in a pending proceeding, but a "judgment," to which the doctrine of *res judicata* applies. *Harrington's Estate*, 81 Pac. 548, 547, 147 Cal. 124, 109 Am. St. Rep. 118.

A "judgment" is defined by Rev. St. § 2882, as the final determination of the rights of the parties in the action. There can be but one judgment in one action, and that must finally dispose of the rights of the parties. In a garnishment where a judgment against the garnishee was reversed on appeal, an order thereafter made, requiring plaintiff to restore to the garnishee the amount collected on the judgment, was not a "judgment," within the statute prohibiting appeals from judgments for less than \$100, but was appealable as a final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment, within Laws 1895, c. 212, subd. 2. *Lewis v. Chicago & N. W. R. Co.*, 72 N. W. 976, 97 Wis. 368.

The words "judgment of the court," in Sess. Laws 1903, c. 59, p. 74, § 4, providing that appeals from the "judgment of the court," in a tax foreclosure, may be taken to the Supreme Court at any time within 30 days, seem to be broad enough to comprehend any final judgment rendered in the action against the owner of the land whereby he is deprived thereof and would apply to an appeal, from an order in such action, to vacate the judgment, though the litigation is between a private certificate holder and owner of the property. *Brown v. Davis*, 78 Pac. 779, 36 Wash. 135.

An appeal from an order continuing to the hearing, an injunction restraining defendant from trespassing on land, pending litigation, is not an appeal from the "judgment" but from a judicial order. The term "order" is sometimes applied to an interlocutory

judgment or decree, and, under the Codes of the several states, interlocutory judgments and decrees are no longer recognized, and "orders" have been substituted therefor. *Carter v. White*, 46 S. E. 983, 984, 134 N. C. 466, 101 Am. St. Rep. 853.

#### Order dismissing action

An order dismissing a petition for a bankruptcy adjudication is a "judgment refusing to adjudge defendant a bankrupt" within Bankr. Act, § 25a, making such a judgment appealable. *Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 73, 80 C. C. A. 25.

"Judgments" of dismissal and for costs are within the rule that a judgment by a court having jurisdiction of the case cannot be collaterally attacked. *Clark v. Southern Can Co.*, 81 Atl. 271, 274, 116 Md. 85, 36 L. R. A. (N. S.) 980.

#### Order dismissing appeal

Rev. St. 1889, § 2882, defines a judgment to be the final determination of the rights of the parties in the action. A judgment is essentially different from an order dismissing an appeal from a decision of a county board disallowing a claim against the county, and such a dismissal is an order from which an appeal may be taken under section 3062. *Ellis v. Barron County*, 98 N. W. 232, 233, 120 Wis. 390.

#### Order for execution or sentence

An order appointing a day for execution, made in a capital case after the sentence of death has been pronounced, is not a "judgment," within Criminal Procedure Act of 1898 (P. L. 1898, p. 885) § 55, or within the rule that, when the term in which final judgment was regularly perfected has expired, the court has no power to grant a new trial unless it be shown that the judgment was rendered without jurisdiction or was obtained by fraud. *State v. Tolla*, 63 Atl. 333, 339, 73 N. J. Law, 249.

#### Order for judgment

A decision is in some respects like the verdict of a jury; it affords a proper basis upon which a judgment may be entered, but is not itself a "judgment." So, also, an order for judgment made by the court is not itself a "judgment." *Kennedy v. Citizens' Nat. Bank*, 93 N. W. 71, 72, 119 Iowa, 123.

A minute order denying the relief prayed for in the complaint is not a judgment from which an appeal can be taken, under Rev. Codes, § 4807. *Bissing v. Bissing*, 115 Pac. 827, 828, 19 Idaho, 777.

#### Order of sale

An order for the sale of real estate by a guardian and the confirmation thereof in an ex parte proceeding, although different in form from judgments in adversary proceedings, has the force and effect of a final judgment and is a "judgment," within *Burns' Ann. St.* 1908, § 295, cl. 4, limiting the time

within which actions may be brought for the recovery of realty, sold by guardians, etc., under a judgment specifically directing the sale. *Sell v. Keiser*, 96 N. E. 812, 814, 49 Ind. App. 101.

"An order of seizure and sale is not a 'judgment' for all purposes and in the full sense of the term, but it is a decree of a court in aid of the execution of an obligation which, by law, is given the effect of a judgment quoad the particular property to which it refers. It is a judgment in so far that an appeal will lie therefrom for the review of the question of the sufficiency of the evidence upon which it is based." *Huber v. Jennings-Heywood Oil Syndicate*, 35 South. 889, 893, 111 La. 747.

An order of seizure and sale is not a "judgment" in the legal sense of the term, and an action to annul a sale made under executory process is not an action to annul a judgment, and as such subject to the prescription of one year. *Pons v. Yazoo & M. V. R. Co.*, 47 South. 449, 450, 122 La. 156.

A judgment of sale for whatever is due is not a judgment against the property for a definite or specific amount. The statute contemplates a judgment against the property, and an order for the sale of the same to satisfy the judgment, and the entry of a "judgment of sale" is rather an order for the enforcement of a judgment than a judgment itself. *Gage v. People*, 69 N. E. 80, 82, 205 Ill. 547.

#### As personal property

See Personal Property.

#### As preference

See Preference.

#### As proceeding

See Proceeding.

#### As specialty

See Specialty.

#### Taxes distinguished

"An assessment of taxes is not a 'judgment,' within the doctrine of *res judicata*, and does not bar or estop a supplemental assessment of property which was in fact erroneously omitted, even though its omission in the first instance was the result of a decision by the officers making the regular assessment, holding it to be exempt." *Georgia R. & Banking Co. v. Wright*, 53 S. E. 251, 260, 124 Ga. 596.

#### As written instrument

See Written Instrument.

### JUDGMENT BOOK

In a court it was the practice for the clerk, as each order for judgment was made, to promptly write out the judgment with a typewriter on separate sheets of paper of uniform size, to sign the judgment and affix the seal of the court, to number the sheets consecutively according to the chrono-



logical order in which the judgments were written out, and to place and securely keep these sheets in their proper order in a compact parcel in an inclosed box or case in the form of a book, labeled "judgment book," until there should be sufficient of them to make a bound volume, when they were permanently bound together, preserving the same order and same paging. The sheets as kept constituted a "judgment book," within Rev. Codes N. D. 1899, §§ 5479, 5487, 5488, which required the clerk of the district court to keep among the records of the court a judgment book in which the judgment in each case is to be entered by the clerk upon the order of the court or judge. *Lynch v. Burt*, 132 Fed. 417, 428, 67 C. C. A. 305.

#### JUDGMENT BY CONFESSION

See Decree Pro Confesso.

See, also, Confession of Judgment.

A judgment by a justice, reciting that the cause coming on to be heard, plaintiff and defendant present, and the petition of the plaintiff being read by his attorney, defendant confesses judgment for the amount claimed, is a "judgment by confession," and not by default. *Wade v. Swope*, 81 S. W. 471, 472, 107 Mo. App. 375.

#### JUDGMENT BY DEFAULT

A "judgment by default" is equivalent to a judgment on confession, and no appeal lies therefrom. *Kieley v. Reinhardt*, 108 N. Y. Supp. 1012 (citing *Adams v. Oaks* [N. Y.] 20 Johns. 282).

"A 'judgment by default' does not involve the merits of the case. The issues of fact or law therein are not decided. The default is based solely upon the fact that, whatever case the party had, he did not appear at the proper time to present it." In re *Stillman's Petition*, 67 Atl. 4, 5, 28 R. I. 298.

A "default" is the failure to take the steps required in the progress of an action, and a "default judgment" is a judgment against a party failing to take such steps. *Peterson v. Kissell*, 125 N. W. 808, 809, 148 Iowa, 516.

A default on which a judgment may be rendered is an admission of every traversable allegation of the declaration or complaint necessary to plaintiff's cause of action, also, that defendant is the person named in the writ and intended to be served, and that the court has acquired jurisdiction of his person, and has jurisdiction of the cause of action, and also constitutes an admission of the due execution of the instrument sued on. *Utah Ass'n of Credit Men v. Bowman*, 113 Pac. 63, 67, 38 Utah, 826, Anni. Cas. 1913B, 834.

"Judgment by default," in its strict sense, is rendered when the previous default of defendant has obviated the necessity of proof. When a defendant omits to plead

within the time allowed for that purpose, or fails to appear at the trial, he "makes default," and the judgment entered in the former case is a "judgment by default." *Leahy v. Wayne* Circuit Judge, 107 N. W. 1060, 1062, 144 Mich. 304, 115 Am. St. Rep. 443 (quoting and adopting definition in *And. Law Dict.*, tit. "Default"; and *Burrell*, Dict.).

Under Code, § 3788, which specifies when a judgment by default may be entered, a judgment entered in the absence of defendant on issues joined and on evidence adduced is not a "judgment by default"; and section 3790, providing for the setting aside of default, has no application in such case. *Acheson v. Inglis Bros.*, 135 N. W. 632, 633, 155 Iowa, 239.

A judgment of the circuit court, rendered in his absence on appeal by defendant from a justice's judgment against him, after two appearances and trial before the justice and subsequent appearance and continuance obtained on his motion in the circuit court, is not a default judgment, within Code 1906, c. 134, § 5, providing that the court in which there is a judgment by default may, on motion, reverse such judgment for any error for which an appellate court might reverse it, and any error in respect thereof is reviewable only on writ of error to the Supreme Court of Appeals. *Dadisman v. West Virginia Eastern Telephone Co.*, 70 S. E. 855, 856, 69 W. Va. 43.

A "judgment by default and inquiry" carries only a judgment for a penny and costs, since such a judgment merely admits a cause of action while the precise character of the cause of action and the extent of defendant's liability remains to be determined by a hearing in damages and final judgment thereon. *Osborn v. Leach*, 45 S. E. 783, 784, 133 N. C. 427 (quoting and adopting definition in 2 *Black*, Judg. § 698).

Where defendant appears, and is only prevented from trying his case by reason of the refusal of the justice to permit the filing of his answer, a judgment against him is not a "default judgment." *S. Perceval, Inc., v. Ernest H. Fleischmann Co.*, 138 N. Y. Supp. 139, 140, 78 Misc. Rep. 252.

#### JUDGMENT CREDITOR

The receiver or general creditors of an insolvent corporation are not "judgment creditors," within P. L. 1898, pp. 699, 700, §§ 71, 72, relating to conditional sales of chattels, and protecting only judgment creditors, subsequent purchasers, and mortgagees, without notice. *Smith v. Hotel Ritz Co.*, 70 Atl. 137, 74 N. J. Eq. 616.

#### JUDGMENT DEBT

A "judgment debt" is one which is evidenced by matter of record. *Hudson Trust Co. v. Boyd*, 84 Atl. 715, 716, 80 N. J. Eq. 267.

**JUDGMENT DEBTOR**

Public officers are, when proceeded against to judgment, "judgment debtors," within Code Civ. Proc. § 710, providing that a transcript of a judgment may be filed with the Controller of the State or auditor of any municipal corporation from "which money is owing to" the judgment debtor, whereon the controller or auditor shall draw his warrant in favor of the creditor, or pay so much money into court as will cancel the judgment, and which "belongs to or is owing to the judgment debtor." *Ruperich v. Baehr*, 75 Pac. 782, 784, 142 Cal. 190.

**JUDGMENT DOCKET**

The fact that a clerk's certificate to the transcript of a judgment docket stated that the transcript was a correct copy of the original "judgment lien docket," while such record is denominated by B. & C. Comp. § 584, a "judgment docket," did not affect the lien of the judgment created on the filing of such transcript, under section 205, providing that, on the filing of such a transcript, the judgment shall be a lien on all the real estate of defendant within the county where the transcript is filed, where it appeared from the entry itself that it was made in a book in which the judgments and decrees of the court were docketed, and that it substantially conformed to the requirements of section 584 as to the entries to be made on the judgment docket. *Budd v. Gallier*, 89 Pac. 638, 640, 50 Or. 42.

**JUDGMENT FILE**

"Judgment files" are only indirectly the creations of statute. The statutes provide that all courts of record shall keep a record of their proceedings, and cause the facts on which they found their final judgments and decrees to appear on the record. Gen. St. 1902, § 763. To secure a proper compliance with this requirement, we have sections 94, 96, of the rules of court. In the first of these sections it is provided that in all actions the judgment shall be formally written out within one week after its rendition; the paper so prepared to be known as the "Judgment File." There is recognized a clear distinction, not only between the judgment and the writing which is required to be made to evidence it, but also between the rendition of the judgment and the preparation of this writing at some subsequent time. *Appeal of Bulkeley*, 57 Atl. 112, 113, 76 Conn. 454.

**JUDGMENT FOR FRAUD**

See, also, Fraud.

A judgment for costs in a criminal prosecution is not a debt based on fraud, so as to prevent its release by discharge of the judgment debtor in bankruptcy. *Olds v. Forrester*, 102 N. W. 419, 420, 126 Iowa, 456.

Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550, providing that judg-

ments in actions for fraud or obtaining property by false pretensions or false representations are not released by a discharge in bankruptcy, comprehends judgments rendered in actions the gist of which is the actual fraud of defendants, and in determining whether an action is in such category the courts will look to the pleadings and judgment, and if the relief granted in the judgment is based on actual, as distinguished from constructive, fraud of the bankrupt, he will not be discharged from its obligation though the action may not be strictly *ex delicto* in form. *Moody v. Muscogee Mfg. Co.*, 68 S. E. 604, 609, 134 Ga. 721, 20 Ann. Cas. 301.

**JUDGMENT FOR MONEY**

See Money Judgment.

**JUDGMENT FOR NECESSARIES**

A judgment for rent of a place of residence, with interest from the date on which payment of rent was demanded and refused, is a "judgment for necessities," within Rev. Laws, c. 168, § 80, authorizing equitable process after judgment for necessities furnished to the judgment debtor or his family, both for the rent recovered and the interest thereon, though interest is allowed as damages for the detention of the principal, and though the declaration must allege that a demand has been made. *Darrigan v. Williams*, 84 N. E. 797, 798, 198 Mass. 457.

**JUDGMENT FOR RECOVERY OF PROPERTY OR FOR ENFORCEMENT OF LIEN**

Under Rev. Codes, § 4475, execution may issue after death of the judgment debtor, where the judgment is for the recovery of real or personal property, or for the enforcement of a lien. Where an action is brought to collect a debt, and an attachment was levied and judgment entered, and before execution the judgment debtor dies, an execution cannot issue, for the reason that the judgment is not one for recovery of real or personal property, or the enforcement of a lien, within such section. *Rose v. Dunbar*, 115 Pac. 920, 921, 20 Idaho, 1, Ann. Cas. 1912D, 1046.

**JUDGMENT IN PERSONAM**

A "judgment in personam" is in form as well as substance between the parties claiming the right involved, and that it is so inter partes appears by the record itself. *Stiller v. Atchison, T. & S. F. Ry. Co.*, 124 Pac. 595, 598, 34 Okl. 45 (quoting and adopting definition in *Woodruff v. Taylor*, 20 Vt. 65).

**JUDGMENT IN REM**

A "judgment in rem" is a judgment against a thing as contradistinguished from a judgment against a person or a judgment whereby a status is determined. *Galveston*

**Chamber of Commerce v. Railroad Commission of Texas (Tex.)** 137 S. W. 737, 746.

"A 'judgment in rem' is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. It differs from a judgment in personam in this: That the latter judgment is in form as well as substance between the parties claiming the right, and that it is so inter partes appears by the record itself. A judgment in rem is founded on a proceeding instituted, not against the person as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration of the status of the thing, and it ipso facto renders it what it declares it to be." *Stiller v. Atchison, T. & S. F. Ry. Co.*, 124 Pac. 595, 598, 34 Okl. 45 (quoting and adopting definition in *Woodruff v. Taylor*, 20 Vt. 65).

#### JUDGMENT LIEN

A "judgment lien" is a mere incident and cannot exist independent of the judgment. When the judgment becomes dormant, the lien ceases to exist. *Harvey v. Godding*, 109 N. W. 220, 222, 77 Neb. 289, 124 Am. St. Rep. 841.

#### JUDGMENT NON OBSTANTE VEREDICTO

See Non Obstante Veredicto.

#### JUDGMENT OF A COURT

Though the court in making an assessment in a proceeding under Ky. St. § 4260, for assessment of omitted property, acts ministerially, and not judicially, it acts as a court, and its decision is the judgment of a court, within Civ. Code Prac. § 518, declaring the power of the court, in which a judgment has been rendered, to vacate it for unavoidable casualty or misfortune preventing the party from appearing or defending. *Commonwealth v. Weissinger*, 136 S. W. 875, 878, 143 Ky. 368.

#### JUDGMENT OF ACQUITTAL

See Acquit—Acquittal.

#### JUDGMENT OF HIS PEERS

The words "judgment of his peers," as used in constitutions, is usually understood to imply a trial by a jury of 12 men. *Lincoln v. Smith*, 27 Vt. 328, 362. Or a trial by jury according to the recognized and established mode of proceeding. *Jelly v. Dils*, 27 W. Va. 267, 274, 275.

#### JUDGMENT OF LAND DEPARTMENT

Patent as, see Patent.

#### JUDGMENT OF NONSUIT

See Nonsuit.

#### JUDGMENT OF REVIVOR

Revivor of a dormant judgment under our statute has no other effect than to restate the judgment, and authorize execution to collect the same. *Tierney v. Evans*, 138 N. W. 140, 141, 92 Neb. 330.

A "judgment of revivor" is not the creation of an original judgment obligation, but is a recognition of the existence of the original judgment and a continuation of its force. *Schneider v. Maney*, 145 S. W. 823, 824, 242 Mo. 36.

#### JUDGMENT ON THE MERITS

See Merits.

#### JUDGMENT ROLL

A statement on a motion for new trial is no part of the "judgment roll," within Code Civ. Proc. § 1196, providing that the pleadings, a copy of the verdict or findings, all bills of exceptions, all orders, matters, and proceedings deemed excepted to without bill of exceptions, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment, shall constitute the judgment roll. *Powell v. May*, 74 Pac. 80, 29 Mont. 71.

A "judgment roll" consists of such papers as constitute the record of the case in the court below. It should contain only such papers as the statute makes a part of that record. *Featherman v. Granite County*, 72 Pac. 972, 974, 28 Mont. 462.

An order of the district court sustaining a motion to dismiss an action appealed to it from a justice's court is properly a part of the judgment roll, within Rev. Codes, § 6806. *Mettler v. Adamson*, 99 Pac. 441, 443, 38 Mont. 198.

The judgment roll consists of such papers as are necessary to support the judgment thereupon entered, and where an action for negligence was brought against two defendants and by stipulation and consent, was discontinued as against one of the defendants, though the order of discontinuance was not made until after judgment was entered against the other defendant, it is not necessary to include in the judgment roll a copy of the answer of the defendant as to whom action was discontinued. *Bohnhoff v. Fischer*, 132 N. Y. Supp. 603, 604, 147 App. Div. 672.

An indictment is a proper part of a "judgment roll" introduced to prove a former conviction. *Ball v. United States*, 147 Fed. 32, 39, 78 C. C. A. 126 (citing *Kirby v. People*, 15 N. E. 33, 123 Ill. 436).

Where an appeal is taken from the judgment on the judgment roll alone and defendant has answered, the judgment roll, under the express provisions of Rev. Codes, § 4456, subdiv. 2, as amended by Laws 1909, p. 76, consists of the pleadings, a copy of the ver-

dict or the findings of the court or referee, a copy of an order made on demurrer or relating to a change of parties, and a copy of the judgment, but bills of exceptions are no part of the judgment roll. *Haas v. Teters*, 113 Pac. 98, 97, 19 Idaho, 182.

The "judgment roll," on an appeal from an order settling the accounts of an executor, consists of the petition and account and reports accompanying the same, objections and exceptions thereto, findings of the court, and the order settling the account. *Laymance v. Utter*, 81 Pac. 658, 659, 1 Cal. App. 104.

Though, where there is a return to a writ of review, the petition for the writ can serve no purpose on appeal, unless embodied in a bill of exceptions, the appeal being on the judgment roll, which, under Code Civ. Proc. § 1077, consists of the judgment, writ, and return thereto, yet a demurrer to the petition being in effect to adopt the facts in the petition as the return, the petition, on appeal from the judgment sustaining the demurrer and dismissing the writ, may be brought up and considered as the return, and therefore as part of the judgment roll. *Stoner v. City Council of City of Los Angeles*, 97 Pac. 692, 694, 8 Cal. App. 607.

Under Comp. Laws 1907, § 3197, defining what papers shall constitute the judgment roll, a petition for removal of the cause is not a part of such roll, and, to make it a part of the record on appeal, it and the proceedings thereon must be incorporated into the bill of exceptions, though, under the federal practice, the petition is part of the record without a bill. *Neesley v. Southern Pac. Co.*, 99 Pac. 1067, 1068, 35 Utah, 259.

Though Civil Practice Act, § 340, provides, among other things, that if any written opinion be placed on file, in entering judgment or making an order below, a copy shall be furnished, certified in like manner, etc., a written opinion and findings of the lower court do not constitute any part of the "judgment roll," but are only intended to aid the appellate court in the determination of an appeal. *Werner v. Babcock*, 116 Pac. 357, 358, 34 Nev. 42.

An order granting leave to amend an answer is no part of the judgment roll, within Code Civ. Proc. § 670, subd. 2, declaring what shall constitute the judgment roll, and it need not be entered thereon. *Segerstrom v. Scott*, 116 Pac. 690, 692, 16 Cal. App. 256.

Under Code Civ. Proc. § 1237, providing that the summons, pleadings, final judgment, interlocutory judgment, if any, and each paper on file, and a copy of each order which in any way involves the merits or necessarily affects the judgment shall be included in the "judgment roll" affidavits, and notice of a motion for a reference are not a part of the "judgment roll." *Schrader v. Fraenckel*, 99 N. Y. Supp. 137, 113 App. Div. 395.

The term "judgment roll" is applicable only to civil cases. Hence, in taxing costs against the county, from which a change of venue in a criminal action was taken, it was error to include in the clerk's fees a charge for a judgment roll. *Green Lake County v. Waupaca County*, 89 N. W. 549, 554, 113 Wis. 425.

Comp. Laws, § 5103, provides that, when there is an answer, the judgment roll shall consist of the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict, etc. Section 4756 defines "verdict" as including findings of fact by a judge or referee. Held, that court's findings of fact are a part of the "judgment roll," and need not be included in a bill of exceptions. *Colonial & U. S. Mortg. Co. v. Bradley*, 55 N. W. 1108, 1109, 4 S. D. 158.

## JUDICIAL

See Quasi Judicial.

### Acts of courts

"The word 'judicial' is defined: (1) Pertaining to courts of justice as judicial powers. (2) Practice in the distribution of justice, as judicial proceedings. (3) Proceeding from a court of justice as a judicial determination. A judicial investigation proceeds after notice and eventuates in a judgment which is the final determination of the rights of the parties unless reversed by an appellate tribunal. The necessity of notice in the inception and conclusive character of the determination constitute the test as to what proceedings are judicial." *Kalbfell v. Wood*, 92 S. W. 230, 233, 193 Mo. 675 (quoting and adopting definition in *Home Ins. Co. of St. Paul v. Flint*, 13 Minn. 244 [Gil. 228]).

## JUDICIAL ACT

When it becomes necessary to determine a question of fact or law, the act is "judicial." *People v. Salsbury*, 96 N. W. 936, 938, 941, 134 Mich. 537.

### As act done by court

"To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the rights of property of the citizens in a manner analogous to that in which they are affected in the proceedings of courts acting judicially. \* \* \* Where proceedings are judicial, if no right of appeal is given certiorari will lie, but the fact that no right of appeal is given has no bearing on the question whether the proceedings are judicial in their nature." *State ex rel. Grant v. Iverson*, 100 N. W. 91, 92, 92 Minn. 355 (quoting *State ex rel. Hardy v. Clough*, 67 N. W. 202, 64 Minn. 378).

### As exercise of judicial power

A "judicial act" is "an act done by a member of the judicial department of government in construing the law or applying

it to a particular state of facts presented for the determination of the rights of the parties thereunder; an act done in furtherance of justice, or a judicial proceeding by a person having the right to exercise judicial authority; an act that determines what the law is, and what the rights of the parties are, with reference to transactions that have been had; an act that undertakes to determine questions of right or obligation; an act done or performed in the exercise of judicial power; the performance of a duty which has been confided to judicial officers to be exercised in a judicial way" (quoting 23 Cyc. p. 1614). Consequently the functions exercised by the court under Laws 1907, c. 538, providing for a hearing and determination by the Supreme Court of an election contest, are judicial in their nature, since the proceedings involve the determination of whether the petition presented conforms to the requirements of the statute, and states facts sufficient to justify the procedure authorized, the approval of the form and sufficiency of the bond, the judicial determination of the legality of each ballot cast, which is disputed or challenged, or the making of orders embodying the results and conclusions reached, and those necessary to carry the determination into effect. *Metz v. Maddox*, 105 N. Y. Supp. 702, 712, 121 App. Div. 147.

#### Discretion involved

"Judicial acts" involve the exercise of discretionary power or judgment, and are not confined to the jurisdiction of judges. *City of Biddleford v. Yates*, 72 Atl. 335, 337, 104 Me. 506, 15 Ann. Cas. 1091.

A "quasi judicial duty" is one lying in the judgment or discretion of an officer other than a judicial officer. The functions of the board of liquidation of the city debt of the city of New Orleans are not strictly judicial, nor, on the other hand, ministerial, but are quasi judicial. When an officer is charged with looking into and acting upon facts not in a way which it specifically directs but after a discretion in its nature judicial, the function is termed "quasi judicial." An act is judicial when it requires the exercise of judgment or discretion by one or more persons or by a corporate body when acting as public officers in an official character in a manner which seems to them just and equitable. *State ex rel. Board of Liquidation of City Debt v. Briede*, 41 South. 487, 489, 117 La. 183 (citing *Bishop, Cont.*, § 785; *Thropp, Pub. Off.* § 533; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *People v. Board of Sup'rs* [N. Y.] 35 Barb. 414).

A proceeding, authorized by Acts 31st Leg. c. 17, §§ 9a, 9b, 9c, 9f, 9g, for the revocation by the Comptroller of Public Accounts of liquor licenses for violations of the law by liquor dealers is not a suit by the state for a "forfeiture" or "penalty," within Const. art. 5, § 8, conferring on the district court exclu-

sive jurisdiction of such suits; for, though an official act may be judicial as involving the exercise of discretion and judgment, yet, when discretion is conferred on an executive officer in the discharge of administrative or executive duties, the acts of the officer are not "judicial." *Baldacchi v. Goodlet* (Tex.) 145 S. W. 325, 328.

#### Legislative act distinguished

An act is a "judicial" one where it undertakes to determine a question of right or obligation or of property as the foundation on which it proceeds. A "judicial act" determines what the law is and what the rights of parties are in reference to transactions already had; a "legislative act" determines what the law shall be in future cases. *Newell v. Franklin* (R. I.) 74 Atl. 1009, 1011; *In re County Com'rs of Seventh Judicial Dist.*, 98 Pac. 557, 560, 22 Okl. 435; *Tyson v. Washington County*, 110 N. W. 634, 636, 78 Neb. 211, 12 L. R. A. (N. S.) 350 (citing and adopting definition in *Cooley, Const. Lim.*); (quoting and adopting definition in *Sinking Fund Cases*).

"A 'judicial act' is one which imposes burdens, or confers privileges, in specific cases, according to the discretionary judgment of some person or board, as to the propriety of imposing the burden or granting the privilege, in the specific case." A municipal ordinance providing for the paving of a street at the cost of the property benefited thereby to the extent of the benefit, being a judicial and not a legislative act, is invalid because passed without notice to the property owners affected thereby. *Sears v. Atlantic City*, 64 Atl. 1062, 1063, 73 N. J. Law, 710, 118 Am. St. Rep. 724.

The official action of a legal body, which is the result of judgment and discretion, is a "judicial act" rather than a legislative one, and so, too, an act which determines the rights and duties of parties under existing law with relation to existing facts is said to be judicial rather than legislative. *Gulnac v. Board of Chosen Freeholders of Bergen County*, 64 Atl. 998, 1000, 74 N. J. Law, 543, 122 Am. St. Rep. 405 (citing *Supervisors of Onondaga v. Briggs* [N. Y.] 2 Denio, 26, 39; *Mills v. City of Brooklyn*, 32 N. Y. 489, 495; *East River Gas-Light Co. v. Donnelly* [N. Y.] 25 Hun, 614; *Harrington v. Township of Woodbridge*, 56 Atl. 141, 70 N. J. Law, 28, 29). See, also, *Grider v. Tally*, 77 Ala. 422, 425, 54 Am. Rep. 65. See *Mabry v. Baxter*, 11 Helsk. (58 Tenn.) 682, 690; also the *Sinking Fund Cases*, 99 U. S. 700, 761, 25 L. Ed. 496.

State courts, in reviewing orders of the Public Service Commission, act "judicially," and not legislatively. Where the Public Service Commission, on complaint after hearing and the taking of evidence, entered an order requiring that complainants stop its interstate trains at a station, the Com-

mission's act was legislative and not "judicial." *Deleware, L. & W. R. Co. v. Stevens*, 172 Fed. 595, 603, 606.

The passage of a city ordinance granting a franchise to a public service corporation involves legislative action only, and such action cannot be reviewed by writ of certiorari. *Tenny v. City of Columbia*, 92 Pac. 895, 896, 48 Wash. 150.

That which distinguishes a "judicial" from a "legislative" act is that the one is a determination of what the law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of future cases falling under its provision. *Tyson v. Washington County*, 110 N. W. 634, 636, 78 Neb. 211, 12 L. R. A. (N. S.) 350.

#### Ministerial act distinguished

"The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial, but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists it is not to be deemed merely ministerial." *Burnam v. Terrell*, 78 S. W. 500, 501, 97 Tex. 309 (quoting Commissioner of General Land Office v. Smith, 5 Tex. 471, 479); *Rainey v. Ridgway*, 43 South. 843, 844, 151 Ala. 532 (citing *Flournoy v. City of Jefferson*, 17 Ind. 169, 79 Am. Dec. 468; *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371; *Morton v. Comptroller General*, 4 S. C. 430; Commissioner of General Land Office v. Smith, 5 Tex. 471; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. [33 U. S.] 291, 8 L. Ed. 949); *State ex rel. Higdon v. Jenks*, 35 South. 60, 61, 138 Ala. 115.

The "rendition of a judgment" in a court of record is essentially a "judicial act," and, if performed when the court is not in session (that is, out of term), it is open to a fatal jurisdictional objection. *Meade v. Scribner*, 85 Pac. 729, 730, 10 Ariz. 33.

The rendition of a judgment by the court is a "judicial act," but the entry thereof by the clerk is not, but is a ministerial act. *Jaqua v. Harkins*, 82 N. E. 920, 922, 40 Ind. App. 639.

The act of a state board of health, in revoking a license to practice medicine, is not a "judicial action," and cannot be regulated by the writ of prohibition. *State ex rel. McAnnally v. Goodier*, 93 S. W. 928, 931, 195 Mo. 551.

#### Allowance of accounts

The determination and allowance by the circuit court of the expenses and fees of a coroner's inquest, as authorized by Comp. Laws, § 11828, providing that the expense of

an inquest shall be paid by the state, etc., on the account of expenses being first allowed by the circuit court, involve the exercise of judicial discretion and judgment, and constitute a "judicial act." *In re Toepel*, 102 N. W. 369, 370, 139 Mich. 85.

#### Appointment or removal of officer

The removal of an officer under a statute authorizing a mayor and city council to remove such officer for specified causes, upon hearing and evidence, is a "judicial act," as distinguished from a political or administrative act, and the right of mayor and city council to try him under the statute should be denied; the judicial power being vested in the courts. *State ex rel. Lee v. Chaney*, 102 Pac. 133, 137, 23 Okl. 788; *Christy v. Kingfisher*, 76 Pac. 135, 141, 13 Okl. 585.

The determination of the civil service commission of a city in classifying the position of battalion chief in the city fire department in the competitive class, made without hearing any testimony, but after arguments of counsel and the protests of citizens expressing their views and the views of officers of other municipalities on the practicability of subjecting applicants to the position to a competitive examination, though involving the exercise of judgment, is not "judicial," and therefore is not reviewable on certiorari. *People ex rel. Schau v. McWilliams*, 77 N. E. 785, 786, 185 N. Y. 92.

#### Approval of bond

The approval or refusal to approve a bond by a justice of the peace, under Code 1907, § 4281, providing that an appeal in unlawful detainer does not prevent the issuance of a writ of restitution unless defendant executes bond with sufficient surety, in a sum to be ascertained by the justice of the peace, is a "judicial act," within the rule that a judicial officer is not liable for damages for erroneous rulings in his judicial capacity, while acting within his jurisdiction. *King v. Sawyer*, 55 South. 320, 321, 1 Ala. App. 439.

#### Canvass

Inspectors of an election, in determining what ballots shall be counted for or against any candidate or any question voted on, or what ballots shall be rejected, "act judicially." *People ex rel. Haverly v. Hanes*, 90 N. Y. Supp. 61, 62, 44 Misc. Rep. 475.

#### Decision as to jurisdiction

Where a judge is called upon by the facts before him to say whether his authority extends over the matter, such an act is a "judicial" one, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong; but when no facts are presented, or only such facts as have neither legal value nor color of legal value in the affairs, then in that event for the magistrate to take jurisdiction is not in any manner the performance of a "judicial act," but simply the

commission of an official wrong. *Rush v. Buckley*, 61 Atl. 774, 779, 100 Me. 322, 70 L. R. A. 464, 4 Ann. Cas. 318 (quoting and adopting definition in *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412).

#### Taking acknowledgment of deed

The taking and certification of an acknowledgment is a "judicial act." *Byrd v. Bailey*, 53 South. 773, 169 Ala. 452, Ann. Cas. 1912B, 331. Contra. *Ardmore Nat. Bank v. Briggs Machinery & Supply Co.*, 94 Pac. 533, 538, 20 Okl. 427, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 477, 16 Ann. Cas. 133.

#### Taxation

Where a city ordinance authorizes the assessment of omitted property by the city council on notice of hearing to the owner, the action of the council in assessing omitted property is purely ministerial, although it has mixed certain discretion as to finding values and the like, which is not reviewable, and which quality is sometimes called "judicial," though it is not "judicial" in the sense that it is the act of a court; and hence such ordinance is not violative of the constitutional limitations on the Legislature to create any judicial tribunals other than the courts expressly named in that instrument. *Muir's Adm'r v. City of Bardstown*, 87 S. W. 1096, 1098, 120 Ky. 739.

The assessment of property for purposes of taxation is not a "judicial function," and a statute providing for an appeal from the county board of equalization to the district court is unconstitutional and void. *Suven v. Board of Com'rs of Osage County*, 92 Pac. 604, 605, 76 Kan. 687, 13 L. R. A. (N. S.) 716, 14 Ann. Cas. 163.

Valuation of property for taxation is not such an exercise of "judicial authority" as necessarily involves the right of appeal to a judicial tribunal; taxes being recoverable without judge or jury. *State v. Bley*, 50 South. 263, 264, 162 Ala. 239.

#### JUDICIAL ACTION

Rev. St. 1909, § 3874, providing that, when the county seat of a county has been destroyed by the erosion of the banks of any river, the county court may select a suitable county seat where all courts of the county shall be held, etc., excludes the theory of the existence of power to establish a temporary county seat where the courthouse has been destroyed by fire, and there are no suitable buildings at the county seat, but the act of the county court in removing the offices and records to another place on such grounds is not judicial and is not reviewable on certiorari; "judicial action" being an adjudication on the rights of parties brought before the court by notice or process and on whose claim some decision or judgment is rendered. *State ex rel. Powell v. Shocklee*, 141 S. W. 614, 617, 237 Mo. 460.

#### JUDICIAL ADMISSION

"A 'judicial admission' is a waiver of proof." Where there are two suits between the same parties on different causes of action, the pleadings in the first suit are admissible as evidence in the second suit, but are not conclusive. *Commonwealth v. Monongahela Bridge Co.*, 64 Atl. 909, 912, 216 Pa. 108, 8 Ann. Cas. 1073.

#### JUDICIAL BUSINESS

Service of notice of appeal is not "judicial business," and such notice may be served on a legal holiday other than Sunday. *Ferrari v. Beaver Hill Coal Co.*, 95 Pac. 498, 54 Or. 210.

The term "judicial business," as used in Code Civ. Proc. § 134, does not include an election to determine whether a proposed municipal corporation should be created, and hence such election may be held on a legal holiday named in Pol. Code, § 10, for on holidays, transactions not within the statutory prohibition may be carried on as on other days. *People ex rel. Russell v. Town of Loyaltown*, 82 Pac. 620, 621, 147 Cal. 774.

#### JUDICIAL CONFESSION

A confession, made by accused on preliminary examination before a magistrate, is a "judicial confession," and is sufficient to justify a conviction, under Kirby's Dig. § 2385, providing that a confession, unless made in open court, will not warrant a conviction unless corroborated by proof of the commission of the offense. *Skaggs v. State*, 113 S. W. 346, 349, 88 Ark. 62, 16 Ann. Cas. 622.

The provisions of the Louisiana Code, establishing estoppel by "judicial confession," which is defined to the declaration which the party or his special attorney makes in a judicial proceeding, must be construed in its relations to other provisions of law which determined the capacity of the individual and the validity of his acts. One cannot confess away that which in the interest of public order and good morals he is prohibited by law from alienating. *Ackerman v. Larnier*, 40 South. 581, 588, 116 La. 101.

#### JUDICIAL CONTEMPT

A "judicial contempt" is any willful disregard of the authority of the court, rightfully exercised. *Powell v. State*, 48 Ala. 154, 156.

#### JUDICIAL COURT

A justice's court in Illinois is a "judicial court" with power to permit amendments, and to restore lost records. *Treharne v. Matson*, 93 N. E. 553, 556, 46 Ind. App. 705.

#### JUDICIAL DECISION

As law, see Law.

A register who has exclusive jurisdiction of the probate of wills and testaments under

Act March 15, 1832 (P. L. 136), is a judge, and the admission of a will to probate by him is a "judicial decision." *In re Kern's Estate*, 61 Atl. 573, 575, 212 Pa. 57 (quoting *Holliday v. Ward*, 19 Pa. 485, 57 Am. Dec. 671).

### JUDICIAL DECREE

A decree, entered by agreement, and not as the result of findings by the court, is not in a strict legal sense a "judicial decree," but is in the nature of a solemn contract between the parties entered by the court. *Hohenadel v. Steele*, 86 N. E. 717, 719, 237 Ill. 229.

### JUDICIAL DICTUM

See Dictum.

### JUDICIAL DISCRETION

See, also, Discretion.

"Judicial discretion" implies the liberty to act as a judge should act, applying the rules and analogies of the law to the facts found after weighing and examining the evidence, to act upon fair judicial consideration, and not arbitrarily. *State v. Foren*, 97 Pac. 791, 793, 78 Kan. 654.

"Judicial discretion" means the exercise of final judgment by the court in the decision of such questions of fact as from their nature and the circumstances of the case come peculiarly within the province of the presiding judge to determine, without the intervention, and to the exclusion of the functions of a jury." *United States v. Mel-drum*, 146 Fed. 390, 391 (quoting and adopting definition in *Bundy v. Hyde*, 50 N. H. 116, 120); *Jacques v. Chandler*, 62 Atl. 713, 715, 73 N. H. 376 (quoting definition in *Darling v. Town of Westmoreland*, 52 N. H. 401, 408, 13 Am. Rep. 55).

"Judicial discretion" is not the arbitrary will of the judge, but is a legal discretion to be exercised in discerning the course prescribed by law, which when discerned it is the duty of courts to follow. *Alexander Smith & Sons Carpet Co. v. Ball*, 122 N. Y. Supp. 187, 188, 137 App. Div. 100.

By "judicial discretion" is never intended the whim or caprice of the magistrate nor a course of judicial action inconsistent with itself in dealing with cases essentially alike. *Hubbard v. Hubbard*, 58 Atl. 969, 970, 77 Vt. 73, 67 L. R. A. 969, 107 Am. St. Rep. 749, 2 Ann. Cas. 315.

"Judicial discretion" does not mean a self-willfulness that may prompt any and every act, but discretion guided by the law (see what the law discloses upon a certain statement of facts, and then decide in accordance with the law), so as to do substantially equity and justice. *People v. Steinhart*, 93 N. Y. Supp. 1026, 1031, 47 Misc. Rep. 252.

The term "judicial discretion" may be defined generally as a discretion which is

sound and guided by fixed principles of law, while a nonjudicial discretion, such as may be vested in the officers of a corporation, does not admit of the application of fixed rules of law, but depends wholly upon the will and judgment of the person exercising it. *Conway v. Minnesota Mut. Life Ins. Co.*, 112 Pac. 1106, 1107, 62 Wash. 49, 40 L. R. A. (N. S.) 148.

"Judicial discretion," in its broadest meaning, is that sense of justice from which has arisen a variety of legal and equitable rules, and in its narrower sense is the capacity of a judge to understand and apply the law of the land to the particular facts, so that the legal rights of the parties may be declared and enforced. *Scott v. Marley*, 137 S. W. 492, 493, 124 Tenn. 388.

Whether an appeal from an interlocutory judgment of the justice of the peace should be dismissed is a question addressed to the court assuming jurisdiction, and its action thereon is a "judicial" determination of a question incident to the proceedings and properly arising therein, and hence its determination to assume jurisdiction was not void but merely irregular, and therefore not subject to collateral attack. *Jennings v. Munden*, 102 S. W. 945, 946, 46 Tex. Civ. App. 520.

### Granting or denying injunction

Where a suit to enjoin a change of the grade of a way involved the relative rights of the parties in the way owned in common, to be determined not only by their original rights under conveyances, but also by the subsequent acts of the parties, an order continuing a temporary injunction halting defendant in work incidental to the improvement of his land, but not immediately necessary for any present use thereof, was within the trial court's judicial discretion, and should not be disturbed on appeal. *Alexander Smith & Sons Carpet Co. v. Ball*, 122 N. Y. Supp. 187, 189, 137 App. Div. 100.

### Granting specific performance

The "judicial discretion" to be applied in determining whether a contract will be specifically enforced must be a sound legal discretion. *Stevens v. Trafton*, 93 Pac. 810, 813, 36 Mont. 520.

### JUDICIAL DUTY

A "judicial duty," within the meaning of the Constitution, is such a duty as legitimately pertains to an officer in the department designated by the Constitution as judicial. An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. The act of a state board of health in revoking a license to practice medicine and surgery is not a judicial action, and cannot be regulated by the writ of prohibition. *State ex rel. McAnally v. Goodier*, 93 S. W. 928, 931, 195 Mo. 551.



Where an officer's duty necessarily requires examination of evidence in the decision of questions of law and fact, the duty is not ministerial, but judicial or discretionary. An act, however, is none the less ministerial because the person performing it may have to satisfy himself that a state of facts exists under which it is his right and duty to perform the act, though in doing so he must to some extent construe the statute by which the duty is imposed. *Stephens v. Jones*, 123 N. W. 705, 708, 24 S. D. 97.

### JUDICIAL FUNCTION

"That a function may be held to be 'judicial,' it must be exercised in determining the merits of the issue. The criterion that, if the action of the tribunal calls for the exercise of judgment and discretion, it is judicial is unsound. While it is true that there must be exercise of judgment or discretion to make a function judicial, yet it is not true that every function wherein judgment and discretion are exercised is a judicial one. The act of a board of supervisors in letting a contract for public printing is not a judicial one. *Hammer v. Smith*, 94 Pac. 1121, 11 Ariz. 420.

The mere fact that a ministerial duty is imposed on a judge by law does not necessarily make it a "judicial function." Such functions are determined by the intrinsic character of the duty or act itself, and not by the character of the official designated to perform it. "When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform the ministerial acts in a particular way, but, when he acts in a judicial capacity, he can only be required to proceed; the manner of his doing so is left entirely to his judgment." *Hamma v. People*, 94 Pac. 326, 328, 42 Colo. 401, 15 L. R. A. (N. S.) 621, 15 Ann. Cas. 655 (quoting *Webster v. Bouv. Law Dict.* p. 416; 27 Cyc. p. 793).

The exercise of the Attorney General's discretion to bring quo warranto proceedings against persons usurping public office, vested in him by Code Civ. Proc. § 1948, providing that the Attorney General may maintain an action on his own information or of a private person against any person usurping, intruding into, or unlawfully holding or exercising within the state a franchise or public office, is not a "judicial function," and therefore a determination by him not to bring such a proceeding is no bar to him or his successor bringing the proceeding subsequently. *People v. McClellan*, 103 N. Y. Supp. 146, 148, 118 App. Div. 177.

The state board of license commissioners exercises "judicial functions" in deciding that licensees have violated the license law and that they are no longer entitled to enjoy a license, and, where the board has jurisdiction of the parties and subject-matter, its judgment is valid until set aside on appropriate proceedings. *Barry v. Little*, 68 Atl. 40,

41, 74 N. H. 319 (citing *State v. Corron*, 62 Atl. 1044, 73 N. H. 434, 6 Ann. Cas. 486).

"Determining whether a rate has been legally established, or whether the same is or is not reasonable, is a 'judicial function.'" *Chicago, I. & L. R. Co. v. Railroad Commission of Indiana*, 78 N. E. 338, 344, 38 Ind. App. 439. But the fixing of a rate by a city, when not a matter of contract, is a legislative or administrative rather than a "judicial function." *Pocatello v. Murray*, 173 Fed. 382, 385 (citing *Reagan v. Farmers' Loan & Trust Co.*, 14 Sup. Ct. 1047, 154 U. S. 397, 38 L. Ed. 1031; *Southern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12).

The function exercised by voters or a representative body, upon whose approval the inception of a franchise grant by the Legislature is made conditional, is not the exercise of a "judicial function." It is the exercise of the function of "referendum." *Duffield v. Ashurst*, 100 Pac. 820, 825, 12 Ariz. 360.

### JUDICIAL INQUIRY

Proceedings for the probate of a will are not a civil action, but a judicial inquiry to ascertain whether the instrument before the court is the last will and testament of the deceased, and section 4 of the Evidence Act is inapplicable. In *re Veazey's Will*, 85 Atl. 176, 177, 80 N. J. Eq. 466.

"A 'judicial inquiry' investigates, declares, and enforces liabilities as they stand on present or past facts, and under laws supposed already to exist." The establishment of railway passenger rates by the Virginia corporation commission is not *res judicata* in a suit which seeks injunctive relief on the ground that the rates are confiscatory, though the commission, for some purposes, is a court enacted only after hearing an investigation, since proceedings to establish rates do not involve a "judicial inquiry." *Prentiss v. Atlantic Coast Line Co.*, 29 Sup. Ct. 67, 69, 211 U. S. 210, 53 L. Ed. 150.

### JUDICIAL NOTICE

"Judicial notice" is a term used to express the duty or power of the courts to accept for the purposes of the trial the truth of certain well-known facts without requiring proof thereof. *City of Chicago v. Williams*, 98 N. E. 666, 668, 254 Ill. 360.

"Judicial notice" takes the place of proof, and is of equal force, and as a means of establishing facts it is superior to evidence, as it stands for proof, and fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary. *Beardsley v. Irving*, 71 Atl. 580, 581, 81 Conn. 489. See, also, *Gay v. City of Eugene*, 100 Pac. 306, 308, 53 Or. 289, 18 Ann. Cas. 188.

The doctrine of judicial notice is not a hard and fast one, but is modified by judicial discretion, the courts not being bound to take judicial notice of matters of fact; whether

they will do so or not being dependent on the nature of the subject, the issue involved, and the apparent justice of the case. *City of St. Louis v. Niehaus*, 139 S. W. 450, 452, 236 Mo. 8.

"That a matter is 'judicially noticed' means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. But the opponent is not prevented from disputing the matter by evidence if he believes it disputable." Thus where, in a proceeding to abate a dam as a public nuisance, it is alleged that the stream is navigable, the court, on demurrer to the complaint, cannot take judicial notice that the stream is nonnavigable and prevent the introduction of proof to show the contrary. *State ex rel. Attorney General v. Norcross*, 112 N. W. 40, 43, 132 Wis. 534, 122 Am. St. Rep. 998.

"'Judicial notice' does not depend on the actual knowledge of the judges. When the fact is alleged, they must investigate and may refresh their recollection by resorting to any means which they may deem safe and proper." In a proceeding for the violation of a liquor injunction, the court can take judicial notice of the decree violated, although the presiding judge has no personal knowledge or remembrance thereof. *Haaren v. Mould*, 122 N. W. 921, 923, 144 Iowa, 296, 24 L. R. A. (N. S.) 404 (quoting and adopting definition given in *State ex rel. Marr v. Stearns*, 75 N. W. 210, 72 Minn. 200).

In the interpretation of an ambiguous statute, courts should examine, in the light of the history of its enactment, as disclosed by the legislative journal, the contemporary conditions and situation of the people, the economic and sociologic policy of the state, its Constitution and laws, and all other matter of common knowledge within the limits of their jurisdiction. The consideration of this knowledge, without proof of the facts, is generally termed "judicial notice" for the want of a better expression; but the term means no more than that courts, in construing the law, will bring to their aid those facts which are known by all well-informed persons because they are matters of public concern. *State v. Kelly*, 81 Pac. 450, 452, 71 Kan. 811, 70 L. R. A. 450, 6 Ann. Cas. 298.

The appellate tribunal should not extend the rule regarding "judicial notice" further than is proper to follow it in the court of first instance. In the appellate court the evidence directly pertinent should be well known to all parties in interest. Courts will not take judicial notice of statutes under which a company is organized, not offered in evidence and not proven. The district court is without authority to take judicial notice of proceedings in a case in another jurisdiction. *Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 South. 492, 493, 117 La. 199 (citing *Jones on Evidence*, verbo

"Judicial Notice"; overruling *Graham v. Williams*, 21 La. Ann. 596).

"What is known need not be proved." *Peterson v. Standard Oil Co.*, 106 Pac. 337, 339, 55 Or. 511, Ann. Cas. 1912A, 625 (quoting and adopting definition in *Town of North Hempstead v. Gregory*, 65 N. Y. Supp. 867, 53 App. Div. 350, and citing *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Wynehamer v. People*, 13 N. Y. 378).

## JUDICIAL OFFICER

Any judicial officer, see Any.

Other judicial officers, see Other.

Assessors of taxes and county clerks are "ministerial officers," and, while in some respects their acts may be construed as judicial, they are not "judicial officers," as that term is used in the Constitution. They have no power to inflict penalties for violation of laws or to determine whether a law has been violated and adjudge persons guilty. *Cleveland, C., C. & St. L. R. Co. v. People*, 72 N. E. 725, 726, 212 Ill. 638.

## Attorney

Acts 1880, p. 18, No. 11, making it unlawful for any "judicial" or ministerial officer of any of the courts of the state to go bail for any prisoner, etc., refers exclusively to such officers as judges, clerks, sheriffs, and their deputies, etc., as directly constitute the machinery of the court, and does not prohibit an attorney from becoming a surety on his client's bail bond, though an attorney is an "officer of the courts" generally. *State v. Babin*, 50 South. 825, 826, 124 La. 1005, 18 Ann. Cas. 837.

A city attorney is an executive or "judicial officer," within Comp. Laws § 11312, punishing the receiving of bribes by such officers. *People v. Salsbury*, 96 N. W. 936, 938, 941, 134 Mich. 537.

## Coroner

A coroner who, by Laws 1887, p. 400, c. 321, Laws 1899, p. 940, c. 464, has been given the powers of a magistrate in a limited class of cases, with the right to issue warrants, hold examinations, and commit or discharge an accused, but can exercise that jurisdiction only when some person has been killed or dangerously wounded by another, is a "judicial officer" within the meaning of Pen. Code, § 72, relating to the acceptance of bribes by such officers. *People v. Jackson*, 84 N. E. 65, 66, 191 N. Y. 293, 15 L. R. A. (N. S.) 1173, 14 Ann. Cas. 243.

Under Const. art. 6, §§ 1, 34-37, vesting judicial power in enumerated tribunals, not including the coroner, provided for in article 9, §§ 10, 11 (Ann. St. 1906, pp. 262, 263), a coroner, though exercising discretion in determining whether an inquest shall be held, is not a judicial officer, and though Rev. St. 1899, §§ 6642, 6643 (Ann. St. 1906, p. 3299), require a coroner's verdict to be in writing,

and to be signed by the coroner and the jurors, a coroner's verdict is not competent in an action on a mutual benefit certificate to prove the cause of death, though it may be competent as a part of the proof of his death. *Queatham v. Modern Woodmen of America*, 127 S. W. 651, 654, 148 Mo. App. 33.

#### **Justice of the peace**

A justice of the peace, in disposing of any cause, civil or criminal, which has been properly brought before him, holds a court of record, and acts as a "judicial officer." *McVeigh v. Ripley*, 58 Atl. 701, 702, 77 Conn. 136.

#### **Mayor**

Const. art. 3, distributes the powers in government into three departments—the legislative, executive, and judicial—and article 6, § 1, vests the judicial power in the courts of the state. *St. Louis City Charter*, art. 4, §§ 5, 15, 16, 47, and the ordinances adopted pursuant thereto, empower the mayor to enforce the laws and ordinances of the city, and to remove officials occupying positions in other departments of the city government on due notice and hearing before him. Held, that the mayor was not a judicial officer within the Constitution while exercising the power of removing city officers under the charter, his functions being merely quasi judicial, and the charter provisions empowering him to remove officers were not unconstitutional on that ground. *State ex rel. Heimbürger v. Wells*, 109 S. W. 758, 760, 210 Mo. 601.

#### **Municipal board of health**

Greater New York Charter, § 1173 (3 Laws 1901, p. 500, c. 466), relating to the city board of health, and providing that the actions of the board shall at all times be regarded as in their nature judicial and be treated as *prima facie* just and legal, and that all meetings of the board in every suit and proceeding be taken to have been duly called and regularly held, and all orders and proceedings to have been duly authorized, unless the contrary be proved, and that courts shall take judicial notice of the seal of the board and the signature of its secretary and chief clerk, does not change the members of the board from administrative to "judicial officers." *People ex rel. Lodes v. Department of Health of City of New York*, 82 N. E. 187, 189, 189 N. Y. 187, 13 L. R. A. (N. S.) 894.

#### **Recorder**

The framers of the Constitution, in providing for the continuance in office of "judicial officers," had in view those who to a general intent and purpose were such and not those who were incidentally and casually intrusted with some attribute of judicial character. The recorder of the municipal court of the city of Bangor was not, in the sense contemplated by the Constitution, a "judicial

officer," and therefore might be removed from office by the Governor and council. *Morrison v. McDonald*, 21 Me. 550, 555.

#### **Referee**

A referee, under the Constitution and statutes is a judicial officer appointed by the circuit court, and, being substituted for the judge, has all the powers of the court over the case referred to him. *Robertson v. Wilson*, 51 South. 849, 850, 59 Fla. 400, 138 Am. St. Rep. 128.

#### **Senator**

Under Const. art. 4, § 1, dividing the powers of government into the executive, legislative, and judicial departments, and article 5, §§ 1, 9, 11, 16, 17, vesting the legislative authority in the General Assembly, making each House a judge of the election and qualifications of its members, with power to expel a member, and providing that the government and other state and judicial officers shall be liable to impeachment, and article 8, § 1, vesting the judicial power in the Senate, sitting as a court of impeachment, in the Supreme Court, district courts, etc., a state senator is a member of the legislative department, though the Senate when sitting as a court of impeachment is a court exercising judicial functions, with power to judge the law and the evidence, and the term "judicial officers" in Laws 1909, c. 113, requiring nominations for judicial offices to be made by petition only as provided by Rev. Codes, § 524, does not include a Senator; the term "judicial officers" being limited to judges of the Supreme and district courts, justices of the peace, and judges of other inferior courts. *State ex rel. Haviland v. Beadle*, 111 Pac. 720, 723, 42 Mont. 174.

#### **Superintendent**

A state superintendent of a water district is not a "judicial officer," within the meaning of Const. art. 3, § 18, providing that judicial officers shall be liable to impeachment for high crimes and misdemeanors, in such manner as to permit his removal from office only by impeachment. *State ex rel. Hamilton v. Grant*, 82 Pac. 2, 13 Wyo. 41, 1 L. R. A. (N. S.) 588, 116 Am. St. Rep. 982 (citing *Farm Inv. Co. v. Carpenter*, 61 Pac. 258, 9 Wyo. 110-143, 50 L. R. A. 747, 87 Am. St. Rep. 918).

### **JUDICIAL POWER**

The "judicial" is the power that expounds and applies the laws. In re Appointment of Revisor of Statutes, 124 N. W. 670, 671, 141 Wis. 592, 18 Ann. Cas. 1176.

"Judicial power" implies the construction of laws and the adjudication of legal rights. *People v. Apfelbaum*, 95 N. E. 995, 997, 251, Ill. 18.

"Judicial power" is authority vested in some court, officer, or person to hear and determine when the rights of persons or prop-

erty or the propriety of doing an act are the subject-matter of adjudication." State ex rel. Higdon v. Jenks, 35 South. 60, 62, 138 Ala. 115; State v. Blaisdell, 132 N. W. 769, 773, 22 N. D. 86, Ann. Cas. 1913E, 1089; Rainey v. Ridgway, 43 South. 843, 844, 151 Ala. 532 (citing Flournoy v. City of Jefferson, 17 Ind. 169, 79 Am. Dec. 468).

The "judicial power," within Const. art. 3, dividing the powers of government into the legislative, executive, and judicial departments, is the power which adjudicates on and protects the rights and interests of individual citizens, and to that end construes the laws, and applies them in particular cases, and is exercised by the judge, with such assistants as he may lawfully have to aid him. Witter v. Cook County Com'rs, 100 N. E. 148, 149, 256 Ill. 616.

The power conferred on the federal Supreme Court by the Constitution is exclusively "judicial," limited to "cases" and "controversies," and it cannot be required or authorized to exercise any other, so that Congress cannot provide for a final judicial determination in the Supreme Court of the constitutionality of legislation without a "case" or "controversy." Muskrat v. United States, 31 Sup. Ct. 250, 253, 219 U. S. 348, 55 L. Ed. 246.

The "judicial power" of the United States, vested by Const. art. 3, § 1, in the federal courts, embraces all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto, except so far as there are limitations expressed in the Constitution on the general grant of judicial power. State of Kansas v. State of Colorado, 27 Sup. Ct. 655-661, 206 U. S. 46, 51 L. Ed. 956.

Whether or not a state has ceased to be republican in form, within the meaning of the federal Constitution, because of its adoption of the initiative and referendum, is not a "judicial" question but a political one which is solely for Congress to determine. Pacific States Telephone & Telegraph Co. v. State of Oregon, 32 Sup. Ct. 224, 228, 223 U. S. 118, 56 L. Ed. 377.

The "judicial power" vested in courts by Const. art. 5, § 1, providing that the judicial power shall be vested in courts specifically mentioned and provided for, includes the right to enforce and protect rights, prevent and redress wrongs, punish offenses against the public, and determine the rights, obligations, and liabilities of persons arising out of their relation to and dealings with each other, and the Legislature may not, even on the fullest, fairest, and most deliberate investigation, after due notice, pass an act declaring that an individual is indebted to the state in a given amount, and by legislative fiat create a lien on his property. Carolina Glass Co. v. State, 69 S. E. 391, 398, 87 S. C. 270.

In the constitutional division of the powers of a state into legislative, executive, and judicial departments, there can be no absolute line of demarcation between the functions of such departments, and where it is scarcely ascertainable whether the several powers conferred by a statute belong more properly to one or the other department, and their assignment to one works no practical encroachment on the functions of another, the fact that all such powers are vested in a single body or tribunal for practical reasons will not invalidate the statute. Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957, 967.

Orders for the entry nunc pro tunc of a judgment and an order overruling a motion for a new trial are the exercise of "judicial power," and a court has no power in vacation to make such orders, either under its implied powers or Rev. St. 1895, art. 1357, authorizing courts in vacation to amend a judgment or decree. Accousi v. G. A. Stowers Furniture Co. (Tex.) 83 S. W. 1104, 1105.

#### As vested in courts or judges

The "judicial power" referred to in the constitutional provision declaring that the judicial power of the state as to matters of law and equity shall be vested in the Supreme Court, and other courts specifically named, means such powers and authority as courts and judges exercise; such as legitimately pertains to an officer in the department designated by the Constitution as "judicial"; such as exercised in the ordinary forms of a court of justice, in a suit between parties with process. It does not include every authority judicial in its nature which requires the exercise of judgment or discretion. State ex rel. School Dist. No. 1, Township 45, Range 3 East, v. Andrae, 116 S. W. 561, 563, 216 Mo. 617.

The intangible assets act (Act April 17, 1905, p. 351, c. 146), which makes the Secretary of State and the Comptroller, required by Const. art. 4, §§ 21, 23, to perform prescribed executive duties and such others as may be prescribed by law, members of a state tax board, with power to value the intangible assets of railroads, and for the distribution of the values for local taxation, is not void as vesting in them judicial power, in conflict with Const. art. 2, § 1, dividing the powers of government into the legislative, executive, and judicial departments, as the word "judicial," as used in the section and in article 5, creating the judicial department, when strictly construed, means courts with power to determine causes between parties affecting the rights of persons as to their life, liberty and property. Missouri, K. & T. Ry. Co. of Texas v. Shannon, 100 S. W. 138, 141, 100 Tex. 379, 10 L. R. A. (N. S.) 681.

"Judicial power" is "the authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far

as it is written law; the power to construe and expound the law as distinguished from the legislative and executive functions" (quoting *Bouv. Law Dict.*). It is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring cases before it for decision" (quoting *Miller, Const.* 314). "Judicial act is the power of interpreting law, of declaring what the law is or has been" (quoting *And. Law Dict.* 579). *Metz v. Maddox*, 105 N. Y. Supp. 702, 719, 720, 121 App. Div. 147.

#### Other powers distinguished

Theoretically the "legislative power" is the authority to make, order, and repeal, the "executive power," to administer and enforce, and the "judicial power," to interpret and apply, the laws. *Richardson v. Young*, 125 S. W. 664, 668, 122 Tenn. 471.

"To declare what a law is or has been is a 'judicial power'; to declare what it shall be is 'legislative.'" Act July 6, 1905 (*Pub. Acts* 1905, p. 413, c. 217), which limits the recovery in a suit against an administrator for the statutory penalty for failure to file an inventory, does not invade the judicial province nor interfere with, dictate to, or coerce the judicial department. *Atwood v. Buckingham*, 62 Atl. 616, 618, 78 Conn. 423 (citing *Dash v. Van Kleeck* [N. Y.] 7 Johns. 477, 498, 5 Am. Dec. 291).

#### Admission of attorney

"Judicial power" is that power which adjudicates and protects the rights and interests of individual citizens, and to that end construes and applies the laws." *Revisal* 1905, §§ 207, 208, relating to the admission of attorneys, and making it the duty of the court to license an applicant where he has complied with the formal prerequisites and shows himself to have a competent knowledge of the law, is not in violation of Declaration of Rights, § 8, which provides that legislative, executive, and supreme judicial powers of the government shall be kept separate and distinct. In re Applicants for License, 55 S. E. 635, 637, 143 N. C. 1, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187 (quoting and adopting definition in *People ex rel. Kern v. Chase*, 46 N. E. 454, 165 Ill. 527, 36 L. R. A. 105).

#### Determination of rates

The railroad commission act of Oregon of February 18, 1907 (*Laws* 1907, p. 67), which requires every railroad to charge reasonable and just rates, creates a state railroad commission, with power to determine in the first instance the reasonableness of rates charged, and, if found unreasonable, to fix rates which shall be prima facie reasonable and just, and shall be conformed to by the railroad company, with the right, however, to bring suit in a court of the state to determine their reasonableness, in which suit it shall have the burden of proof, is not unconstitutional, as conferring executive and ju-

dicial functions on the commission, in violation of article 3, § 1, of the state Constitution, providing that the powers of government shall be divided into three separate departments, legislative, executive, and judicial, and that, except as provided in the Constitution itself, no person charged with official duties under one of these departments is competent to exercise any function on the other. *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 957, 967.

#### Drain proceedings

*Rev. St.* 1899, § 8284, requiring the report of the commission appointed to locate drains in proceedings for the establishment of a drainage district, etc., when considered in connection with sections 8286, 8287, as amended relating to hearing before the court on the report, etc., is not in conflict with Const. art. 6, § 1 (*Ann. St.* 1906, p. 212), vesting the judicial power in courts, as it does not undertake to control the decision of the county court, and make the decision depend on the report of the commission appointed under the act. *State ex rel. Applegate v. Taylor*, 123 S. W. 892, 915, 916, 224 Mo. 393.

#### Contempt

The power to punish for contempt is essentially a judicial power, except in the limited degree in which it inheres in the legislative body. It can be exercised only by a tribunal possessing judicial functions. *State ex rel. Haughey v. Ryan*, 81 S. W. 435, 436, 182 Mo. 349.

#### Extension of city limits

*Gen. St.* 1901, § 1172, empowering county boards to determine the application of a city of the third class for permission to extend its limits, is not in violation of the Constitution as conferring on county boards "judicial powers." And the same is true of the provision giving the county board power to determine whether the proposed extension of a city will cause manifest injury to individuals, though so far judicial as to permit an appeal from such determination to the courts. *Nash v. City of Glen Elder*, 106 Pac. 292, 293, 81 Kan. 446.

#### Issuing warrant

Authority in the clerk of an inferior court of criminal jurisdiction to issue warrants of arrest is not "judicial power," which can be conferred only on judicial officers, as such warrants are issued only on verified complaints, and returnable to the court from which they issue. *Kreulhaus v. City of Birmingham*, 51 South. 297, 299, 164 Ala. 623, 26 L. R. A. (N. S.) 492.

#### Preliminary examination

"Judicial power," under Const. art. 6, § 1 [*Ann. St.* 1906, p. 212], providing that the judicial power of the state shall be vested in certain courts specified, is the power which vests in a court to try and determine causes, as distinguished from the judicial function to

examine and discharge or commit for trial, and Rev. St. 1899, § 2441 [Ann. St. 1906, p. 1478], vesting in justices of the peace the power to make a preliminary examination of one accused of felony, is not a grant of the judicial power of the state. *State ex rel. Board of Education of St. Louis v. Nast*, 108 S. W. 563, 565, 209 Mo. 708.

#### **Punishment for contempt**

The "judicial power" referred to in Const. art. 6, § 1, providing that the judicial power shall be vested in a supreme court, district court, justice of the peace, police magistrate, and such other courts inferior to the district court as may be created by law, when considered in connection with section 18, providing that justices of the peace shall exercise such jurisdiction as may be provided by law, includes the power of a justice of the peace to commit a witness for refusal to testify in proceedings to take his deposition under the statute authorizing justices to take depositions and to punish persons refusing to answer proper questions. In *re Button*, 120 N. W. 203, 204, 83 Neb. 686, 23 L. R. A. (N. S.) 1173.

#### **Quasi judicial acts**

"The 'judicial power' vested by the Constitution in courts relates to that administration of remedies for remediable rights formerly exercised exclusively by courts. The discretionary, denominated quasi judicial, authority vested in such boards as the State Board of Dental Examiners is a necessary incident of purely administrative duties. The two in many branches of civil government are inseparable and have no similarity to authority exercisable by courts through the instrumentality of judicial remedies." The authority of the State Board of Dental Examiners to pass upon the reputability of colleges is neither legislative nor judicial, but is quasi judicial, and hence does not contravene the constitutional provision vesting judicial authority in the courts. *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 500, 511, 127 Wis. 468.

Where judgment is exercised by an administrative board as an incident to a ministerial power, it is not an exercise of "judicial power," within the meaning of the Constitution separating the departments of government. *Conover v. Gatton*, 96 N. E. 522, 523, 251 Ill. 587.

#### **Removal or appointment of officer**

The removal of a village marshal by a board of trustees is not such an exercise of "judicial power" as to be repugnant to the Constitution. It is only the exercise of an administrative and governmental function belonging to the municipality. *Conwell v. Village of Culesac*, 92 Pac. 535, 536, 13 Idaho, 575.

"Judicial power" includes the authority to appoint all necessary subordinate officers

and assistants essential to the conducting of judicial business. *People v. Crissman*, 92 Pac. 949, 952, 41 Colo. 450 (quoting and adopting definition in *State ex rel. Douglas v. Westfall*, 89 N. W. 175, 178, 85 Minn. 437, 446, 57 L. R. A. 297, 89 Am. St. Rep. 571).

Appointment to office, while generally called an executive function, cannot under Const. art. 13, § 9, providing for the election of officers whose election or appointment is not provided for by the Constitution, by electors of the counties, cities, or towns, as the case may be, be classified as exclusively a function of either of the three great departments of government, but may be exercised by either the legislative or "judicial" department when it becomes necessary or proper, in the execution of their proper duties, to have administrative acts performed by assistants, provided the Constitution does not otherwise direct. In *re Appointment of Revisor of Statutes*, 124 N. W. 670, 672, 141 Wis. 592, 18 Ann. Cas. 1176.

#### **Settling and signing case**

The settling and signing of a case made by the judge trying the cause is the exercise of "judicial power," and one which the law has conferred upon the judge trying the cause, and on no one else. *City of Enid v. Wigger*, 85 Pac. 697, 698, 15 Okl. 507.

### **JUDICIAL PROCEEDING**

See, also, Proceeding.

As privileged communication, see Privileged Communication.

"Judicial proceedings," within the meaning of the rule that statements, otherwise slander, which are made in judicial proceedings, are absolutely privileged, means proceeding in a court of justice established or recognized by law, wherein the rights of parties recognized and protected by law are involved and may be determined. Proceedings of a municipal investigating committee do not constitute judicial proceedings within the meaning of the rule. *Blakeslee v. Carroll*, 29 Atl. 473, 475, 64 Conn. 223, 25 L. R. A. 106.

The term "judicial proceeding" is synonymous with the word "suit," and means any proceeding for the purpose of obtaining such remedy as the law allows. *State ex rel. West v. McCafferty*, 105 Pac. 992, 997, 25 Okl. 2.

Where, in a proceeding before a local board not having the character of an ordinary court, public notice is required, and a hearing of objections to the contemplated action is provided for, and the order to be made affects the property or rights of the citizens, the proceeding is judicial in character, and reviewable on certiorari within Code Civ. Proc. § 1068, authorizing writ of review. *Imperial Water Co. No. 1 v. Board of Sup'rs of Imperial County*, 120 Pac. 780, 782, 162 Cal. 14.

The publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called, and no judicial action invited, thereon, is not, within the common-law privilege, accorded to the publication of judicial proceedings. While under some circumstances the words "proceedings" or even "judicial proceedings" may be used in a sense to include the services or filing of a pleading, the phrase "judicial proceedings," or rather "report of a judicial proceeding," had attained a perfectly definite significance in the law of libel, the subject which the Legislature were attempting to regulate in that they used it in the sense they did. *Isley v. Sentinel Co.*, 113 N. W. 425, 427, 133 Wis. 20, 126 Am. St. Rep. 928.

#### **Arbitration**

The statutory arbitration provided for and regulated by the Code of Civil Procedure is a "judicial proceeding," and hence, in view of section 6, forbidding a "court" to be open or transact any business on Sunday, to proceed with the hearing of arbitration on Sunday, in the face of objections and protest of parties is illegal and constituted misconduct violating the award. *In re Picker*, 114 N. Y. Supp. 289, 292, 130 App. Div. 88.

#### **Foreclosure**

A chancery foreclosure of mortgage is a "judicial proceeding." *Butters v. Butters*, 117 N. W. 203, 206, 153 Mich. 153.

A proceeding, professing to determine the right of property where no notice, written or constructive, is given, is not a "judicial proceeding," under Code 1907, §§ 2932, 4741, relative to notice of levy of attachment, and notice to a subtenant of a levy on his crop in attachment against the tenant to enforce a landlord's lien is required, and, where the record does not show notice and an opportunity to defend, a judgment is not *prima facie* evidence against him. *Hudson v. Wright*, 51 South. 389, 391, 164 Ala. 390, 137 Am. St. Rep. 55.

#### **Justice's or police magistrate's proceedings**

An information laid before a magistrate, whether before or after arrest, places before him for judicial action the question whether he is authorized to issue judicial process thereon; and, though he holds it insufficient, a "judicial proceeding" is had, on which accused, after discharge, may base an action for malicious prosecution. *MacDonald v. National Art Co.*, 125 N. Y. Supp. 708, 710, 69 Misc. Rep. 325.

#### **Proceedings before corporation commission**

The establishment of railway passenger rates by the Virginia Corporation Commission is not *res judicata* in a suit which seeks injunctive relief on the ground that the rates are confiscatory, although such commission for some purposes is a court, and acted only

after hearing and investigation, since proceedings to establish rates are legislative, and not judicial, in their nature. *Prentiss v. Atlantic Coast Line Co.*, 29 Sup. Ct. 67, 69, 211 U. S. 210, 53 L. Ed. 150.

#### **Proceeding for summary process**

A preliminary affidavit, filed for the purpose of procuring a writ of *capias ad respondendum*, is not such a "judicial proceeding" that the publication of a fair and impartial report thereof is privileged within the law relating to libel. *Todd v. Every Evening Printing Co. (Del.)* 62 Atl. 1089, 1091.

#### **Proceeding to obtain liquor license**

A proceeding to obtain a license, to sell intoxicating liquors, is a "judicial proceeding," in the nature of a civil action. *Bryan v. De Moss*, 73 N. E. 156, 157, 34 Ind. App. 473; *Scanlon v. Deuel*, 94 N. E. 561, 562, 176 Ind. 208.

### **JUDICIAL PROCESS**

"Judicial process" includes the mandate of a court to its officers, and a means whereby courts compel the appearance of parties, or compliance with its commands, and includes a summons. *Ex parte Hill*, 51 South. 786, 787, 165 Ala. 365.

#### **Bankruptcy proceeding**

The filing of a petition in bankruptcy is "judicial process," and operates as an attachment or sequestration from that time of the property of the bankrupt for the equal benefit of all of his creditors, and as a restraint to its disposition by him. *In re Smith & Shuck*, 132 Fed. 301, 303.

#### **Distress**

A distress for taxes is not a "judicial process." *Acme Harvesting Mach. Co. v. Hinkley*, 122 N. W. 482, 483, 23 S. D. 509, 21 Ann. Cas. 743 (citing *Ross v. Holtzman*, 3 Cranch, 391, 20 Fed. Cas. 1239).

### **JUDICIAL PURPOSES**

The registration of a chattel mortgage is not within the meaning of the term "judicial purposes" under a statute attaching an unorganized county to an organized county for "judicial purposes"; that term being defined as purposes of the courts in administration of justice. *First Nat. Bank of Portales, N. M., v. McElroy*, 112 S. W. 801, 804, 51 Tex. Civ. App. 284.

Under a statute attaching an unorganized county to an organized county for "judicial purposes," the grand jury of the organized county has jurisdiction to indict, and its courts can try and punish for offenses committed in the unorganized county. *First Nat. Bank of Portales, N. M., v. McElroy*, 112 S. W. 801, 804, 51 Tex. Civ. App. 284.

### **JUDICIAL QUESTION**

It is a judicial question whether the common law invoked in a judicial proceeding has been modified by constitutional or statu-

tory law, "judicial decisions," or the conditions and wants of the people, and consequently to what extent it remains in force in the state. *Cooper v. Seaverns*, 105 Pac. 509, 514, 81 Kan. 267, 25 L. R. A. (N. S.) 517, 135 Am. St. Rep. 359, 19 Ann. Cas. 168.

While the right to exercise the police power is acknowledged by the courts, the question whether the constitutional rights of a citizen as to his person or property have been unduly invaded in a particular instance is always a "judicial question." In *re McCapes*, 106 Pac. 229, 230, 157 Cal. 26.

### JUDICIAL RECORD

A "judicial record" is a public writing. *Hibernia Savings & Loan Soc. v. Boyd*, 100 Pac. 239, 242, 155 Cal. 193.

### JUDICIAL SALE

As sale, see Sale.

Purchaser at sale as purchaser, see Purchaser.

A "judicial sale" is a sale authorized by a court which has jurisdiction to grant such authority. *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 Fed. 162, 165, 91 C. C. A. 196.

"Judicial sales" are involuntary sales, the officer conducting the same being the agent of the debtor, so that the conveyance by such officer does not estop the judgment creditor. *Brady v. Carteret Realty Co.*, 60 Atl. 938, 939, 67 N. J. Eq. 641, 110 Am. St. Rep. 502, 3 Ann. Cas. 421 (citing *Den v. Wilians*, 14 N. J. Law 1).

In a "judicial sale" the court is the vendor, and in selling it acts as the agent of defendant, compelling him to do what it determines he ought to have done; and in making a "judicial sale" the court does not act by authority of the plaintiff. The court acts by the authority of the law of the land, and the plaintiff is in no sense his principal, and, where judgment for the enforcement of bonds and mortgages is reversed after the sale of property to a third person, appellees are only responsible for the amount received from the sales, with interest, and, when the sale was made to the mortgagee, the appellant may either allow the sale to stand and take the money, or have the sale set aside subject to a lien on the property for taxes paid and expenses incurred by the mortgagee. *Hess v. Deppen*, 101 S. W. 362, 363, 125 Ky. 424, 15 Ann. Cas. 670.

Sales of real property of a lunatic in proceedings before the proper probate judge or clerk of the superior court of North Carolina acting as a probate court are "judicial sales." *Rexford v. Brunswick-Balke-Collender Co.*, 181 Fed. 462, 471, 104 C. C. A. 210.

#### Administrator's sale

The term "judicial sale" denotes more than what is known in the text-books as such, and a sale by an administrator or executor

under an order of court is in the nature of a "judicial sale." *Green v. Freeman*, 55 S. E. 45, 47, 126 Ga. 274, 7 Ann. Cas. 1069.

A sale of real estate by an administrator under an order and decree of court is a "judicial sale." *Pierce v. Vansell*, 74 N. E. 554, 556, 35 Ind. App. 525.

A sale to pay a decedent's debts, made under an order of the orphans' court, is a "judicial sale." *Podesta v. Binns*, 60 Atl. 815, 818, 69 N. J. Eq. 387.

Administrators' sales under orders of the probate court are "judicial sales," and the county court may modify an order of sale made by itself so as to authorize property which has been ordered to be sold at private sale to be sold at a public sale. *Rhodes v. Bell*, 130 S. W. 465, 471, 230 Mo. 138.

Rev. St. 1899, § 3172, provides that every lease of lands for an unexpired term of three years or more shall be subject to execution and sale as real property. Section 2933 gives a widow dower in leasehold estates of her husband for a term of 20 years or more to be assigned as in real estate, and for a term of less than 20 years to be assigned as personal property. Held, that such sections were not in conflict, but supplemented each other, and section 3172, being sufficiently broad to include all "judicial sales," which embraces a sale of real estate under an order of the probate court, and where a leasehold for an unexpired term of three years or more not assigned to a widow as dower is required to be sold for the lessee's debts, it must be sold in the manner provided by sections 147, 148, for sales of real estate, which can only be made on the administrator's petition, accompanied by an inventory of the decedent's real estate and remaining personal property and a list of the debts unpaid, and after notice to those interested. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 502, 225 Mo. 414, 20 Ann. Cas. 1072.

#### Foreclosure

Where a county before any administrative sale of real estate for taxes sues to foreclose a tax lien and obtains a decree, a sale thereunder is a "judicial sale" and does not become complete until confirmation; the time for redemption dating from such confirmation. *Smith v. Carnahan*, 120 N. W. 212, 213, 83 Neb. 667.

#### Guardian's sale

A guardian's ex parte sale of realty is a "judicial sale" within *Burns' Ann. St.* 1908, § 3052, which vests title in the wife as to her inchoate interest upon judicial sale of her husband's real estate. *Huffman v. Huffman* (Ind.) 99 N. E. 769, 771.

#### Partition sale

A sale in partition made under process of the court by an officer appointed and commissioned to sell, which becomes absolute only on confirmation by the court, is a "judi-



cial sale." *Staser v. Gaar, Scott & Co.*, 78 N. E. 987, 988, 38 Ind. App. 696.

A sale under a decree of the probate court for division between the heirs of a deceased owner is a "judicial sale," and the fact that the property was at the time of the sale in the adverse possession of a third person does not invalidate the deed from the commissioner to the purchaser, though the deed was made before the present Code went into effect. *Williams v. Williams*, 54 South. 107, 108, 170 Ala. 143.

#### **Receiver's sale**

A sale by a receiver appointed by a court is a "judicial sale," and the maxim "caveat emptor" applies to such sale. *Southern Cotton Mills v. Ragan*, 75 S. E. 611, 613, 138 Ga. 504.

A sale by a receiver in bankruptcy, confirmed by the court, is a "judicial sale." *F. A. Ames Co. v. Slocomb Mercantile Co.*, 51 South. 994, 995, 166 Ala. 99.

#### **Trustee's sale**

A sale of personal property by a trustee in bankruptcy, under an order to sell issued by the court, is a "judicial sale." *Carney v. Averill (Me.)* 85 Atl. 494, 496.

### **JUDICIAL TRIBUNAL**

A legislative investigating committee charged with the duty of gathering and reporting information for legislative guidance is not a "judicial tribunal" within the meaning of the Constitution. *State ex rel. Rosenheim v. Frear*, 119 N. W. 894, 896, 138 Wis. 173.

The charter of the city of La Follette (Acts 1897, c. 161), provides by section 13, that a contest over the election of any city officer shall be heard and determined by the council, under such rules as it should have previously established for such hearing. *Shannon's Code*, § 6063, provides that circuit courts are courts of general jurisdiction in all cases where the jurisdiction is not conferred upon another tribunal. Held, that the city council was not a "judicial tribunal," within the sense and meaning of section 6063, so that the circuit court had original jurisdiction of a contested mayoralty election in such city. *Taylor v. Carr*, 141 S. W. 745, 747, 125 Tenn. 235, Ann. Cas. 1913C, 155.

A "judicial tribunal" decides upon the legality of claims and conduct, and it applies the law and defines the rights of parties with reference to transactions already had. A statute authorizing the Governor, on the recommendation of the Supreme Court, to appoint an additional judge for the time recommended by the court lodges legislative power with the court in conflict with Const. art. 4, § 1. In re Commissioners of Counties Comprising Seventh Judicial Dist., 98 Pac. 557, 559, 22 Okl. 435 (quoting and adopting definition in *Merrill v. Sherburne*, 1 N. H. 204, 8 Am. Dec. 52).

Where a city ordinance authorizes the assessment of omitted property by the city council on notice of hearing to the owner, the act of the council in assessing omitted property is purely ministerial, although it has mixed certain discretion as to finding values and the like, which is not reviewable, and which quality is sometimes called "judicial," though it is not judicial in the sense that it is the act of a court; and hence such ordinance was not violative of the constitutional limitation on the Legislature to create any "judicial tribunals" other than the courts expressly named in that instrument. *Muir's Adm'r v. City of Bardstown*, 87 S. W. 1096, 1098, 120 Ky. 739.

By inability to enforce in the "judicial tribunals of the state" a right claimed by defendant seeking to remove a case to the federal court is meant any judicial tribunal of the state that may have jurisdiction of the prosecution. It was intended thereby to provide that if a defendant in a criminal proceeding pending in a state tribunal cannot enforce his right to the equal protection of the laws in such court, or in any court to which it may be carried, then he was entitled to a removal. *Commonwealth of Kentucky v. Powers*, 139 Fed. 452, 487.

### **JUDICIAL WRIT**

See *Scire Facias*.

### **JUICE**

See *Cherry Juica*.

### **JUMP**

#### **JUMPING A WIRE**

"Jumping a wire" by a telephone company consists in taking a pair of unused wires from a cable supplying another area or cable district and carrying it aerially into the cable box of another district from which they are extended to the phone to be connected. *Cumberland Telephone & Telegraph Co. v. Kelly*, 160 Fed. 316, 325, 87 C. C. A. 268, 15 Ann. Cas. 1210.

### **JUNCTION**

Rev. Laws Minn. 1905, § 2033, requiring railroads to stop their trains before reaching junctions with other roads, imposes no duty on them to stop such trains before reaching connections of their own tracks with double tracks and connection of such tracks with side tracks which are all parts of one railroad directed by the same management or controlled by the same operator; such connections not being "junctions" within the meaning of the statute. *Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 176 Fed. 237, 240, 100 C. C. A. 41, 20 Ann. Cas. 1200.

## JUNIOR

The word "junior" or "Jr." or words of similar import, are ordinarily mere matters of description and form no part of a person's legal name. *Teague v. State*, 40 South. 312, 314, 144 Ala. 42.

The affixes "Sr." and "Jr." do not form part of a name, but are descriptive merely; hence in legal contemplation their presence or absence is immaterial. *State v. Lewis*, 83 Atl. 692, 693, 83 N. J. Law, 161.

The suffixes "Jr." or "Sr." are no part of a man's name and, except in a few instances, may be disregarded. *Ross v. Berry* (N. M.) 124 Pac. 342, 343.

### In indictment

The word "junior" added to the name of a person referred to in an indictment is mere matter of description, constituting no part of the name, and need not be proved when proof of the name is necessary. *State v. Simpson*, 76 N. E. 544, 546, 166 Ind. 211 (citing *Allen v. State*, 52 Ind. 486).

### In legal proceedings and papers

The addition of the word "junior" or "senior" to a name is mere matter of description and not a part thereof, so that the fact that the suit was brought by plaintiff as administratrix of C. G. "Jr." deceased, and judgment was rendered against the administratrix under that name, while the assignment of errors omitted "Jr." from decedent's name, was not ground for dismissal of the appeal. *Guthell v. Dow*, 97 N. E. 426, 177 Ind. 149.

## JUNK

Old iron chains are not "junk, old," within the meaning of *Tariff Act July 24, 1897*, c. 11, § 2, *Free List*, par. 588, 30 Stat. 198, but are dutiable as "scrap iron \* \* \* fit only to be remanufactured," under section 1, *Schedule C*, par. 122, 30 Stat. 151. *G. W. Sheldon & Co. v. United States*, 152 Fed. 318, 320.

The provision for "scrap iron" in *Tariff Act July 24, 1897*, c. 11, § 1, *Schedule C*, par. 122, 30 Stat. 159, is more specific than for "junk, old," in section 2, *Free List*, par. 588, 30 Stat. 198, as the latter includes an infinite variety of things, of which one kind is "scrap iron." *G. W. Sheldon & Co. v. United States*, 159 Fed. 105, 106, 86 C. C. A. 295.

## JUNK DEALER

One who dealt in scrap iron and steel in large quantities, and handled no single pieces of iron, was not a "junk dealer," within the meaning of an ordinance providing that junk dealers must be duly licensed, and that "any one dealing in the purchase and sale of junk, old rope, old iron, brass, copper, tin, or lead, rags, slush, or empty bottles shall be deemed to be a junk dealer, and the place of business

a junk shop." The court said: "The respondent deals in scrap iron and steel and purchases articles like boiler tubes, axles, car wheels, switches, tracks, crossings, steel frames of buildings, sections of elevated railroad fabrics and of bridges, all of great bulk and weight, which he ships to mills and furnaces. He does not buy or sell single pieces of iron, and the smallest purchases shown were one of two barrels of horse shoes and one of four tons of such articles. I think that such traffic is not that of a junk dealer. 'Junk,' originally a nautical term, meant old rope or cordage, and it has been extended to mean cast-off odds and ends, like scrap iron, old bottles, metals, glass, and the like. \* \* \* It is quite clear that section 22, after the use of the general term 'junk,' does but define it by the further terms 'old rope,' 'old iron,' 'brass,' etc. The fact that a thing is composed of old iron or old steel does not make it junk. It is the size and character of the article rather than its composition that must determine whether it is within that term. It may not be easy to define the term, because it covers nondescript articles, but it is not difficult to determine whether an article is within it. It seems to me clear that the general character and scope of the business of the defendant does not fall within the description of a dealer in junk. There is a radical difference between the buyer of great masses of metal weighing tons at a time, parts of railroad equipment, sections of elevated railroad structures or bridges, and the like, and one who may buy old bottles, scraps, or pieces of metal, slush, old rope, and the like, which might readily be pilfered or stolen, and carried away to be secretly sold by the culprit. It is the business of this character that is to be licensed, located, regulated, and made subject to the scrutiny of the police authorities. The business of the respondent is not necessarily within the terms of the ordinance, while the reasons for the enactment of it and the further sections of regulation do not exist." *City of New York v. Vandewater*, 99 N. Y. Supp. 306, 308, 113 App. Div. 456 (citing *Commonwealth v. Farnum*, 114 Mass. 267; *Eastman v. City of Chicago*, 79 Ill. 178; *Commonwealth v. Ringold*, 65 N. E. 374, 182 Mass. 308; 4 Words and Phrases, p. 3874).

*Gen. St. 1902*, § 4654, provides that every person who engages in the business of buying and selling junk, etc., unless licensed, shall be fined, and section 4653, as amended by *Pub. Acts 1903*, p. 30, c. 43, and *Acts 1905*, p. 305, c. 88, provides for the issuance of such licenses to dealers and traders in junk and for the regulation of their business. Held, that an employé of a licensed junk dealer, acting in good faith as such in the purchase and sale of junk for his employer, was not a "junk dealer," within such sections, and was not required to be licensed. *State v. Rosen-*

baum, 68 Atl. 250, 251, 80 Conn. 327, 15 L. R. A. (N. S.) 288, 125 Am. St. Rep. 121.

### JUNK SHOP

A "junk shop," within an ordinance forbidding the carrying on, without a license, of what is commonly called a junk store, is a place where junk is dealt with in small quantities, and not a wholesale establishment, which buys by the car load or from licensed junk shops in wagon load lots, as other provisions of the ordinance, providing for the keeping of books describing each article bought, and giving the name and residence of the persons from whom it was bought, prohibiting resale of any article within 10 days of purchase, and providing for the business being constantly under the surveillance of the police department, would, if applied to a wholesale dealer, be impracticable, and so burdensome as to render the ordinance void as an unreasonable interference with his business. *City of Chicago v. Lowenthal*, 90 N. E. 287, 288, 242 Ill. 404.

A wholesale dealer in metals that buys old and new metals in lots of from 500 pounds to a car load, and refines about one-quarter of them, and sells its metals to foundries at wholesale, and has no dealings with peddlers, nor in old iron or any article of a kindred character, does not keep a "junk shop," within section 2040, Revised Municipal Code of Chicago, providing that no person shall keep a junk shop without being first licensed. *West Side Metal Refining Co. v. City of Chicago*, 140 Ill. App. 599, 600.

### JURAT

"Jurat" is defined to be that part of an affidavit where the officer certifies that the same was sworn to before him." *Partridge v. Merchants' Nat. Bank*, 77 Atl. 410, 412, 77 N. J. Eq. 208 (citing and adopting *Bouv. Law Dict.* [Rawles' Rev.] p. 111).

A deed, of record for more than 40 years, and on which there appeared, after the grantor's signature, the words, "Signed, sealed and delivered in the presence of [two parties named], Jurat," was presumptively legally probated and duly registered; the word "jurat," when written on a deed by an officer authorized to take probate, meaning "proved." *Moore v. Quickle*, 74 S. E. 927, 928, 159 N. C. 129.

### JURATORY CAUTION

The term "juratory caution" means a stipulation by oath without sureties, and, if it be not required, it is a misnomer to call the proceedings by that name. Under the civil law, cautions with respect to the manner in which they were taken were: *Cautio fide jussoria* (by sureties); *pignoratitia* (by deposit); *juratoria* (by oath); *nude promissoria* (bare promise).

*Bradford v. Bradford*, 3 Fed. Cas. 1129, 1130, note, 2 Flipp. 280.

### JURIDICAL CONVICTION

"Juridical conviction' may be defined to be the fitting of facts to hypothesis. If, in criminal issues, there is reasonable doubt whether the facts fit the hypothesis of guilt, then there must be an acquittal. In civil issues, when there are conflicting hypotheses, the judgment must be that for which there is a preponderance of proof." In *re Friedman*, 164 Fed. 131, 142 (quoting and adopting definition in *Whart. Ev.*).

### JURISDICTION

See Appellate Jurisdiction; Common-Law Jurisdiction; Competent Jurisdiction; Concurrent Jurisdiction; Court Having Jurisdiction; Criminal Jurisdiction; Criminal Jurisprudence; Equity Jurisdiction; Excess of Jurisdiction; Exclusive Jurisdiction; Final Jurisdiction; Full Jurisdiction; Inherent Jurisdiction; Limited Jurisdiction; Original Jurisdiction; Plea to the Jurisdiction; Protestant Episcopal Jurisdiction.

Jurisdiction pertaining to probate court, see Pertaining to Probate Courts.

#### Commissioner of Pensions or Secretary of the Interior

In Rev. St. § 4746, as amended in 1898, which makes it a criminal offense for any person to procure the making or presentation of any false or fraudulent affidavit or other paper or writing pertaining to any matter "within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior" the word "jurisdiction" is used in its legal sense, meaning authority to hear and determine a cause, and the provision, if applicable at all to anything outside of pension or bounty land matters, does not apply to papers or writings presented to the officers of a local land office relating to the entry or purchase of lands under the public land statutes in which the Secretary of the Interior has no power to act except in case of an appeal. Nor, if applicable to any such papers or writings, would it apply to such as are not required by statute, but only by a regulation made by the land department. *United States v. Kettel*, 157 Fed. 396, 406.

#### Religious society

Under the Presbyterian form of government, "jurisdiction" or power of government, viz., that part of the sovereignty of the whole which belongs to each particular church organization, is lodged in the church session, and not in the members at large. *Landrith v. Hudgins*, 120 S. W. 783, 791, 121 Tenn. 556.

**State**

"Jurisdiction" is the sovereign authority to make, decide on, and execute laws. *Meyler v. Wedding*, 60 S. W. 20, 24, 107 Ky. 685 (dissenting opinion, citing *Arnold v. Shields*, 5 Dana [35 Ky.] 22, 30 Am. Dec. 669).

The word "jurisdiction," as used in the Virginia compact, means, primarily at least, *jurisdictio*—authority to apply the law to the acts of men—and not in the sense of sovereignty, and was similarly used in the agreement between New York and New Jersey, giving New York exclusive jurisdiction over the waters and lands under the waters of New York Bay, west of the middle line thereof. *Central R. Co. of New Jersey v. Jersey City*, 28 Sup. Ct. 592, 593, 209 U. S. 473, 52 L. Ed. 896.

The word "jurisdiction," as used in the Virginia Act providing for the formation of Kentucky, and declaring that the use and navigation of the Ohio river, so far as the territory of the proposed state, or the territory which shall remain within the limits of Virginia, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction of Virginia, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which compose the opposite shores of the said river, is not confined to any one of the three agencies of jurisdiction, legislative, executive, or judicial. *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104.

"'Jurisdiction,' whatever else or more it may mean, is *jurisdictio* in its popular sense of authority to apply the law to the acts of men." The state of Oregon cannot, by virtue of its concurrent jurisdiction under Act Cong. Feb. 14, 1859, over the Columbia river, make criminal the operation of a purse net in that river within the territorial limits of Washington, under authority and license from that state. *Nielsen v. State of Oregon*, 29 Sup. Ct. 383, 384, 212 U. S. 315, 53 L. Ed. 528 (quoting and adopting definition in *Wedding v. Meyler*, 24 Sup. Ct. 322, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 833).

**JURISDICTION (Of Courts)**

"Jurisdiction" is the foundation of judicial proceedings. *Moody v. Port Clyde Development Co.*, 66 Atl. 967, 975, 102 Me. 365.

The term "jurisdiction," when applied to courts and not restricted by the written law conferring it, means the power to hear and decide issues, both of law and fact, and the power to enforce the conclusion reached by the court. It is also defined as the power conferred on a court by Constitution or statute to take cognizance of the subject-matter of a litigation and the parties brought before it, and to legally hear, try, and determine the issues joined by them, either of law or of fact, or both. *Western Union Tel. Co.*

*v. Arnold*, 77 S. W. 249, 250, 33 Tex. Civ. App. 306 (citing *Brown*, *Jurisdiction*, § 2; *Townes*, *Tex. Pl.* pp. 18, 19).

"The power and authority constitutionally conferred upon a court or judge to pronounce the sentence of the law or to award the remedies provided by law upon a state of fact proven or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal in favor of or against persons who present themselves or who are brought before the court in some manner sanctioned by law as proper and sufficient," constitutes "jurisdiction." *Ingram v. Fuson*, 82 S. W. 606, 607, 118 Ky. 882 (quoting *Black*, *Judgm.* § 215).

The term "jurisdiction," as used in Const. art. 7, § 8, declaring that the circuit court shall have jurisdiction in all matters, civil and criminal, within the state, together with appellate jurisdiction from all inferior courts, with power to use all writs necessary to carry into effect its orders, judgments, or decrees, is used in its broad general sense, that of judicial power. "A court may have jurisdiction of a particular subject-matter, but by settled judicial policy ought not to exercise it. Again, it may, by the settled law, established by its own practice, deemed to be as binding as the written law, have power in a constitutional sense to adjudicate disputed matters of a particular character, acting by recognized unbending principles of procedure, but not jurisdiction to adjudicate such matters in the particular way attempted." The constitutional jurisdiction of the circuit courts is substantially co-extensive with that of the English courts of King's Bench, Common Pleas, and Chancery combined. *Harrigan v. Gilchrist*, 99 N. W. 909, 939, 121 Wis. 127.

"Jurisdiction" is *jurisdictio* in its popular sense of authority to apply the law to the acts of men. Jurisdiction is acquired by an Indiana court by service of process on the Ohio river on the Kentucky side of the low-water mark on the Indiana shore, in view of the condition contained in the Virginia Compact of 1789, § 11, declaring that the jurisdiction of the proposed state of Kentucky on the Ohio river should be concurrent only with the states which may possess the opposite shores of the river, which condition Congress assented to and adopted when it consented to the Virginia Compact by the act of February 4, 1791, admitting Kentucky to the Union. *Wedding v. Meyler*, 24 Sup. Ct. 322, 324, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 833.

"Jurisdiction" is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Court of the United States under the express terms of the act of August 13, 1888,

if the plaintiff be a citizen of one state, and defendant a citizen of another, if the amount in controversy exceed \$2000, and the defendant be properly served with process within the district. *Venner v. Great Northern R. Co.*, 28 Sup. Ct. 328, 330, 209 U. S. 24, 52 L. Ed. 666 (quoting and adopting definition in *Illinois Cent. R. Co. v. Adams*, 21 Sup. Ct. 253, 180 U. S. 28, 45 L. Ed. 412).

Laws 1911, c. 569, which increases to \$5,000 the limit of the amount for which judgment in actions to recover money only can be rendered by the City Court of New York, does not violate Const. art. 6, § 18, which provides that the Legislature shall not "confer" on any inferior or local court any equity jurisdiction or any greater jurisdiction in other respects than is conferred on County Courts by the article, though that article limits the jurisdiction of County Courts, in actions for recovery of money only, to suits where not more than \$2,000 is demanded, since chapter 569 gives the City Court no new jurisdiction, but merely changes the limit, and since the test of jurisdiction depends on the condition of things at the time the action is brought, and the term "jurisdiction," as used in the Constitution, refers to subject-matter and persons rather than to the locality in which or the amount for which actions may be brought. *Lewkowicz v. Queen Aeroplane Co.*, 136 N. Y. Supp. 894, 897, 77 Misc. Rep. 151.

Under Acts 1908, No. 124, providing that, whenever suit is brought by the state to forfeit a corporation's charter, the court shall have jurisdiction of all the corporation's property from the date of filing the suit, the word "jurisdiction," as there used, meant legal control and seisin, so that voluntary dissolution proceedings taken by the stockholders of a corporation, after suit brought by the Attorney General to forfeit its charter, were ineffectual to authorize liquidation by the corporation's liquidators, instead of by a liquidator to be appointed by the Governor. *State ex rel. Guion v. People's Fire Ins. Co. of New Orleans*, 52 South. 763, 765, 126 La. 548.

Where a demurrer to a bill in a circuit court assigned as grounds want of "jurisdiction" in the court as a federal court, because neither diversity of citizenship nor any federal question was disclosed, and also want of "jurisdiction" as a court of equity for lack of equity in the bill, a decree sustaining the demurrer and dismissing the bill for want of jurisdiction must be construed to refer to the real jurisdictional grounds, and an appeal therefrom lies to the Supreme Court, and not to the Circuit Court of Appeals, under sections 5 and 6 of Act March 3, 1891, c. 517, 26 Stat. 828. *Crawford v. McCarthy*, 148 Fed. 198, 200, 78 C. C. A. 356 (citing *Courtney v. Pradt*, 25 Sup. Ct. 208, 196 U. S. 89, 49 L. Ed. 398; *Bache v. Hunt*, 24 Sup. Ct. 547, 193 U. S. 525, 48

L. Ed. 774; *Louisville Trust Co. v. Knott*, 24 Sup. Ct. 119, 191 U. S. 225, 48 L. Ed. 159; *Blythe v. Hinckley*, 19 Sup. Ct. 497, 173 U. S. 501, 43 L. Ed. 783; *Smith v. McKay*, 16 Sup. Ct. 490, 161 U. S. 355, 40 L. Ed. 731).

#### As authority or power

"Jurisdiction," in its strict sense, means power, as distinguished from mere judicial rules as to when it may be exercised. *State ex rel. Cook v. Houser*, 100 N. W. 964, 968, 122 Wis. 534.

"Jurisdiction" is simply power. Any power possessed by a judicial tribunal, either affirmative or negative, is jurisdiction. This is the definition of jurisdiction given by Chief Justice Greene of New Jersey, and Van Fleet, in his work on Collateral Attack, says it is the best he has ever seen." *Johnson v. McKinnon*, 45 South. 23, 25, 54 Fla. 221 (citing *Garvin v. Watkins*, 10 South. 818, text 821, 29 Fla. 151).

"Jurisdiction" means the power of him who has the right of judging, and the competency of the judge, quoad the subject-matter, and the parties litigant being conceded, it includes not only the power expressly conferred by law, but all such power as may be necessary to the full exercise and enjoyment of that expressly conferred. *State ex rel. Dauphin v. Ellis*, 32 South. 335, 348, 108 La. 521.

A judicial officer has "jurisdiction" when he has power to inquire into the facts, to apply the law, and to pronounce the judgment. *Benedict v. Clarke*, 123 N. Y. Supp. 964, 966, 139 App. Div. 242.

"Want of 'jurisdiction' means want of legal power to act." *People ex rel. Scharff v. Frost*, 91 N. E. 376, 378, 198 N. Y. 110, 139 Am. St. Rep. 801 (dissenting opinion of Judge Vann).

"Jurisdiction" is the power of a court or a judge to entertain action, petition, or other proceeding. *Perry v. Morse*, 57 Vt. 509, 513.

Acts 1894-95, p. 498, is entitled "An act to limit the criminal jurisdiction of justices of the peace and notaries public within certain precincts in J. county and in the wards of a certain city," and provides that justices and notaries in such territory shall not have jurisdiction over any criminal case, except to take affidavits and to issue warrants thereon returnable to the police court of B. in all cases in which that court has jurisdiction, and to take affidavits and issue warrants and examine persons charged with offenses of which such court has not jurisdiction. Held, that the word "jurisdiction," as used in the title, was synonymous with "power" or "authority," as distinguished from "power to hear and determine," and that the act was therefore not objectionable as containing matter not expressed in the title of the act. *Lee v. State*, 39 South. 366, 367, 143 Ala. 93.

The subject-matter presented to a Court of Appeals is the action of the trial court as shown by its rulings and judgment as preserved in the record, and where it has no power to review the action of the trial court of a county outside of its territorial limits, it has no jurisdiction of the subject-matter of the appeal; "jurisdiction" being the power which one has to do justice in cases brought before him. *State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon*, 134 S. W. 538, 541, 232 Mo. 496.

#### As authority to hear and determine

"Jurisdiction" is the right to hear and determine. *Staples v. Shiver* (Ky.) 122 S. W. 826.

"Jurisdiction" is the power to hear and determine, and is in truth the power to both, or either, to hear without determining, or determine without hearing. *Lockard v. Lockard*, 110 N. W. 104, 105, 21 S. D. 134.

"Jurisdiction" is the power to hear and determine. The nature of the functions to be exercised controls, whether they are brought into activity by primary process or by the removal from an inferior tribunal. *People's Sec. Bank of Worthing v. Sanderson*, 123 N. W. 873, 877, 24 S. D. 443.

"Jurisdiction" is authority to hear and determine a cause. *Lange v. Superior Court of Solano County*, 103 Pac. 908, 909, 11 Cal. App. 1; *Threadgill v. Colcord*, 85 Pac. 703, 710, 16 Okl. 447 (quoting and adopting definition in *McNit v. Turner*, 16 Wall. 366, 21 L. Ed. 341); *State ex rel. McNamee v. Stobie*, 92 S. W. 191, 197, 194 Mo. 14; *Bonham v. Doyle*, 79 N. E. 458, 459, 39 Ind. App. 438; *Ex parte Wade*, 100 Pac. 35, 38, 2 Okl. Cr. 100 (quoting 4 Words and Phrases, p. 3877); *Carter's Adm'r v. Skillman*, 60 S. E. 775, 780, 108 Va. 204; *Davis v. Cleveland, C. & St. L. Ry. Co.*, 156 Fed. 775, 777, 84 C. C. A. 453; *Rose v. Christinet*, 92 S. W. 866, 77 Ark. 582 (adopting definition in 1 *Freem. Judgm.* § 118); *People v. Harper*, 91 N. E. 90, 244 Ill. 121.

"Jurisdiction" is the power to hear and determine a cause. It is *coram iudice* whenever a case is presented which brings this power into action. *Rexford v. Brunswick-Balke-Collender Co.*, 181 Fed. 462, 470, 104 C. C. A. 210.

The word "jurisdiction" is defined in law as the power to hear and decide a legal controversy. *Douglas County v. Vinsonhaler*, 118 N. W. 1058, 1063, 82 Neb. 810.

"Jurisdiction" is the power vested by law in a tribunal to hear and determine causes properly coming before it. *Saylor v. Duel*, 86 N. E. 119, 120, 236 Ill. 429, 19 L. R. A. (N. S.) 377.

"Jurisdiction," when applied to courts, and speaking generally, consists, in the power to hear and determine causes. It presupposes always and of course that there is a

court to exercise it, for it is not predicable of anything but a lawfully existing tribunal. It relates to the subject-matter of the controversy or to the person, and never is applied to any question touching the existence of the court itself. It is not conferred until the court designated to exercise it has been brought into being according to the mode prescribed by law." An alleged plea to the jurisdiction of the court in a criminal case alleging that the court was not lawfully constituted because the Governor was out of the state at the time he directed the holding of the term and signed the judge's commission was a nullity, since the court could not pass on its own existence as a court. *State v. Hall*, 55 S. E. 806, 807, 142 N. C. 710.

"Jurisdiction" is the power to hear and determine a cause; the authority by which judicial officers take cognizance of and decide causes. Courts of bankruptcy, in the administration of bankrupt estates, are invested with the exercise of equitable 'jurisdiction,' and by the bankrupt act, as now amended, 'jurisdiction' is expressly conferred upon the bankrupt court over suits between trustees in bankruptcy and third parties to recover from them property or funds held by them in fraud of the bankrupt act, or as preferred creditors." *Blake v. Nesbet*, 144 Fed. 279, 283.

"Jurisdiction" is the power of a court to hear and decide a cause. The "jurisdiction" of a federal circuit court as a federal court is so involved as to sustain a direct writ of error from the federal Supreme Court under Act March 3, 1891, § 5, in a judgment dismissing the suit on the ground of the invalidity of the attachment and garnishment of the property of the nonresident defendant and upon the lack of a general appearance by him. *Davis v. Cleveland, C. & St. L. R. Co.*, 30 Sup. Ct. 463, 466, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

"Jurisdiction" is the authority by which courts and judicial officers take cognizance of and decide cases; power to hear and determine a cause. If a court has 'jurisdiction' of the persons to the action, and the cause is the kind of a cause triable in such court, it has jurisdiction and power to render any rightful judgment." *Thurston v. Washington*, 90 Pac. 16, 18, 18 Okl. 362 (quoting definition in *Parker v. Lynch*, 7 Okl. 631, 56 Pac. 1082); *Jarrell v. Block*, 92 Pac. 167, 169, 19 Okl. 467.

"Jurisdiction" is the authority by which judicial officers take cognizance of and decide cases; power to hear and determine a cause; the right of a judge to pronounce a sentence of the law on a case or issue before him, acquired through due process of law. *State v. Wakefield*, 60 Vt. 618, 15 Atl. 181, 183.

The word "jurisdiction," as used in Rev. St. 1887, § 4994, declaring that the writ of prohibition arrests the proceedings when they are without or in excess of the jurisdiction, means the right to hear and determine a matter, and carries with it the idea of exercising judicial or quasi judicial functions. *Stein v. Morrison*, 75 Pac. 246, 256, 9 Idaho, 426.

"Jurisdiction" is the power to hear and determine. Hence the nature of the functions to be exercised controls, whether they are brought into activity by primary process or by the removal from an inferior tribunal. Thus, on a trial de novo, the power of an appellate court in dealing with the pleadings and the evidence, the application of the law, and the rendition of judgment are independent of the action of the trial court, but are in no manner different from what it would be had the case been begun there originally. *People's Sec. Bank of Worthing v. Sanderson*, 123 N. W. 873, 877, 24 S. D. 443.

#### Same—Particular controversy

"Jurisdiction" is the power to hear and determine. As applied to a particular claim or controversy, it is the power to hear and determine that controversy. *City Council of City of Cripple Creek v. Hanley*, 75 Pac. 600, 601, 19 Colo. App. 390 (quoting *Field, J.*, in *People ex rel. Whitney v. Board of Delegates of San Francisco Fire Department*, 14 Cal. 480, 496).

"Jurisdiction" is authority to hear and determine a cause; authority to decide. It is the power conferred by law to hear and determine controversies concerning certain subjects, and, as applied to the particular controversy, it is the power to hear and determine that controversy. *Sumner v. Village of Milford*, 73 N. E. 742, 743, 214 Ill. 388 (citing 11 Cyc. p. 660; *People ex rel. Raymond v. Talmadge*, 61 N. E. 1049, 194 Ill. 67).

"Jurisdiction" is the power to hear, determine, and pronounce judgment on the issues before the court. *In re Hatch*, 99 Pac. 398, 399, 9 Cal. App. 333; *Menard v. MacDonald*, 115 S. W. 63, 52 Tex. Civ. App. 627.

"Jurisdiction" is the right to adjudicate concerning the subject-matter in a given case, which depends upon the court's cognizance of the class of cases to which the one to be adjudicated belongs; presence of the proper parties and the point decided being in substance and effect within the issue. *City of Rockland v. Inhabitants of Hurricane Isle*, 76 Atl. 286, 287, 106 Me. 169.

#### Same—Subject-matter in controversy

"Jurisdiction" consists first in authority over the subject-matter, and, second, authority over the parties concerned; jurisdiction of the subject-matter coming wholly from the Constitution or statutes of the state. *Smith v. Potter*, 137 N. W. 854, 861, 92 Neb. 39 (quoting 2 Cooley, Tax. p. 879).

"Jurisdiction" is the power to hear and determine the subject-matter in controversy. If the law confers the power to render a judgment or decree, then the court has jurisdiction." *Raine v. Lawlor*, 82 Pac. 688, 689, 1 Cal. App. 483; *Franklin Union, No. 4, v. People*, 77 N. E. 176, 180, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248.

"Jurisdiction" means lawful power to hear and determine the matter in controversy, and this includes the power to determine the legal results to follow from the facts pleaded and proven. *Menard v. MacDonald*, 115 S. W. 63, 65, 52 Tex. Civ. App. 627.

"Jurisdiction" is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that, if the power is conferred to render the judgment or enter the decree, it includes also the power to issue proper process to enforce such judgment or decree. *Phelps v. Mutual Reserve Fund Life Ass'n*, 112 Fed. 453, 458, 50 C. C. A. 339, 61 L. R. A. 717 (citing *Riggs v. Johnson County*, 6 Wall. [73 U. S.] 166, 187, 18 L. Ed. 768).

#### As authority to declare the law

"Jurisdiction" in courts is the power and authority to declare the law. The very word in its origin imports as much. It is derived from 'juris' and 'dico'—'I speak by the law.' And that sentence ought to be inscribed in living light on every tribunal of criminal power. It is the right of administering justice through the laws, by the means which the law has provided for that purpose. But here the mode and the manner of administering the justice of the country was not provided or prescribed by the law and is directly prohibited by it. There was therefore no jurisdiction." Hence the existence and legal constitution of a court is an inseparable part of its jurisdiction. *Johnston v. Hunter*, 40 S. E. 448, 449, 50 W. Va. 52 (quoting and adopting the definition in *Mills v. Com.*, 13 Pa. 630).

#### Consent

"Jurisdiction" comes solely from the law; in no degree from the consent of litigants. So that neither consent nor anything else can authorize a court to act in a cause outside the sphere which the law has ordained for it. *State v. Mortenson*, 73 Pac. 562, 565, 28 Utah, 312.

#### Correctness of decision immaterial

"Jurisdiction" is the power to decide—wrong, as well as right." *Armantage v. Superior Court of Los Angeles County*, 81 Pac. 1033, 1034, 1 Cal. App. 130.

"Jurisdiction" is authority to hear and determine a cause, and does not depend either on the regularity of the exercise of that power or on the rightfulness of the decisions made. *State ex rel. McNamee v. Stoble*, 92 S. W. 191, 197, 194 Mo. 14.

"Jurisdiction" is the power to hear and determine a cause, and carries with it the power to decide a cause within the jurisdiction of the court incorrectly as well as correctly, and it does not relate to the rights of the parties, but to the power of the court. *Dahlgren v. Superior Court of Santa Cruz County*, 97 Pac. 681, 683, 8 Cal. App. 622.

The "jurisdiction" of a question is the lawful power to enter upon a consideration of and to decide it, and it is not limited to authority to render a correct decision, but includes the power to decide wrong as well as right. *Ex parte Moran*, 144 Fed. 594, 604, 75 C. C. A. 396.

"The test of 'jurisdiction' is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong." *Clark v. Rossiter*, 78 Pac. 358, 360, 10 Idaho, 348, 3 Ann. Cas. 231 (quoting *Van Fleet*, *Collateral Attack*, § 61).

"The test of 'jurisdiction' is whether the court has power to enter upon the inquiry. The 'jurisdiction' of the subject-matter embraces the power to determine every issue or controverted question in the case within the scope of the authority of the court according to its own view of the law and evidence, and it is not dependent upon the correctness of the conclusion which the court reaches. Where, under the general rules of the common law or by express provision of statute, the existence of some particular fact must be established at the trial to enable the court having cognizance of such cases to pronounce judgment in favor of one party or the other, an erroneous conclusion of the court in respect thereof is merely an error in the course of the proceeding, and it is not a jurisdictional defect." *Flannigan v. Chapman & Dewey Land Co.*, 144 Fed. 371, 373, 75 C. C. A. 310.

"Jurisdiction" is authority to hear and determine a cause. Since jurisdiction is the power to hear and determine, it is not dependent either upon the regularity of the exercise of that power or upon the rightfulness of the decision made. When there is jurisdiction of the person and subject-matter, the decisions of all other questions arising in the case are but an exercise of that jurisdiction." In adjudicating the question whether an instrument proposed was the last will and testament of testator, the county court has power to determine all facts pertinent, including the question whether or not the will was a forgery and whether it was executed with essential formalities and properly attested. Error of the county court in deciding any pertinent fact, including the question whether or not such will was a forgery and whether or not it was executed with essential formalities, including proper attestation, was an error in the exercise of jurisdiction, and not in the assumption there-

of. *Camplin v. Jackson*, 83 Pac. 1017, 1018, 34 Colo. 447.

Though the circuit and superior courts have concurrent jurisdiction with the Supreme Court in habeas corpus proceedings, that fact does not authorize them to decide a question contrary to the way it has been decided in the Supreme Court, for jurisdiction is authority to hear and decide a case, and does not depend upon actual facts alleged, nor the correctness of the decision made, but upon authority to determine the existence or nonexistence of alleged facts and to render judgment according to the findings. Hence when the Supreme Court has, by affirming a conviction, determined its validity, and that fact appears on a petition for habeas corpus, neither the superior court nor any judge thereof has jurisdiction to determine that it is void and cannot grant a writ of habeas corpus to determine the validity of the imprisonment thereunder. *People v. Superior Court of Cook County*, 84 N. E. 875, 878, 234 Ill. 186, 14 Ann. Cas. 753.

#### Essentials

To obtain jurisdiction of a cause three things are necessary. Black, in his work on Judgments (volume 1, § 242), said: "First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue." In *St. Louis, I. M. & S. Ry. Co. v. State*, 17 S. W. 806, 807, 55 Ark. 200, 205, the court said: "'Jurisdiction' is defined to be 'the right to adjudicate concerning the subject-matter in the given case.'" In *Babb v. Brubere*, 23 Mo. App. 604, jurisdiction is defined to be "the power to hear and determine the particular cause." In *Hope v. Blair*, 16 S. W. 595, 105 Mo. 85, 24 Am. St. Rep. 366, it is said there are three essentials to jurisdiction: "First, the court must have cognizance of the class of cases to which the one adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue"—thus approving and adopting the definition of "jurisdiction" given by Black. *Nenno v. Chicago, R. I. & P. R. Co.*, 80 S. W. 24, 26, 105 Mo. App. 540.

"Jurisdiction" is the right to adjudicate concerning the subject-matter in a given case; essentials thereto being cognizance of the class of cases to which the particular one belongs, proper parties, service of process on defendant, and a point to be decided within the issues. In *re Casey*, 195 Fed. 322, 328; *Sloan v. Byers*, 97 Pac. 855, 857, 37 Mont. 503 (quoting *Munday v. Vail*, 34 N. J. Law, 418); *Rankin v. Schofield*, 98 S. W. 674, 81 Ark. 440 (quoting and adopting definition in *St. Louis, I. M. & S. Ry. Co. v. State*, 17 S. W. 807, 55 Ark. 206); *Forrest v. Price*, 29 Atl. 215, 219, 52 N. J. Eq. 16 (quoting and adopting



definition in *Munday v. Vail*, 34 N. J. Law, 418, 422); *Cowling v. Nelson*, 88 S. W. 913, 915, 76 Ark. 146 (quoting and adopting definition in *Falls v. Wright*, 18 S. W. 1044, 55 Ark. 562, 29 Am. St. Rep. 74); *City of Rockland v. Inhabitants of Hurricane Isle*, 76 Atl. 286, 287, 106 Me. 169; *J. P. Jorgenson Co. v. Rapp*, 157 Fed. 732, 739, 85 C. C. A. 364 (citing *Black, Judgm. § 242*); *State ex rel. McManus v. Muench*, 117 S. W. 25, 29, 217 Mo. 124, 129 Am. St. Rep. 536; *Robinson v. Levy*, 117 S. W. 577, 582, 217 Mo. 498 (quoting and adopting definition in *Munday v. Vail*, 34 N. J. Law, 422).

Though jurisdiction depends on service of process and upon the fact that the subject-matter of the action is one upon which the court is given authority to exercise judicial authority, these things do not in themselves constitute "jurisdiction," since, when parties are before the court and present to it a controversy which the court has authority to decide, a decision appropriate to that question, but erroneous, is a proper exercise of "jurisdiction." *Calhoun v. Bryant*, 133 N. W. 266, 269, 28 S. D. 266.

"Jurisdiction exists wherever there is a suit, the subject-matter of which is cognizable in a court of chancery, and parties are brought before the court whose rights in relation to such subject-matter the court may adjudicate, and the effect of such adjudication between the parties, until reversed or set aside, does not depend upon the fact that the power of the court may have been erroneously exercised in making it. If there be necessary parties wanting, whose absence may render the adjudication fruitless or ineffectual, because the rights of such parties cannot be determined, that may be good cause for arresting proceedings or dismissing the suit, but it does not deprive the court of the power to proceed." The want of necessary parties does not deprive the court of jurisdiction, but the decree will bind the parties to it until set aside in a direct proceeding. *Tod v. Crisman*, 99 N. W. 686, 689, 123 Iowa, 693.

"Jurisdiction" may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That the court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. S. granted certain land to his five daughters, by name, for life, and then to the heirs of their body forever, and thereafter a creditor of S., after the latter's death, sued to set aside the deed, the petition alleging that S. had conveyed

the land to avoid his debts, and prayed that the land be subjected to payment of his debts, and the defendants in the creditor's suit, who were the daughters and three of the minor heirs, the remaindermen under S.'s deed, the rest being then unborn, answered, and the judgment decreed that the deed from S. to his daughters and their heirs be set aside and divested defendants of all interest under the deed, and vested the same in widow and heirs at law of S.; but the land was never sold to satisfy the creditor's judgment, it being otherwise paid, and the decree setting aside the deed was never enforced. Defendants claim through the heirs of S., and contend that the decree in the creditor's suit setting aside the deed completely divested the remaindermen of all title therein. Held, that there was no issue raised in the creditor's suit between the life tenants and the remaindermen under S.'s deed, the only question in issue being whether the deed was void as against the complaining creditor, and the decree divesting the title of the remaindermen under the deed and vesting it in the heirs of S. was in excess of the court's jurisdiction and void. *Charles v. White*, 112 S. W. 545, 549, 214 Mo. 187, 21 L. R. A. (N. S.) 481, 127 Am. St. Rep. 674 (quoting and adopting *Munday v. Vail*, 34 N. J. Law, 418).

"Jurisdiction" has been defined as the power to hear and determine a cause, and it is coram iudice whenever a case is presented which brings this power into action; but, before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected, that such complaint has actually been preferred, and that such person or thing has been properly brought before the tribunal to answer the charge therein contained. When these appear the jurisdiction has attached, the right to hear and determine is perfect, and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred. Jurisdiction cannot be made to depend upon the records disclosing such a state of facts to have been shown in evidence as to warrant the exercise of its authority. *Fisher & Lanning v. Quillen*, 81 N. E. 182, 183, 76 Ohio St. 189 (citing *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Ludlow's Heirs v. Johnston*, 3 Ohio 500, 17 Am. Dec. 609; *Lessee of Adams v. Jeffries*, 12 Ohio 253, 40 Am. Dec. 477).

#### Subject-matter and person

Legal jurisdiction consists of jurisdiction of the subject-matter and of the parties, and authority to determine the controversy. *West Cove Grain Co. v. Bartley*, 74 Atl. 730, 733, 105 Me. 293.

"Jurisdiction" is of two kinds—jurisdiction of the person, and jurisdiction of the property or thing in controversy; or, in oth-

er words, jurisdiction in personam and jurisdiction in rem. And jurisdiction in either case is sufficient to authorize a valid judgment to be rendered. *Dillon v. Heller*, 18 Pac. 693, 695, 39 Kan. 599.

"Jurisdiction" is of two kinds—one of the subject, the other of the parties—and both must exist in order to authorize the court to try and determine the cause. Unless the law gives the court jurisdiction of the subject, jurisdiction cannot be acquired by the consent of the parties; but, if the law gives jurisdiction of the subject, the court may acquire jurisdiction of the parties by their consent. If A. and B. both reside in this state and A. should sue B. for a debt in the circuit court of a county in which neither resides, and the writ is served on B. in that county, the court would have jurisdiction of the subject—that is, jurisdiction of subjects of that character—but it would not have jurisdiction of that case by virtue of the service of the process. But if B., without challenging the jurisdiction of the court, should file his answer pleading to the merits, neither party could afterwards question the jurisdiction of the court because by their actions they are conclusively presumed to have consented to give the court jurisdiction of their persons—that is, their personal rights—in that case." *State ex rel. Furstenfeld v. Nixon* (Mo.) 133 S. W. 340, 342.

Where the action provided for in place of quo warranto was erroneously begun by the Attorney General, the defect could be taken advantage of by demurrer, for, while the court had jurisdiction over the defendants by their appearance, jurisdiction involves, not only authority over the person of defendant but authority over the subject-matter, and the complaint showed that the action had not been commenced according to law. *State v. Mills*, 119 Pac. 763, 766, 61 Or. 245.

In holding that, if the district court had "jurisdiction" of the parties and the matter adjudicated, the injunction cannot be said to be absolutely void, the word "jurisdiction" in the sense used does not mean simple jurisdiction of the particular case occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. It is sufficient that the case belongs to a general class over which the authority of the trial court extends. If it does, then jurisdiction attaches, and is not lost because of an erroneous decision, however erroneous it may be. *Lytle v. Galveston, H. & S. A. Ry. Co.*, 90 S. W. 316, 317, 41 Tex. Civ. App. 112.

The word "jurisdiction," as used in Act March 3, 1891, 26 Stat. 827, c. 517, § 5, authorizing direct writs of error from the Supreme Court when the jurisdiction of the lower court is in issue, is applicable to "in-

itial questions of the jurisdiction of the United States District or Circuit Court, whether in law or in equity over the subject-matter and the parties, and not to questions whether a court of equity or of law is the proper forum for the working out of rights properly within the particular federal jurisdiction for adjudication." *United States v. Larkin*, 28 Sup. Ct. 417, 418, 208 U. S. 333, 52 L. Ed. 517 (quoting *United States ex rel. Mudsill Min. Co. v. Swan*, 65 Fed. 647, 13 C. C. A. 77).

#### **Territorial limitation**

Under Cr. Code, § 272, making it an offense for any person to hire, persuade, or induce a witness in a criminal case to leave the "state," so that he cannot be produced as a witness, an indictment alleging that witnesses were induced to absent themselves from the "jurisdiction" of the court was sufficient, as the word "jurisdiction" is synonymous with the word "state" as used in the statute. *Tedford v. People*, 76 N. E. 60, 62, 219 Ill. 23.

The term "jurisdiction" may be used "in the sense in which it is applied to the right of a court over a person in a county other than that of his residence." A change of venue by agreement, in a suit for land brought in the county in which it is situated, does not destroy the force or jurisdiction of the suit as it pendens in such county. *Jones v. Robb*, 80 S. W. 395, 402, 35 Tex. Civ. App. 263.

#### **Venue distinguished**

The question of where a suit should be brought is not one of "jurisdiction," and the question of venue either as to person or subject-matter may be waived; and where the court is one of general jurisdiction, having jurisdiction generally of the subject-matter of an action, and no objection is made to the venue, the question of venue will be treated as waived by defendant on whom service was obtained. *Burke v. Malaby*, 78 Pac. 105, 107, 14 Okl. 650.

Under Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, which confers federal "jurisdiction" over a controversy between citizens of a state and foreign states, and provides that no person shall be arrested in one district for trial in another in any civil action in any Circuit or District Court, and that no civil suit shall be brought before those courts in any other district than that in which he is a resident, but that, when jurisdiction is founded only on the fact of a diversity of citizenship, suit shall be brought only in the district where either the plaintiff or the defendant resides, the court's "jurisdiction" depends on the status of the parties, which cannot be waived, as distinguished from the venue, which is a personal privilege granted to defendant and which may be waived either expressly or by failure to take ap-

propriate and seasonable advantage of it. *Fribourg v. Pullman Co.*, 176 Fed. 981, 984.

### JURISDICTION OF THE PERSON

"Jurisdiction" of the person or property of an alien is founded on its presence or situs within the territory." *Wallace v. United Electric Co.*, 60 Atl. 1046, 1047, 211 Pa. 473 (citing and adopting definition in *Steel v. Smith* [Pa.] 7 Watts & S. 447).

The demurrer authorized by Code Civ. Proc. § 488, subd. 1, in cases where it appears upon the face of the complaint "that the court has no jurisdiction of the person," means that the person is not subject to the jurisdiction of the court, and not that the suit has been irregularly begun; and a foreign corporation, sued under Code Civ. Proc. § 1780, making foreign corporations subject to the general jurisdiction of the courts where personal service is made as directed by the Code, cannot, by demurrer, raise the question of proper service. *Heney v. Chartered Co. of Lower California*, 128 N. Y. Supp. 436, 437, 71 Misc. Rep. 237.

The variance between an ordinance, for the paving of a street and the curbing of it with limestone, and the publication notice and delinquent list, specifying an assessment for curbing with wooden blocks and paving the street, goes to the merits, and can be raised without a special appearance questioning the jurisdiction of the court to render judgment and order of sale of property for nonpayment of a special assessment; for jurisdiction is authority to hear and decide a case, and "jurisdiction of the person" means the authority obtained by service of a summons or other proper notice or by an appearance to render a personal judgment, and "jurisdiction of the subject-matter" is the power to hear and determine cases of the general class to which the proceeding in question belongs. *People v. Harper*, 91 N. E. 90, 244 Ill. 121 (quoting 4 Words and Phrases, pp. 3885, 3886).

The term "jurisdiction of the person" means the power obtained by the service of summons or other proper notice, or by an appearance, to render a personal judgment. *Sanipoli v. Pleasant Valley Coal Co.*, 86 Pac. 865, 866, 31 Utah, 114, 10 Ann. Cas. 1142.

"Jurisdiction of the person" is the power of the court to deal with the person of defendant and to render a personal judgment against him, and is acquired by the service of the summons or other proper notice, or by voluntary appearance in person or by counsel. Jurisdiction of the person may be conferred, or, if lost, restored, by consent, and defects arising from irregularities in the commencement of an action or subsequent proceedings may be waived by appearance, or even by failure to make seasonable objections. *Hobbs v. German-American Doctors*, 78 Pac. 356, 357, 14 Okl. 236.

"Jurisdiction of the person" is generally understood to mean the authority, obtained by the service of a summons or by other proper notice, or by an appearance, to render a personal judgment." When an ordinance for the improvement of a street provided that the curbing should be of limestone, and the publication notice and delinquent list specified a curbing of wooden blocks, the notice gave the court "jurisdiction of the person" of a delinquent property owner in an application for judgment and order of sale. *People v. Harper*, 91 N. E. 90, 244 Ill. 121 (citing 4 Words and Phrases, p. 3885).

### JURISDICTION OF THE SUBJECT-MATTER

"Jurisdiction of the subject-matter" is the power to hear and determine cases of the general class to which the particular proceeding belongs. *Daniels v. Bruce*, 95 N. E. 569, 572, 176 Ind. 151; *Gulf, T. & W. Ry. Co. v. Lunn* (Tex.) 141 S. W. 538, 541; *People v. Harper*, 91 N. E. 90, 91, 244 Ill. 121; *Rush v. Buckley*, 61 Atl. 774, 778, 100 Me. 322, 70 L. R. A. 464, 4 Ann. Cas. 318 (quoting and adopting definition in *State ex rel. Walnut St. Ry. Co. v. Neville*, 19 S. W. 491, 110 Mo. 345); *State ex rel. Bogle v. Superior Court of King County*, 114 Pac. 905, 907, 63 Wash. 96.

"Jurisdiction of the subject-matter" means "jurisdiction of the class of cases to which the particular case belongs." *Myer v. Minch*, 91 N. E. 32, 33, 45 Ind. App. 495 (quoting *Chicago & A. R. Co. v. Sutton*, 30 N. E. 291, 130 Ind. 405); *United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 761, 41 Ind. App. 345 (quoting and adopting the definition in *Chicago & A. Ry. Co. v. Sutton*, 30 N. E. 291, 130 Ind. 405, 410; *McCoy v. Able*, 31 N. E. 453, 131 Ind. 417).

"Jurisdiction of the subject-matter" does not mean simple jurisdiction of the particular case before the court, but jurisdiction of the class of cases to which the particular case belongs. The court has jurisdiction of the subject-matter, if the complaint states a case belonging to a general class over which the court's authority extends, whether the complaint is good or bad. *State v. Smith*, 72 Atl. 710, 714, 29 R. I. 513.

"Jurisdiction of the subject-matter" means the power, lawfully conferred, to deal with the particular subject involved in a particular action in a civil court, or of a particular offense charged in an indictment in a criminal prosecution. *People v. Blake*, 106 N. Y. Supp. 319, 324, 121 App. Div. 613.

In respect to jurisdiction over the subject-matter, by which is meant the nature of the cause of action and of the relief sought, jurisdiction is acquired only by the Constitution of the court. *Wolff v. McGaugh*, 57 South. 754, 755, 175 Ala. 299.

"Jurisdiction of the subject-matter" is the power of the court to deal with the general subject involved in the action, and is conferred by the law, and must be sought for in the general nature of its powers or the general laws defining its jurisdiction. This power cannot be conferred by agreement, nor can the lack of jurisdiction over the subject-matter be waived either by acquiescence, consent, or express agreement. *Hobbs v. German-American Doctors*, 78 Pac. 356, 357, 14 Okl. 236.

"Jurisdiction of the subject-matter" means, not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide. Though it has general jurisdiction over the subject-matter, for instance, of actions to foreclose mortgages, to quiet title to real property, or for damages for personal injuries, its power to decide and determine matters in dispute between the parties in a given action is limited to those questions which are brought before it by the pleadings. The foundation of the rule that judgments of a court of competent jurisdiction are attended with a presumption of absolute verity is the fact that the parties have been properly brought into court and given an opportunity to be heard upon the matters determined. But the foundation falls and the rule of verity ceases when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard. When the court goes beyond and outside the issues made by the pleadings, and in the absence of one of the parties determines property rights against him which he has not submitted to it, the authority of the court is exceeded, even though it has jurisdiction of the general subject of the matters adjudicated. *Sache v. Wallace*, 112 N. W. 386, 387, 101 Minn. 169, 11 L. R. A. (N. S.) 803, 118 Am. St. Rep. 612, 11 Ann. Cas. 348.

"Jurisdiction of the subject-matter" is the power lawfully conferred to deal with the general subject involved in the action." The jurisdiction of the district court conferred by Const. art. 8, § 7, providing that the district court shall have original jurisdiction in all matters civil, is the power to pass on the subject-matter of the controversy without reference to whether it has jurisdiction of a particular case. *Snyder v. Pike*, 83 Pac. 692, 694, 30 Utah, 102 (quoting and adopting definition in *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129).

The variance between an ordinance, for the paving of a street and the curbing of it with limestone, and the publication notice and delinquent list, specifying an assessment for curbing with wooden blocks and paving the street, goes to the merits, and can be raised without a special appearance questioning the jurisdiction of the court to render

judgment and order of sale of property for nonpayment of a special assessment; for jurisdiction is authority to hear and decide a case, and "jurisdiction of the person" means the authority obtained by service of a summons or other proper notice or by an appearance to render a personal judgment, and "jurisdiction of the subject-matter" is the power to hear and determine cases of the general class to which the proceeding in question belongs. *People v. Harper*, 91 N. E. 90, 91, 244 Ill. 121 (quoting 4 Words and Phrases, pp. 3885, 3886).

The statement of the court in *Re Leggat*, 56 N. E. 1009, 162 N. Y. 437, and *People ex rel. Asmus v. Melody*, 86 N. Y. Supp. 837, 91 App. Div. 570, to the effect that a discharge of a judgment debtor from custody on a writ of habeas corpus, without notice to the judgment debtor's creditors "was without jurisdiction, and the order made in the premises was 'void' and should have been vacated," must be taken as meaning that there was an irregularity requiring reversal of judgment, and not that the judgment was "void"; and the statement of the court in the *Leggat Case* that, because of the failure to serve the parties in interest, the court had no "jurisdiction of the subject-matter," may have been made to distinguish, instead of to overrule, the case of *Savacool v. Boughton* (N. Y.) 5 Wend. 171, commented on in 21 Am. Dec. 181. A judgment may be "void" as to the parties, and valid for the purpose of protecting the ministerial officers, where the court issuing process on the judgment had "jurisdiction of the subject-matter" and nothing appears on the face of the process to apprise the officer that the court was without jurisdiction of the person. *Levy v. Melody*, 99 N. Y. Supp. 153, 156, 50 Misc. Rep. 509 (citing *Murfree, Sher.* § 101a; *Savacool v. Boughton* [N. Y.] 5 Wend. 170, 21 Am. Dec. 181; *Young v. Stone*, 53 N. Y. Supp. 656, 33 App. Div. 268; *Welles v. Thornton* [N. Y.] 45 Barb. 393; *Porter v. Purdy*, 29 N. Y. 106, 113, 86 Am. Dec. 283; *Kerr v. Mount*, 28 N. Y. 659; *Roderigas v. East River Sav. Inst.*, 76 N. Y. 316, 32 Am. Rep. 309).

#### JURISDICTION ORIGINALLY EXERCISED BY CHANCERY COURT

Under Comp. Laws 1897, §§ 646-701, c. 33, relating to the jurisdiction of probate courts, and sections 8697-8747, chapter 234, relating to guardians and wards, the probate court has exclusive jurisdiction of the settlement of estates of incompetents under guardianship, except where its remedies are inadequate, since the amendment of Rev. St. 1838, pt. 3, tit. 1, c. 4, § 4, giving the judge of probate jurisdiction of all matters relating to the settlement of the estates of minors and others under guardianship, by Pub. Acts 1871, p. 38, No. 39 (Comp. Laws 1897, § 651), adding the proviso that the jurisdiction so conferred shall not deprive the circuit court in chancery of concurrent jurisdiction as

originally exercised over the same matters, was merely declaratory of existing law, to remove any doubt of the power of the chancery court to exercise its equity powers where the remedies in the probate court were inadequate, the term "originally exercised over the same matters" referring to the inherent equitable powers of the court as theretofore exercised in the state, and did not give the court of chancery full concurrent jurisdiction "of all matters relating to the settlement of the estates of such \* \* \* minors and others under guardianship," etc., as originally exercised by the court of chancery of England. *Nolan v. Garrison*, 120 N. W. 977, 979, 156 Mich. 397.

### JURISDICTIONAL DEFECT

Nonperformance of some act which is not inherently or constitutionally necessary to a tax sale, but which the Legislature in its discretion may or may not require, is not a "jurisdictional defect." *Nind v. Myers*, 109 N. W. 335, 340, 15 N. D. 400 (citing *Roberts v. First Nat. Bank*, 79 N. W. 1049, 8 N. D. 504).

### JURISDICTIONAL FACTS

"Jurisdictional facts" are those which condition the power of the court to decide some of the issues in the case, like the nature of the subject-matter and the service of process. Other facts, which condition the character of the decree or the nature of the relief that should be granted or denied, are not jurisdictional, and final adjudications of issues relating to them conclusively estop the parties to the proceedings from again litigating them. The facts essential to invoke jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. In *re First Nat. Bank*, 152 Fed. 64, 68, 69, 81 C. C. A. 260, 11 Ann. Cas. 355 (citing *In re Plymouth Cordage Co.*, 135 Fed. 1000, 1004, 68 C. C. A. 434, 438).

### JURISDICTIONAL QUESTION

The trial judge's failure to make up and file a statement of facts within the time prescribed by law is not assignable, in the Court of Civil Appeals, on ex parte affidavit showing such failure as an error, since it is not one of the subjects which Rev. St. 1895, art. 1014, authorizes that court to review, and not being an error "apparent upon the face of the record" within such article, nor a "jurisdictional question" within article 998, so as to authorize review, and since there is adequate remedy to bring a statement of facts into the record under articles 1015 and 1382, authorizing the Court of Civil Appeals, for good cause, to extend the time for filing it, and under an application for mandamus to compel the trial judge to make up and file a statement. *Applebaum v. Bass* (Tex.), 113 S. W. 173, 174.

### JUROR

See Answer of Juror; Competent Juror; Objectionable Juror.

Fixed opinion of juror, see Fixed Opinion.

Interest of juror, see Interest (In Suit or Action).

Prejudice of, see Prejudice.

In a verdict, "We, the juror, find the defendant guilty as charged," the word "juror" means "jury." *Morris v. State*, 45 South. 456, 458, 54 Fla. 80, 14 Ann. Cas. 285.

Rev. St. 1899, §§ 3784, providing that each "juror" not on the regular panel, and summoned to sit as a juror in any criminal case wherein the offense charged is punishable with death or by imprisonment in the penitentiary, shall be allowed certain sums for attendance and mileage whether he sits in the trial of the cause or is challenged off, embraces only such jurors as were qualified on the panel of 40 from which the panel of 12 to try the cause were to be selected. *State ex rel. Suter v. Wilder*, 95 S. W. 396, 401, 196 Mo. 418, 7 Ann. Cas. 158.

A "juror," within Rev. St. 1899, § 2045, directed against the attempt to improperly influence a "juror" in any civil or criminal case in relation to any matter pending in court before whom such "juror" shall have been summoned or sworn, is one who has been summoned, sworn, and impaneled and thus constituted and made a "juror." *State v. Williford*, 86 S. W. 570, 572, 111 Mo. App. 668.

A member of a general jury panel, who has not been sworn to try an issue in any particular case, is a "juror," within Code, § 4461, giving the court power to punish as contempt an attempt to influence a juror. *Marvin v. District Court of Polk County*, 102 N. W. 119, 126 Iowa, 355.

For some purposes, the actual taking of the oath may be essential to constitute a "juror"; but, as soon as a citizen is designated by law as one chosen to sit as a juror, he falls within the letter and spirit of Cr. Code 1902, § 263, punishing attempting to corrupt any juror, and the fact that a juror appears on oral notice, without more formal summons, cannot avail an accused who has attempted to influence such juror before he was sworn. *State v. Maddox*, 61 S. E. 964, 965, 80 S. C. 452.

### Grand juror

The word "jurors," as used in Rev. St. § 802, declaring that jurors shall be returned from such parts of the district from time to time as the court shall direct, etc., embraced both grand and petit jurors. *Spencer v. United States*, 169 Fed. 562, 565, 95 C. C. A. 60.

The term "jurymen," as used in a statute which renders county officers ineligible as jurymen in any civil or criminal case, is

not limited to the members of the petit jury, but extends to members of the grand jury. *State v. Graham*, 60 S. E. 431, 432, 79 S. C. 116.

## JURY

See Condemnation Jury; De Facto Jury; Drawn Jury; Grand Jury; Impartial Jury; Polling Jury; Separation of Jury; Special Jury; Struck Jury; Sufficient Case for Jury; Trial by Jury; Try Without Jury.

Coercion of, see Coerce—Coercion.

Jurors' fees as costs, see Costs.

Misconduct of jury, see Misconduct.

The expression "the jury," in a verdict in a criminal case, "We, the jury, find defendant guilty," etc., is not necessary to the validity of the verdict. *Kehoe v. State (Tex.)* 89 S. W. 270.

"A 'jury' has been defined as a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them. \* \* \* Our Code defined it as 'a body of men temporarily selected from the qualified inhabitants of a particular district and invested with power (1) to present or indict a person for a public offense; (2) to try a question of fact.' *Ballinger's Ann. Codes & St. § 4730.*" *State v. Stentz*, 70 Pac. 241, 244, 30 Wash. 134, 63 L. R. A. 807.

The word "jury," as used in the Constitution, means a jury of men possessing such qualifications as the law in force at the time prescribes for jurors serving in the courts and selected from one of the lists in use by the courts. *Hallett v. Boyer*, 114 N. Y. Supp. 559, 560.

"The word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States, with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument." *State v. McCarthy*, 69 Atl. 1075, 1076, 76 N. J. Law, 295.

"A 'jury' implies 12 competent and disinterested men." *Blair v. M. McCormack Const. Co.*, 107 N. Y. Supp. 750, 751, 123 App. Div. 30.

The word "jury" means a tribunal of 12 men, presided over by a court and hearing the allegations, evidence, and argument of the parties. *Zanesville, M. & P. R. Co. v. Bolen*, 81 N. E. 681, 683, 76 Ohio St. 376, 11 L. R. A. (N. S.) 1107, 10 Ann. Cas. 658.

It may be that, if persons were called or summoned as jurors wholly without color of law, an objection would be available to a litigant, for in such case the persons so called or summoned would not be either a jury de facto or de jure. *State v. Ju Nun*, 97 Pac. 96, 98, 53 Or. 1.

## Number

A "jury," within the meaning of the federal Constitution, and the sixth amendment thereto, is a jury constituted as at common law of 12 persons—neither more nor less. *Bettge v. Territory*, 87 Pac. 897, 898, 17 Okl. 85.

The word "jury," as used in the Constitution, means a common-law jury of 12 men. *State v. Peterson*, 41 Vt. 504, 520.

## JURY COMMISSIONERS

As officer, see Officer.

## JURY LIST

As record, see Records.

## JURY OF THE COUNTY

In Const. art. 1, § 22, granting to accused the right of a trial by a "jury of the county," the words quoted mean no more than that the jurors should come from some part of the county. *State v. Newcomb*, 109 Pac. 355, 356, 58 Wash. 414.

## JURY OF THE VICINAGE

The term "jury of the vicinage" literally signifies of the neighborhood where a crime was committed. *Commonwealth v. Jones*, 82 S. W. 643, 644, 118 Ky. 889, 4 Ann. Cas. 1192.

## JURY ROOM

As public place, see Public Place.

## JURY TRIAL

See Trial by Jury; Waiver of Jury Trial. See, also, Try Without Jury.

## JURYMAN

See Juror.

## JUS

### JUS ALLUVIONIS

See Alluvion.

### JUS DISPONENDI

"The 'jus disponendi' of a testator is a property right (*O'Neill v. Supreme Council*, A. L. of H., 57 Atl. 463, 70 N. J. Law, 411, 1 Ann. Cas. 422), and one which should be protected by a court of equity from a threatened or anticipated attack." *Vanderbilt v. Mitchell*, 67 Atl. 97, 101, 72 N. J. Eq. 910, 14 L. R. A. (N. S.) 304.

### JUS PRIVATUM

The "jus privatum" was the right of the King to convey and vest in others of his private will the title to and over the sea, its arms and rivers, where the tide ebbed and flowed, and the shore below high-water mark, subject however to the jus publicum. The term "jus privatum," however, defined, included the ownership of the soil between high and low water marks. *Bardes v. Herman*, 114 N. Y. Supp. 1098, 1101, 62 Misc. Rep. 428.

"The king of England had title to the land under the navigable waters throughout his kingdom as his private property, which he could dispose of as he saw fit without restraint or hindrance from the law. This was known as the 'jus privatum' held by him in his individual capacity." The "jus privatum" is subject to the "jus publicum," or the king's title as sovereign to the navigable waters within rivers and arms of the sea where the tide ebbed and flowed. A lessee of land under navigable waters to use for the cultivation of oysters has no right in the land that is not subject to the power of the United States to construct improvements in aid of commerce and navigation. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N. E. 846, 847, 198 N. Y. 287, 34 L. R. A. (N. S.) 1084, 19 Ann. Cas. 694.

The *jus privatum* of the crown, by which the sovereign of England was deemed to be the absolute owner of the soil of the sea and of the navigable rivers, was not adopted as a part of the common law of the American colonies, and, except in so far as the *jus privatum* of the crown has devolved upon littoral and riparian owners, such right resides in the people in their sovereign capacity, and the public have a right to use the foreshore of the margin of tide waters for fishing, bathing, and boating, including the necessary incidental right of passage. *Barnes v. Midland R. Terminal Co.*, 85 N. E. 1093, 1096, 193 N. Y. 378, 127 Am. St. Rep. 962.

Under the common law and Act Cong. Feb. 14, 1859, c. 33, 11 Stat. 383, admitting Oregon as a state, and providing that all the navigable waters of the state should be common highways forever free to the inhabitants of the state and to all other citizens of the United States, the tidelands between high and low water mark became the property of the state; and in the title thus acquired there were two elements—the "*jus privatum*," or private right, and the "*jus publicum*," or public right; the *jus privatum* being a species of private property which the state held the same as a private owner, and might grant to any one, in any manner, or for any purpose not forbidden by the Constitution, the grantee thereby taking the title as absolutely as under a private conveyance. *Corvallis & E. R. Co. v. Benson*, 121 Pac. 418, 422, 61 Or. 359.

#### JUS PUBLICUM

The king "had title, as sovereign, and in no sense as proprietor, to the navigable waters themselves within rivers and arms of the sea where the tide ebbed and flowed, but he held them in trust for his people, and he could not dispose of them by grant or otherwise. They were incapable of private ownership, for they were the '*jus publicum*' held by the king, in a representative capacity. \* \* \* The '*jus publicum*' under the right of conquest and the treaty of peace made af-

ter the Revolutionary War went to the original states, and, when the Constitution was adopted, became subject to the rights surrendered thereby to the United States." A lessee of land under navigable waters to use for the cultivation of oysters has no right in the land that is not subject to the power of the United States to construct improvements in aid of commerce and navigation. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N. E. 846, 847, 34 L. R. A. (N. S.) 1084, 19 Ann. Cas. 694.

The "*jus publicum*" was the right of the public to use the sea, its arms and rivers, where the tide ebbed and flowed, and the shore below high-water mark, for the development of commercial navigation. *Bardes v. Herman*, 114 N. Y. Supp. 1098, 1101, 62 Misc. Rep. 428.

Under the common law and Act Cong. Feb. 14, 1859, c. 33, 11 Stat. 383, admitting Oregon as a state, and providing that all the navigable waters of the state should be common highways forever free to the inhabitants of the state and to all other citizens of the United States, the tidelands between high and low water mark became the property of the state; and in the title thus acquired there were two elements—the "*jus privatum*," or private right, and the "*jus publicum*," or public right. The *jus publicum*, being the dominion of sovereignty in the state, by which it prevents any use of lands bordering on navigable waters which would materially interfere with navigation and commerce thereon, cannot be abdicated or granted. *Corvallis & E. R. Co. v. Benson*, 121 Pac. 418, 422, 61 Or. 359.

#### JUST

See True and Just.

The word "just" means conformable to rectitude and justice; not doing wrong to any; violating no right or obligation; not transgressing the requirements of truth and propriety; rendering to each his due. *Champlain Stone & Sand Co. v. State*, 123 N. Y. Supp. 546, 553, 66 Misc. Rep. 434.

The word "just," according to its popular interpretation, means upright, honest, impartial, fair, inequitable, and with its legal interpretation means true, exact, and conformable to law. In its legal sense nothing is "just" which is unlawful and nothing unjust is lawful. In the application of the word to taxes the legal interpretation must be given. *State v. Several Parcels of Land*, 116 N. W. 682, 684, 81 Neb. 770.

#### As correct

Where the statute requires that claims filed with an assignee for the benefit of creditors shall be verified by an affidavit that the statement is "true," that the debt is "just," and that there are no credits or offsets, etc., the statute must at least be sub-

stantially complied with by a creditor before he is entitled to benefits, and, where the affidavit to a creditor's claim omits to say that the statement is "true," and that it is "just," the statement in the affidavit that the account is "correct" is not equivalent to saying that it is "true," and that the debt is "just." An account might be correct, and yet the debt not be just. The Legislature evidently believed, in enacting the statute, that it was more important that the creditor should state that his debt was "true" and that it was "just," than that he should merely make affidavit that it was "correct." *Hughes v. Potts*, 87 S. W. 708, 709, 39 Tex. Civ. App. 179.

#### **Reasonable synonyms**

The word "just" is a synonym of reasonable. *Houston & T. C. R. Co. v. Everett* (Tex.) 86 S. W. 17, 18 (citing *Stand. Dict.*).

#### **JUST ALLOWANCE**

Trustees under an order for "just allowance" are entitled only to charges and expenses. *State Bank at Elizabeth v. Marsh*, 1 N. J. Eq. 288, 296 (quoting and adopting definition in *Manning v. Manning's Ex'rs* [N. Y.] 1 Johns. Ch. 527).

#### **JUST AND ADEQUATE COMPENSATION**

Where a commercial railroad company occupies the streets of a town or city pursuant to legislative authority and with the consent of the municipal authorities, such permission is subject to the constitutional restraint that private property shall not be taken or damaged for public purposes without "just and adequate compensation being first paid," and the company must first pay or tender to the abutting landowner just and adequate compensation for the damages consequential on the construction of the track and the uses to which it will be put. *Athens Terminal Co. v. Athens Foundry & Machine Works*, 58 S. E. 891, 893, 129 Ga. 393.

#### **JUST AND EQUAL DISTRIBUTION**

Orphan's Court Act N. J. 1898, § 168 (P. L. p. 715), directs the court to order a "just and equal" distribution to the next of kindred to the intestate in equal degrees or legally representing their stocks, each according to his or her respective right pursuant to the laws in such cases of the rules and limitations therein set down. Those rules and limitations direct a distribution to the next of kindred in equal degree, of or unto the intestate and their legal representatives as aforesaid. The words "as aforesaid" seem to have been used to direct attention to the limitation upon the right of representation among collaterals which has been stricken out, and they probably no longer serve any useful purpose. The distribution, to comply with the statute, must answer the following requirements: It must be just and equal. It must be to the next of kin in equal degree,

"and their representatives." It must be to each according to his or her respective right. It must be pursuant to the rules and limitations of the act. The words "just and equal" are perhaps a little difficult to explain. In one sense any distribution authorized by the statute would be just, for prior to the statute the next of kin were without right to share in the personal estate. But the word would have been quite superfluous if nothing more had been meant than a compliance with the statute. I think it had another meaning and referred to that natural right inherent in propinquity of blood mentioned by Chief Justice Beasley in *Taylor v. Bray*, 32 N. J. Law, 184, and in *Schenck v. Vail*, 24 N. J. Eq. 551. Whatever the law may be, it cannot be denied that a general sense of justice favors the rights of blood, and this sense of justice appears in the general scheme of our laws on the subject of descent and distribution. Tested by this sense of justice, the first cousins and their descendants seem nearer in blood than great great-grandparents and their descendants, although great great-grandparents and cousins are alike related in the fourth degree. The reasons are that great great-grandparents belong to so remote a generation that they are hardly likely to have been known personally to the intestate, and even their names are probably forgotten. Their descendants naturally become so numerous and so scattered that the intestate seldom can have known them, or even have been aware of the relationship, and the passing of three generations makes proof of kinship difficult. We have no reason to doubt the statement in appellant's brief that hardly 40 per cent. of the claimants who have been excluded from sharing in this estate will be able to legally prove that they are representatives of an ancestor, who, if living, would have stood in equal degree of kinship to the intestate as the living first cousins. Cousins, on the other hand, are ordinarily contemporaries of the intestate, are known to him, and their relationship recognized, while the descendants of first cousins, belonging to a younger generation, are more naturally looked on as having a *spes accrescendi*, to use Lord Hardwicke's expression in *Evelyn v. Evelyn*, 3 Atkins, 762. Again, there are eight pairs of great-great-grandparents, and hence at least eight stocks with which the cousins must share, if the appellants' contention is sound. In a perfectly conceivable and not improbable case, the intestate may have but one cousin. To adopt a construction which would give to that cousin only one-ninth of the estate and distribute eight-ninths to remote relatives would lead to a result which must shock the sense of justice of most men. Yet that is an understatement of the difficulties to which the construction would lead; for one of each pair of great-great-grandparents may have remarried after the death of the spouse,



and, since the half blood share in the personal estate with the whole blood, there may be 16 stocks to share with the cousin. Such considerations have had weight with the courts in decided cases. The rights of brothers and sisters depend upon the same language of the statute as the right of cousins. They take as next of kin in the second degree; but grandparents are also in the second degree, and it has been contended that the four grandparents were entitled to share with brothers and sisters. They would be entitled to share upon the bare words of section 169, subd. 3; but it was decided in England in several cases prior to our Revolution that grandparents did not share with brothers and sisters. This construction was so thoroughly satisfactory that the cases seem never to have been taken to an appellate court; and we in this state have acquiesced so entirely that, although the case must have arisen, no one seems ever to have mooted the question in court. Yet the only foundation in reason for excluding the grandparents is the sense of natural justice which the framer of the statute had in mind when he required the distribution to be just. If no rule or limitation of the statute militates against such a construction, the just distribution required by section 168 would favor the respondents in this case. The distribution must also be equal. The equality is, of course, not an absolute equality of shares, but an equality according to the respective rights of each and the rules and limitations of the statute. *Smith v. McDonald*, 65 Atl. 840, 841, 71 N. J. Eq. 261 (citing 2 Williams, Ex'rs, 1591; *Ordinary v. Cooley*, 30 N. J. Law, 271, opinion of Justice Vredenburg).

### JUST AND FAIR

See Fair and Just.

### JUST AND REASONABLE DEMAND

Where, prior to an action by a domestic servant for services, plaintiff demanded \$2.50, and the amount recovered was \$2, the demand was not "just and reasonable," within the provision of Buffalo Municipal Court Act, Laws 1891, p. 233, c. 105, § 458, as amended by Laws 1898, p. 195, c. 101, § 3, entitling plaintiff in such an action to additional costs and a body execution, where it appears that she made a personal, just, and reasonable demand for the amount claimed from the defendant prior to the commencement of the action. *Brennan v. Flick*, 108 N. Y. Supp. 1008.

### JUST AND TRUE ACCOUNT

The words "just and true," when used in connection with an account, mean an account which states truth, and not falsehood, and demands no more than, in right and justice, the claimant ought to have. *Kneisley Lumber Co. v. Edward B. Stoddard Co.*, 88 S. W. 774, 779, 113 Mo. App. 306.

The statement of lien filed is not "a 'just and true statement of account' of the demand due," as required by statute to sustain the lien, where the amount claimed is from 60 to 70 per cent. above the amount due, as claimant must have known. *Griff v. Clark*, 119 N. W. 1076, 1077, 155 Mich. 611, 29 L. R. A. (N. S.) 305, 130 Am. St. Rep. 582.

Though a subcontractor's agreement fixed his compensation at a lump sum, a mechanic's lien account, filed by him, must be fairly itemized to constitute it "a just and true account," within Rev. St. 1909, § 8217; and hence an account which merely recites "to contract painting house, \* \* \* \$180," is insufficient. *Baker v. Smallwood*, 143 S. W. 518, 519, 161 Mo. App. 257.

### JUST CAUSE

See Justifiable Cause.

"Just cause" means lawful ground. Hence, whether a man has "just cause" to desert his wife, or to refuse to support her, is a question of law to be determined by the court. *State ex rel. Mioton v. Baker*, 36 South. 703, 704, 112 La. 801.

A "just cause" for the removal of officers means something more than the mere wish of that part of the sovereign people which elected the officer whom it is attempting to remove. The question is not whether there was cause for the removal from office, as the word "cause" has heretofore been used in this connection. The fitness of the incumbent or the propriety or impropriety of his conduct is not alone involved. Malfeasance, misfeasance, or nonfeasance in office may call for the exercise of the right conferred, but it includes more than these. A clear conception of the purpose of such a proceeding for removal as distinguished from an ordinary "removal for cause" is necessary. The power to remove a corporate officer from office, for reasonable and "just cause," is one of the common-law incidents of all corporations, and this extends to elective as well as appointive officers, and it is competent for the charter of a city to so provide. *Good v. Common Council of City of San Diego*, 90 Pac. 44, 46, 5 Cal. App. 265 (citing *Richards v. Clarksburg*, 4 S. E. 774, 30 W. Va. 491, and *Croly v. Board of Trustees of City of Sacramento*, 51 Pac. 323, 119 Cal. 234).

Under Laws 1905, c. 363, § 22, providing that no subordinate or employé in the civil service of the state shall be removed, except for just cause, the courts have jurisdiction to determine whether the cause assigned for removal by the removing officer is a "just cause," but not to determine whether such officer correctly determined, on the facts, that such cause existed, and hence, where a state treasurer removed an employé for incompetency and insubordination, the court could not review his action; these being "just causes." *State ex rel. Wagner v. Dahl*, 122 N. W. 748, 750, 140 Wis. 301.

An instruction that if the jury believe that plaintiff, a passenger on defendant's train, was arrested without just cause, either by the conductor in charge of the train, or by another employé of the defendant by order of the conductor, is misleading in the use of the words "just cause." A conductor may be justified in making an arrest as conservator of the peace, though he has no just cause in the sense of actual cause for making the arrest, since he is entitled to make an arrest if there exist such a state of facts as constitute, in law, probable cause. *Davis v. Chesapeake & O. Ry. Co.*, 56 S. E. 400, 401, 61 W. Va. 246, 9 L. R. A. (N. S.) 993.

Opprobrious epithets or insulting gestures, when applied to a person, constitute a "just or lawful cause of provocation to passion." *State v. Brown*, 79 S. W. 1111, 1112, 181 Mo. 192.

#### Probable cause synonymous

"Just cause," as used in an instruction in an action for abuse of process authorizing a recovery if defendant issued an attachment against plaintiffs without just cause, was not synonymous with "probable cause." *Sehon, Blake & Stevenson v. Whitt* (Ky.) 92 S. W. 280, 281.

#### JUST CLAIM

The term "just claim," in the rule that want of proper care on the part of the vendor of an article to protect himself from imposition takes from him all just claims for relief, whether his negligence is attributable to his indolence or credulity, is used solely as regards the right of the purchaser to invoke judicial power to save himself from loss, nor with the idea that the moral wrong done by the vendor could be balanced by his victim's negligence. *Bostwick v. Mutual Life Ins. Co.*, 92 N. W. 246, 253, 116 Wis. 392, 67 L. R. A. 705.

A claim is not a "just claim," within Gen. Laws 1896, c. 215, § 2, which, after prescribing the time within which claims must be presented to the administrator, concludes in the declaration that no claim other than those presented as aforesaid may be enforced against the estate, but other just claims can be paid out of assets, where it has been extinguished by lapse of time. *Kenyon v. Probate Court of East Greenwich*, 65 Atl. 267, 268, 27 R. I. 566 (citing *Thompson v. Hoxie*, 55 Atl. 930, 25 R. I. 377).

#### JUST COMPENSATION

Fair and just compensation, see Fair and Just.

The words "just compensation," as used in Const. art. 2, § 21, ordaining that private property shall not be damaged or taken for public use without "just compensation," mean exactly the same that they mean when used in everyday business transactions between man and man. They are not circumscribed by any technical definition that places them

beyond the comprehension of men of ordinary intelligence. *St. Louis, M. & S. E. R. Co. v. Continental Brick Co.*, 96 S. W. 1011, 1013, 198 Mo. 698.

The term "just compensation," when applied to the taking of land for railroad purposes under the power of eminent domain, means, first, the full value of the land taken; and, second, where a part only of the land is taken, a fair and adequate compensation for all injury to the residue sustained or to be sustained by the construction and operation of the railroad, determined after a consideration of the advantages and disadvantages resulting and to result from the operation of the railroad. *Genesee River R. Co. v. Boyington*, 112 N. Y. Supp. 343, 345, 60 Misc. Rep. 416.

The "just compensation" which must be paid for the extending of a street across a railroad right of way is merely compensation for the diminution in value of the exclusive right to use for railroad purposes the property sought to be condemned, caused by the existence and use of the street, and the expense of erecting gates, planking, crossing, and maintaining flagmen which will necessarily result therefrom must be regarded as incidental to the exercise of the police powers of the city in opening the street and are not elements of "just compensation." *Grafton v. St. Paul, M. & M. R. Co.*, 113 N. W. 598, 602, 16 N. D. 313, 22 L. R. A. (N. S.) 1, 15 Ann. Cas. 10.

On the payment of the damages which constitute the "just compensation" for private property taken for public use, the title acquired by the exercise of the power of eminent domain becomes perfected. The owner of land taken for public uses may waive the formality of a statutory assessment of damages, and, when he voluntarily accepts a satisfactory amount agreed upon between the company and himself, the constitutional guaranty of a "just compensation" is fulfilled. *Currie v. Bangor & A. R. Co.*, 75 Atl. 51, 54, 105 Me. 529.

"Just compensation" required to be paid for land taken for public use is not obtained when fixed by an interested tribunal, unless the amount is agreed to. *Peirce v. City of Bangor*, 74 Atl. 1039, 1041, 105 Me. 413.

#### Benefits included

The "just compensation" required to be made to an owner where part of his land is taken for public use is the value of the part taken and damages to the remainder, less any special benefit to the remainder by reason of the taking and use for a particular purpose. In *re Water Front on North River in City of New York*, 105 N. Y. Supp. 750, 757-762, 120 App. Div. 849.

#### Costs and expenses of action to obtain included

While "just compensation" requires a fair indemnity to the landowner for his nec-

essary expenses in proving the value of the land, he is not to be fully indemnified for any unusual compensation which he may choose to pay his counsel and expert witnesses. *Studwell v. Halsted*, 116 N. Y. Supp. 68, 70, 62 Misc. Rep. 330.

The provisions of Laws 1905, p. 2027, c. 724, as supplemented by Laws 1905, p. 2051, c. 725, for allowance of expenses and disbursements, including witness and counsel fees, are sufficient to satisfy the constitutional requirement of "just compensation," so far as the landowner's necessary expenses are concerned; the term "expenses" being of broad meaning, and covering any necessary expense, except those items specifically mentioned and otherwise provided for in the statute. In re Board of Water Supply of City of New York, 116 N. Y. Supp. 642, 645, 62 Misc. Rep. 328.

Though, under Code Civ. Proc. § 274, which provides that costs, witness fees, and disbursements shall not be taxed in the Court of Claims, nor shall counsel or attorney's fees be allowed, no costs or disbursements can be recovered by a claimant for the value of land appropriated by the state for a canal improvement, yet his expenses in procuring an abstract of his title, being preliminary to the filing of the claim must be awarded to him. The condemnation law so far as it allows taxation of costs and disbursements in proceedings to condemn real property in general (Code Civ. Proc. § 3372), is not applicable to the Court of Claims, in passing on a claim for the value of land appropriated by the state. *Brainerd v. State*, 131 N. Y. Supp. 221, 231, 74 Misc. Rep. 100.

#### **Damages to land not taken included**

"Just compensation" to the owner of a farm, a part of which is taken by the United States by permanently flooding it in improving navigation, as an incident to which a public highway crossing the flooded land is also flooded, demands an award of the damages to that part of the farm not taken by reason of the destruction of the easement of access to the turnpike by way of the highway thus destroyed. *United States v. Grizzard*, 31 Sup. Ct. 162, 163, 219 U. S. 180, 55 L. Ed. 165, 31 L. R. A. (N. S.) 1135.

#### **As difference in value before and after taking part**

"Just compensation" provided by the Constitution (art. 1, § 6) as damages for the taking of private property for public use is to be measured by the difference in the market value of the premises before and after the appropriation, where a part only of the property is taken. *Brainerd v. State*, 131 N. Y. Supp. 221, 225, 74 Misc. Rep. 100.

#### **As fair cash value**

The "just compensation" required by the Constitution for the taking of private property for a public use is the fair cash value of

the property taken. The value of the capabilities of the property for a particular use at the time of the taking must be considered in determining the market price, but the speculative value of the property in the hands of a future owner may not be considered; and where an owner has developed his property, and is using it in the way which possesses a special value to him, just compensation requires that he be paid for it at the place and in the form in which it is taken. *Southern Ry. Co. v. City of Memphis*, 148 S. W. 662, 669, 126 Tenn. 267, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913E, 153.

#### **As full and fair equivalent**

"Just compensation" means a full and fair equivalent for the loss sustained; the fair market value of the thing taken. *Champlain Stone & Sand Co. v. State*, 123 N. Y. Supp. 546, 553, 66 Misc. Rep. 434.

In the law of eminent domain the constitutional combination of the two words "just compensation" means a full and perfect equivalent for the property taken, and the just compensation is for the property, and not to the owner. *Town of Nahant v. United States*, 136 Fed. 273, 283, 70 C. C. A. 641, 69 L. R. A. 723 (citing *Monongahela Nav. Co. v. United States*, 13 Sup. Ct. 622, 626, 148 U. S. 312, 326, 37 L. Ed. 463).

"Just compensation," within the meaning of the compensation to be awarded in condemnation proceedings, means full compensation for everything or element of value taken. *Kennebec Water Dist. v. City of Waterville*, 54 Atl. 6, 19, 97 Me. 185, 60 L. R. A. 856.

A requested instruction in condemnation proceedings, stating that the compensation to be paid was the fair cash value in the market of the leasehold interest and the buildings on the various lots at the date of filing the petition, was modified by the court by adding that: "Just compensation is the payment to another of such a sum of money as will make him whole, so that, upon the receipt of the same, he will be no poorer by reason of the taking of his property than he would be if the same were not taken." Held that, while perfect accuracy would require the court to state a maximum beyond which the jury should not go, yet the jury could not have been misled. *West Chicago Park Com'rs v. Boal*, 83 N. E. 824, 827, 232 Ill. 248.

Where the United States in its sovereign capacity exercises its arbitrary power to condemn private property for necessary public use, the "just compensation" which it is required by the Constitution to make to the owner should be determined on equitable principles, and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken. *United States v. Town of Nahant*, 153 Fed. 520, 521, 82 C. C. A. 470 (citing *Lewis, Em. Dom. § 404*).

The term "just compensation," as used in connection with the taking of property for public use, involves placing the property owner in the same position financially that he would have been in if his property had not been taken on a given date. In re Board of Rapid Transit Com'rs, 112 N. Y. Supp. 619, 635, 128 App. Div. 103.

#### As market value

"Just compensation" means the fair market value of the thing taken. Champlain Stone & Sand Co. v. State, 123 N. Y. Supp. 546, 553, 66 Misc. Rep. 434.

"Just compensation," provided by the Constitution (article 1, § 6), as damages for the taking of private property for public use, is to be measured by the market value of the property where the whole property is taken. Brainerd v. State, 131 N. Y. Supp. 221, 225, 74 Misc. Rep. 100.

Under the constitutional requirement (article 1, § 6) of "just compensation" for private property taken for public use, an owner against whom benefits are to be charged must be given at least the market value of the lands taken. Brainerd v. State, 131 N. Y. Supp. 221, 232, 74 Misc. Rep. 100.

Where property on which the owner had conducted a large and successful business for several years, and which was peculiarly adapted to such business, was entirely condemned for the use of a railroad company, the owner, under the Constitution and statutes requiring payment of "just compensation," was limited to the reasonable market value of the property at the time of the taking and was not entitled to damages resulting from injury to the business or loss of profits incident to its removal to another location. Hunter's Adm'r v. Chesapeake & O. R. Co., 59 S. E. 415, 417, 107 Va. 158.

#### As money equivalent

"Just compensation" for property taken by condemnation means a fair equivalent in money, which must be paid at least within a reasonable time after the taking, and it is not within the power of the Legislature to substitute for such present payment future obligations, bonds, or other valuable advantage. City of Waterbury v. Platt Bros. & Co., 56 Atl. 856, 858, 76 Conn. 435 (citing Butler v. Ravine Road Sewer Com'rs, 39 N. J. Law, 665; Bloodgood v. Mohawk & H. R. R. Co. [N. Y.] 18 Wend. 9, 35, 31 Am. Dec. 313; Sanborn v. Belden, 51 Cal. 266; Burlington & C. R. Co. v. Schwelkart, 14 Pac. 329, 10 Colo. 178).

In the law of eminent domain the owner is entitled to "just compensation," and cannot be compelled to accept any other kind of property in lieu thereof. "In the exercise of the right of eminent domain, no just compensation can be made for the property taken, except in money. Money is a common standard, by comparison with which the value of

anything may be ascertained." Oregon Short Line R. Co. v. Fox, 78 Pac. 800, 801, 28 Utah, 311 (quoting 2 Words and Phrases, p. 1354).

#### Speculative damages

The "just compensation" to which one is entitled under the laws of eminent domain means compensation for real damages, and does not include fanciful or speculative damages. Spohr v. City of Chicago, 69 N. E. 515, 518, 206 Ill. 441 (citing Chicago & A. R. Co. v. City of Pontiac, 48 N. E. 485, 490, 169 Ill. 155, 173; Chicago, B. & Q. R. Co. v. City of Chicago, 37 N. E. 78, 149 Ill. 457).

#### JUST DEBTS

See Pay All My Just Debts.

Laws 1909, c. 207, § 1, provides that any municipal council contracting for the performance of any public work shall require a bond of the contractor for the payment of all materialmen and just debts incurred by the contractor. Section 2 makes the city itself liable on failure to take such a bond. An action was brought against the contractor, its receiver, and the municipality for which the contract work was done to recover the contract price for material furnished to the contractor. It appeared that a part of the material furnished was neither used in the work, nor delivered upon the ground to be used therein. Held, that neither as a materialman nor as one to whom a just debt had been incurred in the performance of contract work could plaintiff recover of the city for material not used or delivered on the ground for use. Gate City Lumber Co. v. City of Montesano, 111 Pac. 799, 800, 60 Wash. 586.

#### JUST INVESTIGATION

See Fair and Just.

#### JUST OR LAWFUL CAUSE

See Just Cause.

#### JUST REMUNERATION

"Just remuneration," as used in a contract for the care of cattle, in case any of the animals should be lost, means the "remuneration" which the owner would be justly entitled to under the law for the loss of his cattle by the contractor's negligence, which is the value of the cattle lost. Mattern v. McCarty, 102 N. W. 468, 470, 73 Neb. 228.

#### JUST SHARE

The plaintiff, a tenant in common, must prove in his action against his cotenant, for money had and received to recover his share of the profits in an enterprise, that defendant has received "more than comes to his 'just share' or proportion. The words 'just share' would imply that his share is to be determined by justice, not by fiction or technicality." Dewing v. Dewing, 42 N. E. 1128, 1129, 165 Mass. 230.

**JUST TITLE**

The phrase "justo titulo," defined in the Civil Code as "that which legally suffices to transfer the ownership or property right, the prescription of which is in question, "does not mean that the titulo must have been effective in the particular case, for then prescription would be unnecessary. A wholly unauthorized grant of public land in the Philippine Islands by subordinate Spanish officials, showing its invalidity on its face, cannot serve as the basis of a prescriptive title under the Spanish royal decree of June 25, 1880, under which a prescriptive right can be founded on possession for ten years under a "just title" and in good faith. *Tiglaio v. Insular Government of Philippine Islands*, 30 Sup. Ct. 129-131, 215 U. S. 410, 416, 54 L. Ed. 257.

**JUSTLY**

The term "justly," as used in the consideration of what a plaintiff in attachment is "justly entitled to recover," includes not only what in good faith to the debtor he is entitled to recover, but also what he is entitled to recover in good faith and justice to other creditors. *Crim v. Harmon*, 18 S. E. 753, 755, 38 W. Va. 596.

**JUSTICE**

See At the Hands of; Due Administration of Justice; Flee from Justice; Furtherance of Justice; Natural Justice; Seat of Justice.

In furtherance of justice, see In Furtherance of.

See, also, Injustice.

"Justice" is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained or until liberty be lost in the pursuit." *McKinstier v. Sager*, 72 N. E. 854, 860, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268 (quoting from *United States v. Nourse*, 9 Pet. [34 U. S.] 8, 27, 9 L. Ed. 31).

"Justice" means that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts. *Meeks v. Carter*, 63 S. E. 517, 518, 5 Ga. App. 421.

Where the colonel of a regiment of the national guard, who had been suspended from duty, wrote the Governor asking that the Governor do him the justice to state that he had done or invited nothing worthy of censure, and subsequently wrote a second letter again demanding "justice" or a court of inquiry, the word "justice" evidently referred to his previous demand that the Governor do him justice by stating that he had done nothing worthy of censure. *State ex rel. Higdon v. Jenks*, 35 South. 60, 138 Ala. 115.

**JUSTICE (An Officer)**

See District Court Justice.

Where a motion is made under Rev. St. 1903, c. 84, § 53, for a new trial on the ground of newly discovered evidence, the statute requires that the testimony respecting the allegations of the motion shall be heard and reported by the "justice," meaning the justice presiding at the term when the motion is filed. *Mitchell v. Emmons*, 71 Atl. 321, 324, 104 Me. 76.

**JUSTICE AND EQUITY**

Under Cobbe's St. 1907, § 8978, authorizing an action, by the owner of property within and contiguous to the boundary of a municipal corporation, to have it disconnected from the municipality, and providing that the court, if it finds that "justice and equity" require that such land, or any part thereof, be disconnected from the municipality, shall enter a decree accordingly, the test of whether "justice and equity" require such disconnection is whether the land has a unity of interest with the platted portion of the municipality in the maintenance of a municipal government, and hence the statute does not authorize the court to exercise legislative policy by determining what justice and equity require without ascertaining any fact or group of facts, upon the determination of which the law will exclude the territory. *Bisenius v. City of Randolph*, 118 N. W. 127, 128, 82 Neb. 520.

**JUSTICE COURT**

As judicial court, see Judicial Court.

A "justice's court" is a court of limited jurisdiction, both as to subject-matter and territory. *Winn v. Butts*, 56 S. E. 406, 407, 127 Ga. 385 (citing *Everett v. Brown*, 43 S. E. 735, 117 Ga. 342).

"A 'justice's court' is a court of limited jurisdiction, and presumptions in favor of its judgments are not allowed to the same extent that they are in cases of judgments by courts of general jurisdiction." *Fleld v. Peel*, 50 S. E. 346, 347, 122 Ga. 503.

A court of "justice of the peace" is of limited jurisdiction. The justice has no powers, except as granted by statute. Hence, in the absence of statutory provision for disposition of causes which are pending in a justice's court and undetermined when the justice dies, the cause abates and dies with him. *State ex rel. Faughnan v. Miesen*, 105 N. W. 555, 96 Minn. 466.

"Justices' courts" in Nebraska are not mere creatures of the Legislature, but they are courts created by the Constitution itself, and an action pending before a justice is removable to a national court on the petition of a nonresident defendant if there exists the proper diversity of citizenship and the value of the matter in controversy exceeds

\$2,000 exclusive of interests and costs. *Katz v. Herschel Mfg. Co.*, 150 Fed. 684, 685.

A court of a "justice of the peace" is one of limited and special jurisdiction, and no presumptions are entertained in favor of its jurisdiction; but the records must show affirmatively that it has jurisdiction of both the subject-matter and of the parties. But after jurisdiction of the subject-matter and of the parties attaches, the rule changes, and in all subsequent proceedings the same presumptions are indulged in favor of the regularity and validity of the proceedings of a justice's court as are extended to a superior court of general jurisdiction. *Rhyne v. Manchester Assur. Co.*, 78 Pac. 558, 559, 14 Okl. 555.

### JUSTICE EJECTMENT

The proceeding commonly known as "justice ejectment," given by statute where one in possession of demised premises under a written or parol lease remains in possession, without right, after the termination of the lease by its own limitation, or after a breach of a stipulation contained therein, is available where the tenancy is created by contract, although it is created for life. *Foss v. Stanton*, 57 Atl. 942, 78 Vt. 365.

### JUSTICE MAY REQUIRE

See As Justice May Require.

### JUSTICE OF THE PEACE

See, also, J. P.

The true conception indicated by the term "justice of the peace," as disclosed by our Constitution and statutes, is that of an officer having both judicial and political functions—judicial, in that he holds a court and decides matters of litigation arising between parties; political, in that he is a member of the quarterly county court, which is the governing agency or legislative body of the county—but that, in performing all of the duties pertaining to these two functions, he is, in the main, dependent upon his civil district, which creates him, which must be his home, which he cannot remove from without forfeiture of his office, and which he represents in the county legislature or county court. *Grainger County v. State ex rel. My-natt*, 80 S. W. 750, 756, 111 Tenn. 234.

A "justice of the peace" is a constitutional officer under Const. art. 6, § 17, and is a town officer, who can have no existence as a public officer independent of his town organization, and as a town officer his powers and duties are limited to such as are given him by statute. A justice of the peace cannot try a case before a jury in an adjoining town, where he has an office, even by consent of the parties. *Eisenberg v. Lape*, 103 N. Y. Supp. 169, 170, 52 Misc. Rep. 329 (citing *Gurnsey v. Lovell*, [N. Y.] 9 Wend. 319; *Town of Lyme v. Town of East Haddam*, 14 Conn. 394; *Lynch v. Vermazen*, 15 N. W. 663, 61

*Iowa*, 76; *Gage v. Clark*, 15 Atl. 831, 51 N. J. Law, 97).

A "justice of the peace" is an officer of limited jurisdiction, but he has the right upon objection to ascertain whether a summons has properly been served so as to confer jurisdiction in a case before him and for that purpose, entertain an application to set aside its service. *People ex rel. Ballin v. Smith*, 76 N. E. 925, 926, 184 N. Y. 93.

#### As city officer

See City Officer.

#### As civil officer

See Civil Officer.

#### As collecting officer

See Collecting Officer.

#### As county officer

See County Officer.

#### As inferior court

See Inferior Court.

#### As judge

See Judge.

#### As judicial officer

See Judicial Officer.

#### As town officer

See Town Officer.

#### As township officer

See Township Officer.

### JUSTICE OF THE PEACE IN THE CITY

Rev. St. 1899, § 5664, provides that, when the amount due on any tax bill does not exceed \$300, suit may be brought before any justice of the peace in the city issuing them. In a suit before a justice on tax bills the summons showed that he was a justice in the township in which the city was situate. The return of service showed that it was served in the township. The transcript set forth a judgment rendered before a justice "within the city in and for" the township. Held, that the justice had jurisdiction to render judgment, for the phrase "justice of the peace in the city" means a justice in the township in which the city is situate, under Rev. St. 1899, § 3805, making justices township officers. *Carpenter v. Roth*, 91 S. W. 540, 543, 192 Mo. 658.

### JUSTICE'S JUDGMENT

See Judgment.

### JUSTIFIABLE

#### JUSTIFIABLE CAUSE

See Just Cause.

"Justifiable cause" which will excuse a husband or wife for leaving the other must be such as could be made the foundation of a divorce from bed and board, and of a nature inconsistent with the marital relation, or such as would render cohabitation unsafe.

Reynolds v. Reynolds, 69 S. E. 381, 383, 68 W. Va. 15, Ann. Cas. 1912A, 889.

### JUSTIFIABLE HOMICIDE

The taking of human life is justifiable, when done in the execution of public justice. *State v. Blackburn* (Del.) 75 Atl. 536, 538, 7 Pennewill, 479.

"Justifiable homicide" is that committed in the execution of public justice, or for the prevention of any atrocious crime attempted to be committed with force. *State v. Watson* (Del.) 82 Atl. 1086, 1087.

Homicide is "justified" by law when committed in defense of one's person against any unlawful and violent attack, made in such a manner as to produce a reasonable expectation of death or some serious bodily injury. *Jirou v. State*, 108 S. W. 655, 658, 53 Tex. Cr. R. 18.

Mansf. Dig. § 1547 (Ind. T. Ann. St. 1899, § 890), defines "justifiable homicide" as the killing of a human being in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony. *Driggers v. United States*, 104 S. W. 1166, 1170, 7 Ind. T. 752.

"Justifiable homicide" is defined by section 6570, Rev. St. 1887, as follows: "Homicide is also justifiable when committed by any person, in either of the following cases: (1) When resisting any attempt to murder any person or to commit a felony, or to do some great bodily injury upon any person. (3) When committed in the lawful defense of such persons. \* \* \* When there is reasonable ground to apprehend a design to commit some great bodily injury, and imminent danger of such design being accomplished. The statute having used the word "great," it was a differentiation for an instruction thereunder to use the word "serious"; there being certainly a distinction between the meaning of the two words. *State v. Crea*, 76 Pac. 1013, 1017, 10 Idaho, 88.

In defining "justifiable homicide" as laid down in section 70, of Pen. Code Ga. 1895, it is inaccurate to use the expression "in self-defense, or in defense of habitation, property, or person, against one who manifestly intends and endeavors by violence or surprise, to commit a felony on either," instead of "one who manifestly intends or endeavors." Mere words or threats will not of themselves justify a homicide or reduce it to manslaughter. *Taylor v. State*, 63 S. E. 296, 298, 131 Ga. 765.

According to the provisions of Pen. Code, § 205, the homicide is justifiable when committed in the lawful defense of the slayer, or of his or her husband, wife, parent, child, sister, master, or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to com-

mit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished. *People v. Regan*, 94 N. Y. Supp. 841, 843, 107 App. Div. 608.

"Homicide" is "justifiable" when committed either in the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master, or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished, or in the actual resistance of the attempt to commit a felony upon the slayer in his presence or upon or in a dwelling or other place of abode in which he is. There is a further provision of law as follows: An act otherwise criminal is justifiable when it is done to protect the person committing it, or another whom he is bound to protect, from inevitable and irreparable personal injury, and the injury could only be prevented by the act; nothing more being done than is necessary to prevent the injury. *People v. Rodawald*, 70 N. E. 1, 7, 177 N. Y. 408.

The killing of a human being in the heat of passion, while reducing the crime to manslaughter, does not constitute "justifiable homicide." *People v. Ashland*, 128 Pac. 798, 802, 20 Cal. App. 168; *Nutt v. State*, 128 Pac. 165, 169, 8 Okl. Cr. 266.

Accused in a prosecution for homicide becoming convinced that his wife sustained illegal relations with L., and that B. had been a party to the matter, went to B's saloon and shot him, and then went to the place where his wife was staying, thrust his hand with a revolver through the door and shot; the bullet inflicting a fatal wound on her. He testified that all three had ridiculed him, and that he became so angry that he did not know what he did at the time of the shooting, which all occurred in a short space of time, and after it was over he made exclamations and apparently unpremeditated utterances indicating ignorance of and surprise at his wife's injuries. Held, that such facts did not present a case of justifiable or excusable homicide as defined by St. 1898, §§ 4366, 4367, the first of which involves some element of self-defense for the enforcement of a duty, and the second excludes the use of dangerous weapons. *Duthey v. State*, 111 N. W. 222, 224, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

### Apprehension of danger

"Homicide" is "justifiable" and is no offense against the law when committed in necessary self-defense. This occurs when one is attacked in such a manner as to produce in his mind a reasonable apprehension of death or serious bodily injury, or where it reasonably appears to one from the act, or acts, coupled with the words of the person

killed, that the slayer is thereby in danger of death or serious bodily injury and he kills to protect himself from such danger. Then such killing is deemed in justifiable self-defense. *McCormick v. State*, 108 S. W. 669, 672, 52 Tex. Cr. R. 493.

"The law has been long settled on this subject in our state, and is that if a party is in real or apparent danger of death or great bodily harm, or believes himself to be so, as evidenced by circumstances justifying that belief as the facts appear to him, and he in good faith, under such apprehension, kill his adversary, it is "justifiable homicide." *Frazier v. State*, 100 S. W. 94, 98, 117 Tenn. 430 (quoting and adopting definition in *Allsup v. State*, 5 Lea [73 Tenn.] 362).

The statute provides that a homicide shall be "justifiable" when there shall be reasonable cause to apprehend a design to commit a felony or do some great personal injury and there shall be reasonable cause to apprehend immediate danger of such design being accomplished. *Sylvester v. State*, 35 South. 142, 151, 46 Fla. 166.

Under Rev. Pen. Code, § 268, making "homicide justifiable" if committed by a person in lawful defense of his person when there is a reasonable ground to apprehend some great personal injury and imminent danger of such design being accomplished in order to constitute the defense it is not essential that the danger actually exists, but only that there be reasonable grounds to apprehend the existence of such danger; and hence a party may act upon appearances of an assault being made upon her. *State v. Lepine*, 113 N. W. 1076, 1077, 21 S. D. 500.

"Justifiable homicide" is the killing of a human being in necessary self-defense. In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or prevent his receiving great bodily injury, the killing of the other was necessary; and it must appear, also, that the person killed was the assailant, and that the slayer had really and in good faith declined any further contest, after the mortal blow or injury was given. *Green v. United States*, 104 S. W. 1159, 1160, 7 Ind. T. 733.

The intentional infliction of death is "justifiable" when it is inflicted to defend oneself or another from immediate and obvious danger of instant death or grievous bodily harm, if he in good faith, and on reasonable grounds, believes it to be necessary when he inflicts it. Self-defense will justify a person in defending those with whom he is associated, and in killing if he believes life is in danger; and the right may be exercised by the servants and friends of the party assaulted, or any one present in repelling an attempted felony. If defendant, as a reasonable man, believed that another person,

who is assaulted, was in danger of losing his life or suffering great bodily harm, he has the same right to defend such other person as that person would have to defend himself. *State v. Hennessy*, 90 Pac. 221, 225, 29 Nev. 320, 13 Ann. Cas. 1122 (quoting and adopting *Desty's American Crim. Law*, §§ 125d, 126, 126a).

"In order to make 'homicide justifiable,' it is essential that the defendant who interposes such defense show not only that he believed that his adversary was about to inflict some great personal injury upon him, but as well that he had reasonable grounds for so believing. It is equally clear that he must decide at his peril upon the force of the circumstances in which he is placed, and the mere fact he believed he was in danger of having some injury inflicted upon him, without reasonable grounds for basing such belief, certainly cannot have the effect to reduce the grade of the crime." *State v. Clay*, 100 S. W. 439, 442, 201 Mo. 679.

A homicide is "justifiable" by one without fault who is attacked by another, where the circumstances furnish reasonable ground for apprehending a design to attack his life or to do him some great bodily harm, and for believing the danger imminent, and that such design will be accomplished, though it may turn out that the appearances were false, and that there was in fact no such design, nor any danger of its being accomplished; but the facts must be such that the jury, in the light of all the facts and circumstances known to him at the time and by him then believed to be true, can see that as a reasonable man he had ground for such belief. *Wells v. Territory*, 78 Pac. 124, 130, 14 Okl. 436.

The statute declaring that homicide is "justifiable" when there is a reasonable ground to apprehend a design to commit a felony or to do some great personal injury and imminent danger of such design being accomplished only authorizes one to take human life, when it reasonably appears necessary to do so, and he is not justified in killing his fellow man through mere cowardice. The law presumes that a defendant has a reasonable amount of intelligence, that he is reasonably prudent, and that he has the power to act with reasonable courage; and the burden is on him who claims the contrary to at least raise reasonable doubt of the existence of such presumed fact, and, when it is said that a homicide must be viewed from the defendant's standpoint, it only means that the jury must take the facts as they were presented to him in his situation at the time, and from them determine whether he acted on reasonable appearance of danger. *Turner v. Territory*, 82 Pac. 650, 652, 15 Okl. 557.

#### Defense of relative

If defendant struck decedent in defense of his brother at a time decedent was really



or apparently endeavoring by violence to commit a felony on his person, and the circumstances were sufficient to excite the fears of a reasonable man that such was the purpose of decedent, the "homicide" would be "justifiable." *Warnack v. State*, 60 S. E. 288, 290, 3 Ga. App. 590.

#### JUSTIFIABLE SELF-DEFENSE

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends, or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like upon either. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him, in so doing, it is called 'justifiable self-defense.' Of course, where one is attacked in his own dwelling house, he is never required to retreat." An owner of a store in which goods are kept for sale or in deposit is not liable in trespass to a would-be burglar, who is shot by a spring gun placed in the store to shoot persons attempting to burglarize it. *Scheuermann v. Scharfenberg*, 50 South. 335, 337, 163 Ala. 337, 24 L. R. A. (N. S.) 369, 136 Am. St. Rep. 74, 19 Ann. Cas. 937 (quoting and adopting definition in *Story v. State*, 71 Ala. 337).

#### JUSTIFICATION—JUSTIFY

See Without Excuse or Justification.

"Justification" as applied to the law of libel does not imply that something has been done which is privileged or excused. *Ferdon v. Dickens*, 49 South. 888, 894, 161 Ala. 181.

The words, "when the finances of the county will justify it," as used in Rev. St. c. 24, § 26, making it the duty of the county board of each county to provide a suitable courthouse, when necessary and the finances of the county will justify it, cannot be construed to mean that the county has no power to make a contract for the repair or construction of a courthouse unless it has cash in its treasury. The fifth paragraph of the section shows that "finances" include all debts and liabilities of every description, and the assets and other means of discharging the same. In passing upon the question, the county board takes into consideration everything in connection with the fiscal affairs of the county, and if, in good faith, without fraud, it determines that the finances justify the erection of the courthouse, the person with whom the contract is made to build the same is not bound to inquire into the correctness of the determination. The conclusion which the board comes to upon the subject is one which must control. *Coles County v. Goehring*, 70 N. E. 610, 617, 209 Ill. 142.

An instruction, that under the requirements of the law a valid location of a mining claim may be made when the prospec-

tor has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore, was properly modified by substituting the word "justified" for the word "willing." The question whether the miner is "willing" to spend his time and money is an entirely different one from the question whether he is "justified" in doing it. The former is a question to be answered by the miner himself, while the latter would present a question for experts. *Ambergris Min. Co. v. Day*, 85 Pac. 109, 113, 12 Idaho, 108.

The word "justify," in the regulations issued by the Commissioner of Internal Revenue requiring sureties on bonds to justify, means the proceeding by which the sureties establish their ability to perform the undertaking of the bond. *United States v. Hardison*, 135 Fed. 419, 421.

Where exception was taken to the sureties on appeal, and, by consent, the justification was postponed from time to time and finally waived by appellees, the 30 days within which the transcript must be filed under L. O. L. § 554, subd. 2, to prevent the appeal from being deemed abandoned began to run from the date of waiver of justification, which was equivalent to a "justification," within section 550, subd. 4, providing that from the expiration of the five days allowed to except to the sureties, or from the justification thereof, if excepted to, the appeal shall be deemed perfected, so that the transcript was filed in time, where filed pursuant to an order made during the 30 days so computed, extending the time for filing as authorized by section 554, subd. 2. *Cantrall v. Sterling Mining Co.*, 122 Pac. 42, 43, 61 Or. 516.

St. 1898, § 3092, requiring a bond as a condition of a new trial in ejectment, provides that the sureties shall "justify" their responsibility in the same manner as bail on arrest. Section 2704, as amended by Laws 1903, p. 233, c. 159, prescribing the "qualifications" of bail, provides that each must be worth the amount of property specified over and above all his debts and liabilities, and sections 2705 and 2706 prescribe the manner of "justification" of bail and proceedings thereon. Held, that an undertaking approved by the judge complied with section 3092, though the sureties in their affidavit of qualification failed to state that the property possessed by each was "over and above all his debts and liabilities," the sureties being subject to "justification" subsequently, as provided by sections 2705 and 2706; the term "justification" being used in the statute in its common-law sense of a proceeding on notice to establish qualification as bail when the undertaking is excepted to. *Dickinson v. Smith*, 120 N. W. 406, 407, 139 Wis. 1.

#### JUVENILE DELINQUENT

As prisoner, see Prisoner.

## K

## K. D.

The letters "K. D.," as used in the phrase "K. D. and released" in a bill of lading on a shipment of wagons, meant "knocked down." That is, that the wagons were not set up in running order, but taken to pieces when packed in the car. *Mouton v. Louisville & N. R. Co.*, 29 South. 602, 604, 128 Ala. 537.

## KALMIA

Of rhododendrons the Century Dictionary says that "the leaves in the typical species forming the section rhododendron proper, are evergreen," and again, that they "are handsome shrubs, much cultivated for their evergreen, leather leaves," etc.; that "the pontic rhododendron (*R. ponticum*) is the most common species of European gardens, hardly only as a low shrub in the northern United States." The encyclopedia Britannica says: "The varieties grown in gardens are mostly derived from the pontic species (*R. ponticum*) and the Virginian (*R. catawbiense*). These are mostly hardy in England. The common pontic variety is excellent for game covert from its hardness," etc. The genus *Kalmia* is said to comprise "six species of ornamental hardy evergreen shrubs," of which *Kalmia latifolia* is the best known and most grown species. 2 Nicholson, Dict. Gardening, p. 216. This species is widely known in the United States as the American laurel ("Kalmia" Cent. Dict.). United States v. Ouwerkerk, 153 Fed. 916, 918.

## KANSAS CUT-THROAT MORTGAGE

A "Kansas cut-throat mortgage" is a contract by the terms of which property was pledged as security for debt at an exorbitant rate of interest, and, if not paid within a limited time, all right and title to the property was forfeited. This was a contract which obtained in the early history of frontier life in some of the western states. Such contracts have been upheld, but never in Kentucky. *W. G. Duncan Coal Co. v. David Duncan & Co.* (Ky.) 97 S. W. 43, 44.

## KATE

"Kate" and Kitten are the same name, one being a nickname and the other a pet name for Catherine. *Corr v. Sun Printing & Publishing Ass'n*, 69 N. E. 288, 290, 177 N. Y. 131.

## KEEP

Keeping a disorderly house, see Disorderly House.

The word "keep," as used in an agreement where a master agreed with a servant

to keep the latter's wages and pay better interest than a bank, does not indicate any trust relation, but indicates that the master is borrowing money. *Tucker v. Linn* (N. J.) 57 Atl. 1017, 1020.

A building which is being "used" for an unlawful purpose is being "kept" for such purpose. *Ollgslager v. Territory*, 79 Pac. 913, 914, 15 Okl. 141.

The court is not authorized to enter of record a verdict of guilty against one indicted for keeping, as a nuisance, a tippling-shop under chapter 73, Rev. St., when three of the jury, upon their being polled, refused to concur in such verdict, but answered guilty of "keeping a bar" there, as the words "keeping a bar" will be construed with reference to the language of the statute to mean having a bar but not necessarily using it. *State v. Wright*, 5 R. I. 287, 289, 290.

The word "kept," as used in a will providing that the estate should be placed in the hands of a trustee "to be equally divided among" testatrix's children "and to be kept in trust by the Fidelity Trust Company, or any other trust company they may prefer," clearly indicates an intention to continue the holding of the estate in trust after testatrix's death. *Cochran v. Lee's Adm'r* (Ky.) 84 S. W. 337, 338.

## Gift imported

The deposit of money to the credit of another together with delivery of the bank book, and an unqualified declaration to the donee in presence of a third person that the money was for her to "keep," evidenced an absolute gift. *Robinson v. Powell*, 59 Atl. 1078, 1080, 210 Pa. 232.

## As determined by intent or purpose

One of the meanings of the word "keep," according to the Century Dictionary, is "to have habitually in stock or for sale." The word "own" is given as a synonym of "possess." The word "have" is the most general of these words; it may apply to a temporary or to a permanent possession of a thing. \* \* \* To own is to have a good legal title to." Acts 1905, p. 82, c. 52, is entitled an act to regulate and in certain cases to prohibit the manufacture, sale, "keeping for sale, owning or giving away of cigarettes," etc., and providing penalties for violation thereof, and declares that it shall be unlawful for any person directly or indirectly to manufacture, sell, dispose of, give away, or keep for sale any cigarettes, etc., or "keep or own or to be in any way concerned, engaged or employed in owning or keeping any such cigarettes." The act passed the Senate under a title "An act to regulate the manufacture, sale, and the giving away of cigarettes," etc. When the bill passed the House

on third reading, it retained such title, which was afterwards amended by adding a penalty clause. The bill then went back to the Senate, and a conference committee reported the bill with its present title under which it was adopted. Held, that the act should not be construed as intending to prohibit the act of smoking cigarettes or keeping them in possession for the sole purpose of smoking them. *State v. Lowry*, 77 N. E. 728, 734, 166 Ind. 372, 4 L. R. A. (N. S.) 528, 9 Ann. Cas. 350.

The Georgia prohibition statute (Acts 1907, p. 81) declares that it shall not be lawful for any person to "keep on hand" at his place of business any intoxicating liquor. The criminal act is the keeping on hand, and it is wholly immaterial for what purpose the intoxicating liquor is there kept on hand. Consequently, an accusation which charged that the defendant, on a day named, "did keep on hand at his place of business intoxicating liquor," was good in form and substance, and on the trial any evidence as to the defendant's purpose in keeping the intoxicating liquor on hand at his place of business was properly excluded as irrelevant and immaterial. *Cohen v. State*, 65 S. E. 1096, 1097, 7 Ga. App. 5.

#### As maintain

The words "keep" and "maintain" are frequently used as synonymous, and a person may be convicted under an indictment for keeping and maintaining a gaming house, on proof that he was guilty of either keeping or maintaining. *Bryan v. State*, 47 S. E. 574, 120 Ga. 201.

Under Rev. St. 1899, § 9055, requiring the recorder to "keep" his office at the county seat, section 9069, requiring him to deliver deeds when recorded, and section 9089, requiring him in certain instances to transmit papers from one county to another, he is entitled to reimbursement from the county for stamps used in his official business; "keep," as used in section 9055, meaning to "maintain," to "provide for," involving the idea of effort in that line, i. e., that the office shall be carried on, enjoyed, etc., and showing a legislative intent that the recorder should maintain and provide for his office in a reasonable way, for the benefit of the public, at public expense. *Ewing v. Vernon County*, 116 S. W. 518, 523, 216 Mo. 681.

If a person, being in possession of a house, makes an executory sale thereof to a lewd woman, so that she may conduct it as a lewd house, and she thereupon occupies it and devotes it to that purpose, he stands in such an accessorial relationship to her act as to be indictable under the provisions of Pen. Code 1910, § 382, which makes it a misdemeanor for any person to keep or maintain a lewd house. *Kinard v. State*, 72 S. E. 715, 10 Ga. App. 133.

P. S. 5623-5629, provide for the licensing of dogs, which are required to wear collars

showing the owner or keeper's name, and provide that one "keeping" a dog contrary to the foregoing provisions shall be fined, etc. Section 5635 authorizes killing of dogs found at large without such collars. Held, that while a constable was authorized to kill defendant's dog on finding it at large without a collar, which had just been lost, defendant is not liable to a fine under section 5629. It appearing that he had no knowledge of such loss; the word "keep" within that section being synonymous with "maintain," and the word "keeping" implying some degree of permanence. *State v. Kelley*, 84 Atl. 861, 862, 86 Vt. 237, 42 L. R. A. (N. S.) 437.

#### As license to sell liquor

A certificate of license "to keep said club," issued by a clerk of the county court to a social club, as provided by Code Supp. 1909, § 1042a, with payment of taxes thereon, constitutes a valid license to sell liquors to members of such club. *State v. Atkinson*, 68 S. E. 291, 294, 67 W. Va. 537.

#### As possession

The term "keep," as used in a statute providing that a warrant for the seizure of liquors must set out the person believed to be the owner, possessor, or keeper of such liquors, merely contemplates authority to deal with the liquor, and actual possession is not necessary. *Commonwealth v. Intoxicating Liquors*, 39 N. E. 348, 349, 163 Mass. 42.

A person who is found in possession of intoxicating liquors with the intention of disposing of same without license is a "keeper" within the meaning of the provisions of Comp. St. 1903, c. 50, § 20. The word "keep" denotes possession, and the statute makes the fact of being found in possession evidence that the person so found is keeping intoxicating liquors within its meaning, and, if it is further shown that the possession is coupled with the "intention of disposing of the same without license in violation" of the law, the crime is complete. *Ford v. State*, 112 N. W. 606, 607, 79 Neb. 309.

Where a statute permitted seizure of liquors and the vessels containing them, without a warrant, but required that the officer should "keep" them till a warrant could be procured, an officer who attempted to make a seizure without a warrant, but was prevented from consummating it by a scuffle with the defendant in which the vessel was destroyed and the liquor split, did not "keep" them, so that he could not later obtain a warrant therefor to justify the seizure. *State v. Howley*, 65 Me. 100, 102.

#### Keep a man

Words charging that a married woman "keeps" some other man than her husband are of doubtful import, and may be understood by an ordinary hearer as imputing adultery. *Henicke v. Griffith*, 29 Kan. 516, 518.

**Keep and maintain**

An allegation that one "did keep and maintain" a liquor nuisance applies either to one who occupies or controls the occupation and procures or permits illegal use of the place. *State v. Fogg*, 77 Atl. 714, 715, 107 Me. 177.

**Keep books**

Kirby's Dig. § 4375a, provides that in an action on a fire policy proof of substantial compliance with its conditions shall be sufficient. In an action on a fire policy it appeared that insured made an inventory of the goods on hand when the policy was issued, and that defendant's agent was present when the policy was issued and examined the stock; that insured kept a book showing what goods were received and what were sold from the date of the policy to the time of the fire, and kept a cashbook showing the amount of goods sold; and it appeared that insured lost all the goods that were not sold. Held, that there was a substantial compliance with the provision of the policy requiring a set of books presenting a complete record of the business transacted. *Security Mut. Ins. Co. v. J. E. Woodson & Co.*, 95 S. W. 481, 482, 79 Ark. 266, 116 Am. St. Rep. 75.

Where a small store or "commissary" in the country was conducted in connection with a lumber business, and tickets were given to the employes for the sum due them for work, which were treated as cash at the store, the amount of purchases being indicated on the ticket by a punch and entered as a cash sale, and where it appeared that there were no credit sales, but the aggregate of such sales each day was entered at the close of the day, and that all goods were sold at a profit of from 25 to 50 per cent., it cannot be said as matter of law that this was a violation of the requirement as to keeping books. Where a merchandise account was kept as showing goods purchased, the aggregate amount of the whole being \$558.87, and where some of the items stated the character of the goods and their price, but there were other items aggregating in amount nearly one-half of the whole sum, which merely stated the name of some person or firm, with the added word "bill," and an amount, in the absence of any other evidence to show that there was in this regard a compliance with the requirement as to "keeping books," it does not on its face appear to meet such requirement. *Ætna Ins. Co. v. Johnson*, 56 S. E. 643, 645, 127 Ga. 491, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461 (citing *Liverpool & London & Globe Ins. Co. v. Ellington*, 21 S. E. 1006, 94 Ga. 785; 2 Cooley, Briefs, Ins. 1822-1824; *Standard Fire Ins. Co. of Kansas City v. Willock* [Tex.] 29 S. W. 218; *McNutt v. Virginia Fire & Marine Ins. Co.* [Tenn.] 45 S. W. 61; *Brown v. Palatine Ins. Co.*, 25 S. W. 1060, 89 Tex. 599; *Jones v. Southern Ins. Co.*, 38 Fed. 19; *Sun Ins. Co. v. Jones*,

15 S. W. 1034, 54 Ark. 376; *Malin v. Mercantile Town Mut. Ins. Co.*, 80 S. W. 56, 105 Mo. App. 625; *German Ins. Co. v. Pearlstone*, 45 S. W. 832, 18 Tex. Civ. App. 706; *American Central Ins. Co. v. Ware*, 46 S. W. 129, 65 Ark. 336; *Ætna Ins. Co. v. Fitze*, 78 S. W. 370, 34 Tex. Civ. App. 214.

**Keep, care for, and support**

A devisee having been in the habit of performing certain personal ministrations for testator, the latter, during an illness which confined him to his bed, made a will devising certain land to the devisee, in fee, in case he should "keep, care for and support testator during the remainder of his life." Testator partially recovered from his illness so as to be able to care for himself and continued to furnish his own living until he died. Held, that the words "keep, care for and support" should be construed to have been used according to their usual and ordinary meaning, and were not substantially fulfilled by such personal ministrations performed by such devisee. *Fisher v. Fisher*, 113 N. W. 1004, 1006, 80 Neb. 145.

**Keep closed**

Where defendant's saloon was so arranged that his boarders and employes could go into the barroom on Sunday either to go in or out of the building, the saloon was not "kept closed" as required by law. *People v. Norman*, 122 N. W. 369, 370, 158 Mich. 37.

**Keep for sale**

Where defendant was a jobber of candy, and admitted that he had purchased candies from which samples shown to be adulterated were taken, that he had such candies at his place of business, and did not contend that the candy was bought for any other purpose than for resale in the course of his business, it sufficiently appeared that it was kept for sale, within New York City Sanitary Code, § 68. *People v. Greenberg*, 119 N. Y. Supp. 325, 326, 134 App. Div. 599.

Posts and poles cut by a foreign corporation, peeled and inspected where cut, and kept there to be gradually shipped away, either to a yard to await sale or directly to the consumer, as orders are received at the yard, are "kept for sale" at the place where cut, within the meaning of Rev. St. 1898, § 1040, providing that merchants' goods, wares, and commodities kept for sale shall be assessed in the district where located. *Valentine-Clark Co. v. Shawano County*, 97 N. W. 915, 916, 120 Wis. 310.

Liquor in possession of a boarding house keeper is "kept for sale," where he keeps it to be disbursed under an agreement that boarders, who pay the regular price, should be entitled to have it to drink with their meals when called for. *State v. Wenzel*, 56 Atl. 918, 920, 72 N. H. 396.

Where accused, who had, in a warehouse in the state, liquors shipped to him from a

sister state, directed a drayman to take the liquor from the warehouse and carry it to a resort maintained by accused, and the liquor, while in the possession of the drayman, was seized by officers, accused was properly found guilty of keeping or having in possession for sale prohibited liquors, in violation of Acts 1909, p. 8, the phrase "keep or have in possession for sale" meaning the same thing; and one who has possession of prohibited liquors for purposes of sale is keeping such liquors for sale, within the statute. *Priest v. State*, 59 South. 318, 319, 5 Ala. App. 171.

#### **Keep gambling device**

The offense of setting up and keeping a gaming device may be prosecuted as a continuing one; the word "keep" itself containing the idea of continuity. *State v. Lawson*, 145 S. W. 92, 96, 239 Mo. 501.

To "set up a gaming table" is to provide whatever may be necessary for the game, and, either by acts or words, to propose to play it. A man may set up a gaming table, without any table in a literal sense; or without having money or property to stake on the game, for his credit may be substituted. The bank is a fund of money, or property, or credit, offered to be staked on all bets, which others may choose to make against the banker, on the game which he shall exhibit to entice bets. He, who employs such a fund, for such a purpose, thereby sets up a gaming table, whether he deals his cards on a table or a bench. And virtually he keeps the bank or gaming table, although some other person may win in his absence, but at his instance, deal the cards and manage the game for him. Setting up a gaming table is no violation of the statute, unless a game be played, and something be bet. In substance and effect therefore the man who sets up a gaming table "keeps a gaming table," and e converso the person who keeps may, in one sense, be said to set up a gaming table *pro hac vice*. *Commonwealth v. Burns*, 4 J. J. Marsh. (27 Ky.) 177, 180, 181.

An instruction that one cannot be convicted of "keeping" a gambling device by reason of playing upon it or betting with others, and that he must have the custody, care, and control of it, and must hold it in readiness to obtain bettors, and that even though defendant frequented a room, and bet and gambled therein, yet, if some one else rented the room, and assumed to control it, and did control it and the tables or devices therein, defendant is not guilty, is proper. *City of Mexico v. Harris*, 92 S. W. 505, 507, 115 Mo. App. 707.

One who merely furnishes a table upon which to play a game of craps, and participates in the game without becoming banker and playing against the crowd, is not guilty of "keeping and exhibiting a gaming table or bank." *Coleman v. State*, 87 S. W. 152, 153, 48 Tex. Cr. R. 202.

#### **Keep her red hot**

A command of an engineer of a railroad train to the fireman to "keep her red hot" meant, of course, for the fireman to give his concentrated attention to keeping up the steam. *Southern Ry. Co. v. Cheaves*, 36 South. 691, 692, 84 Miss. 565.

#### **Keep in possession**

The words "store and keep in possession," as used in 26 St. at Large, p. 60, prohibiting the unlawful accepting, receiving, storing, and keeping in possession alcoholic liquors contrary to law, involve the idea of continuity or habit, and have no different construction or meaning in counties where the sale of liquor is prohibited from that which they have in counties where liquors are lawfully sold through dispensaries. In a prosecution under 26 St. at Large, p. 60, relating to the unlawful keeping, storing or receiving of alcoholic liquors, the court erred in charging that it was unlawful for one to have liquor in his possession in a prohibition county without reference to the quantity or purpose. *State v. Green*, 71 S. E. 847, 848, 89 S. C. 132.

#### **Keep in repair**

Maintain synonymous, see *Maintain*.

A covenant in a lease, obligating the lessor to keep the premises in good repair, requires him to maintain them in as sound condition as when the contract was made, and to repair defects caused by the elements, arising from decay or natural causes, but not to improve the property by the construction of a drain to carry water, which, in wet weather, goes into the basement. *Kingsted v. Wright County Co-operative Co.*, 133 N. W. 399, 400, 116 Minn. 131.

The words "keep in repair" as used in Civ. Code 1895, § 3123, making it the duty of the landlord, in the absence of a stipulation to the contrary, to keep the premises in "repair," are not technical words, but are used in their ordinary sense. To "repair" is to mend; to restore to a sound state whatever has been partially destroyed; to make good an existing thing; restoration after decay, injury, or partial destruction. An improvement is a valuable and useful addition, something more than a mere repair or restoration to the original condition. *Dougherty v. Taylor & Norton Co.*, 63 S. E. 923, 930, 5 Ga. App. 773.

Where the contract between plaintiffs and defendant was to do and perform, during the space of five years, all the work necessary for building wharves and "repairing and keeping in good order" the levee and the wharves designated, plaintiffs were bound to do, at all times, the work necessary to repair and keep in good order the wharves and levee, and to leave them in good order at the expiration of the period named. *Davis v. New Orleans*, 13 La. Ann. 824, 825; *Cornell v. Vanartsdalen*, 4 Pa. 364.

A franchise by which a railway company obtained a right of way through a city street provided that such railroad would "keep and preserve in good order for the use of the citizens of the town" that particular street. Held, the obligation of the railroad will not be measured by the size and condition of the city at the time the contract was entered into, but by the new and improved methods of paving demanded by its growth and changing conditions, which must have been within the purview of the parties at the time of making the contract, so that the railroad must provide a permanent pavement, where it was necessary to provide the public with the same accommodations as were afforded by similar streets of the city. *City of New Bern v. Atlantic & N. C. Ry. Co.*, 75 S. E. 807, 159 N. C. 542 (citing 4 Words and Phrases, p. 3125).

#### Keep insured

A covenant in a contract of sale of realty to keep the property insured for a sum equaling the insurance on some of the buildings at the date of the contract is a covenant to continue the insurance as it was at that date, and no abatement of purchase money can be had for loss by fire of a portion of the property on which there was no insurance; the covenant having been performed. *Conklyn v. Shenandoah Milling Co.*, 70 S. E. 274, 275, 68 W. Va. 567.

#### Keep on premises

Where five gallons of gasoline ordered by one of the plaintiffs for use at his home was delivered at the insured factory while the buyer was out, and, when he returned shortly thereafter, he directed it to be set outside, where it remained for an hour, when it was taken away, the presence of gasoline under such circumstances was not a violation of the clause in the policy insuring the factory that gasoline should not be kept or allowed on the premises as a matter of law. *Clute v. Clintonville Mut. Fire Ins. Co.*, 129 N. W. 661, 663, 144 Wis. 638, 32 L. R. A. (N. S.) 240.

A fire policy stipulated that it should be void if gasoline was kept, used, or allowed on the premises, which were used for a restaurant. Gasoline was kept on the premises for use in carrying on the business. Sometimes gasoline was delivered at the restaurant for use in it and in the business of insured in another building; but the quantity used in such other business was not kept in the restaurant, but was sent to such other building. Held, that the gasoline so sent out was not "kept, used, or allowed" on the premises insured. *American Cent. Ins. Co. v. Chancey (Tex.)* 127 S. W. 577, 579.

A condition in a fire policy rendering it void in case fireworks should be "kept, used, or allowed" on the premises was violated by the taking of fireworks on the premises, and there setting them off for the purpose

of an exhibition. *Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co.*, 56 S. E. 584, 587, 106 Va. 633.

#### Keep open

The offense of keeping a saloon open on Sunday consists in not keeping it closed on Sunday, and it is not material whether or not any sale was made on that day, nor what was the saloon keeper's intent in not keeping it closed, nor whether any person was seen to enter or depart from the saloon. *State v. Schell*, 117 N. W. 505, 22 S. D. 340.

A shop, warehouse, or workshop may be kept open on the Sabbath within the prohibition of the statute without being kept wide open, or kept open in the same manner and for the same purpose in which and for which it is kept open for business on week days. Where a person who operated a shop in which he employed nine men and twelve women opened it on the Sabbath to allow those who desired to go in and work, and nine men and one woman went in and worked during the day, when he opened the shop again to permit them to leave in the evening, keeping the doors locked in the meanwhile, he was guilty of "keeping open" his workshop on the Lord's Day. *Commonwealth v. Kirshen*, 80 N. E. 2, 194 Mass. 151, 10 Ann. Cas. 948.

Pen. Code 1895, § 390, declaring that any person who shall be guilty of "keeping open a tippling-house" on the Sabbath day or Sabbath night shall be guilty of a misdemeanor, was originally aimed at the keeping open of houses where intoxicating liquors should be drunk on the Sabbath day. "There can be no keeping open of a tippling-house on Sunday which is innocent, because the law forbids it, and unless he who keeps it open is mentally irresponsible the intention to violate the law will be conclusively presumed. The fact that a saloon is kept open, though but for an instant on the Sabbath day, if unexplained, will authorize a jury to convict—they will not err if they do convict—but the defendant has the right to explain, and then it would be for the jury to decide whether urgent necessity and innocence of intention justified the accused, or whether the excuse is a hollow subterfuge which the jury should not hesitate to spurn if presented." *Richardson v. State*, 59 S. E. 916, 918, 3 Ga. App. 313.

Sayles' Ann. Civ. St. 1897, art. 4542, requires railroad ticket offices to be kept open for one-half hour prior to the departure of each train. Held that, where the one in charge of a ticket office during the half hour before the departure of a train absented himself a sufficient time to attend to two separate business matters, and to incidentally hold a conversation with a friend, the office was not "kept open" half an hour prior to the departure of the train, within the stat-

ute. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 95 S. W. 12, 14, 43 Tex. Civ. App. 93.

### KEEPER

See Dramshop Keeper; Innkeeper; Liv-  
ery Stable Keeper; Restaurant Keep-  
er; Saloon Keeper; Shopkeeper; Time-  
keeper.

Webster defines a "keeper" as one who has the care, custody, or superintendence of anything, or one who has or holds possession of anything. In *re Avdalas*, 102 Pac. 674, 677, 10 Cal. App. 507.

#### Of animal

Where defendant, as the head of his family, occupied certain premises on which a vicious bulldog belonging to his wife was harbored, and defendant was present there each week end from Friday or Saturday until the succeeding Monday, the rest of his time being spent in business in another city, he was properly found to be the keeper of the dog, and so liable for its misconduct. *Slater v. Sorge*, 131 N. W. 565, 566, 166 Mich. 173.

Where defendant, some six weeks prior to plaintiff's injury by being bitten by defendant's dog, delivered the dog to B., under an arrangement that B. should keep the dog, but that defendant might sell him if a customer was found, and the injury was inflicted on plaintiff in the highway in front of B.'s premises, B., and not defendant, was the "keeper" of the dog, within Comp. Laws, § 5593, making the keeper of a vicious dog, as distinguished from the owner, liable for injuries caused by him. *Wetzel v. Bolster*, 134 N. W. 1099, 1101, 169 Mich. 43.

#### Of bawdyhouse

A "keeper" of a bawdyhouse in the ordinary meaning of the word "keeper" is one exercising control and direction over it. *Griffin v. People*, 99 Pac. 321, 322, 44 Colo. 533.

Code 1906, § 5055, providing that every keeper of a house of prostitution shall be punished as a vagrant, does not exclude the right to prosecute such person for "keeping a bawdyhouse"; the latter offense, which is distinct from vagrancy, being an offense at common law, which still prevails in Mississippi, where not abrogated by statute. *Gavin v. State*, 50 South. 498, 96 Miss. 377.

#### Of building or hotel

Sess. Acts 1901, p. 219, § 1 (Ann. St. 1906, § 9053—1), requires the owner, proprietor, lessee, or "keeper", of office buildings, etc., more than three stories high, to provide fire escapes. Section 5 (section 9053—5) makes the owner, proprietor, lessee, or "manager" of a building, required to be equipped with fire escapes, who neglects for 60 days after the act becomes effective to comply with the act guilty of a misdemeanor. Acts 1903, pp. 251, 252 (Ann. St. 1906, §§ 9053—1 to 9053—3), repealed the first three

sections of the act and enacted new sections in their place, but section 1 of the act as amended required the owner, proprietor, lessee or keeper of such buildings to provide escapes as in the original act. Section 2 provided that, if a fire escape was found upon inspection to be unsafe, the owner, proprietor, lessee, or keeper should repair it, and section 5 remained unchanged. Held, that the words "manager of a building" did not necessarily mean the same as "keeper of a building," or denote any particular duties in relation to the building, and one charged as manager of a building with violating the act could not be convicted, in the absence of evidence showing that his duties made him a keeper of the building. *State v. Cook*, 128 S. W. 212, 213, 148 Mo. App. 383.

The phrase "keeper or proprietor," in Acts 1899, p. 352, c. 178, requiring the "keeper or proprietor" of a hotel over two stories in height to provide means of escape in case of fire, means the party conducting the hotel, whether he be the owner or lessee, and does not mean the owner of the property unless he operates it, and therefore the act does not impose any duty on the owner of a hotel operated by a lessee. *Adams v. Cumberland Inn Co.*, 101 S. W. 428, 430, 117 Tenn. 470.

#### Of fruit stand

As shop keeper, see Shop Keeper.

#### Of gambling house

Gambling distinguished, see Gambling—Gaming.

One who permits many people to come and gamble in his residence, and who does not charge any fees or superintend the games, but plays as one of the visitors, and has none of the usual gambling house paraphernalia, is not a keeper of a gambling house within the purview of Acts 31st Leg. c. 59, entitled "An act to define and punish vagrancy." *Austin v. State*, 135 S. W. 1167, 1171, 61 Tex. Cr. R. 573.

#### Of saloon or intoxicating liquor

"The words 'dealer' and 'keeper' are synonymous," and were held to be so used in an indictment charging defendant as a liquor dealer or keeper of a barroom. *Hofheintz v. State*, 74 S. W. 310, 311, 45 Tex. Cr. R. 117.

A person who is found in possession of intoxicating liquors with intent of disposing of the same without license is a "keeper" within Comp. St. 1903, c. 50, § 20. *Ford v. State*, 112 N. W. 606, 607, 79 Neb. 309.

In an action under Gen. St. 1909, § 4387, authorizing an injunction against the keeping of a place where intoxicants are illegally sold, a finding that defendant was guilty of keeping a place where intoxicants were sold is supported by evidence that he sold beer, which he kept for that purpose in a barrel in an alley, the want of other paraphernalia not preventing the spot occupied being a

"place" within the statute, nor did its location prevent his being its "keeper," so long as he used it for his own ends. *State v. Dykes*, 111 Pac. 179, 180, 83 Kan. 250.

## KELLY POOL

As game, see Game.

## KENNEL

A kennel license issued under Pub. Acts 1907, c. 167, § 3, as amended by Pub. Acts

1909, c. 55, § 2, is not vitiated because part of the dogs were kept at the owner's house; the word "kennel" not meaning the house or place in which the dogs are kept, but a pack or collection of dogs usually kept or bred for hunting, or for sale. *State v. Tripp*, 81 Atl. 247, 249, 84 Conn. 640.

## KEPT

See Keep.

Unlawfully kept as unlawfully hold over, see Unlawfully Hold Over.



## KEROSENE

As inflammable liquid, see Inflammable Liquid.

It is a matter of common knowledge that "kerosene" is a product of crude petroleum. *Moeckel v. C. A. Cross Co.*, 76 N. E. 447, 448, 190 Mass. 280.

## KEYHOLES

"Keyholes" are holes in the crosshead of a locomotive to which the driving rod is connected or fastened by a bolt or pin. *St. Louis & S. F. R. Co. v. Vestal*, 86 S. W. 790, 791, 38 Tex. Civ. App. 554.

## KEYSTONE

The word "Keystone," in its primary and ordinary signification, is not geographical. It is only when it is used as an adjective or otherwise to describe a state that it signifies any special locality, and this use is small in comparison to its use in its broader and more general sense. It was therefore properly used as a trade-name. *Buzby v. Davis*, 150 Fed. 275, 277, 80 C. C. A. 163, 10 Ann. Cas. 68.

## KICK—KICKING

The term "kick," as applied to the propulsion of cars, means a light push of cars by an engine by which such cars are driven along the track by their own momentum. *Day v. Louisiana Western R. Co.*, 46 South. 203, 121 La. 180.

A railroad car is "kicked" or "shunted" when it is set in motion by the engine and then detached to travel forward. *Lang v. Missouri Pac. R. Co.*, 91 S. W. 1012, 1013, 115 Mo. App. 489.

A car is said to be "kicked" when it is turned loose with a shove from the locomotive. *Hurt v. Louisville & N. R. Co.*, 76 S. W. 502, 116 Ky. 545.

The word "kicking" in railroad parlance is the operation of giving a rapid movement to a train of cars before coming to a switch, of sufficient force to drive the cars intended to go upon the side track off the main line on which the train was moving, and then to quickly reverse the movement of the other cars which remained connected with the engine. *Brown v. Erie R. Co.*, 176 Fed. 544, 547, 100 C. C. A. 132.

### Flying switch synonyms

The word "kicking," as used in railroad parlance, is synonymous with making a flying switch. Making a flying switch is not negligence per se as to the employé performing it. It is the attempt to make a running switch when the detached car has no brakeman on it, and is under no control, that is declared to be negligence, because highly dangerous.

*Allen v. Atlantic Coast Line R. Co.*, 58 S. E. 1081, 1082, 145 N. C. 214 (citing *Wilson v. Atlantic Coast Line R. Co.*, 55 S. E. 257, 142 N. C. 336).

The practice in railroading of making flying switches embraces what is called "kicking cars." *Lacey v. Louisville & N. R. Co.*, 152 Fed. 134, 136, 81 C. C. A. 352 (citing *Beach*, *Contrib. Neg.* [3d Ed.] § 217).

### As stamp

See Stamp.

## KICK SIGNAL

A "kick signal" is one calling for a quick and sudden movement of the train. *Texas Mexican Ry. Co. v. Higgins*, 99 S. W. 200, 201, 44 Tex. Civ. App. 523.

## KICKER

See Steam Kicker.

## KIDNAPPING

Blackstone defines "kidnapping" to be the "forcible abduction of a man, woman, or child from their own country and sending them into another." The word "kidnap" has a technical meaning. It is derived from the common law, and must be interpreted according to its technical meaning at common law. Both under the common law and under the statute it means to take and carry away any person forcibly or fraudulently beyond the boundaries of the state. The characteristics and limits of this offense are differently drawn by legal writers. It has been described as the most aggravated species of false imprisonment, and defined to be the stealing and carrying away and secreting of any person. It has been held that transportation to a foreign country is not a necessary part of the offense; and Bishop defines it as "false imprisonment, aggravated by conveying the imprisoned person to some other place." *State v. Harrison*, 59 S. E. 867, 870, 145 N. C. 408 (citing 5 Words and Phrases, p. 3928).

In a prosecution for kidnapping, under Pen. Code 1895, § 110, providing that any person who forcibly, etc., takes or entices away a child under the age of 18 years from its parent or guardian or against his will, or without his consent, is guilty of "kidnapping," that a 17 year old girl, alleged to have been kidnapped, was a prostitute, is no defense. *Hunt v. State*, 69 S. E. 42, 43, 8 Ga. App. 374.

"It is only where the child has no parent or guardian that it is 'kidnapping' to forcibly, maliciously, or fraudulently lead, take, or carry it away, or decoy or entice it away, against its will or without its consent. This being true, a count in an indictment charging that the accused did these things against the will or consent of the child should allege that it had no parent or guardian, and is fatally

defective without such an allegation." *Sutton v. State*, 50 S. E. 60, 61, 122 Ga. 158.

Under the statute subjecting to punishment every person, who without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another, with intent to send him out of the state against his will, an information charging that defendant did forcibly seize and confine and did inveigle and kidnap another charges the single crime of "kidnapping." The crime charged could have been committed by doing any one or all of the acts alleged. *State v. White*, 87 Pac. 137, 139, 48 Or. 416.

Where a husband, who by a conclusive decree of divorce lost the custody of a child, took the child while pretending to act under the decree permitting him to visit it at stated periods, and without the consent of the wife, who had been awarded its custody, carried it out of the state pursuant to a willful and deliberate purpose at the time of the taking to obtain the custody thereof, he was guilty of kidnapping, within Rev. St. 1908, § 1668, defining "kidnapping" as the forcible abduction, stealing away, or secreting of a man, woman, or child. *Lee v. People*, 127 Pac. 1023, 1024, 53 Colo. 507.

## KIDNEY

See Floating Kidney.

## KILL

See Assault with Intent to Kill; Intent to Kill; Premeditated Killing; Unlawful Killing.

"The word 'murder' is a legal and technical term and implies something more than mere killing, though it includes all the elements of the latter word, but there is nothing technical about the word 'kill.' It means to deprive of life; to put to death; to slay." An allegation that defendant did "kill and murder" the deceased is a sufficient allegation that the latter died. *State v. Sly*, 80 Pac. 1125, 1127, 11 Idaho, 110.

The words "kill and murder" form a strictly legal phrase. *Canterbury v. State*, 43 South. 678, 682, 90 Miss. 279 (dissenting opinion).

An information in extradition proceedings, charging accused with "assault with intent to kill and murder," sufficiently brings the offense within article 10 of the treaty with Great Britain, authorizing extradition of persons charged with "assault with intent to commit murder." An assault with intent to kill and murder is practically the same as an assault with intent to commit murder, though the words "to kill" do not necessarily imply more than the destruction of life, which may have been caused without guilt, while to commit murder implies killing with malice aforethought. But the use of

the word "kill" in the conjunctive with "murder" shows that it was intended to charge the commission of the crime of assault with intent to kill with malice aforethought. *United States v. Plaza*, 133 Fed. 993, 999.

The term "killed," as used in Pen. Code, § 1510, providing that when the coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, does not embrace every means of death, but is qualified by the other clauses used in the statute, and refers only to a killing that is sudden and unusual and of such nature as to indicate a possibility of death by the hands of the deceased, or through the instrumentality of some other person. *Morgan v. San Diego County*, 86 Pac. 720, 722, 3 Cal. App. 454.

The word "killed," as used in San Francisco Charter, art. 8, c. 10, § 4, providing a pension for widows of police officers killed while performing duty, applies to death resulting from violence or external force. *Edwards v. Sweigert*, 115 Pac. 256, 258, 15 Cal. App. 503.

The word "killed" as used in the constitution, providing that a benefit shall be paid to the beneficiaries named in the certificate "in case of death by accident," but that, if a member suspended for nonpayment of dues shall be "injured" during his delinquency, the delinquent shall receive no indemnity therefor, "nor shall his beneficiaries receive anything should he be 'killed' during such period of delinquency," and providing for reinstatement of the delinquent members, refers to the result of the accident, and not to the accident from which death ensues; and, where the death of a member occurred after his reinstatement, and while he was in good standing, his beneficiary was entitled to benefits, though the accident from which death ensued occurred during the member's delinquency. *Roth v. Travelers' Protective Ass'n of America*, 115 S. W. 31, 33, 102 Tex. 241, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

## KILLED DOWN

"Killed down" is an expression used by electricians, meaning that the current of electricity has been cut off. *Woelflen v. Lewiston-Clarkson Co.*, 95 Pac. 493, 495, 49 Wash. 405.

## KILLING IN SELF-DEFENSE

See Self-Defense.

## KILN DOORS

As machinery, see Machinery.

## KILO

A "kilo" is the equivalent of 2.20462125 pounds, or practically 2½ pounds. *Ellsworth v. Knowles*, 97 Pac. 690, 692, 8 Cal. App. 630.

The words "pound" and "kilo" designate units of weight of different systems; a pound being the unit of weight in the system in most common use in this country, while the word "kilo" is an abbreviation of the word "kilogram," which is the unit of weight of a system not in such common use in this country, but well known and understood. *Ellsworth v. Knowles*, 97 Pac. 690, 692, 8 Cal. App. 630.

## KIN

See Kindred; Nearest of Kin; Next of Kin.

The primary and ordinary meaning of the word "kin" is related by the tie of consanguinity. *State v. Tucker*, 93 N. E. 3, 4, 174 Ind. 715, 31 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 100.

A testator gave his estate to a trustee to pay the income therefrom to his sons and daughter, and "from and after the death of either of my sons or daughter and until the death of all of them to pay the income which he or she would, if living, have received to such person or persons of kin, to such son or daughter as he or she may by will have appointed, and in default of such appointment to the child or children of such son or daughter," and one of the sons on dying appointed the income among his children, including among them an adopted child not of the kin nor blood of the donor. Held, that such appointment to the adopted child is invalid; and that even, if there should be a total default, the adopted child would not be entitled to assert any rights to a portion of the income under the alternative provision in the will of the donor, inasmuch as she is not a child of her adopted father within the meaning of the will of the latter's father; the words "kin" and "kindred" when used in a will being limited to blood relatives. *In re Freeman's Estate*, 40 Pa. Super. Ct. 31, 39.

With the exception of a few special bequests, and a provision for the erection of a monument and a direction that any note owing him by any of his "kin" should be canceled and the amount given to such "relative," a will provided for the distribution of the estate among testator's relatives "equally as provided by statute, as if no will had been made," thus embracing only blood relatives. Held, that the words "kin," "relative," and "relatives" referred *prima facie* to blood connections only, so that the husband of testator's niece was still liable on notes given to the testator. *Boyd v. Perkins*, 113 S. W. 95, 96, 130 Ky. 77.

## KIND

See Like Kind.

Any kind, see Any.

The term "kind of light," as used in a requirement that railroad companies shall

maintain at all points of street intersection by their railroad the same "kind of lights" maintained by the town at other street crossings, refers to class, or sort, rather than to grades, or degrees, of the same class; that is, it refers to such general kind and classifications as electricity, gas, oil, and the like, and not to various grades of such general classes. *Chicago, I. & L. R. Co. v. Town of Salem*, 82 N. E. 913, 915, 170 Ind. 153, 19 L. R. A. (N. S.) 658.

A designation of Trinidad Lake asphalt as the material to be used for paving was the designation of a "kind of material," within Kansas City Charter, art. 9, § 2, providing for the selection by property owners of the material with which a street shall be paved from not less than two kinds of material and not the designation only of a species of kind based on mere locality of the material designated. *Barber Asphalt Paving Co. v. Field*, 86 S. W. 860, 865, 188 Mo. 182.

A bitulithic pavement consisting of a stone foundation upon which rest layers of small stone coated with coal tar, pitch, asphalt, or a mixture thereof, or other equivalent bituminous material, which pavement is patented, is a "kind of pavement," as distinguished from a sheet asphalt pavement, and not merely a different make, style, or brand of the same kind. *Union Paving Co. v. Board of Contract and Supply of City of Schenectady*, 134 N. Y. Supp. 740, 743, 74 Misc. Rep. 646.

The phrases "kind of trade or business" and "kind of work," as used in a schedule of rates in an employer's indemnity policy, refer generally to the nature of the work carried on, so as to include all who are engaged in the prosecution of the work, even though the kind of work be designated as "boiler makers," "blacksmiths," etc.; and the compensation of all employes, whose injuries or death appellant is indemnified against, furnishes the measure for determining the amount of premiums earned, and includes employes of a power, heat, and light department of the plant, although they are in a building separated from the rest, and timekeepers and drivers, although they did not work upon the premises all of the time. *Empire State Surety Co. of New York v. Moran Bros. Co.*, 127 Pac. 1104, 1106, 71 Wash. 171.

## KINDERGARTEN

In Greater New York Charter, authorizing the establishment of elementary schools and kindergartens, and providing that no female teacher of a mixed class shall receive less than \$60 a year more than a female teacher of a girls' class of a corresponding grade, the term "female teacher" refers to teachers of the graded classes and is to be distinguished from the "Kindergarten," which

refers to teachers in kindergartens in which no grades exist and where the children are usually boys and girls of the ages of from 4 to 6 years. The provision for the additional annual compensation of \$60 has reference only to female teachers in the regular graded school work and does not entitle a kindergarten to such additional compensation. *Bronx Borough Teachers' Ass'n v. Board of Education*, 118 N. Y. Supp. 483, 484.

Const. art. 9, § 5, requires the Legislature to provide for a system of "common schools" by which a free school shall be kept up and supported in each district. Section 6 provides that the "public school system" shall include "primary and grammar schools," and such high schools, evening schools, etc., as may be established by legislative or local authority, and further provides that the entire revenue derived from the state school fund shall be applied exclusively to the support of "primary and grammar schools." Pol. Code, §§ 1622, 1861, reiterate the requirement that the revenue of the state school fund shall be applied solely to primary and grammar schools. Section 1532 requires the Superintendent of Public Instruction to apportion the balance of the state school fund which remains after providing for teachers to the several counties according to their "average daily attendance," as shown by reports of the county superintendents for the preceding year. Sections 1617, 1662, and 1663 recognize, and make certain provisions in relation to, the adoption of kindergartens as part of the "public primary schools" in cities and towns. Held that, notwithstanding the legislative designation of kindergartens as "primary" schools, such institutions are not "primary and grammar schools," within the meaning of the constitutional and statutory provisions for the distribution of the state school fund, and the kindergarten attendance is not to be computed in ascertaining the proportion of the school fund to which a county is entitled. *Los Angeles County v. Kirk*, 83 Pac. 250, 251, 148 Cal. 385.

"The term 'kindergarten' was devised to apply to a system elaborated for the instruction of children of very tender years, which by guiding their inclination to play into organized movement, and investing their games with an ethical and educational value, teaches, besides physical exercises, habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact. It is apparent that the work contemplated by such a system is purely preliminary to, and entirely different in character from, the ordinary work of the common school, and is in fact designed to fit very young children, whose minds and bodies are, solely because of their tender age, not yet capable of the instruction contemplated in an ordinary school, for such school work." *Los Angeles County v. Kirk*, 83 Pac. 250, 251, 148 Cal. 385 (quoting and adopting *Sinnott v.*

*Colombet*, 40 Pac. 329, 107 Cal. 187, 28 L. R. A. 594).

## KINDRED

See Next of Kindred

### As child

See Child—Children (In Statutes).

### Illegitimates

The statute of descents must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status of the persons who are to take under the statute is to be created by which the capacity to inherit is given, but these requisites must be sought elsewhere, and the words "children" and "child" in the first clause, "issue" in the phrase "if he leaves no issue," in subsequent clauses, and "kindred" in the last two clauses of the statute clearly include a child made legitimate by the marriage of its parents and acknowledged by the father after its birth in the manner pointed out by other statutory provisions. *Finley v. Brown*, 123 S. W. 359, 363, 122 Tenn. 316, 25 L. R. A. (N. S.) 1285.

### As kindred by blood

The word "kindred," in its primary legal acceptance, means relatives by blood. The word "kindred," as used in Rev. St. 1899, § 2908, providing that the property of one dying intestate shall descend to his kindred, means blood kinship. Under sections 5246-5248, making it lawful to adopt a child as heir or devisee, and giving an adopted child the same rights against its adopted parents as to support and humane treatment as children have against lawful parents, and confining the effect of such provision to persons executing the deed of adoption, the act of adoption does not bring the adopted child into relationship with any one but the adoptive parent, and such child cannot inherit from the brother of her deceased adoptive father the share which the adoptive father would have taken had he survived such brother. *Hockaday v. Lynn*, 98 S. W. 585, 587, 200 Mo. 456, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775.

A testator gave his estate to a trustee to pay the income therefrom to his sons and daughter, and "from and after the death of either of my sons or daughter and until the death of all of them to pay the income which he or she would, if living, have received to such person or persons of kin, to such son or daughter as he or she may by will have appointed, and in default of such appointment to the child or children of such son or daughter," and one of the sons on dying appointed the income among his children, including among them an adopted child not of the kin nor blood of the donor. Held, that such appointment to the adopted child is invalid; and that even, if there should be a total default, the adopted child would not be en-

titled to assert any rights to a portion of the income under the alternative provision in the will of the donor, inasmuch as she is not a child of her adopted father within the meaning of the will of the latter's father the words "kin" and "kindred" when used in a will being limited to blood relatives. In re Freeman's Estate, 40 Pa. Super. Ct. 31, 39.

In a bequest of personalty, the word "family" is synonymous with "kindred," those related by blood who are entitled as next of kin under the statute of distribution. Jacobs v. Prescott, 65 Atl. 761, 762, 102 Me. 63.

Ky. St. § 2071, provides that an adopted child shall be capable of inheriting as though he were the child of the petitioner. Section 1393, subsec. 1, provides that when a person dies intestate his real estate descends, first, to his "children" and their descendants. Section 1401 of the same chapter, limiting section 1393, provides that if an infant having title to real estate derived by gift, devise, or descent from one of its parents dies without issue such estate shall descend to that "parent" and his or her "kindred," and, if none, then to the other parent and his or her kindred. And section 460 declares that the common-law rule that statutes in derogation thereof should be strictly construed does not apply to such revision, but that its provisions are to be liberally construed with a view to promote its object. Held, that the purpose of the limitation was to prevent the estate of the parent from being distributed to strangers to his blood; that the word "kindred" in section 1393 was not necessarily confined to blood relations, but might include a relation in law, as an adopted child, and that the word "children" in subsection 1 was not necessarily confined to children born in lawful wedlock, but might include children by adoption; that within section 1401 the foster parent of an adopted child was a "parent"; and hence that an adopted child inheriting from his parent was on the same footing as a natural child, so that where he inherited from his foster father, and then died in infancy without issue, the estate went back to the father's kindred, to the exclusion of his natural mother. Lanferman v. Vanzile, 150 S. W. 1008, 1010, 150 Ky. 751.

## KINETOSCOPE

While a city ordinance imposing a license fee on and prescribing the location of museums, panoramas, cycloramas, kinetoscope, or phonograph parlors, does not specifically refer to the motion picture business, it is sufficiently covered by the words, "panorama" and "kinetoscope," and must be held to be within the contemplation of the ordinance. Laurelle v. Bush, 119 Pac. 953, 955, 17 Cal. App. 409.

A "kinetoscope" is a machine for producing animated pictures, a mechanical contriv-

ance involving, among other things, a transparent or translucent narrow film on which a series of photographs consecutively represent the continuous development of movement or action in the persons or things which are the subject of such photographs.—Laurelle v. Bush, 119 Pac. 953, 955, 17 Cal. App. 409.

## KING

See Restraints of Kings or Princes.

## KINK

See Sun Kink.

## KITING

An agent has no authority to use the principal's bank deposit as a basis for a "kit-ing" business with another person, consisting of an exchange of checks to temporarily raise money or credit, for the agent's private benefit. Farmers' & Merchants' Bank of Williamston v. Germania Life Ins. Co., 64 S. E. 902, 908, 150 N. C. 770.

## KITTIE

Kate and "Kittie" are the same name; one being a nickname and the other a pet name for Catherine. Corr v. Sun Printing & Publishing Ass'n, 69 N. E. 288, 290, 177 N. Y. 131.

## KNEES

In defendant's sawmill where the injuries sued for were sustained, was a carriage or carrier upon which logs were held while being sawed into lumber and upon which were "knees" or upright pieces about 12 or 14 feet apart, connected with which were appliances known as "dogs," controlled by levers in the hands of workmen known as doggers. The dogs were made of iron fashioned like claws, and when in proper condition and properly controlled should close upon the logs and hold them securely against the knees to prevent lateral motion of the logs while being sawed. Moses v. Grant Lumber Co., 38 South. 684, 114 La. 933.

## KNEW

See Know; Well Knew.

## KNIFE

See Penknife.

As deadly weapon, see Deadly Weapon.

## KNOCKED DOWN

"Knocked down," relating to a shipment of wagons, meant that the wagons were not set up in running order, but taken to pieces when packed in the car. Mouton v. Louisville & N. R. Co., 29 South. 602, 604, 128 Ala. 537.

The term "knocked down," used to describe the condition of a traction engine on arrival at its destination, means that its several parts had to be put together in order to its operation. *Aultman & Taylor Machinery Co. v. Gay*, 62 S. E. 946, 947, 108 Va. 647.

### KNOCKING DOWN

The act of cutting or removing coal is called "knocking down." *Ivy Coal & Coke Co. v. Alabama Coal & Coke Co.*, 33 South. 547, 548, 135 Ala. 579, 93 Am. St. Rep. 46.

### KNOT

"The log was invented about the same time which inaugurated measuring of the sea or marine miles, known as 'English geographical' miles. \* \* \* The sea mile, knot, geographical or marine mile measures 6,086.7 feet on the sea, on the scale of 60 geographical or sea miles to a degree." In the *Muscongus Grant* by the council of Plymouth in Devon, England, between 1620 and 1635, after the inauguration of the geographical or marine mile, granting certain land, etc., within three miles of the main land, the three-mile limit is to be measured by the geographical or marine mile or "knot," and not by the statute mile. *Lazell v. Boardman*, 69 Atl. 97, 99, 103 Me. 292, 13 Ann. Cas. 673 (citing *Rockland, Mt. D. & S. S. Co. v. Fessenden*, 8 Atl. 550, 79 Me. 140).

### KNOW

See Bound to Know; Do not Know.

In law to "know" is to possess information. *Bouv. Law Dict.* verbo "knowingly." Hence, one who states a fact without possessing information does not know the fact, and makes a "false statement." Statements not known to be true by the person making them are in law false. *United States v. Bradford*, 148 Fed. 413, 424 (citing *Lynch v. Mercantile Trust Co.*, 18 Fed. 486).

The words "not knowing," or "having no reasonable grounds to suspect," or "knew," or "know," or "had reasonable grounds to suspect," when used in an instruction in an action for injuries to a passenger while attempting to board a train in consequence of the starting of the train, relating to the knowledge or want of knowledge of the conductor in starting the train before the passenger had boarded it, are legal equivalents. *Choctaw, O. & G. R. Co. v. Hickey*, 99 S. W. 839, 842, 81 Ark. 579.

In an action for damages from a trespass by defendant's cattle, an issue as to whether defendant "knew or intended" that the cattle herded by him outside of plaintiff's fence would break the fence was not erroneous on the theory that, if defendant either knew or intended, then plaintiff would be entitled to recover, since in such connection the words

"knew" and "intended" were equivalent. *Moore v. Pierson* (Tex.) 93 S. W. 1007, 1008.

A statutory provision that engineers, after stopping and before proceeding to run a train over a railway crossing, must "know the way to be clear" means not only that the crossing is free from immediate obstruction but free from danger of such obstruction as ought reasonably to be expected, but it does not require knowledge that the way will certainly remain clear against all after-occurring or extraordinary happenings. *Southern Ry. Co. v. Bonner*, 37 South. 702, 706, 141 Ala. 517.

### As-actual knowledge

The word "know," used in a rule requiring a brakeman giving a signal to the engineer to "know" that it had been seen and obeyed, does not necessarily import absolute knowledge of a fact, but means the full belief to the exclusion of doubt or uncertainty of a reasonable and prudent man, based upon convincing evidence addressed to his intelligence. *Bowers v. Atchison, T. & S. F. Ry. Co.*, 107 Pac. 777, 779, 82 Kan. 95.

### KNOWING

See Not Knowing.

The words "knowing the same," as used in *La. Rev. St. 1876*, § 833, declaring that whoever shall alter or publish as true any false, forged, or counterfeited record, etc., and knowing the same to be false, shall be punished by imprisonment at hard labor, are not technical terms, such as the word "felonious," or such as, in an indictment for murder, the words "malice aforethought"; but they are words used to describe the wrongful act which the statute forbids. Therefore any words equivalent to the words used in the statute may be substituted. Thus, if the word "knowingly" be in the statute, and the word "advisedly" be substituted for it in the indictment, the indictment may be sufficient. *State v. Hauser*, 36 South. 396, 407, 112 La. 313.

Plaintiff alleged that defendant drove cattle upon a certain strip of land near plaintiff's fence, "knowing and intending" that the cattle should break the fence and enter plaintiff's pasture, which they did. Held, that a charge that plaintiff was entitled to recover, if defendant drove a herd of cattle upon the land in question, "knowing and intending" that they should break plaintiff's fence, was not erroneous on the ground that it required, as precedent to a recovery, that defendant both knew and intended that the cattle should break into the pasture, when either such knowledge or intention would suffice, as "knowing" and "intending" in such connection were synonymous. *Moore v. Pierson*, 94 S. W. 1132, 1133, 100 Tex. 113.

### As actual knowledge or scienter

The fact that the charge did not require that employes on the engine should have "re-

alized" the danger, but made it suffice to raise the duty defined if they had "reasonable ground to believe and it was apparent to them" that the person was in danger, would not render it objectionable, since for practical purposes a person must be treated as "knowing" a fact when he has reason to believe it and when it is apparent to him. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds*, 122 S. W. 531, 532, 103 Tex. 31.

Pen. Code, § 550, as amended by Laws 1903, c. 326, now Penal Law (Consol. Laws, c. 40) § 1308, which provides for the punishment of a person receiving stolen property "knowing" it to have been stolen, includes actual and constructive knowledge. *People v. Rosenthal*, 90 N. E. 991, 992, 197 N. Y. 394.

By the words "knowing that property was stolen," in an information for receiving stolen goods, was not meant absolute, personal, and certain knowledge on the part of the defendant that the property mentioned in the information had been stolen, but such knowledge and information in his possession at the time he so received the same as would put a man of ordinary prudence or exercising ordinary care on his guard and would cause such a man to believe and to be satisfied that the property had been stolen. *State v. Kosky*, 90 S. W. 454, 455, 191 Mo. 1.

#### KNOWINGLY

The word "knowingly," as used in a criminal statute, means that state of mind wherein the person charged was in possession of facts under which he was aware he could not lawfully do the act whereof he was charged. *State v. Smith*, 105 S. W. 68, 69, 119 Tenn. 521.

"Knowingly," as used in Laws 1903, p. 308, c. 132, entitled an act to prevent the unauthorized use of the name or picture of any person for the purpose of trade, means that such use must not be made if the offender knows that the portrait or picture in question is that of a living person. *Rhodes v. Sperry & Hutchinson Co.*, 104 N. Y. Supp. 1102, 1104, 120 App. Div. 467.

The term "knowingly," generally speaking, in a criminal proceeding, imports that the accused person knew what he was about, and, possessing such knowledge, proceeded to commit the crime with which he is charged. *State v. Bridgewater*, 85 N. E. 715, 718, 171 Ind. 1.

Under the statute defining bigamy as the offense of "knowingly" having a plurality of husbands or wives at the same time, scienter is an essential of the crime, and an honest belief that the marriage has been dissolved is a good defense. *Robinson v. State*, 65 S. E. 792, 795, 6 Ga. App. 696.

The adverb "knowingly," as used in Comp. Laws, § 11612, making it an offense for any person holding a public office to knowingly and unlawfully appropriate to his own use,

or to the use of any other person, money, or property received by him in his official capacity, was intended to exclude, from the definition of the offense, mistakes of fact, accidents, such as loss of money by fire, or other casualty, or inadvertent appropriation. *People v. Glazier*, 124 N. W. 582, 589, 159 Mich. 528 (citing *McGuire v. State*, 7 Humph. [27 Tenn.] 54).

The word "knowingly," in an indictment for obtaining money by false pretenses, sufficiently avers a scienter. *State v. Blauvelt*, 38 N. J. Law, 306, 307.

The word "knowingly," as used in Act July 5, 1884, providing that any person who shall "knowingly" bring into or cause to be brought into the United States, or aid or abet the landing in the United States from any vessel, any Chinese person, refers to knowledge of the fact of landing, and was intended to recognize a distinction between the landing knowingly aided or abetted in and one unwittingly or unconsciously aided, such, for instance, as where a Chinaman might effect a landing from a vessel as a stowaway in another vessel. *Sims v. United States*, 121 Fed. 515, 519, 58 C. C. A. 92.

The offense denounced by Penal Law (Consol. Laws, c. 40) § 2460, subd. 4, punishing "every person who shall knowingly receive any money, \* \* \* for \* \* \* procuring and placing in the custody of another, for immoral purposes, any woman, with or without her consent," is completed where one knowingly receives money on account of procuring and placing in the custody of prosecutor two women with their consent, for immoral purposes, though prosecutor merely laid a trap for accused, and did not intend to make use of the women for immoral purposes, and did not so make use of them; the word "knowingly" being limited to the receipt of money, to the procuring, and to the immoral purposes for which the women were procured. *People v. Moore*, 127 N. Y. Supp. 98, 142 App. Div. 402.

"Knowingly" means with knowledge, and the word, as used in Rev. St. U. S. § 5198, providing that the charging by a national bank of interest greater than allowed, when knowingly done, shall be deemed a forfeiture of the entire interest on the debt, and that if a greater rate of interest has been paid the person paying it or his representative may recover twice the amount of the payment, means intentionally and designedly, and an allegation in pleading that a contract for the usurious interest was knowingly made is equivalent to charging that it was corruptly made. *First Nat. Bank of Blakely v. Davis*, 70 S. E. 246, 247, 135 Ga. 687, 36 L. R. A. (N. S.) 134.

A state court granted naturalization to a woman who had been dead over four years, and the certificate was issued by the clerk. No hearing was had nor evidence taken in

open court, as required by Naturalization Act June 29, 1906, c. 3592, § 9, 34 Stat. 599; but affidavits in support of the petition were made out by the clerk, and subscribed and sworn to by defendants, the material statements in which were false. Defendants, however, did not understand the English language, and were not informed of the contents of the affidavits, but signed the same as directed by the clerk. Held, that they were not guilty of "knowingly" giving false testimony, made a crime by section 23 of the act. *United States v. Janke*, 183 Fed. 277, 279.

P. S. 2053, provides that a person who "knowingly" receives greater fees than the law allows shall pay to the person aggrieved 10 times the excess to be recovered in an action on the statute, etc. Held, that the word "knowingly," when used in a prohibitory statute, is used to import a knowledge of the essential facts, from which the law presumes a knowledge of the legal consequences arising therefrom; the word being also used as in such section in the sense of "intentionally," so that where a tax collector received fees in excess of those allowed by section 6262, but in accordance with a usual custom obtaining in the town, and not with knowledge that the fees were illegal, he was not liable for the penalty. *Crawford v. Joslyn*, 76 Atl. 108, 83 Vt. 361, Ann. Cas. 1912A, 428.

In an indictment for unlawfully giving intoxicating liquor to a minor, the use of the word "knowingly," in the beginning of the charging part of the indictment, is sufficient as an allegation that defendants gave the liquor knowing the recipient thereof to be a minor. *Ferguson v. State*, 95 S. W. 111, 50 Tex. Cr. R. 155.

Rev. Laws, c. 212, § 16, as amended by St. 1905, p. 235, c. 316, makes it an offense to "knowingly" distribute an advertisement giving notice of any place where abortions may be performed; and by chapter 218, §§ 17, 29, a crime may be charged in the words used in the statute, with a general averment that defendant committed the act. Held, that an indictment under chapter 212, § 16, charging that defendant "knowingly" distributed an advertisement, was not subject to a motion to quash because it did not more specifically aver guilty knowledge of the contents of the advertisement. *Commonwealth v. Hartford*, 79 N. E. 784, 785, 193 Mass. 464 (citing *Commonwealth v. Hersey*, 2 Allen [84 Mass.] 173, 180; *Commonwealth v. Lavery*, 73 N. E. 884, 188 Mass. 13, 16).

The words "knowingly" or "well knowing" are uniformly held to supply the place of a positive averment in an indictment that defendant knew the fact subsequently stated. An indictment charging that defendant "knowingly" uttered as true a false and forged check, with intent to defraud, was sufficient, under Code, § 4854, prescribing the punishment of a person who utters a forged

instrument, "knowing the same to be false." *State v. Waterbury*, 110 N. W. 328, 329, 133 Iowa, 135.

2 Ballinger's Ann. Codes & St. § 7313, provides that every person who shall "knowingly" sell or give a minor intoxicating liquors without the written consent of his parent or guardian shall, on conviction, be fined, etc. Held, that an instruction that the sale was made knowingly within such statute if defendant's bartender knew, or in the exercise of reasonable prudence should have known, that his customer was a minor at the date of the alleged sale, correctly defined the term "knowingly." *State v. McCormick*, 105 Pac. 1037, 1038, 56 Wash. 469.

The word "knowingly," as used in Civ. Code La. art. 2301 (2279), providing that he who receives what is not due to him, whether through error or "knowingly," obliges himself to restore it to him from whom he has unduly received it, does not imply necessarily the idea of wrongdoing or bad faith, but means only "with knowledge." The word "knowingly," as here used, does not necessarily imply the idea of wrongdoing, as is the case in criminal pleading, but is to be given the signification of the French word "sciement," meaning "with knowledge," and not implying either bad faith or wrongdoing. In an action of this nature, bad faith is important only as affecting the quantum of the recovery. *Drainage Commission of New Orleans v. National Contracting Co. of New York*, 136 Fed. 780, 782.

On a prosecution under Kirby's Dig. §§ 1593, 1594, for "knowingly" marrying the wife of another, proof of knowledge of facts that would cause a belief of the woman's marriage in a mind not obstinately closed to such belief will sustain a conviction. *Brooks v. State*, 84 S. W. 1033, 1035, 74 Ark. 58 (citing 5 Words and Phrases, p. 3937).

Under a statute providing for the punishment of one who "knowingly" sells intoxicating liquors to a minor, the sale is made "knowingly," if the seller knew the purchaser was a minor, or had such information from his appearance or otherwise as would lead a prudent man to believe he was a minor, and which, followed by inquiry, would bring knowledge of that fact home to him. *State v. Constatine*, 86 Pac. 384, 385, 43 Wash. 102, 117 Am. St. Rep. 1043.

In an action against a public officer for knowingly collecting illegal fees, it is not error to define the term "knowingly" in the language of Rev. St. 1898, § 4053, subd. 5, which declares that the term "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of the Code, but does not require any knowledge of the unlawfulness of the act or omission. *Skeen v. Chambers*, 86 Pac. 492, 494, 31 Utah, 36.



In that provision of Rev. St. § 5438, which makes it a criminal offense if any one "knowingly" purchases or receives in pledge from any soldier clothes or other public property, such soldier not having the lawful right to pledge or sell the same, the word "knowingly" applies only to the question whether a person purchasing or receiving such property in pledge knew, or should have known from facts which put him on inquiry, that the person offering the same was a soldier. *United States v. Koplik*, 155 Fed. 919, 922.

An indictment under Rev. St. § 5440, which charges that defendants knowingly, unlawfully, wickedly, and corruptly conspired to defraud the United States out of its title to certain public lands by means of false, fraudulent, and fictitious entries of the same under the land laws, and that in pursuance of, and to effect the object of, such conspiracy, certain acts set forth were committed by one or more of the defendants, is not insufficient, because it does not expressly aver that such acts were done with knowledge of the fraudulent and illegal character of the entries. The essence of the offense is the conspiracy, and while an overt act is an essential element under the statute, the use of the word "knowingly" in charging the conspiracy must fairly be held to apply to and characterize the acts specifically charged to have been done in furtherance of such conspiracy, and for the purpose of carrying it into effect. *United States v. Mitchell*, 141 Fed. 666, 668.

Proof that a note for \$393 was taken for three months' loan of \$350 is proof that a charge of excessive interest was "knowingly done," within Rev. St. U. S. § 5198, providing that the reserving, etc., of a rate of interest greater than that allowed by law, when "knowingly done," shall be a forfeiture of the entire interest. *Wagoner Nat. Bank v. Welch*, 104 S. W. 610, 613, 7 Ind. T. 259.

Kirby's Dig. § 5030, as amended by Acts 1905, p. 726, punishing one who shall interfere with, entice away, "knowingly employ," or induce a laborer, who has contracted with another for a specified time, to leave his employer before the expiration of his contract, does not punish one for merely giving employment to a laborer during the unexpired term of his broken contract with another, but implies that the employment was done as an interference with the laborer's performance of his prior contract with another, or as an enticement of the laborer away from his employer, or as an inducement of the laborer to leave the service of his employer, and is valid as tending towards the preservation of peace and good order. *Tucker v. State*, 111 S. W. 275, 276, 86 Ark. 436.

Under Acts 1908, p. 284, c. 189, § 19, providing that "no person \* \* \* shall knowingly sell [ardent spirits] to any intoxicated person," and section 27, p. 286, declaring that

any person violating any of the provisions of the act shall be guilty of a misdemeanor, a licensed barkeeper is criminally liable for a sale of liquor to an intoxicated person made in the conduct of the business by the keeper's son, employed in the barroom and intrusted with the conduct of the same in the absence of the barkeeper; the term "knowingly sell" being referable to the condition of the person to whom the liquor is sold, and not to the sale. *O'Donnell v. Commonwealth*, 62 S. E. 373, 374, 108 Va. 882.

To commit the offense defined in Rev. St. § 5395, denouncing a penalty against one who "knowingly swears falsely" in making any oath under any law relating to naturalization, it is not necessary that there should be any purpose of gain or any instigation of malice. *Holmgren v. United States*, 156 Fed. 439, 444, 84 C. C. A. 301.

Where the sufficiency of an indictment for causing nonmailable matter to be deposited in the post office is not questioned until after verdict, the words "willfully, unlawfully, wrongfully, and knowingly," as used therein, were to be taken in their broadest sense as applying to all that was expressed in respect of the act, and therefore as imputing to defendants knowledge of the contents of the circular alleged to have been mailed, and of the book of which it was an advertisement. *Burton v. United States*, 142 Fed. 57, 59, 73 C. C. A. 243.

An indictment, alleging that accused did "unlawfully and knowingly deposit and cause to be deposited in" a post office a letter concerning a lottery, sufficiently charges knowledge of accused of the contents of the letter; the word "knowingly" qualifying not only the verb "deposit," but the whole matter described subsequently in the indictment. *United States v. Purvis*, 195 Fed. 618, 619.

In St. 1909, c. 534, § 22 providing for the punishment of any person who, in operating an automobile, "knowingly went away without making himself known after injuring any person or property," the word "knowingly" imports a perception of the facts requisite to make it a crime; and where, after injury to a woman, the driver of the automobile, after waiting awhile, sent a man back to the place with instructions to disclose his identity, there was no violation of statute, though such person failed to state who the driver was. *Commonwealth v. Horsfall*, 100 N. E. 362, 364, 213 Mass. 232.

#### As willfully

An instruction that, if the jury believe that any witness has "knowingly" testified falsely, they may disregard his entire testimony, was not subject to the objection that it failed to use the word "willfully," since such words are of equivalent meaning. *Peterson v. Pusey*, 86 N. E. 692, 693, 237 Ill. 204.

Mines and Miners' Act, § 18, requires a daily inspection of the mine, and provides that no one shall remain in the mine until dangerous conditions discovered therein have been made safe. In a miner's injury action the declaration alleged that the dangerous condition which caused the injury existed the day before it happened, and that defendant "willfully" permitted plaintiff to enter the place. Held, that the word "willfully" was synonymous with "knowingly," and the declaration, at least argumentatively, alleged that defendant knew of the dangerous condition so as to sustain a judgment for plaintiff. *Peebles v. O'Gara Coal Co.*, 88 N. E. 166, 168, 239 Ill. 370.

#### KNOWINGLY AND FRAUDULENTLY

Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, provides that a bankrupt shall be discharged unless he has committed an offense punishable by imprisonment, and section 29b declares that a person shall be punished by imprisonment on conviction of having "knowingly and fraudulently" concealed while a bankrupt, or after his discharge, property belonging to his estate. Held, that the words "knowingly and fraudulently," as so used, must have their natural significance in considering a charge of concealment in opposition to a discharge, and hence, where the bankrupt received \$85.10 as the unearned part of certain insurance premiums on lapsed policies, and he used the same to pay rent after his counsel, who was also counsel for the creditors, had advised him that the money belonged either to an insurance society or to his wife, he did not "knowingly or fraudulently" conceal property. *Klein v. Powell*, 174 Fed. 640, 641, 98 C. C. A. 894.

#### KNOWINGLY AND WILLFULLY

The words "knowingly and willfully fails," in a statute imposing a penalty where a corporation or person charged "knowingly and willfully fails" to comply therewith, are about equivalent to "willfully neglects" and mean the same as "willfully omits." *New York Cent. & H. R. R. Co. v. United States*, 165 Fed. 833, 840, 91 C. C. A. 519.

The words "knowingly and willfully" in Act June 29, 1906, c. 3594, 34 Stat. 607, punishing a carrier who knowingly and willfully fails to feed, water, and rest cattle shipped, describe an essential element of every right to the penalty therein prescribed. *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69, 71, 94 C. C. A. 437.

The words "knowingly and willfully," in Act June 29, 1906, c. 3594, § 3, 34 Stat. 608, relating to confinement of cattle for more than 28 hours without food or water, described an essential element of the offense on account of which penalties are prescribed, without proof of which they cannot be recovered; "knowingly" meaning with knowledge of the facts which, taken together, constitute

a failure to comply with the statute, and "willfully" meaning purposely or obstinately, describing the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute, or is indifferent to its requirements. *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 105, 110 C. C. A. 432.

Defendant's railroad constituted a part of a line of railroad over which live stock was transported under an interstate shipment to defendant's stockyards. At the time the cattle were delivered to defendant by the connecting carrier, they had all been kept in the cars without being unloaded for rest, water, and feed for more than 36 hours, in violation of Act June 29, 1906, c. 3594, § 1, 34 Stat. 607, which fact was disclosed by the waybills, which were not delivered to defendant until after the cattle were in defendant's custody. The next and only place where the cattle could have been unloaded and watered was at defendant's yards at destination, where defendant delivered the cattle with all reasonable dispatch with the facilities it had for handling them. Held, that defendant had not "knowingly and willfully" failed to comply with the provisions of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607), and was therefore not liable for a penalty for its violation. *United States v. Sioux City Stockyards Co.*, 162 Fed. 556, 562.

"Knowingly" is frequently used in the Customs Laws in contradistinction to innocently, ignorantly, or unintentionally. It has been held, with regard to knowingly and willfully obstructing the mail, that, when the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, though to attain other ends may have been his primary object, and so "the words 'knowingly and willfully,' as used in a revenue law providing a penalty for so constructing cisterns in a distillery as to permit the abstraction of spirits, do not require an intent to defraud the revenue, but the penalty prescribed by the act is incurred and the offense is complete when the defendants have left undone those things which they ought to have done, and done those things which they ought not to have done, without any fraudulent or criminal intent." *United States v. Fifty Walham Watch Movements*, 139 Fed. 291, 300 (citing *United States v. Kirby*, 7 Wall. [74 U. S.] 482, 19 L. Ed. 278; *United States v. McKim*, 26 Fed. Cas. 1122).

Where defendant, a terminal railroad company, received cattle from a connecting carrier for the sole purpose of transporting them to certain stockyards to feed, water, and rest them, and then to return them to the carrier from which they have been received, not knowing that such carrier had already confined them in the cars exceeding the time allowed by Act June 29, 1906, c. 3594, § 1, 34 Stat. 607, providing that cattle

shall not be confined for a longer period than 36 hours, the terminal carrier, having used due diligence in carrying the cattle to the stockyards and unloading them, was not guilty of itself "knowingly and willfully" violating such act; such words being intended to mean either an intentional violation of the statute or an indifferent disregard of its requirements. *United States v. Stockyards Terminal Ry. Co.*, 178 Fed. 19, 23, 101 C. C. A. 147.

It is no defense to an action for "knowingly and willfully" violating Act June 29, 1906, c. 3594, § 1, 34 Stat. 607, relating to the carriage of live stock and known as the "twenty-eight hour law," that defendant made rules requiring its employes to comply with such statute, and that its failure to do so was through the negligence of an employe, and in violation of its rules. *United States v. Atlantic Coast Line R. Co.*, 173 Fed. 764, 766, 98 C. C. A. 110.

#### KNOWINGLY MISREPRESENT

To "knowingly misrepresent" is to represent that which is not true with knowledge that the representation is false and with an intent to cause another to act to his prejudice upon such misrepresentation. *Hyde v. United States*, 198 Fed. 610, 612, 119 C. C. A. 493.

#### KNOWINGLY PERMIT

The phrase "knowingly permitted," as applied to the mortgagee allowing the mortgagor to sell merchandise covered by the mortgage, is an equivalent to "understood and agreed." *Ryan v. Rogers*, 94 Pac. 427, 432, 14 Idaho, 309.

Under Ky. St. 1903, § 1972, making it an offense for the owner or controller of a billiard table to "knowingly suffer or permit" a minor to play any game thereon, the owner or controller of the table must know that the party playing upon it is a minor, in order to render him guilty of the prescribed offense. *Commonwealth v. Wills*, 89 S. W. 144, 121 Ky. 103.

#### KNOWLEDGE

See Actual Knowledge; Best of His Knowledge and Belief; Best of the Knowledge and Belief; Constructive Knowledge; Denial of Knowledge or Information; Equal Means of Knowledge; Imputed Knowledge; Means of Knowledge; Necessarily Acquired Knowledge; Negative Knowledge; Presumption of Legal Knowledge; Reasonable Knowledge; Within Immediate Knowledge.

See, also, Notice.

"Knowledge" is the receiving of a mental impression; the state of being aware. *Crosby v. Wells*, 87 Atl. 295, 302, 73 N. J. Law, 790 (citing Wigmore, Evidence, §§ 244, 245, 300).

"Knowledge" may mean that gained by information or intelligence, and is not confined to what is personally observed. *Davenport v. Prentice*, 110 N. Y. Supp. 1056, 1063, 128 App. Div. 451.

"The term 'knowledge,' as used in defining assumed risks, means no more than that all the facts and circumstances surrounding the given case must be sufficient to charge the employe with the required information;" and a trainman, struck by a flag shanty negligently located, may recover despite his knowledge of the location when his attention was distracted by the engrossing character of his duty at the moment. *King v. Seaboard Air Line Ry.*, 58 S. E. 252, 256, 1 Ga. App. 88.

"Knowledge," within the meaning of the Penal Code of New York, is merely knowledge that the facts exist which constitute the act or omission a crime, and a knowledge of the unlawfulness of the act or omission is not required. *People v. Acritelli*, 110 N. Y. Supp. 430, 446, 58 Misc. Rep. 574.

"Knowledge," as applied to a person receiving stolen goods, may be deduced from conduct and behaviour, the character of the person from whom the goods are received, the character of the goods, and the hour when received. *State v. Richmond*, 84 S. W. 880, 884, 186 Mo. 71 (citing *Huggins v. People*, 25 N. E. 1002, 135 Ill. 243, 25 Am. St. Rep. 357; *Frank v. State*, 6 South. 842, 67 Miss. 125; *Hester v. State*, 15 South. 857, 103 Ala. 83; *People v. Schooley*, 43 N. E. 536, 149 N. Y. 99; *Commonwealth v. Finn*, 108 Mass 466).

"Knowledge," as used in the law of perjury, with reference to the making of a false statement under oath with knowledge of its falsity, is an intangible thing resting in the mind, the possession of which may be admitted by the party, or be shown by proof of circumstances from which it may reasonably be inferred. *State v. Dryden* (Del.) 84 Atl. 1037, 1038, 63 Or. 180.

The term "knowledge," used in the rule that a payment, with "knowledge" that the person to whom it was paid was not entitled to receive it, cannot be recovered, is not used in a broad sense, so that recovery may be had, though the payer knew that the payee was not entitled to it but did not recollect it at the time. *Citizens' Bank of Fitzgerald v. Rudisill*, 60 S. E. 818, 820, 4 Ga. App. 37.

In an action against promoters of a corporation for the contract price of an air compressor, the court charged that, where such promoters had entered into a contract, the same might be ratified by the corporation subsequently formed, and that it was not necessary that the directors as a body, or at a meeting, should by formal resolution ratify the same; the corporation being bound to pay for property which was actually used, which had been bought by its promoters, and

the use of which the directors had actual knowledge, if they continued to use it and failed to repudiate it. Held, that the word "knowledge" referred to the corporation's knowledge of the use of the compressor, and the word "repudiate" to the contract, and not to the compressor, and, as so construed, the instruction was not misleading. *Possell v. Smith*, 88 Pac. 1064, 1065, 39 Colo. 127.

As a rule, where the statute makes knowledge that a claim presented is false or fraudulent a necessary element of the offense of presenting a false claim, knowledge must be alleged, and allegations of the affidavit, in a prosecution of an officer of a bridge company for presenting a false claim to county commissioners for allowance for work done for the county, that accused "unlawfully, feloniously, and knowingly made out and filed a certain false and fraudulent claim," and that the bridge company had no lawful demand therefor against the county, "as he then and there well knew," sufficiently alleged accused's knowledge of the falsity of the claim presented. *Bader v. State*, 94 N. E. 1009, 1011, 176 Ind. 268.

The word "knowledge" as used in Ky. St. § 597, making it a felony for a bank president to receive deposits with knowledge of the bank's insolvency, has no technical meaning, but meant that the officer had knowledge of the existing condition by means of his relation to the bank, his association with it, and his control over it; his direction thereof being such as to give him actual, personal information concerning it. *Parrish v. Commonwealth*, 123 S. W. 839, 341, 136 Ky. 77.

A complaint, in an action to foreclose a materialman's lien, brought against the owner, lessee, and contractors, which alleges that the owners at all times knew that the lessee was constructing a building, and did not at any time give notice that they would not be responsible therefor, sufficiently charges the owners with "knowledge," within Comp. Laws, § 3889, providing that every building constructed on lands with the knowledge of the owner shall be held to have been constructed at the instance of the owner, etc. *Tonopah Lumber Co. v. Nevada Amusement Co.*, 97 Pac. 636, 639, 30 Nev. 445.

Where, in a suit for injuries by defective machinery, plaintiff knew the defective condition of the press, but claimed that he did not know the danger, an allegation that he did not have equal means of knowledge with defendant, using the term "knowledge" to include actual or constructive knowledge, was material. *Ellie v. C. Cowles & Co.*, 73 Atl. 258, 259, 82 Conn. 236.

It is not enough to assert merely that the discovery (of a right to have a judgment vacated for fraud) was not sooner made. It must appear that it could not have been made by the exercise of reasonable diligence. And that which reasonable diligence would

have disclosed, plaintiff is presumed to have known; means of knowledge in such a case being the equivalent of the "knowledge" which it would have produced. The complaint, in an action to vacate a judgment because of fraud in not interposing a certain defense, did not show a right to more than three years for bringing it, under Code Civ. Proc. § 338, subd. 4, providing that the limitation of three years for relief from fraud does not begin to run till discovery of the facts constituting the fraud, by the mere allegation that the failure to interpose the defense was not discovered till within two months before commencement of the action to set aside the judgment; no reason for failure to make the discovery being given, and it not being stated that any diligence was exercised, or that with reasonable diligence the discovery would not have been made sooner. *People ex rel. Post v. San Joaquin Valley Agricultural Ass'n*, 91 Pac. 740, 744, 151 Cal. 797 (quoting and adopting *Truett v. Onderdonk*, 53 Pac. 29, 120 Cal. 589; *Lady Washington Consol. Co. v. Wood*, 45 Pac. 809, 113 Cal. 486).

#### As belief

"There is a difference between 'knowledge' and 'belief.' A person may honestly believe a thing and yet not know it." One is not guilty of bigamy who contracts a second marriage honestly believing, after exercising reasonable diligence that his first marriage had been dissolved by a divorce. *Robinson v. State*, 65 S. E. 792, 795, 6 Ga. App. 696.

#### Information distinguished

Under the Code authorizing a denial on information and belief by an allegation that the pleader has not the knowledge or information on which to base a belief, an allegation that as to plaintiff's corporate existence, the indorsement of the note sued on to it, and as to its being the owner and holder thereof, defendant cannot obtain sufficient information on which to base a belief, and hence denies such allegation, was insufficient; the words "knowledge" and "information" not being synonymous. *Welles v. Colorado Nat. Life Assur. Co.*, 113 Pac. 524, 525, 49 Colo. 508.

#### As notice

"Knowledge" is not the same as "notice," but to constitute "notice," the "knowledge" must be communicated in the prescribed way. *Wade v. Wade's Adm'r*, 69 Atl. 826, 827, 81 Vt. 275.

"Knowledge" and "notice" are not always synonymous. *Field v. Campbell* (Ind.) 67 N. E. 1040, 1041 (citing *Kirkham v. Moore*, 65 N. E. 1042, 30 Ind. App. 549).

"Notice" is equivalent to "knowledge." *Bova v. Norrigan*, 67 Atl. 326, 327, 28 R. I. 319, 125 Am. St. Rep. 741.

Actual notice and "knowledge" are not always synonymous, but upon proof of sufficient acts the law will presume that a person has information equivalent in its legal effects to actual knowledge. *Dunlap v. Gibson*, 112 Pac. 598, 599, 83 Kan. 757, 31 L. R. A. (N. S.) 1071.

"Knowledge" and "notice" are not synonymous, for that which does not amount to actual knowledge may constitute notice. The notice may be of such a character that its effects amount to knowledge. On the other hand, the party may be charged with notice when in utter ignorance of that of which he is presumed to be advised. *Rosenberger v. Hawker*, 103 N. W. 781, 782, 127 Iowa, 521.

A distinction is to be observed between "knowledge" of the pendency of a suit and notice thereof. Jurisdiction can be acquired, if one does not submit himself to it, in no other way than by actual notice or by constructive notice. Actual notice is given only by personal service of process; constructive notice by some form of substituted service. Where there is no service, there is no notice, irrespective of any knowledge which the defendant may acquire informally. Notice is given only by a service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge on notice or to force him into court to defend himself. *National Metal Co. v. Greene Consol. Copper Co.*, 89 Pac. 535, 537, 11 Ariz. 108, 9 L. R. A. (N. S.) 1062.

Where an agent of the authorized sales agent of the owner of lots upon which one in possession was erecting a building had an office, which he visited daily, in plain view of the building being erected, the owner was put on such inquiry as to charge him with "knowledge" under Code Civ. Proc. § 1192, giving a lien upon property for labor and material furnished with knowledge of the owner. *National Lumber Co. v. Whalley*, 121 Pac. 729, 730, 162 Cal. 224.

The "knowledge" or privity of the managing officer or agent of a corporation is the knowledge or privity of the corporation within the meaning of Rev. St. § 4283, providing for the limitation of liability of shipowners for losses caused without their privity or knowledge. In *re Jeremiah Smith & Sons*, 193 Fed. 395, 397, 113 C. C. A. 391.

A complaint, alleging that an act by which plaintiff, a passenger, was injured was done with "knowledge" or "notice" of defendant's agent, does not state a cause of action for wantonness; "notice" not being the equivalent of "knowledge," and the averment in the disjunctive not affirming either. *Birmingham Ry. & Electric Co. v. Butler*, 33 South. 33, 35, 135 Ala. 388.

Code, § 3448, provides that actions for relief on account of fraud are barred within five years, but that, in actions heretofore solely recognized in courts of equity, the cause of action will not be held to have accrued until the alleged fraud is discovered. Held, that "knowledge of fraud," as we have construed that expression in this connection, does not contemplate actual knowledge thereof before the statute begins to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud. The record of a deed imparts constructive notice of its contents, and if the facts which the record shows, with other facts known to the creditor, are of a character to suggest fraud, he is charged with the knowledge which inquiry made with reasonable diligence would disclose. This rule has its application, not only as against creditors seeking relief, but as to other persons interested in or making claims to property which has been fraudulently conveyed by the recorded deed. *E. B. Piekenbrock & Sons v. Knoer*, 114 N. W. 200, 201, 136 Iowa, 534.

Where, in an action against a county to set aside a conveyance, a decree was taken by default, the court, under L. O. L. § 103, may, in its discretion, within one year after notice thereof, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and has jurisdiction to entertain a motion to set aside such decree when filed within one year after knowledge of the decree was acquired by the agents or officers of the county, though not until more than one year after the decree was entered; "notice," as used in such statute, being a synonym of "knowledge." *Chapman v. Multnomah County*, 126 Pac. 996, 998, 63 Or. 180.

#### KNOWLEDGE OF DANGER

"Although the terms 'knowledge of danger' and 'appreciation of risk' are frequently used in the discussion of due care, still these elements in and of themselves do not constitute contributory negligence as a matter of law." *Frost v. McCarthy*, 86 N. E. 918, 919, 200 Mass. 445.

The test of an employee's "knowledge of danger" is not the exercise of ordinary care to discover the danger, but whether the danger was known to, or plainly observable by, him. *Rase v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 120 N. W. 360, 365, 107 Minn. 260, 21 L. R. A. (N. S.) 138.

#### KNOWLEDGE OF THE LAW

See, also, "Ignorance of the Law."

The maxim, "Every one is presumed to know the law," does not obtain literally and generally; it is limited by the reason for the rule, viz., to prevent violators of the Criminal Code from escaping punishment on

the ground of ignorance of the law and violators of private rights, escaping liability for actual loss thereby inflicted on such ground. *Topolewski v. Plankinton Packing Co.*, 126 N. W. 554, 561, 143 Wis. 52.

**KNOWN**

See If His Address is Known; Personally Known; To Me Known.

**KNOWN ADDRESS**

See Last Known Address.

**KNOWN AGENT**

The division superintendent of a non-resident railroad company is a "known agent" of such company within the meaning of V. S. 1109, providing for the service of attachment, although he may not be a person upon whom, pursuant to section 3948, service of process generally upon such corporation may be made. *Boston & M. R. R. v. Gokey*, 28 Sup. Ct. 657, 660, 210 U. S. 155, 52 L. Ed. 1002.

**KNOWN AND WELL-DEFINED CHANNEL**

That water flows naturally through a channel will not make it a "known and well-defined channel." *Killian v. Killian*, 57 South. 825, 829, 175 Ala. 224.

**KNOWN INVENTION**

Defendant, a citizen of the United States, conceived an invention, but did not reduce it to practice until some four or five years later, when he applied for and obtained a patent therefor. In the meantime complainant had made the same invention, and reduced it to actual practice and use in a foreign country, but did not patent it, nor was it described in any printed publication. He made a full disclosure of the invention orally to an American, who also saw the device in actual use, and on his return to this country described it, both orally and in writing, to others skilled in the art, who were capable of understanding it, but it was not put into actual use in this country. After defendant's patent had been granted, complainant filed an application for a patent. Held, that the knowledge of the invention by persons in this country, obtained from complainant, in the absence of an actual reduction to practice here, did not make it "known," within the meaning of Rev. St. § 4886, which authorizes the granting of a patent to an inventor for an invention "not known or used by others in this country before his invention or discovery thereof," and that, as between complainant and defendant, neither having reduced it to actual practice in this country, defendant, who was the first to conceive it and to constructively reduce it to practice by the filing of his application, under said section and section 4923, took precedence as the original and first inventor, and was entitled to the patent. *Westinghouse Mach. Co. v. General Electric Co.*, 199 Fed. 907, 910.

**KNOWN LODE OR VEIN**

A "known vein," within the limits of a placer, when that question is raised collaterally, is one known to exist at the time of application for patent for such placer, and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them. *McConaghy v. Doyle*, 75 Pac. 419, 420, 32 Colo. 92.

A mineral vein, within the boundaries of a placer claim, is "known" to exist, within the meaning of Rev. St. U. S. §§ 2319, 2333, first, when it is known to the placer claimant; second, when its existence is generally known; and, third, when any examination of the ground sufficient to enable the placer claimant to make oath that it is subject to location as such would necessarily disclose the existence of the "vein." *Mutchmor v. McCarty*, 87 Pac. 85, 88, 149 Cal. 603 (citing *Iron Silver Min. Co. v. Mike & S. Min. Co.*, 12 Sup. Ct. 543, 143 U. S. 403, 36 L. Ed. 201; *Lindley, Mines*, § 781; *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156).

Rev. St. U. S. § 2333, provides that, where an application for a patent for a placer claim does not include an application for a known vein or lode within its boundaries, the application shall be construed as a declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but that, where the existence of a vein or lode claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof. Held, that a "vein or lode" within such section is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain, and that a "known vein or lode" is one clearly ascertained, and of such extent as to render the land more valuable on that account and justify its exploitation and development. *Noyes v. Clifford*, 94 Pac. 842, 847, 37 Mont. 138.

**KNOWN MINES**

The term "mineral lands," as used in Rev. St. U. S. § 2302, is one of broader significance than "known mines." It refers to a class of lands, rather than specific tracts easily ascertainable, not only by the land department, but by the applicants themselves. *Old Dominion Copper, Mining & Smelting Co. v. Haverly*, 90 Pac. 333, 338, 11 Ariz. 241.

**KNUCKLES**

Railroad couplings resembling two human hands or fists, with the fingers clasped into each other, there being a coupling pin, which has to be pulled out before they will lock, are called "knuckles." *McGuire v. Quincy, O. & K. C. R. Co.*, 107 S. W. 411, 412, 128 Mo. App. 677.

A declaration charged it was defendant's duty to have a competent person "to operate the knuckle where the cars were let down from the mine entry to the tippie below," but that it employed a totally irresponsible boy of 15 years to operate the knuckle and levers necessary in letting down said cars off the hill. The evidence showed that the word "knuckle" was sometimes used to embrace the drumhouse and all appurtenances at the head of the incline, but that the boy was employed simply to operate the check blocks immediately at the knuckle, and that he was

15 years and 4 months old. Held, that the word "knuckle" was employed in the declaration in its restricted sense, and there was no material variance. *Wilkinson v. Kana-wha & Hocking Coal & Coke Co.*, 61 S. E. 875, 64 W. Va. 93, 20 L. R. A. (N. S.) 331.

## KNURLING

A "knurling" is a roughening of the surface of articles, like vices and pincers, to prevent slipping. *Capewell Horse Nail Co. v. Putnam Nail Co.*, 140 Fed. 670, 671.

## L

## L. S.

The mere addition of the letters "L. S." after the name of a signer, without any expression in the instrument of a purpose to seal it, does not make the instrument a sealed instrument. *Hughes v. Spratling*, 57 South. 629, 630, 3 Ala. App. 517.

The letters "L. S.," placed after the signature of a person or corporation, are an abbreviation of "locus sigilli," meaning "the place of the seal," and are usually inserted within brackets in copies of documents to indicate the position of the seal in the original. *Cannon v. Gorham*, 71 S. E. 142, 143, 136 Ga. 167, Ann. Cas. 1912C, 39.

When the letters "L. S.," inclosed within parentheses, thus, "(L. S.)," appear opposite the signature of the maker of a promissory note in the usual place for the seal, but with no reference to it in the body of the instrument, whether written or printed, it is evidence of a purpose to make a sealed instrument. *Langley v. Owens*, 42 South. 457, 459, 52 Fla. 302, 11 Ann. Cas. 247.

The use by the recorder of deeds of the letters "L. S." is a sufficient representation of the seal of a corporate grantor in a recorded deed. It has been variously held that where the seal on original papers is indicated on the record or a copy by the letters "L. S.," or the word "seal," or by a scroll employed for that purpose, it will answer the requirements of the law. *Altschul v. Casey*, 76 Pac. 1083, 1084, 45 Or. 182 (citing *Holbrook v. Nichol*, 36 Ill. 161, 164; *Moore v. Willamette Transportation & Locks Co.*, 7 Or. 359; *Bucklen v. Hasterlik*, 40 N. E. 561, 155 Ill. 423).

Inasmuch as the impression of the device of an official seal upon an instrument cannot be transferred from the instrument to which it is affixed to the record by the officer making the record thereof, it is only necessary that he should, in some appropriate manner, indicate that a seal was affixed thereto, and, when the letters "L. S.," the word "seal," or a scroll are employed for that purpose, they will be sufficient, and, where the official seal on the original is indicated on a certified copy of the record thereof by the letters "L. S.," it must be held to answer the requirement of the law, and such certified copy cannot be excluded from evidence on the ground that no official seal appears to have been annexed to the original. *Holbrook v. Nichol*, 36 Ill. 161, 164.

## LABEL

A "label" is usually much broader in its information than a mere trade-mark, and, to

be subject to litigation in case of unfair competition, must indicate the source of the chattel. *De Nobili v. Scanda*, 198 Fed. 341, 345.

There is no essential difference in the meaning of the term "label," as used in commerce and in common speech. According to standard lexicographers, the term includes a slip or tag of paper, or other material, bearing the description in the form of a word or words, name, monogram, letter, scroll, or trade-mark, indicating the character, origin, or destination of the article to which it is attached. Under the provision of Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179, for "labels, for garments or other articles, composed of cotton," labels are not to be excluded because in the piece and requiring to be cut apart before used as labels. *United States v. Herzog*, 145 Fed. 622, 623, 76 C. C. A. 373.

The provision in the Tariff Act for "labels for garments or other articles, composed of cotton," does not include strips of cotton containing certain words woven therein in silk, which are intended, when properly cut, to be attached to the top of shoes. Such articles are dutiable as manufactures of cotton, under said act. *Herzog v. United States*, 135 Fed. 919.

The word "label," as used in Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768, which requires packages of drugs shipped in interstate commerce to bear a statement on the label of the quantity or proportion of any alcohol, etc., means a descriptive paper affixed to the package, which must include the statement of how much alcohol, etc., is contained in the package. *United States v. Knowlton Danderline Co.*, 175 Fed. 1022, 99 C. C. A. 667.

Penal Law N. Y. (Consol. Laws 1909, c. 40) § 2354, subd. 6, provides that a person who knowingly sells, offers, or exposes for sale any goods which are represented in any manner, by word or deed, to be the manufacture, packing, bottling, boxing, or product of any person, firm, or corporation other than himself, unless such goods are contained in the original package, box, or bottle and under the labels, marks, or names placed thereon by the manufacturer, is guilty of a misdemeanor. Held, that the words "labels, marks, or names," which the manufacturer is entitled to use on his packages, are trade-marks in which the manufacturer has a special right, or, if not technical trade-marks, those which are entitled to protection under similar principles, and do not include mere identifying numbers placed on the containers of the goods. *B. V. D. Co. v. Kommel*, 200 Fed. 559, 561, 119 C. C. A. 39.



**LABOR**

See *By Her Own Labor*; *Cessation from Labor*; *Claim for Labor or Material*; *Hard Labor*; *Manuel Labor*; *Permanent Inability to Labor*; *Separate Labor*; *Servile Labor*.

As commodity, see *Commodity*.

As merchandise, see *Merchandise*.

As property, see *Property*.

As sum of money, see *Sum of Money*.

Employer of labor, see *Employer*.

Inability to labor, see *Inability*.

Whoever labors, see *Whoever*.

Work synonymous, see *Work*.

For instances of men whose services are held to be labor, see subtitle *Laborer*.

The word "labor," in legal parlance, has a well-defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly consisting in the protracted exertion of muscular force. "Labor may be business, but it is not necessarily so, and business is not always labor. In legal significance labor implies toil; exertion producing weariness; manual exertion of a toilsome nature." *Moore v. American Industrial Co.*, 50 S. E. 687, 688, 138 N. C. 304 (citing *Bloom v. Richards*, 2 Ohio St. 387).

A lending of tools for a few minutes and receiving a board which might otherwise have been allowed to fall without any injury resulting did not constitute "labor," for which a lienable claim could be enforced. *Cole v. Clark*, 27 Atl. 186, 188, 85 Me. 336, 21 L. R. A. 714.

Where the specific relation which the labor of a lien claimant must bear to the property is pointed out in the statute giving a lien, no other labor furnishes the basis for a lien claim, but where the statute is general, and provides for a lien to any person performing labor on a mining claim, labor of any class bearing a direct relation to the mining operations forms a basis for a lien claim. *Comp. Laws 1897*, § 2221, giving a lien for labor in a mining claim, gives a lien for manual labor performed on a limestone mining claim, for labor in the care of horses on the claim, used in the mining operations thereon, for labor in a lime kiln, closing lime bins, and gathering up tools at the lime quarry and kiln, all on the mining claim. *Gray v. New Mexico Pumice Stone Co.*, 110 Pac. 603, 604, 15 N. M. 478.

"Labor," whether physical, intellectual, or a combination of the two, is not, by any fair rule of construction, an "article of trade, manufacture, or use," or an "article, commodity, or utility," which enters into the manufacture of "any article of utility," within the meaning of those words as used in the Anti-Trust Statute (*Gen. Laws 1899*, p. 437, c. 359; *Rev. Laws 1905*, § 5168). *State v.*

*Duluth Board of Trade*, 121 N. W. 395, 412, 107 Minn. 506, 23 L. R. A. (N. S.) 1260.

An order for sashes and doors for a special purpose to be manufactured by the seller at a stated price, to be paid on completion of the work, is a contract for the sale of goods and not for "labor," within the statute of frauds. *Tower Grove Planing Mill Co. v. McCormick*, 106 S. W. 113, 114, 127 Mo. App. 349.

To keep open, manage, and superintend a theater and sell tickets therein on Sunday is "labor" within the meaning of an ordinance providing that every person who shall labor himself or compel a servant in his control to labor, other than household work or daily necessity or works of charity, on Sunday, shall be deemed guilty of a misdemeanor. *City of Topeka v. Crawford*, 96 Pac. 862, 864, 78 Kan. 583, 17 L. R. A. (N. S.) 1156, 16 Ann. Cas. 403.

Selling tickets to a theater, printing a newspaper, serving as a police magistrate, serving as an attorney's clerk, and giving of theatrical exhibitions have all been held to be "laboring," within the intent and meaning of that term as used in the Sunday laws. *Moore v. Owen*, 109 N. Y. Supp. 585, 590, 58 Misc. Rep. 332 (citing *Quarles v. State*, 17 S. W. 269, 55 Ark. 10, 14 L. R. A. 192; *Smith v. Wilcox* [N. Y.] 19 Barb. 581; *Id.*, 25 Barb. 341; *Palmer v. City of New York*, 2 Sandf. [4 N. Y. Super. Ct.] 318; *Watts v. Van Ness* [N. Y.] 1 Hill, 76; *Lindenmuller v. People* [N. Y.] 33 Barb. 548).

**Baseball**

Baseball is essentially and naturally in the nature of amusement, both for the participants and spectators, and is far removed from the ordinary meaning of the word "labor." *Territory v. Davenport* (N. M.) 124 Pac. 795, 798, 41 L. R. A. (N. S.) 407.

**Mining claims**

Work done in cleaning up and washing gold taken from a mining claim is "labor done upon the claim," for which the workmen are entitled to a lien under *Civ. Code Alaska*, § 262. *Cascaden v. Wimbish*, 161 Fed. 241, 246, 88 C. C. A. 277.

"Labor" and improvements, within the meaning of the mining law, are deemed to have been expended on a mining claim when the labor is performed or the improvements are made for its development, though in fact the labor and improvements may be at a distance from the claim itself, such as the building of a road to be used in general development. *Sexton v. Washington Mining & Milling Co.*, 104 Pac. 614, 615, 55 Wash. 380 (citing *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Mt. Diablo, Mill & Mining Co. v. Callison*, 5 Sawy. 439, 17 Fed. Cas. 918; *Book v. Justice Mining Co.*, 58 Fed. 106).

**Preaching**

The common understanding of the term "labor" does not include preaching. *Holy Trinity Church v. United States*, 12 Sup. Ct. 511, 143 U. S. 457, 36 L. Ed. 226.

**Running pool room**

Pen. Code 1895, arts. 196, 197, prohibiting "labor" on Sunday, except as to ferrymen, etc., prohibits the running of a pool room. *Ex parte Axsom*, 141 S. W. 793, 63 Tex. Cr. R. 627, 40 L. R. A. (N. S.) 179, Ann. Cas. 1913D, 794.

**Sale of liquor**

The act of a steward of a club in separately selling two bottles of beer on Sunday does not constitute "labor" within the meaning of Pen. Code 1895, art. 196, prohibiting any person to labor on Sunday. *Benson v. State*, 85 S. W. 800, 47 Tex. Cr. R. 609.

**Services of superintendent**

Services of a superintendent in charge of dredging work under a contract with the United States, which were rather those of a foreman in charge of the manual work than those of a financier or general business manager, were in the nature of "labor," within a provision of his employer's bond, given as required by U. S. Comp. St. 1901, p. 2523, providing that contractors shall promptly make full payments to all persons supplying labor and materials in the construction of the work. *United States v. United States Fidelity & Guaranty Co.*, 123 N. Y. Supp. 938, 943, 139 App. Div. 262.

A superintendent of a mill, whose duties consist in overseeing the milling operations, conducting a commissary store, and keeping the books, and who does not perform any manual labor, is not a "laborer" within Const. art. 14, § 4, requiring the General Assembly to enact legislation giving mechanics and laborers a lien on the subject-matter of their labor, and does not perform "labor" within Code, § 1255, which carries the provisions of the Constitution into effect. *Moore v. American Industrial Co.*, 50 S. E. 687, 688, 138 N. C. 304.

**Work of architect**

The work of a supervising architect, who furnishes plans and specifications and supervises the construction of a building pursuant to a contract with the owner for such services, is labor, for which he is entitled to a lien under Rev. Codes 1899, § 4788, giving a lien to any person who performs labor on a building. *Friedlander v. Talutor*, 104 N. W. 527, 14 N. D. 393, 116 Am. St. Rep. 697, 9 Ann. Cas. 96.

An architect preparing plans and specifications for a building and superintending its construction furnishes "labor" for the erection of such building and is entitled to a mechanic's lien under Sayles' Ann. Civ. St. 1897, art. 3294, giving a lien to any person

or firm, lumber dealer or corporation, artisan, laborer, mechanic or subcontractor, who may labor or furnish material, etc., to erect any house or improvement, or repair any building or improvement, even if such architect is not an "artisan," "laborer," or "mechanic," since, by the use of the expression "any person or firm, \* \* \* who may labor," an intention is evidenced to provide a lien for any and all persons, whether artisans, laborers, mechanics, or not, who may labor to erect a house or improvement. *Sanguinett & Staats v. Colorado Salt Co. (Tex.)* 150 S. W. 490, 491.

**LABOR AGENT**

A person employed by a railway construction company as a day laborer was sent to a city to employ additional labor. He hired certain laborers and was endeavoring to induce others to enter its service. Held, that he was not a "labor agent," within Code 1904, p. 2247, imposing a fine on one conducting the business of a labor agent without having first obtained a license therefor; the statute requiring a strict construction as against the state, because it imposes a tax and is intended to reach persons who, for compensation, conduct the business of employing laborers for others. *Watts v. Commonwealth*, 56 S. E. 223, 106 Va. 851.

**LABOR AGITATOR**

Ordinarily the term "labor agitator" would justly apply to one actively engaged in the promoting of the interests of the laboring men. It does not imply the use of unlawful or improper means. The statement of a railroad company that a person was a "labor agitator" could not amount to a libel, where the statement was made in answer to an inquiry addressed to it by another railroad, which contemplated employing him. *Wabash R. Co. v. Young*, 69 N. E. 1003, 1005, 1006, 162 Ind. 102, 4 L. R. A. (N. S.) 1091.

**LABOR AND MATERIAL**

The furnishing of scows to transport material in the prosecution of work under a government contract is not the furnishing of "labor and material," within a bond executed by the contractor under the federal statute requiring every contractor for public work to execute a bond to make payment to all persons supplying labor and materials in the prosecution of the work, and providing that the person supplying such labor and materials shall have the right to sue in the name of the United States on the bond. *United States v. Conkling*, 135 Fed. 508-512, 68 C. C. A. 220.

Comp. Laws 1897, § 10,743, provides that, when a public work is to be built at the expense of a city, etc., the agents contracting in behalf of such city shall require bond for the payment of the contractor and of subcontractors for all labor performed or materials furnished. Held, that the term "labor and materials furnished under the contract"

in bond given by a city contractor meant such labor and materials as were necessary to construct the work in accordance with the contract, and the bond did not cover labor and material furnished in repairing a dredge, pumps, and machinery used by a contractor in connection with the work. *City of Alpena, for Use of Besser, v. Title Guaranty & Surety Co.*, 123 N. W. 1126, 1127, 159 Mich. 329, 334; *City of Alpena, for Use of Beaudrie, v. Murray Co.*, 123 N. W. 1128, 159 Mich. 336.

### LABOR AND SKILL

"Labor and skill" are not articles of commerce, at least not in the same sense as the articles thereby produced, and a classification which distinguishes them, and provides for a diversity of legislation in respect to them, is reasonable and proper. *Cleland v. Anderson*, 92 N. W. 306, 308, 66 Neb. 252, 5 L. R. A. (N. S.) 136.

### LABOR ORGANIZATION

A "labor organization" is a combination of workmen usually, but not necessarily, of the same trade or allied trades, for the purpose of securing by united action, the most favorable conditions as regards wages, hours of labor, etc., for its members. *Stone v. Textile Examiners & Shrinkers Employers' Ass'n*, 122 N. Y. Supp. 460, 462, 137 App. Div. 655.

### LABOR PERFORMED

A claim for rental of scrapers is neither for "labor performed" nor "material furnished," within Ballinger's Ann. Codes & St. § 5902, giving one who, at the owner's request, grades, etc., land, or a street in front thereof, a lien for the labor performed and the materials furnished. *Hall v. Cowen*, 98 Pac. 670, 671, 51 Wash. 295.

Under Revisal 1905, § 1131, providing that mortgages of corporations shall not exempt the corporation's property or earnings from execution for satisfaction of any judgment against such corporation for labor performed, a contractor who had installed a gas holder for the corporation, and had paid for labor in installing it, was entitled to no preference over the mortgage; the preference for "labor performed" being given only to laborers employed by the corporation, and not to contractors who employ labor under a contract to place betterments upon the company's property. *Cox v. New Bern Lighting & Fuel Co.*, 87 S. E. 477, 478, 152 N. C. 164.

### LABOR UNION

"Labor unions," which are associations to enable their members to negotiate matters arising between them and their employers through the intermediation of officers of the union, and to accomplish their ends through concerted action, are valid. *Kemp v. Division No. 241, Amalgamated Ass'n of Street*

and Electric Ry. Employes of America, 99 N. E. 389, 392, 255 Ill. 213, Ann. Cas. 1913D, 347.

### LABORER

See Chinese Laborer; Common Laborer; Contract Laborer; Farm Laborer; Person Who Performs Labor.

The word "laborer," in its ordinary and usual sense, implies the personal service and work of the individual employed. *Fidelity & Deposit Co. v. Parkinson*, 94 N. W. 120, 122, 68 Neb. 319 (citing *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521).

"The word 'laborer' has a definite and fixed meaning in the Constitution and legislation of this state. In article 14, § 4, of the Constitution, it is provided that the General Assembly shall enact suitable legislation for the purpose of giving to mechanics and laborers an adequate lien on the subject-matter of their labor, and in pursuance of this provision the mechanic's and laborer's lien law (chapter 41 of the Code) was enacted by the General Assembly. Words used in legislation which have a technical meaning are supposed to be used in that sense. Worcester defines a laborer to be one who labors; one regularly employed at some hard work. Webster defines a laborer to be one who labors in a tiresome occupation; one who does work that requires little skill, as distinguished from an artisan." *Moore v. American Industrial Co.*, 50 S. E. 687, 688, 138 N. C. 304.

Const. art. 5, § 3, provides for the appointment of assistant superintendents of public works, for the filling of vacancies in such office, etc., and declares that all other persons employed in the care and management of canals, except collectors of tolls, and those in the department of the state engineer and surveyor, shall be appointed by the inspector of public works, and be subject to suspension or removal by him. Relator, a Civil War veteran, was appointed bridge tender by a deputy surveyor in 1901, working during the season of canal navigation; his services being dispensed with and his pay stopped during the closed season. He was employed for successive seasons until the spring of 1911, when on his reporting for duty his position was refused him. The position of bridge tender is not an office created or recognized by statute, being left to the discretion of the superintendent of public works and the agreement of the parties; nor is the term of employment or compensation regulated by legislation. The position was placed in the noncompetitive class, was exempt from examination, and classed as "laborer." Held that, the word "laborer" being ordinarily used to designate persons whose employment is uncertain as to time and terminates when the works on which they are engaged ends, as distinguished from men who are employed for a definite or

fixed term from year to year, relator was therefore subject to removal without the preferring of charges or the granting of a hearing. *People ex rel. Schoenwald v. Treman*, 137 N. Y. Supp. 64, 67.

To convict under Code 1907, § 6850, the servant or "laborer" enticed away must be under a written contract of employment at the time. *Abingdon Mills v. Grogan*, 52 South. 596, 599, 167 Ala. 146.

Whether an employé is a "laborer," within Civ. Code 1895, § 4732, making the daily, weekly, or monthly wages of day laborers exempt from garnishment, is generally a question of fact, dependent upon whether his duties are mainly physical or mental. *Buchanan v. Echols & Nix*, 70 S. E. 28, 8 Ga. App. 565.

Under a statute giving preference in the distribution of the assets of an insolvent corporation to claims for "wages of mechanics, workmen and laborers," the wages preferred and the class of persons within the statute depend upon the nature and kind of work done, rather than on the social position or professional character and standing of the person rendering the service, and, if the service is such as to bring the person rendering it within the statute, his compensation, whether large or small, or whether payable by the day, week, month, or year, is "wages," within the meaning of the statute, and preferred. *Gay v. Hudson River Electric Power Co.*, 178 Fed. 499, 501.

Under L. O. L. § 7420, making it the duty of every original contractor to file his lien within 60 days from the completion of his contract, and of every mechanic or other person to file within 30 days, one engaged merely to work for an indefinite time, under the direction of the lessee of a house, is a mere "laborer," whose rights to a lien would expire within 30 days from his last day of work. *Bernard v. Hassan*, 118 Pac. 201, 60 Or. 62.

Under Laws 1897, p. 516, c. 418, § 3, giving a lien to a "contractor, subcontractor, laborer, or materialman, who performs labor or furnishes material for the improvement of real property," the terms "contractor," "subcontractor," "laborer," and "materialman," while they refer primarily to the man who has a formal contract with the owner, or a subcontractor with the contractor, or who performs manual labor or furnished material, also embrace the man who buys the labor and material which enter into the improvement. *Kerwin v. Post*, 104 N. Y. Supp. 1005, 1007, 120 App. Div. 179.

Masters, mates, engineers, firemen, crane men, deck hands, and scow men employed on tugs, dredges and scows used in dredging a harbor channel are not "laborers or mechanics," within the meaning of the act of August 1, 1892, forbidding contractors upon any public work of the United States or of the Dis-

trict of Columbia, under penalty of fine or imprisonment, to permit or require laborers and mechanics employed thereon to work more than eight hours each day. *Ellis v. United States*, 27 Sup. Ct. 600, 603, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 589.

Defendant was a contractor engaged in constructing for the United States jetties near Cape May harbor, extending from the shore into the open sea. The jetties were built up with stone, thrown overboard from barges, which were towed across Delaware Bay, anchored, and as needed towed to the jetties and warped along while being discharged. As crews of such barges defendant employed engineeers, boatmen, and hookmen, selected for their seafaring experience, who operated the barges and also discharged their cargoes. The work done and the time required to do it depended on tide, wind, and weather, which ordinarily required variable hours of service on the part of the men. Held, that such men were seamen, with the rights of such, including the right to a lien on the vessel for their wages, and could not be classed as "laborers" or mechanics, within the meaning of act Aug. 1, 1892, c. 352, § 1, 27 Stat. 340, which makes it unlawful for any contractor for government work to require or permit any laborer or mechanic employed by him thereon to work more than eight hours in any calendar day, except in case of extraordinary emergency. *Breakwater Co. v. United States*, 183 Fed. 112, 114, 105 C. C. A. 404.

#### Mode of payment

Under the ruling made in the cases of *Oliver v. Macon Hardware Co.*, 25 S. E. 403, 98 Ga. 249, 58 Am. St. Rep. 300, and *Moultrie v. Crocker*, 54 S. E. 197, 125 Ga. 82, the defendant, whose employment was that of building cabs and pilots for railway locomotives, was a "laborer," within the meaning of Civ. Code 1895, § 4732, exempting the wages of journeymen, mechanics, and day laborers from process of garnishment. The fact that the laborer is paid according to the amount, and not the length of time of his work, does not preclude him from claiming the exemption. *Prather v. Pantone*, 54 S. E. 663, 125 Ga. 808 (citing *Johnson v. Hicks*, 48 S. E. 383, 120 Ga. 1002).

#### Skill used

The test for determining who is a "laborer" is whether the work of a particular person involves mental skill, business capacity, involving the exercise of the intellectual faculties, or whether the work depends on mere physical power and manual labor; in other words, whether mind or muscle preponderate in the performance of the work. *Thompson v. Passmore*, 72 S. E. 185, 186, 9 Ga. App. 771.

A person under a contract of employment contemplating services mainly of work requiring mental skill or business capacity,

and involving the exercise of his mental faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, is not a "laborer," whose wages are exempt from garnishment. *Tabb v. Mallette*, 47 S. E. 587, 588, 120 Ga. 97, 102 Am. St. Rep. 78.

#### **Bartender**

A person employed in a liquor store, whose duties were to open the store every morning during the week, to sweep the floors and dust and clean up the store, to wash counters and glasses and dust the shelves, to pour out drinks for the trade and to sell and deliver whiskies and wines in bottles, to receive into the house shipments of goods and to unpack shipments and place the same upon the shelves, to place beer in bottles on ice, tap and draw beer out of kegs, lift barrels of whisky onto the scaffolding, draw whisky out of them into bottles and place the same on the shelves to be sold, to build scaffolding on which to place the whisky barrels, and to erect fixtures in the bar, to handle the cash during his employer's absence, and to deposit and pay out the same according to directions, to give checks in the employer's absence when expressly directed to do so, and to keep such books as were incidental to the doing of a cash business, was a "laborer," within the meaning of the Laborers' Lien Law. *Bluthenthal & Bickart v. Bennefield*, 56 S. E. 517, 518, 127 Ga. 444, 119 Am. St. Rep. 350 (citing *Lowenstein v. Meyer*, 40 S. E. 726, 114 Ga. 709; *Oliver v. Boehm*, 63 Ga. 172).

#### **Bookkeeper**

An employ   of a contractor, who kept the books of his employer, superintended a part of the work, and was foreman of a squad of laborers, cannot be said, as a matter of law, to be such a "laborer" as would be entitled to a lien for his work, and there was no error in submitting this issue to the jury. *Tuck v. Moss Mfg. Co.*, 56 S. E. 1001, 1003, 127 Ga. 729 (quoting and adopting definition in *Oliver v. Macon Hardware Co.*, 25 S. E. 403, 98 Ga. 249, 58 Am. St. Rep. 800).

#### **Clerk**

An affidavit that affiant contracted with his employer "to clerk in his storehouse as a general clerk, in selling goods and doing other things in and about the storehouse and place of business" of the employer, at a named sum per month, did not show that he was a "laborer," so as to authorize foreclosure of a laborer's lien given by Code 1882,    1974. *Tuten v. Cudahy Packing Co.*, 66 S. E. 249, 133 Ga. 509.

A "laborer" is one who works at a toll-some occupation, a man who does work requiring little skill, as distinguished from an artisan, sometimes called a laboring man. Clerks, agents, cashiers of banks, and all

that class of employ  s, whose employment is associated with mental labor and skill, are not considered laborers, so as to have a lien for their wages. Primarily the word, in the sense in which it is used in Civ. Code 1895,    2792, giving a lien to laborers, does not include a clerk in a mercantile establishment, if his contract of employment contemplates that his services are to consist mainly of work requiring mental skill or business capacity and involving the exercise of his mental faculties rather than work, the doing of which properly would depend upon a mere physical power to perform ordinary manual labor. If, on the other hand, the work which his contract required him to do was, in the main, to be the performance of such labor as depended merely on physical power, he would be a laborer. The nature of the labor to be performed and whether the mental element preponderates or not is to be determined by the contract of employment, and one who claims a laborer's lien must be classified with reference to the character of the services required of him by his employer under the terms of his contract. *Howell v. Atkinson*, 59 S. E. 316, 319, 3 Ga. App. 58.

#### **Conductor**

A freight conductor, who has general control of the train and employ  s thereon, its running and management, procuring way-bills, making reports, attending to the delivery of freight, and generally performing work requiring the exercise of his intellectual faculties and business capacity is not a "laborer," within Civ. Code 1895,    4732, whose wages are exempt. *Robinson v. McWilliams-Rankin Co.*, 64 S. E. 717, 6 Ga. App. 203.

#### **Contractor**

The mechanic's lien act of 1883 and amendments thereto, giving a lien to "mechanics, laborers, and materialmen," does not give a lien to contractors. *Fleming v. Greener (Ind.)* 90 N. E. 73, 75.

Where plaintiff contracted to haul logs at a specified rate per thousand feet, he was not entitled to a laborer's lien; the word "laborer," in *Sayles' Ann. Civ. St.* 1897, art. 3339a, giving such lien, meaning one who labors with his hands for wages, and not including one who contracts for the hauling of lumber with his wagon and team. *Jackson v. Downs (Tex.)* 149 S. W. 286, 287.

One who agrees to furnish or pay for labor for another's benefit is a contractor, and not a servant or "laborer," within Act Aug. 15, 1903 (Acts 1903, p. 90), punishing one procuring money on a contract to perform services with intent to defraud. *Coleman v. State*, 65 S. E. 46, 47, 6 Ga. App. 398.

#### **Contractor on railroad**

Mechanic's Lien Act (Acts 1883, p. 140, c. 115), as amended in 1889 (Acts 1889, p.

257, c. 128), giving a lien to "mechanics, laborers," etc., was intended to protect the class of persons commonly known by those terms, who generally personally perform the work, and "laborers" does not embrace "contractors"; and hence section 12 of the act (Burns' Ann. St. 1908, § 8305), giving liens to persons performing work in the construction of a railroad, etc., does not apply to contractors. *Indianapolis Northern Traction Co. v. Brennan*, 87 N. E. 215, 220, 174 Ind. 1, 30 L. R. A. (N. S.) 85.

**As domestic servant**

See Domestic Servant.

**Employé distinguished**

See Employé.

**Foreman**

The services of a foreman who superintends and directs the laborers in the work of construction or repair are within Kirby's Dig. § 8661, giving a "laborer or other person who shall perform work or labor" a lien for his services. *St. Louis, I. M. & S. Ry. Co. v. Love*, 86 S. W. 395, 397, 74 Ark. 528 (citing Phil. Mech. Liens, § 158; *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262; *Mut. Ben. Life Ins. Co. v. Rowland*, 26 N. J. Eq. 389).

One who had a control over laborers in a mill, but who was hired as a millwright and general utility man, held, under the evidence, to be a "laborer" within the meaning of the statute relating to the guarding of machinery. *Watt v. Mishawaka Paper & Pulp Co. (Ind.)* 99 N. E. 1029, 1031.

**General manager**

The general manager of a corporation, though a director, is a "laborer" entitled to a preference, under the corporation act allowing a preference for wages due from an insolvent corporation to "all persons doing labor or service of whatever character in the regular employ of the corporation." The purpose of the statute is the preservation of the organized operative force of the corporation in a time of embarrassment, and the retention of the general manager as the important supervisory organizer of the operative force is peculiarly essential to the accomplishment of this purpose. *Buvinger v. Evening Union Printing Co.*, 65 Atl. 482, 484, 72 N. J. Eq. 321.

**Lawyer**

Laws N. Y. 1897, c. 415, § 8, provides that, "upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employés of such partnership or corporation shall be preferred to every other debt or claim." Section 2 defines the word "employé" as used in the act as meaning "a mechanic, workingman or laborer who works for another for hire." Held that, under the construction placed upon a similar prior statute by the Court of

Appeals of the state, an attorney at law employed by an electric company to procure options on certain property, and water power sites which the company desired to buy, at an understood compensation of \$10 per day, and expenses for the time employed in the service, was not a "workingman" or "laborer," and hence not an "employé" entitled to preference under the statute. *Gay v. Hudson River Electric Power Co.*, 178 Fed. 499, 501.

**Merchant distinguished**

See Merchant.

**Night watchman**

A person whose wages it was sought to garnish was employed by garnishee as night watchman. His duties consisted mainly in walking about the premises and keeping tramps away and seeing that fire did not break out, but he was without authority to arrest any one and only drove them off the premises when found loitering. He worked 12 hours a day and made a round each hour, about 20 minutes being occupied in making the same, and had to register 16 times during the round. He had a license to run an engine, and each morning, after making his eleventh round, fired the boiler, which took him about 30 minutes, and he was required to remain in the boiler room in all about 1 hour and 40 minutes. Held to authorize a finding that he was a "laborer," so as to exempt his wages. *McAdams v. Ellis*, 62 S. E. 1001, 5 Ga. App. 262.

**Officer**

Officers are not within Revisal 1908, § 1206, providing that, in case of insolvency of a corporation, "laborers" and "workmen" shall have a prior lien on its assets for work and labor. *Alexander v. Farrow*, 66 S. E. 209, 210, 151 N. C. 320.

**Preacher**

The common understanding of the term "laborers" does not include preachers. *Holy Trinity Church v. United States*, 12 Sup. Ct. 511, 513, 143 U. S. 457, 36 L. Ed. 226.

**Servant synonymous**

See Servant.

**Stenographer**

A stenographer to the assistant manager of a corporation, who receives letters by dictation and transcribes the same, preserves office records, addresses and mails letters, and performs generally the duties of amanuensis in the office, whose salary is payable semi-monthly, and whose term of service is not fixed, is a "laborer," whose wages are exempt from garnishment. *Cohen v. Aldrich*, 62 S. E. 1015, 1016, 5 Ga. App. 256.

**Subcontractor**

Laborer, as subcontractor, see Subcontractor.

The mechanic's lien act of 1883 and amendments thereto, giving a lien to "me-

chanics, laborers, and materialmen," does not give a lien to subcontractors. *Fleming v. Greener* (Ind.) 90 N. E. 73, 75.

The term "laborer," as used in *Mechanics' Lien Law* (P. L. 1898, p. 538) § 3, giving a lien to laborers to secure wages earned, would not include a subcontractor, who excavated the cellar of a building with his teams and laborers at a specified price per cubic yard. *McNab & Harlin Mfg. Co. v. Paterson Bldg. Co.* (N. J.) 63 Atl. 709, 717.

A "laborer" is one who furnishes his personal service, of a grade commonly performed by persons working by the day, while a subcontractor is one who agrees to do a particular act covered by a superior contract. There is no distinction between the term "laborer" and the term "employé," as regards the element of personal service. Commonly understood, the latter is broader than the former in that it includes persons in a higher degree of employment. The term "laborer" cannot be construed as designating one who contracts for and furnishes the labor and services of another, or one who contracts for and furnishes one or more teams for work, whether with or without his own services, but such person is properly described as a contractor. *Farmer v. St. Croix Power Co.*, 93 N. W. 830, 834, 117 Wis. 76, 98 Am. St. Rep. 914 (citing *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521; *Farmers' Loan & Trust Co. v. Canada & St. L. R. Co.*, 26 N. E. 784, 127 Ind. 250, 11 L. R. A. 740; *Watson v. Watson Mfg. Co.*, 30 N. J. Eq. 588; *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358).

#### Superintendent

A superintendent in the employ of a contractor, who occasionally assists in laying cement blocks used in the construction of the building, but whose main duties are to employ, pay off, and discharge the laborers, and supervise and direct them while at work, is not a "laborer" within, and so entitled to the benefit of, Code 1906, § 3074, part of the mechanic's lien law; but, to constitute a person a "laborer" physical toil must be the main ingredient of the services rendered by him. *Williams v. Alcorn Electric Light Co.*, 53 South. 958, 959, 98 Miss. 468, Ann. Cas. 1913B, 137.

A superintendent of a mill, whose duties consist in overseeing the milling operations, conducting a commissary store, and keeping the books, and who does not perform any manual labor, is not a "laborer" within Const. art. 14, § 4, requiring the General Assembly to enact legislation giving mechanics and laborers a lien on the subject-matter of their labor, and does not perform "labor" within Code, § 1255, which carries the provisions of the Constitution into effect. *Moore v. American Industrial Co.*, 50 S. E. 687, 688, 138 N. C. 304.

Under Revisal 1906, § 2016, giving laborers and mechanics a lien for work done up-

on buildings, a "laborer or mechanic" is one engaged in manual labor or onerous work with his hands, and so one superintending the erection of a building is not entitled to a lien for his services. *Stephens v. Hicks*, 72 S. E. 313, 314, 156 N. C. 239, 36 L. R. A. (N. S.) 354, Ann. Cas. 1913A, 272.

#### Switchman

A railroad switchman is a "laborer" in the sense of Code Prac. art. 644, as amended by Acts 1876, p. 123, No. 79, exempting laborers' wages from seizure under execution. *Schroeder v. Collins*, 37 South. 722, 113 La. 778.

#### Teamster

The word "laborer" means one who labors with his hands for wages, and does not include one who contracts for the hauling of lumber with his wagon and team at a fixed price per 1,000 feet of lumber hauled. Where petitioners were engaged by an insolvent mill company to haul logs with their own teams at a certain price per 1000 feet, petitioners were not "laborers" and were not entitled to a preferred lien for the amount due them, under *Sayles' Ann. Civ. St.* 1897, art. 3339a, providing that, whenever any "laborer" may labor or perform any service in any mill by virtue of any contract or agreement, etc., he shall have a first lien. *Sparks v. Crescent Lumber Co.*, 89 S. W. 423, 424, 40 Tex. Civ. App. 222 (citing *St. Louis, A. & T. Ry. Co. v. Mathews*, 12 S. W. 976, 75 Tex. 94).

#### Workman distinguished

Workman is the general term which frequently applies to one who does relatively skilled work, as contrasted with a "laborer," whose work demands strength or exertion rather than skill. *State v. City of Ottawa*, 113 Pac. 391, 393, 84 Kan. 100.

#### LABORER FOR WAGES

The phrase "laborer for wages," in a statute giving a lien to such on agricultural products, means those who cultivate on shares and receive a portion of the crop in payment for their labor, as well as those who work for money. *Betts v. Ratliff*, 50 Miss. 561, 570.

#### LACE

See *Cotton Laces*; *Imitation Lace*; *Real Lace*.

Articles made of, see *Articles*.

The names given to articles by retailers puffing their wares, and by the women who buy them, do not control in the classification of merchandise under the tariff laws, and goods are not classifiable as lace simply because they are usually dealt in by the retail trade in this country as "lace" articles. The provision in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181, for articles of "lace" and of imitation "lace," does not include women's collars and cuffs,

composed of braids sewn together by hand, and ornamented with threads and other materials. *D. S. Hesse & Bro. v. United States*, 154 Fed. 171, 172 (citing *Kleeberg v. United States*, 72 Fed. 252, 254; *Sidenberg v. Robertson*, 41 Fed. 763).

Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181, relating to "articles made \* \* \* of lace," includes goods made by sewing together pieces of lace produced in shapes designed to be used in making the articles; the term "lace" not being restricted to articles made up from lace that is bought and sold by the yard. *Goldenberg Bros. & Co. v. United States*, 157 Fed. 1003, 85 C. C. A. 678.

Straw lace sewed with thread which constitutes a substantial element of its cost, and without which the material could not be held together or be a merchantable article is not within the provision in paragraph 400, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 189, for "lace" composed "wholly" of straw, but is dutiable as a manufacture in chief value of straw, under paragraph 449 of said act (30 Stat. 193). *Kurtz, Stuboeck & Co. v. United States*, 136 Fed. 268, 269.

## LACER

See Belt Lacer.

## LACHES

"Laches" is an equitable doctrine applied independently of the statute of limitations to assist in reaching an equitable result. *Walther v. Null*, 134 S. W. 993, 999, 233 Mo. 104.

"Laches" is an equitable doctrine, proceeding, regardless of the statute of limitations, to do equity, and is only applied to work out equitable results. *Adams v. Gosom*, 129 S. W. 16, 21, 228 Mo. 566.

In general, "laches" is neglect to do what in the law should have been done for an unreasonable or an unexplained length of time under circumstances permitting diligence. *Newberry v. Wilkinson*, 199 Fed. 673, 686, 118 C. C. A. 111.

The doctrine of "laches" is an equitable principle invoked to promote, but never to defeat, justice. It has no function where the analogous action at law is not barred and no unusual conditions invoke its application. *Brun v. Mann*, 151 Fed. 145, 154, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

"'Laches' is a defense peculiar to a court of equity, the practice of which is to deny affirmative relief to a party who applies therefor after unreasonable delay." *Sheffield-King Mill Co. v. Sheffield Mill & Elevator Co.*, 117 N. W. 447, 449, 105 Minn. 315, 127 Am. St. Rep. 574.

"Laches" is an equitable defense, and is allowed, in order to do justice, in view of

the relations of the parties to each other and to the subject-matter, under the particular circumstances of the case without regard to the statute of limitations or any fixed period. *Rutter v. Carothers*, 122 S. W. 1056, 1059, 223 Mo. 631.

"Laches" is an equitable defense, and the right to plead it is confined to claims for purely equitable remedies, and it cannot be properly pleaded in courts of law, especially in actions where plaintiff seeks to enforce a strict legal right. *Waits v. Moore*, 115 S. W. 931, 932, 89 Ark. 19.

"Laches" is negligence or omission reasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained lapse of time, and under circumstances where the delay has been prejudicial to an adverse party, and when it would be inequitable to enforce the right. *Leathers v. Stewart*, 79 Atl. 16, 18, 108 Me. 96, Ann. Cas. 1913B, 366.

"Laches" is defined as such neglect or omission to assert a right, as taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay. *Cahill v. Superior Court of City and County of San Francisco*, 78 Pac. 467, 469, 145 Cal. 42 (citing *Taylor v. Board of Councilmen of City of Bayonne*, 30 Atl. 431, 57 N. J. Law, 378; *People v. Common Council of Syracuse*, 78 N. Y. 56; *Chinn v. Trustees*, 32 Ohio St. 236; *Merrill, Mandamus*, § 87; *Wood, Mandamus*, 40).

"'Laches' is neglect or omission to assert a right." As parties who inherit lands of a grantor, in case he dies intestate, have no present right during his life to bring a suit to cancel his deed on the ground of mental incapacity, laches cannot be imputed to them until a legal right attaches in them by his death. *Ring v. Lawless*, 60 N. E. 881, 883, 190 Ill. 520.

"When the foundations of \* \* \* equity jurisprudence were first laid, \* \* \* it was declared that, whenever a party invoked the extraordinary powers of a court of equity to compel the specific performance of a contract, he must proceed with both diligence and promptness. The absence of this diligence has long since been crystalized in the legal term 'laches,' which is incapable of an exact definition, and \* \* \* is not \* \* \* dependent upon \* \* \* the lapse of time. \* \* \* The defense of laches is in no sense dependent upon the statute of limitations. The lapse of time and the staleness of the claim are undoubtedly the gov-



erning considerations which control the application of this rule, but the parties are always held bound to proceed with reasonable diligence in the enforcement of their rights." *Woodruff v. Williams*, 85 Pac. 90, 99, 35 Colo. 28, 5 L. R. A. (N. S.) 986 (quoting and adopting definition in *Hagerman v. Bates*, 38 Pac. 1104, 5 Colo. App. 402).

"Laches" is not like limitations, but is a question of the inequity of permitting a claim to be enforced, and it depends on whether, under all the circumstances, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. *Venner v. Chicago City Ry. Co.*, 86 N. E. 266, 273, 236 Ill. 349.

The defenses of laches, waiver, and estoppel are in a certain sense akin to each other, and run into each other: yet they are distinct defenses. "Laches," with some supporting circumstances, may run into waiver, and likewise into estoppel; but each has its own individuality. Waiver may run into estoppel. *Berwind-White Coal Min. Co. v. Metropolitan S. S. Co.*, 173 Fed. 806, 809.

There is no absolute rule as to what is "laches." If there has been an unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, or suffers his adversary to incur expense, enter into obligations, or otherwise change his position, or if he in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, equity will ordinarily refuse aid for the establishment of an admitted right, especially if an injunction is asked, diligence being a prerequisite to equitable relief of that nature; but so long as there is no knowledge of the wrong committed, and no refusal to embrace opportunity to ascertain facts, there can be no laches. On discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means for relief; but one who openly defies known rights, in the absence of anything to mislead him, or to indicate assent or abandonment of intent to oppose on the part of others, cannot urge as a bar to relief failure to take the most instant conceivable resort to the courts. Mere lapse of time, although an important element, is not necessarily a decisive consideration. *Stewart v. Finkelstone*, 92 N. E. 37, 39, 206 Mass. 28, 28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370.

"Laches" is of the nature of estoppel. Courts apply it to suits in equity by analogy to the statute of limitations to protect innocent parties and to avoid inequitable results. In the absence of extraordinary circumstances, such as the destruction of muniments of title, the death or removal of parties, many

innocent purchasers, radical changes in the condition or value of property or its speculative character, courts of equity never apply the doctrine of laches earlier than at the expiration of the time limited for the commencement of analogous actions at law." *Brown v. Arnold*, 131 Fed. 723, 727, 67 C. C. A. 125 (citing *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21).

Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law the question of diligence is determined by the language of the statute, and, if an action is brought a day before the statutory time expires, it will be sustained, but, if the day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is not adapted to the flexible remedies of a court of equity, since the statute frequently works great practical injustice, while the equity doctrine of "laches" never does. Lapse of time is one of the chief ingredients in laches, but there are other ingredients of almost equal importance, such as change in the value of the property and diligence in availing one's self of means of knowledge within his control. *Mexican Nat. Coal, Timber & Iron Co. v. Frank*, 154 Fed. 217, 235.

"The doctrine of 'laches' rests upon equitable principles, which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case. The ultimate inquiry is on which side would fall the balance of justice in sustaining or denying the defense. The important elements to be considered are the length of time which has elapsed, the nature of the acts which have been done in the meanwhile, the knowledge which the complainant had of the fraud which he charged, and the time when he acquired that knowledge, and the change in the situation during neglectful repose, either as to the loss of evidence, which would have been available to the defendant, or the advance in value of the property which may be the subject of the suit." *Northern Pac. R. Co. v. Boyd*, 177 Fed. 804, 823, 101 C. C. A. 18 (citing *Gallher v. Cadwell*, 12 Sup. Ct. 873, 145 U. S. 363, 36 L. Ed. 738; *Wilson v. Wilson*, 69 Pac. 923, 41 Or. 459).

What will constitute "laches" in a given case depends on the discretion of the court, and, unless that discretion is abused, it will not be interfered with. *Evans v. Woodsworth*, 72 N. E. 1082, 1083, 213 Ill. 404.

"In the application of the doctrine of 'laches,' the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations." *Williams v. Neely*,

134 Fed. 1, 13, 67 C. C. A. 171, 69 L. R. A. 232.

The rule as to "laches" invoked by courts of equity in analogy to statutory limitations of the time within which actions may be brought in courts of law to discourage the assertion of stale claims does not involve the laches contemplated by Civ. Code, § 1691, which provides that, upon discovering the fraud, rescission must be promptly sought, if the defrauded party is free from duress and aware of his right to rescind. *Richards v. Farmers' & Merchants' Bank*, 94 Pac. 393, 398, 7 Cal. App. 387.

"Laches" cannot be predicated of one whose delay is occasioned by constant assurances of his resident agent that legal proceedings would be useless and by frequent promises that payment will be procured without such proceedings. *Cushing v. Schoeneman*, 96 N. W. 346, 348, 1 Neb. (Unof.) 482.

The maxim that "the laws serve the vigilant, and not those who sleep," is applied only to the case where the party is silent, and permits an interference with his alleged rights, without adequately and seasonably protecting them. Where complainant, a licensee of the exclusive right to use and sell patented phonographs and graphophones in a certain district, brought suit against defendant, a corporation, which succeeded to the rights of the licensor, for breach of covenant in the license within five years after defendant's incorporation, and within less than three years after the termination of fruitless negotiations to settle, and there was no evidence that complainant had acquiesced in defendant's intrusion into such field, complainant was not barred by "laches." *New York Phonograph Co. v. Edison*, 136 Fed. 600, 607 (citing *Bradford v. Belknap Motor Co.*, 105 Fed. 63; *Ide v. Trorlicht, Duncker & Renard Carpet Co.*, 115 Fed. 137, 53 C. C. A. 341; *Richardson v. D. M. Osborne & Co.*, 93 Fed. 828, 36 C. C. A. 610; *Saxlehner v. Elsner & Mendelson Co.*, 19 Sup. Ct. 886, 173 U. S. 704).

#### Change in status of parties or property

It is only prejudicial delay which constitutes "laches," but it does not follow that such prejudice must always be affirmatively shown. *McNeil v. McNeil*, 170 Fed. 289, 291, 95 C. C. A. 485.

"Laches" is not a matter of time merely, but of inequity, and delay will not bar a suit in equity before it would be barred at law by limitation, unless the delay has been prejudicial to the defendant. *Brissell v. Knapp*, 155 Fed. 809, 810 (citing *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14; *Williamson v. Monroe*, 101 Fed. 322, 330; *Gallihier v. Cadwell*, 12 Sup. Ct. 873, 875, 145 U. S. 368, 373, 36 L. Ed. 738).

"Laches" is such delay in enforcing one's right as works disadvantage to another, or

such delay as will warrant the presumption that the party has waived his right. *Snyder v. Charleston & S. Bridge Co.*, 63 S. E. 616, 619, 65 W. Va. 1, 131 Am. St. Rep. 947.

"Laches" is negligence by which another has been led into changing his condition as to the property or right in question, making it inequitable to allow the negligent party to be preferred on his legal right. *Hughes v. Wallace (Ky.)* 118 S. W. 324, 326.

"Laches" is not mere delay, but a delay in enforcing rights against another until the condition of the latter has in good faith become so changed that he cannot be restored to his former state. *Tatum v. Arkansas Lum. Co.*, 146 S. W. 135, 136, 103 Ark. 251.

"Laches" is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced and inequity founded upon some change in the condition of relations of the property of parties." *Ryason v. Dunten*, 73 N. E. 74, 77, 164 Ind. 85 (quoting and adopting definition in *Gallihier v. Cadwell*, 12 Sup. Ct. 873, 145 U. S. 368, 36 L. Ed. 738).

"Laches," unlike limitation, does not depend upon time, but principally on the inequity of permitting the claim to be enforced; an inequity founded upon some change in the condition, or the relations of the property or the parties, and in legal significance constitutes not mere delay, but delay that works a disadvantage to another; and whether it exists in a particular case is a question addressed to the sound discretion of the court, depending upon all the surrounding facts. *Shearer v. Hütterische Bruder Gemeinde*, 134 N. W. 63, 65, 28 S. D. 509.

"Mere delay in bringing a suit will not deprive a party of his remedy, unless such neglect has so prejudiced the other party, by loss of testimony or means of proof or changed relations, that it would be unjust to now permit him to exercise his right." *Farr v. Hauenstein*, 61 Atl. 147, 69 N. J. Eq. 740 (citing *Lundy v. Seymour*, 35 Atl. 893, 55 N. J. Eq. 1, 9).

The lapse of time which might induce the application of the doctrine of laches is not a determined period, and depends upon the circumstances of the particular case. One principle pervades all cases involving the defense of laches, and that is that not only must there be a seemingly necessary delay on the part of the plaintiff in bringing or prosecuting his action, but that, by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of plaintiff to be enforced. *London & San Francisco Bank v. Dexter, Horton & Co.*, 126 Fed. 593, 601, 61 C. C. A. 515 (quoting *Gallihier v. Cadwell*, 12 Sup. Ct. 873, 145 U. S. 368, 36 L. Ed. 738; *Halstead v. Grinnan*, 14 Sup. Ct. 641, 152 U. S. 412, 38 L. Ed. 495; *Wheeling Bridge &*

*Terminal R. Co. v. Reymann Brewing Co.*, 90 Fed. 189, 32 C. C. A. 571).

"Statutes of limitation," as applied in courts of law, are inflexible and framed upon the theory that mere lapse of time, irrespective of other considerations, should bar the claim, while the doctrine of "laches," applied in courts of equity, is sufficiently flexible to give reasonable effect to the special circumstances of any case, and rests, not alone upon the lapse of time, but upon the inequity of permitting the claim to be enforced, because of some change in the condition or relations of the property or the parties. *Stevens v. Grand Central Min. Co.*, 133 Fed. 28, 31, 67 C. C. A. 284 (citing *Hammond v. Hopkins*, 12 Sup. Ct. 418, 143 U. S. 224, 250, 38 L. Ed. 134; *Townsend v. Vanderwerker*, 16 Sup. Ct. 258, 160 U. S. 171, 186, 40 L. Ed. 383; *Ward v. Sherman*, 24 Sup. Ct. 227, 192 U. S. 168, 176, 48 L. Ed. 391; *Bryan v. Kales*, 10 Sup. Ct. 435, 134 U. S. 126, 135, 33 L. Ed. 829).

"'Laches' in bringing an action cannot be successfully interposed as a defense, unless delay in this respect has injuriously affected the party against whom suit is brought, or his position has been altered to his prejudice thereby." Where a husband fraudulently conveyed a boarding house to his wife, and continued the business in the same manner as before, and the wife devoted no more time or money in improving the property and business than she would have done had title remained in her husband, so that laches by the husband's creditor in instituting a creditors' suit not having been prejudicial to the wife, it was no defense to the bill. *Helm v. Brewster*, 93 Pac. 1101, 1105, 42 Colo. 25; *Morgan v. King*, 63 Pac. 416, 27 Colo. 539; *Farris v. Wirt*, 63 Pac. 946, 16 Colo. App. 1; *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750).

"'Laches' will bar an equity, but lapse of time alone may not be sufficient to constitute laches. It depends upon whether conditions have been changed, resulting in injury to defendant on account of the delay." Where the state's deed to swamp lands is regular on its face, a suit by the state to cancel the deed on the ground of its insufficiency and the falsity of the affidavits as to the extent of cultivation may be barred by equitable limitations, and it is *prima facie* guilty of "laches," where more than the statutory period has elapsed since the execution of the deed, and the facts presented do not excuse the delay. *State v. Warner Valley Stock Co.*, 106 Pac. 780, 786, 56 Or. 283.

"Laches" is not mere delay, but delay working a disadvantage to another, and, so long as parties are in the same condition, it matters little whether one presses a right promptly or slowly within limits allowed by law; and the doctrine of laches is founded on the maxims of equity that he who seeks

equity must do equity, and that he who comes into equity must come with clean hands, and that the law serves the vigilant, and its object is to exact of a party fair dealing with his adversary. *Comans v. Tapley*, 57 South. 567, 573, 101 Miss. 203.

"'Laches,' in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within the limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. This disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes, for, where the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." *Chancellor v. Banks*, 123 S. W. 650, 651, 92 Ark. 497 (quoting and adopting definition in *Osceola Land Co. v. Henderson*, 100 S. W. 896, 898, 81 Ark. 432, 439); *Ruckman v. Cox*, 59 S. E. 760, 762, 63 W. Va. 74.

"One important principle involved in the term 'laches' is that after a long lapse of years, during which testimony is impaired or destroyed, witnesses remove or die, their recollection is dimmed or lost, and papers, letters, documents, books, records, etc., are lost or destroyed, or, if not lost or destroyed, are in the hands of persons not familiar with their contents, liable to misinterpret them, unable to supply their defects, or correct the same, or explain them from the memory of living witnesses, the defendant is at the complete mercy of any claimants who may wish to take advantage of the situation. Time impairs and destroys evidence of the true facts, and makes it practically impossible to meet positive testimony of the complainants, whether the same be true or untrue. A court of equity, therefore, finding itself unable to render substantial justice between the parties, asserts the principle of laches on the ground of public policy and for the repose of property rights." This declaration of the master is in entire harmony with our view of what is shown by this record and the law applicable to it. *Dempster v. Rosehill Cemetery Co.*, 68 N. E. 1070, 1074, 206 Ill. 261.

#### **Delay alone insufficient**

Mere delay is not of itself laches, but the delay must have worked injury to another. *Wills v. Nehalem Coal Co.*, 96 Pac. 528, 535, 52 Or. 70.

"Laches" is not mere delay, but delay that works a disadvantage to another, and, so long as the parties are in the same condition, the failure to assert a right, before the running of statutory limitations, is not laches.

Stephens v. Dubois, 76 Atl. 656, 660, 31 R. I. 138, 140 Am. St. Rep. 741.

The doctrine of "laches" as a defense to a suit in equity implies something more than a mere lapse of time; and, to constitute a defense, it must be unreasonable. Baird v. Erie R. Co., 129 N. Y. Supp. 329, 347, 72 Misc. Rep. 162.

In order that "laches" may bar a suit in equity, it must appear that, beyond the mere lapse of time, it would be inequitable in some matter of substance to permit the claimant to assert his alleged right as against those having enjoyed the same in repose in the meanwhile. Stuart v. Holland, 179 Fed. Rep. 969, 971.

The defense of "laches" does not depend on any limitations, but is in the nature of an equitable estoppel, and a great lapse of time, if reasonably excused and without danger to defendant, may be ignored, while slight delay, accompanied by circumstances of negligence, apparent acquiescence, or danger of defendant's position, is sufficient to establish laches. Likens v. Likens, 117 N. W. 799, 801, 136 Wis. 321.

"Limitations" and "laches," when applied to the period within which an equitable right may be asserted, are not synonymous.

"Limitations" signify that fixed statutory period, whether expressly applicable to suits in chancery or followed by analogy, while "laches" signifies unreasonable delay independent of statute or any fixed period of time. "Laches" also involves prejudice, actual or implied, resulting from the delay. It does not arise from delay alone, but from delay which works disadvantage to another, as the defense of laches is neither a limitation nor an estoppel, but partakes of the characteristics of both. Wilder's Ex'x v. Wilder, 72 Atl. 203, 205, 82 Vt. 123.

"The general rule as to 'laches' is that, where the action is at law, mere delay will not bar the action, unless it covers the statutory period, and unless the doctrine of estoppel can be successfully invoked." Thomas v. Holmes, 120 N. W. 636, 142 Iowa, 288 (citing Doyle v. Burns, 99 N. W. 195, 123 Iowa, 488).

No arbitrary rule exists for determining when a demand becomes stale, or what delay will be excused; and the question of "laches" is to be decided upon the particular circumstances of each case. Unreasonable delay alone, independently of any statute of limitations, may operate as a bar to equitable relief. Generally, however, when a statute of limitations is applicable, lapse of time alone, short of the period of limitation, will not operate as bar. "In applying the doctrine of 'laches,' the inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action, and whether a reasonable excuse is offered for the delay." Harrison v. Rice, 114 N. W. 151, 152, 78 Neb.

659 (quoting Hawley v. Von Lanken, 106 N. W. 456, 75 Neb. 597).

When the assertion of the right is neglected or omitted for a period of time more or less great, and under such circumstances as to cause prejudice to an adverse party, it may operate as a bar in equity. Although a proper ingredient in the law of "laches," the instances seem to be rare where courts have declared that mere lapse of time may effect a positive bar, even in case of purely equitable jurisdiction, while, on the other hand, relief has frequently been granted, notwithstanding great delay, when substantial justice could yet be done between the parties. Therefore mere lapse of time where the parties remain in the same relative position, the delay working no serious wrong to the adverse party and justice being possible, will not operate as a bar in equity. Roberts v. Braffett, 92 Pac. 789, 801, 33 Utah, 51 (quoting Hamilton v. Dooley, 15 Utah, 280, 49 Pac. 769, and citing 5 Words and Phrases, pp. 3969-3972).

It is a well-established doctrine that the defense of laches does not rest entirely upon lapse of time, nor require any specific period of delay, as does the statute of limitations. But, in order to constitute "laches," there must be something more than mere delay by the plaintiff, accompanied by an expenditure of money or effort on the part of the defendant. It must also appear that it will be inequitable to enforce the claim. Verdugo Canon Water Co. v. Verdugo, 93 Pac. 1021, 1029, 152 Cal. 655.

"'Laches,' in a general sense, is such negligence in bringing an action or otherwise asserting one's right as will preclude him from obtaining equitable relief. \* \* \* Mere delay does not constitute laches, unless the circumstances were such as to make the delay blamable. Whether the delay has been culpable or not depends upon many circumstances, such as knowledge of the facts, infancy or other personal disability, mistake, undisturbed possession, and the consequences of the delay to others. \* \* \* The practical question in each case is whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." Lloyd v. Simons, 105 N. W. Rep. 902, 903, 97 Minn. 315 (citing and adopting 1 Thomp. Trials, § 1437; 16 Cyc. pp. 152, 167; 5 Words and Phrases, p. 3969; Sanborn v. Eads, 36 N. W. 338, 38 Minn. 211; Hayes v. Carroll, 78 N. W. 1017, 74 Minn. 134; Wall v. Melke, 94 N. W. 688, 89 Minn. 232).

A delay in the prosecution of a suit to foreclose a mortgage does not prevent the granting of proper relief where either party could have compelled a hearing, but both failed to act, especially since delay unaccompanied by circumstances, which in some way show inexcusable negligence, which will re-

sult in giving the party in fault an unfair advantage, or which will produce injustice in some way, is ordinarily, when standing alone, insufficient to prevent relief on the ground of laches. *Utah Commercial & Savings Bank v. Fox* (Utah) 120 Pac. 840, 845.

#### Knowledge of facts or rights implied

"Laches" is the creature of circumstances. It is inaction when, in good conscience, there should be action. Inactivity, when it is not blamable, is not laches. No one can be charged with negligence in the assertion of his rights unless he knew them, or is blamable for not knowing them. There is no such thing as acquiescence in a wrong, unless there is notice or knowledge of that wrong. *Kessler & Co. v. Ensley Co.*, 129 Fed. 397, 418.

Where a petition to revoke a bankrupt's discharge for fraud alleged that the fraud was not known to petitioners until after the discharge, and they had no opportunity before that time to interpose the fraud in opposition to the discharge as alleged, they were not chargeable with "laches." *In re Griffin Bros.*, 154 Fed. 537, 539.

Full knowledge of all the facts concurring with a delay for unreasonable length of time are the essential elements of the defense of laches, and laches does not begin to run until knowledge is shown to exist. *Wills v. Nehalem Coal Co.*, 96 Pac. 528, 535, 52 Or. 70.

"Laches" rests in a large degree on acquiescence, which presupposes notice of a status opposed to the title or equity sought to be enforced. *Butt v. McAlpine*, 52 South. 420, 423, 167 Ala. 521.

The doctrine of "laches" carries with it the idea of acquiescence on the part of him charged, and so it cannot be invoked to bar the right of one non compos mentis to set aside a fraudulent conveyance made by his guardian. *Bradley v. Singletary* (Ala.) 59 South. 58.

"Laches is not, like limitation, a mere matter of time, but rather a question of the inequity of granting the relief." Laches cannot be successfully invoked in aid of a publisher of an infringing article, when it does not appear that the owner of the copyrighted article had knowledge of the infringement, or that he had notice of any fact sufficient to put him on inquiry. *Encyclopedia Britannica Co. v. American Newspaper Ass'n*, 130 Fed. 460, 467 (citing *Gallagher v. Cadwell*, 12 Sup. Ct. 873, 145 U. S. 368, 36 L. Ed. 738; *Old Colony Trust Co. v. Dubuque Light & Traction Co.*, 89 Fed. 794).

"Laches" has been defined to be such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great and other circumstances causing prejudice to an adverse party, operates as a bar in court of equity. The petitioner,

having no notice or knowledge of the proceedings to probate a will, who files a petition to set aside the probate within a year of the date of the probate, is not guilty of laches. *Wright v. Simpson*, 65 N. E. 628, 631. 200 Ill. 56.

#### As neglect of legal duty

Laches is such neglect to assert a right as taken in connection with lapse of time and other circumstances causing prejudice to another party operates as a bar in a court of equity, and, to constitute laches, there must be a legal duty to do some act, a failure to do that act, and attending circumstances which cause prejudice to the adverse party. *Houck v. Houck*, 76 Atl. 581, 585, 112 Md. 122.

"Laches" consists in an inexcusable delay in asserting a right. It involves negligence, and arises from a failure in duty. Without such failure there can be no laches. *Allis v. Hall*, 56 Atl. 637, 642, 76 Conn. 322.

"'Laches' may be regarded as an equitable statute of limitations, and is applied to equity cases in analogy to legal statutes applied to cases at law. And generally he would not be barred in equity. In *Babb v. Sullivan*, 21 S. E. 277, 43 S. C. 436, 441, Judge Benet gives the following definition of laches: 'Delay is not the sole factor that constitutes laches. If it were so, some period fixed by statute or by common law of the courts would afford a safe and unvarying rule. Laches connotes, not only undue lapse of time, but also negligence and opportunity to have acted sooner; and all three factors must be satisfactorily shown before the bar in equity is complete. Other factors of lesser importance sometimes demand consideration, such as the nature of the property involved, or the subject-matter of the suit, or the like. As a definition of laches, however, it is sufficiently correct to say that it is the neglecting or omitting to do what in law should have been done, and this for an unreasonable and unexplained length of time, and in circumstances which afforded opportunity for diligence.'" *Brock v. Kirkpatrick*, 52 S. E. 592, 596, 597, 72 S. C. 491 (citing *Wagner v. Sanders*, 39 S. E. 950, 62 S. C. 73, 89).

Quoting from *Demuth v. Old Town Bank*, 37 Atl. 266, 85 Md. 326, 60 Am. St. Rep. 322, "strictly speaking," "and using the term as it is understood in law, 'laches' is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." Lord Ellenborough observed in *Sebag v. Abitbol*, 4 Maule & S. 462: "Laches is a neglect to do something which by law a man is obliged to do." Obviously, then, there must be a duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine can be suc-

cessfully invoked. Mere lapse of time, without more, unless of sufficient duration to amount to and constitute the bar of the statute of limitations, will not be sufficient. In a suit filed April 22, 1901, to vacate a fraudulent conveyance of land on a claim of indebtedness of the vendor dating from 1885, the vendor and vendee were made defendants. The vendor answered on the day suit was filed, admitting the indebtedness, but denying fraudulent intent. The vendee answered May 28, 1901, denying the fraud, and filed with his answer as an exhibit the affidavit of the vendor that she had not authorized any person to file an answer for her, and that she was never indebted to plaintiff. Plaintiff died May 31, 1901. The vendor died January 29, 1902, and the vendee died May 1, 1902, having on January 3, 1902, deeded the property to another. On March 18, 1902, a corporation purchased the property, and on May 22, 1902, discovered the suit, filed a petition setting up interest, and asked to be made a party, which was granted. After various other steps in the proceedings, the plaintiff's administrator filed a petition on June 1, 1903, to revive the action, and have himself made plaintiff. Held, that "laches" could not be predicated of the administrator's failure, prior to the death of the vendor, to take notice of the vendor's affidavit. Nor was it laches for the administrator to fail to take notice of the fraudulent vendee's suggestion of the abatement of the suit by the death of the original plaintiff. The administrator's failure on February 14, 1902, at the time of procuring an order admitting him as plaintiff, to mention the death of the fraudulent vendor, and to make the first purchaser pendente lite a party, was not laches. Laches could not be imputed because of the administrator's delay of four days from the time letters were issued to him on the estate of the original plaintiff and the filing of his petition to be made plaintiff in the cause; it appearing that after her death a contest arose as to the appointment, which was not adjusted until three days before the letters were issued. Nor could laches be imputed on account of the staleness of the claim when suit was inaugurated; there being nothing on the face of the bill to indicate how long the indebtedness had been overdue. *Sinclair v. Auxiliary Realty Co. of Baltimore City*, 57 Atl. 664, 668, 99 Md. 223.

#### As a presumption

"It has always been a principle of equity to discourage stale demands, and 'laches' is often a defense wholly independent of the statute of limitations. \* \* \* Mere delay is not always laches, and laches in the assertion of a right is not always sufficient to defeat it. The laches must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim or such as to prevent a proper defense by reason of the

death of the parties, loss of evidence, or otherwise. \* \* \* Whether the lapse of time is sufficient to bar a recovery must of necessity depend upon the particular circumstances of each case." An absentee's delay of 15 years in suing for a legacy which had been paid to an administrator for him was not such "laches" as to bar his right of action, where the executor, whose duty it was to pay the legacy, was still living, and no evidence had been lost or destroyed, and there was no uncertainty in the amount due, nor any presumption of payment. *Selden v. Kennedy*, 52 S. E. 635, 637, 104 Va. 826.

## LACK OF MUTUALITY

See Mutuality.

## LACK OF PROBABLE CAUSE

See Malice.

## LACTARENE

Casein is "lactarene," as enumerated in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 594, 30 Stat. 199. *United States v. Brownell*, 166 Fed. 1022, 92 C. C. A. 668.

So-called casein industrielle, which is produced by drying the substance left after drawing off the whey from skimmed milk that has been allowed to sour, held to be "lactarene," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 594, 30 Stat. 199. *B. P. Ducas Co. v. United States*, 143 Fed. 362.

## LADDER

As place of work, see Place.

## LADEN

The term "laden in bulk," like the term "stored in bulk," means having a cargo loose in the hold or not inclosed in boxes, bales, or casks. *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, 1022, 119 Ky. 75.

## LADING

See Bill of Lading.

## LAGER BEER

"Lager beer" is an unequivocal term, designating a light German beer, so called because it is stored for ripening before being used. *People ex rel. Lanci v. O'Reilly*, 114 N. Y. Supp. 258, 261, 129 App. Div. 522 (quoting and adopting definition in Cent. Dict.).

#### As intoxicating liquor

See Intoxicating Liquor.

#### As malt liquor

See Malt Liquor.

**LAGGINGS**

"Laggings" are timbers about five feet long placed on the tops of other timbers set about three feet apart, running with the entry of a mine; the purpose of the structure being to hold up the roof or top of the mine. *Birmingham Mining & Contracting Co. v. Skelton*, 43 South. 110, 111, 149 Ala. 465.

**LAGNIAPPE**

"Lagniappe" is defined to be a trifling present given to customers by tradesmen; a gratuity. *Wall v. Schwarz*, 72 S. E. 434, 435, 9 Ga. App. 845.

**LAID OUT**

See Duly Laid out or Erected.

**LAKE**

See Thread of a Lake.

Navigable lake, see Navigable.

Depressions locally called lakes or ponds which go dry at times, and, when not entirely dry are covered with stale, stagnant water, with an unhealthy green scum, and which are largely formed from the backwater of a river in wet weather, are not "lakes" within *Burns' Ann. St.* 1908, § 6141, which provides that a drain shall not be located so close to any lake covering 10 acres of ground as to lower its water level, etc. *Shields v. Pyles* (Ind.) 99 N. E. 742, 745.

The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a "lake," nor does a lake lose its distinctive character

because there is a current in it for a certain distance tending towards a river, which forms its outlet. *Hastie v. Jenkins*, 101 Pac. 495, 497, 53 Wash. 21.

**As coloring matter**

Lakes containing lead are more specifically provided for as "colors \* \* \* containing lead," under *Tariff Act* July 24, 1897, c. 11, § 1, Schedule A, par. 54, 30 Stat. 154, than as "lakes \* \* \* not specially provided for," under paragraph 58, 30 Stat. 154. *United States v. G. Seigle Co.*, 175 Fed. 885, 886.

**LAMB**

As sheep, see Sheep.

**LAMP**

As cruel and unusual weapon, see Cruel and Unusual Weapon.

Where a witness, in speaking of an electric light, spoke of it as the "lamp," it was held that the jury were not bound to believe that he referred to the glass bulb alone, in contradistinction to the whole arrangement of wires, bulb, and socket, which together, according to common speech, constituted the "lamp." *Saures v. Stevens Mfg. Co.*, 82 N. E. 694, 696, 106 Mass. 543.

**LAMP HOLE**

"Lamp holes," in a resolution for the construction of a sanitary sewer, refer to small openings to permit lowering of a lamp for the purpose of inspection. They are common in the construction of sewers. *Comstock v. City of Eagle Grove*, 111 N. W. 51, 52, 133 Iowa, 589.











